Argument. The jury should have been instructed that if they sentenced Appellant to death, he would be executed by lethal injection or electrocuted until dead. The jury should also have been instructed that if it sentenced Appellant to life in prison, he would almost certainly spend the rest of his life in prison; and if it sentenced him to a term of years, he would almost certainly serve the entire term of years in prison. This Court has made it clear that "[i]t is the responsibility of each juror to decide whether the defendant will be executed . . . ." *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985). By failing to instruct the jury that life means life and death means death, the jury might have sentenced Appellant to death thinking it was the only way to ensure public safety. The lack of this instruction denied Appellant his right to reliable sentencing, due process, and a fair penalty hearing.

This Court should reconsider its holding in *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997) that an instruction to the jury "that a sentence of death would result in [Defendant's] death . . . is not required by law and its omission cannot be considered error." *Id.* at 306.

Additionally, an instruction should have been given to accurately inform jurors about parole. Such information is routinely provided jurors in even the most minor felony cases. KRS 532.055(2) (a). In *St. Clair II*, this Court held that even though KRS 532.025 does not specifically authorize victim impact testimony in capital sentencing proceedings, such testimony is admissible because KRS 532.025(2) provides evidence of aggravators "otherwise authorized by law," and KRS 532.055, the truth in sentencing statute, allows victim impact testimony. *St. Clair II*, 319 S.W.3d at 316-317. But KRS 532.025(2) also allows evidence of mitigators "otherwise authorized by law," and, in fairness, under *St.*

Clair II, KRS 532.055(2) must also be read as authorizing testimony about parole and consequences of verdicts. To deny capital defendants the same benefit of KRS 532.055 given the prosecution would deny equal protection. In light of *St. Clair II*, the Court should overrule *Fields v. Commonwealth,* 274 S.W.3d 375, 417 (Ky. 2008), already overruled on other grounds in *Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010). "Truth in sentencing" parole information must be allowed to prevent a life from being forfeited due to the jury's misconception about parole. *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001).

It makes no sense to have "truth-in-sentencing" in all cases except for those where the defendant's life might be forfeited. Failure to give parole information violated Appellant's 6th, 8th, and 14th Amendment rights. *Cf. Simmons v. South Carolina*, 512 U.S.154, 160-161 (1994) (holding that the defendant was denied due process by the trial court's refusal to instruct that life imprisonment meant no possibility of parole). This Court should overrule its holding to the contrary in *Mills v. Commonwealth,* 996 S.W.2d 473, 493 (Ky. 1999).

SENTENCING ISSUES

23. Invalid sentencing factors relied on by the court and the jury violated due process, and the 8th and 14th Amendments.

Preservation. Unpreserved.

Argument. The actual sentencing lasted about two minutes. The court stated "I always thought that I would have some problems with imposing the death penalty, Mr. St. Clair, but in your case, where you've admitted to killing at least four people…[and] the evidence was overwhelming as it relates to this court's belief that you committed the murder of Mr. Brady and the person from New Mexico, no, *in* New Mexico, from

Colorado, so I am going to, pursuant to Criminal Rule 11.04, set your execution date...."[176]

Two of the murders the court *expressly* relied on to sentence Appellant to death were not yet convictions, and the alleged murder of Tim Keeling had not even been charged. These were invalid sentencing factors. This Court ordered this third sentencing trial because some of the jurors at the second trial **may have** recommended a death sentence based on two of the same invalid sentencing factors the judge relied on here. *St. Clair II*, 319 S.W.3d at 303-04. In this third sentencing trial, the jury was allowed to consider not only those murders but –worse-- the alleged, uncharged, and irrelevant murder of Tim Keeling. There is no way to know if the jury found any of these invalid factors to be true, but the judge expressly based Appellant's death sentence on them.

This was constitutional error. A "sentencer's consideration of an invalid eligibility factor amounts to constitutional error in a non-weighing State [when] it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process...." *Brown v. Sanders*, 546 U.S. 212, 218-19 (2006). The rule as stated by the Court in *Sanders* is as follows:

> ...An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.
>
> This test is not, as Justice BREYER describes it, "an inquiry based solely on the admissibility of the underlying evidence." If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here. The issue we confront is the skewing that could result from the jury's considering *as aggravation* properly admitted evidence

[176] CD3 Hearings, 11/16/11, 9:42:30 – 9:43:00.

> that should not have weighed in favor of the death penalty. As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

Brown v. Sanders, 546 U.S. 212, 220-21 (2006) (internal citations omitted).

Appellant was presumptively innocent of Keeling's murder, a crime that had not been charged against him. The only evidence linking him to that crime was the unreliable, self-serving testimony of co-defendant Dennis Reese. *No other, valid sentencing factor* enabled the jury or judge to give aggravating weight to the circumstances of Tim Keeling's murder. It was irrelevant and invalid. "[I]t would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance." *Johnson v. Mississippi*, 486 U.S. 578, 585-86 (1988) (holding sentence based in part on felony conviction that was later vacated violated Eighth Amendment). Tim Keeling's murder was worse than a conviction that was later vacated. It was not even a conviction, not even an indictment. Like Johnson, Appellant was presumptively innocent of that crime. Basing Appellant's death sentence in part on Tim Keeling's murder was a "perverse" violation of due process, the 8th and 14th Amendments.

24. Kentucky's death penalty is unconstitutional.

Preservation. This issue is preserved.[177] See KRS 532.075.

Argument. KRS 532.025 fails to narrow the class eligible for death.

The 8th Amendment requires a state's statutory death penalty scheme to include rational criteria to narrow the decision-maker's judgment in deciding whether a defendant

[177] Motion for New Trial and JNOV incorporating all prior motions from 1998 to present, TR3-IV, 589; Order overruling Defendant's motion for sentencing to be conducted without capital penalties. TR3-III, 438.

is eligible for death. If the criteria could include every murderer, the statutory scheme is unconstitutional. *Tuilaepa v. California*, 512 U.S. 967 (1994); *Jacobs v. Commonwealth,* 870 S.W.2d 412 (Ky. 1994). This Court's interpretation of KRS 532.025 in *Jacobs*[178] renders the Kentucky death penalty scheme unconstitutional.

KRS 532.030(1) provides that any person convicted of a capital offense may have punishment fixed at death, LWOP25, LWOP, life, or imprisonment for not less than 20 years. Murder is defined as a "capital offense," not a Class A felony. The death penalty or LWOP or LWOP25 are applicable sentences for murder. KRS 507.020(2); *Jacobs,* 870 S.W.2d at 420. The death penalty can only be imposed if a statutory aggravator in KRS 532.025(2) is found according to the final sentence of KRS 532.025(3). However, subsection (3) of KRS 532.025 has been negated. In *Harris v. Commonwealth*, 793 S.W.2d 802 (Ky. 1990), Harris argued he could not be sentenced to LWOP25 because the jury had not found one of the "aggravating circumstances enumerated in KRS 532.025(2) (a)." This Court applied the introductory language of KRS 532.025(2), which authorized judge and jury to "consider 'any aggravating circumstance otherwise authorized by law,' and concluded that the literal language of the last sentence in KRS 532.025(3) was in conflict with the general purpose of the statute and must give way. *Harris*, at 805. The final sentence of KRS 532.025(3) was completely negated in *Jacobs, supra* at 420.

This means the only circumstance now required to make a person death-eligible in Kentucky is conviction for murder, contrary to *Tuilaepa, supra*, and *Arave v. Creech*, 507

[178] This Court's opinion in *Jacobs* was written before KRS 532.030 was amended to include LWOP and before KRS 532.025 was amended to include a "domestic violence" aggravator. These amendments do not affect this argument.

U.S. 463, 474 (1993). The final sentence of KRS 532.025(3) formerly limited the criteria for death eligibility to the aggravating circumstances in KRS 532.025(2). With the elimination of KRS 532.025(3) in *Jacobs* and the continued applicability of KRS 532.030, every defendant charged with a capital offense is now "death eligible." Because this change eliminated legislative guidance narrowing the class of persons who are death eligible, KRS 532.025 as now interpreted violates the 8th and 14th Amendments and the prohibition against mandatory death sentences. See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Kentucky provides insufficient statutory guidance.

A statutory scheme providing for the death penalty must give the sentencer meaningful guidance. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Because "death is ... different," *Gardner v. Florida*, 430 U.S. 349, 357 (1977), statutory schemes must provide for "a greater degree of reliability" in assessing death as punishment. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

The statutory scheme under which Appellant was sentenced to death provides no standards to guide the sentencer. It does not require the indictment to charge the aggravators. It permits conviction and execution of the factually and legally innocent. It does not provide directions to the court or jury on how to hear and resolve "additional evidence in extenuation, mitigation and aggravation of punishment." There are no directions providing which evidentiary standard shall be used in determining when mitigating factors exist. There is no guidance on how to consider, weigh, or apply the mitigators and aggravators. There is no requirement that the judge or jury make a finding regarding the existence of any mitigation.

In addition, Kentucky's statute could be interpreted to allow guilt or penalty phase introduction of non-statutory aggravating factors. It could be interpreted to limit consideration of the defendant's character and background to specifically enumerated mitigating circumstances. Several of the mitigating and aggravating circumstances are vague.[179] The statute authorizes a death sentence without a finding of specific intent to kill. With such crucial, outcome-determinative questions unanswered, KRS 532.025 fails to provide proper guidance to determine who shall die. *Woodson, supra*, 428 U.S. at 303.

Prosecutorial discretion makes arbitrariness inherent.

Most capital indictments are resolved by a plea, and Kentucky prosecutors have unlimited discretion whether to seek death. In contrast to the practice in other states, there are no statewide guidelines and no procedures for pretrial judicial review of the prosecutorial decision.[180] Nowhere in Kentucky's legal system is there more absolute and arbitrary power over the lives of criminal defendants than in the prosecutor's authority to plea bargain a capital indictment down.

Of the men and one woman who currently reside on Kentucky's death row, approximately 35% were convicted in two counties. A Kentucky decision to impose death depends not just on what crime was committed, but on which side of the street it occurred. Kentucky has 60 judicial districts and 60 prosecutor/decision makers, each with different values, motivations, and influences. With no standards to guide the decision-making process and no judicial check on prosecutorial discretion, the selection of who is

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[179]KRS 532.025(2)(b)(1), KRS 532.025(b)(8), KRS 532.025 (2)(a)(1), KRS 532.025(2)(a)(2), KRS 532.025(2)(a)(3).

[180]*State v. Watson*, 312 S.E.2d 448, 451-52 (N.C. 1984); *State v. McCrary*, 478 A.2d 339 (N.J. 1984); *Ghent v. Superior Court*, 153 Cal.Rptr.720, 727-28 (Cal.App. 1979).

subject to capital prosecution is influenced by diverse political factors rendering the system as a whole arbitrary and capricious.

Danger of executing the innocent.

There is growing awareness of an unacceptably high rate of wrongful conviction in capital cases.[181] The *Furman* mandate to fix the arbitrariness and capriciousness of death sentencing has not been realized. Instead, Justice White's premonition in his concurrence in *Gregg v. Georgia, supra*, 428 U.S. at 226, that "[m]istakes will be made and discriminations will occur which will be difficult to explain," has come true. The fallibility of the death machinery is no longer speculation; it is a proven fact. The demonstrated potential for mistakes requires this Court to hold Kentucky's death penalty scheme unconstitutional.

In his dissenting opinion in *Moore v. Parker*, 425 F.3d 250, 268-270 (6th Cir. 2005), Circuit Judge Boyce F. Martin, Jr., summed up many constitutional problems with the death penalty. Based on 25 years on the 6th Circuit and review of many death cases, he said, "only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair...." *Id.* The death penalty is unconstitutional. This Court must reverse Appellant's death sentence. U.S. Const. Am. 5, 6, 8, 14 and Ky. Const. § 1, 2, 3, 7, 11, 17, and 26.

25. Appellant's death sentence is arbitrary and disproportionate.

Preservation. Unpreserved. See KRS 532.075.

Argument. Appellant's death sentence is unconstitutional considering the

[181]At least 18 prisoners who spent time on death row have been freed based on DNA evidence alone. See http://www.innocenceproject.org/ (website last visited on 12/17/12). It is not known how many prisoners executed since 1976 were innocent. *See, Herrera v. Collins*, 506 U.S. 390, 417-418 (1992).

circumstances and comparing him and his case with others. Some evidence of mitigation was introduced here, including evidence that Reese --- not Appellant -- was the shooter, that Appellant had an extremely disadvantaged childhood, and that his ex-wife, Bylynn, retained cherished memories of him. But this Court cannot deny being aware, and should also consider the mitigation evidence contained in its own files in Appellant's related Hardin County appeal. Just as the Judicial Conduct Commission took judicial notice of its own files containing prior sanctions against a judge, *Thomas v. Judicial Conduct Com'n*, 77 S.W.3d 578, 581-82 (Ky. 2002), Appellant requests KRE 201 judicial notice of the still-relevant psychological evaluations conducted by Drs. Engum and Walker contained in this Court's own files in No 2001-SC-200.[182]

Appellant's prior record of a capital conviction is the sole aggravating factor found by this jury. In mitigation, Appellant suffers from brain damage.[183] He has a visible uncontrollable tic in his eye. Congenital brain defects impact his ability to control his impulses, to plan, to think about consequences.[184] In addition, the Hardin appellate record contained in this Court's own files contains evidence supporting his juvenile mental age issue, stating that he operates below the mental age of a fifth-grader, and is borderline mentally retarded.[185] The Oklahoma lawyer, Payne, testified that Appellant grew up in extreme poverty in a highly dysfunctional family and that prior to the instant crime had

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[182] Neuropsychological and Psychological Evaluation by Dr. Eric S. Engum, attached in Appendix to Brief for Appellant, *St. Clair v. Commonwealth*, No. 2001-SC-000209-MR in this Court's files, pp. A21-38, At Tab 10; and Report of Dr. Candace Walker, attached in Appendix to Brief for Appellant, *St. Clair v. Commonwealth*, No. 2001-SC-000209-MR in this Court's files, pp. A39-49, copies attached at Tab 11.
[183] TR1-4, 456; TE1-23 89 – 91. See also Report of Trial Judge, p. 2, indicating "organic" [brain damage].
[184] TE1-16, 171, 188, 221 – 223, 264; TE1-21, 78 – 80, 82, 84, 87, 96, 106; TE1-23, 45, 47, 48. *See also*, *St. Clair II*, 319 S.W.3d at 309.
[185] CD3 Voir Dire, 10/17/11, 10:08:26 – 10:18:18; Dr. Eric Engum Report, At Tab 10.

no previous history of ever killing a stranger.[186] By contrast, the co-defendant Reese had a prior history of at least one rape-murder in which he stole the victim's truck and left the body in a remote area. The entire case against Appellant consists of the word of Dennis Reese, a convicted murderer who had a history much closer to the m.o. of the instant crime and who was strongly motivated to shift all blame to Appellant.

Dennis Reese received life without parole. Other cases involving less doubt and worse facts have also resulted in more lenient sentences.[187] Appellant's death sentence cannot stand because Reese and many other Kentuckians who "deserve" capital punishment as much or more have escaped it. *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring). Under *Bush v. Gore*, 531 U.S. 98 (2000), a state's election ballot-counting scheme violated equal protection because the standard for what constituted a valid vote varied from county to county and some counties had no standard. Similarly, Kentucky's standards for deciding who it will kill are not the same from county to county and its death penalty scheme lacks standards, resulting in the "arbitrary and disparate treatment." Just as a state may not value one person's vote over that of another, *Bush v. Gore*, 531 U.S. at 104-105, a state must ensure that it does not kill its citizens "by . . . arbitrary and disparate treatment." *Id.* Considering the mitigation, considering that this death sentence is based on Reese's word against Appellant's,

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[186] CD3 Trial, 10/27/11, 9:44:00 – 9:58:00.

[187] *Reyes v. Commonwealth*, 764 S.W.2d 62, 62-63 (Ky. 1989) (case described as "one of the most heinous and infamous in Christian County history;" murder, attempted murder, first degree robbery and two counts of first degree sodomy; while in custody awaiting trial, Reyes escaped – life sentence); *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992) (two murders of young girls molested by the defendant and arson burning the home after the murders with the children inside - life without the possibility of parole for 25 years); *Commonwealth v. Phon*, 17 S.W.2d 106 (Ky. 2000) (two execution-style murders in a home invasion in which the parents were killed, a teenage girl was shot and left to languish for hours, all while the two young brothers were present in the home for hours with their dead parents and wounded sister - first degree assault, first degree robbery, first degree burglary - life without parole).

considering Appellant's psychological disabilities and considering the comparison with other cases in which death was not imposed, Appellant's death sentence must be reversed under the U.S. Const. amend. 8 and 14 and Ky. Const. §§ 1, 2, 3, 7, 11, 17, 26. *Meece v. Commonwealth*, 348 S.W.3d 627, 726 (Ky. 2011), reh'g denied (Oct. 27, 2011), *cert. denied,* 133 S. Ct. 105 (U.S. 2012) and similar cases should be overruled.

26. Kentucky's proportionality review –recently criticized by the ABA-- violates due process.

Preservation. This issue is unpreserved.

Argument. Kentucky's proportionality review has been severely criticized by a recent American Bar Association (ABA) report. Chapter 7 of the report urges this Court to establish a statewide data collection system on all death-eligible cases and broaden its method of evaluating proportionality to include cases in which the death penalty was not imposed.[188] In order for Kentucky's proportionality review to be constitutional, this Court must expand its universe of cases to include all potential capital cases, regardless of result. From the expanded universe, this Court must cull out "similar cases, considering both the crime and the defendant" and then perform an actual comparative review as required by KRS 532.075 (3) (c).

KRS 532.075(l) mandates that whenever the death penalty is imposed for a capital offense, the sentence "shall be reviewed on the record by the [Kentucky] Supreme Court." "With regard to the sentence, the court shall determine. . . .[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

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[188] *Defending Liberty, Pursuing Justice, Evaluating Fairness and Accuracy in State Death Penalty Systems: the Kentucky Death Penalty Assessment Report, an Analysis of Kentucky's Death Penalty Laws, Procedures, and Practices,*,available online at the AMA website: http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.authcheckdam.pdf (last visited on 12/17/12).

considering both the crime and the defendant." KRS 532.075(3) (c). This language calls for a "comparative" review in which the court reviews the defendant and the sentence in relation to defendants and sentences in similar cases. *Pulley v. Harris*, 465 U.S. 37, 43, (1984). By contrast, in a "traditional" review the court decides whether the punishment is justified by the crimes committed. *Id.* at 42-43. The language of KRS 532.075 (3) (c) requires a comparative review, but Kentucky does not compare cases in which the death penalty was imposed to the penalty imposed in similar cases. This Court has never included a non-death case for comparison.[189]

The plain wording of KRS 532.075(2) and (3) mandates that this Court shall "determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," and "whether the evidence supports the jury's or judge's finding of statutory aggravating circumstances as enumerated in KRS 532.025(2)." Under KRS 532.075(3) (c) a death sentence must also be compared "to the penalty" imposed in similar cases. This plain language requires a comparison of the nature of the defendant and the crime with cases where different penalties were imposed besides death.

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[189] E.g., *Sanders v. Commonwealth*, 801 S.W.2d 665, 683-684 (Ky. 1990) which listed: *Scott v. Commonwealth,* 495 S.W.2d 800 (Ky. 1973); *Leigh v. Commonwealth,* 481 S.W.2d 75 (Ky. 1972); *Lenston and Scott v. Commonwealth,* 497 S.W.2d 561 (Ky. 1973); *Call v. Commonwealth,* 482 S.W.2d 770 (Ky. 1972); *Caldwell v. Commonwealth,* 503 S.W.2d 485 (Ky. 1972); *Tinsley and Tinsley v. Commonwealth,* 495 S.W.2d 776 (Ky. 1973); *Galbreath v. Commonwealth,* 492 S.W.2d 882 (Ky. 1973); *Caine and McIntosh v. Commonwealth,* 491 S.W.2d 824 (Ky. 1973); *Hudson v. Commonwealth,* 597 S.W.2d 610 (Ky. 1980); *Meadows v. Commonwealth,* 550 S.W.2d 511 (Ky. 1977); *Self v. Commonwealth,* 550 S.W.2d 509 (Ky. 1977); *Boyd v. Commonwealth,* 550 S.W.2d 507 (Ky. 1977); *Gall v. Commonwealth,* 607 S.W.2d 97 (Ky. 1980)[189]; *McQueen v. Commonwealth,* 669 S.W.2d 519 (Ky. 1984); *White v. Commonwealth,* 671 S.W.2d 241 (Ky. 1983); *Harper v. Commonwealth,* 694 S.W.2d 665 (Ky. 1985); *Skaggs v. Commonwealth,* 694 S.W.2d 672 (Ky. 1985); *Kordenbrock v. Commonwealth,* 700 S.W.2d 384 (Ky. 1985); *Matthews v. Commonwealth,* 709 S.W.2d 414 (Ky. 1986); *Marlowe v. Commonwealth,* 709 S.W.2d 424 (Ky. 1986); *Bevins v. Commonwealth,* 712 S.W.2d 932 (Ky. 1986); *Halvorsen and Willoughby v. Commonwealth,* 730 S.W.2d 921 (Ky. 1986); *Smith v. Commonwealth,* 734 S.W.2d 437 (Ky. 1987); *Stanford v. Commonwealth,* 734 S.W.2d 781 (Ky. 1987); *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky. 1988); *Simmons v. Commonwealth,* 746 S.W.2d 393 (Ky. 1988); and *Moore v. Commonwealth,* 771 S.W.2d 34 (Ky. 1989).

This Court's deliberate failure to fairly implement its own statute violates Appellant's interest in liberty and due process. *Greer v. Mitchell*, 264 F.3d 663, 691 (6th Cir. 2001) (holding that a state-adopted proportionality review process must comport with due process); *accord, Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("...when a state opts to act in a field... it must act in accord with due process); *cf, Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (holding that because Hawaii's prison regulations placed no substantive limitations on official discretion they created no liberty interest protected by due process). KRS 532.075 places clear substantive limitations on official discretion and substantive due process is implicated.

Kentucky's proportionality review also denies death row prisoners procedural due process. *Cf., Harris by and through Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1286-91 (W.D. Wash. 1994) (invalidating Washington state's proportionality review for procedural due process violations, including failure to define similar case and failure to provide notice and opportunity to be heard). Appellant has received no notice of the procedure to be followed, no adequate notice of what "similar cases" the Court will consider, or what factors will be compared, and no meaningful opportunity to be heard:

> The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner."

Hilltop Basic Resources, Inc. v. County of Boone, 180 S.W.3d 464, 469 (Ky. 2005), citing *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Appellant has no adequate notice of this Court's standard for reviewing "similar cases." He has no notice of whether this Court will adopt a "trial judge's report" as findings of fact. He has no meaningful opportunity to be heard because the Court conceals the proportionality review process

until its ultimate decision. Considering the heightened degree of scrutiny of procedural due process required by *Furman v. Georgia*, 408 U.S. 238 (1972), the lack of notice and lack of opportunity to be heard violate procedural due process. *Pulley v. Harris, supra.*

Kentucky's statute violates procedural due process in at least five ways. First, as in *Ramseyer*, Kentucky's statute violates procedural due process by failing to define a "similar case." Neither the legislature nor this Court has determined what should be considered in determining "similar cases, considering both the crime and the defendant." In only three cases since 1970 has this Court compared cases that were "similar" to the case being reviewed.[190] Because the only factor the Court compares is whether death was imposed, every death sentence in Kentucky has been automatically deemed proportionate. As pointed out by Justice Liebson, "Many death penalty cases have been reduced to life imprisonment on independent proportionality review by state Supreme Courts in Florida, Georgia and Texas, but none by ours." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 417 (Ky., 1988) (Liebson, J., dissenting).

Second, there is no procedure for the parties to be notified which cases this Court will consider similar until after the Court's determination appears in its decision. Third, when there are no factually similar cases, the statute provides no alternative procedure. See, *Slaughter*, 744 S.W.2d at 416. As Justice Liebson noted in dissent, "I have reviewed

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[190] This Court compared the death penalty in *Foley v. Commonwealth*, 953 S.W.2d 924 (Ky. 1997) with the death sentences in three cases of "substantial similarity" where the Court had also affirmed death sentences. *Id.* at 942-943. The Court compared the penalty in *Tamme v. Commonwealth*, 973 S.W.2d 13, 41 (Ky. 1998) with "those in which a defendant was sentenced to death for multiple intentional murders unaccompanied by other criminal behavior directed toward the victims, *e.g.*, burglary , robbery, rape, etc., ..." And in *Mills v. Commonwealth,* 996 S.W.2d 473, 495 (Ky. 1999), this Court compared Mills' death sentence with "those in which a defendant was sentenced to death for intentional murders unaccompanied by other criminal behavior directed toward the victim, e.g., burglary, robbery, rape, etc., ... " This Court made no attempt to compare the death sentences in *Foley, Tamme,* or *Mills* with the sentences in any similar case where the death penalty was **not** imposed or **not** upheld on appeal.

the fact situation in *all* of the death penalty cases listed in the Majority Opinion. There is no case similar to this one where the death penalty was affirmed." *Id.*, (emphasis in original)

Fourth, KRS 532.075 gives no standard for reviewing the selected similar cases. The Court has announced no standard and makes no analyzed comparison with its list of cases since 1970. And fifth, no procedure is established for fact-finding as part of the proportionality review either at the trial level or on appeal. Proportionality review is conducted in a seeming factual vacuum entirely by the Supreme Court. *McClellan v. Commonwealth*, 715 S.W.2d 464, 472-3 (Ky. 1986) (holding that the trial court shall not conduct proportionality review). This is contrary to KRS 532.075(1), which requires a "report of the trial judge" that is clearly intended by the legislature to include findings of fact related to proportionality. Fact-finding is not the usual or proper role of an appellate court. This Court's *pro forma* proportionality review ignores the "trial court report" requirement, and makes no fact-findings of its own.

Other states with a similar proportionality review statute recognize they must compare each death penalty case with all cases containing the same factual predicate whether death was imposed or not. *See State v. Young*, 325 S.E.2d 181 (N.C. 1985); *State v. Loftin*, 724 A.2d 129 (N.J. 1999). Appellant's right to substantive due process demands that this Court expand its universe to all similar cases, whether death was imposed or not. See *Correll v. Commonwealth*, 352 S.E.2d 352, 360-361 (Va. 1987), *Harvey v State*, 682 P.2d 1384, 1385 (Nev. 1984),*White v. State*, 481 A.2d 201, 212-215 (Md. 1984); *State v. Jeffries,* 132 717 P.2d 722, 740 (Wash. 1986); *State v. Neal,* 796 So.2d. 649 (La. 2001).

When conducting proportionality review in *Young, supra*, the North Carolina Supreme Court recognized that in 26 cases involving murder during the course of a robbery, jurors returned death verdicts only three times. Accordingly, it held the sentence of death for Young was disproportionate. Yet, if this Court were reviewing the same case, it would compare Young's death sentence only to the three cases where the death penalty was returned and automatically find the sentence proportionate. Kentucky's proportionality review ensures a death sentence will always be found proportionate. This violates due process. *Evitts v. Lucey, supra.*

"In order to ensure that a death sentence has not been arbitrarily or capriciously imposed, the states must provide 'meaningful appellate review.'" *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990); *Parker v. Dugger*, 498 U.S. 308, 321 (1991). ("[M]eaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" (citation omitted). Kentucky's proportionality review fails to perform this function, although the statute requires this Court to evaluate "similar cases, considering both the crime and defendant." KRS 532.075(3) (c). None of the published opinions of this Court discuss the defendant's background and character as having a bearing on the proportionality of the sentence. The failure to consider the "nature of the defendant" as well as the circumstances of the crime violates KRS 532.075 and the 8th Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

No Access To KRS 532.075(6) Data

Access to this data is imperative because decisions about the appropriateness of Appellant's death sentences will be made without disclosure of vital information and without the participation of counsel or argument. This offends the U.S. Const. amend. 6, 8, and 14. See *Gardner v. Florida*, 430 U.S. 349, 360 (1977); *Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1286-91 (W.D.Wash. 1994). KRS 532.075(4), states a defendant sentenced to death "shall have the right to submit briefs...and to present oral argument to the court." That statute also requires this Court to reference similar cases and gives this Court the authority to set aside and remand the case for resentencing "based on the record and argument of counsel" with regard to disproportionality. KRS 532.075(5) (b). It is impossible to do that in a vacuum.

Appellant is indigent and unable to collect complete records of all previous actual or potential death penalty cases on his own. Therefore, he also has been denied equal protection of the law. *Griffin v. Illinois*, 351 U.S. 12 (1956). This Court has previously rejected the argument presented here. *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978); *Gall v. Commonwealth*, 607 S.W.2d 97, 113 (Ky. 1980). "[T]he public defender is not entitled to such data." *Skaggs v. Commonwealth*, 694 S.W.2d 672, 682 (Ky. 1985). Appellant request this Court to reconsider those decisions. Until this Court releases the KRS 532.075 (6) data, he is not able to fully present an argument that Kentucky's death penalty scheme is unconstitutional as applied under *Furman v. Georgia*, 408 U.S. 238 (1972).

Appellant requests access to the KRS 532.075 (6) data, leave to file further argument and reversal of his sentence of death.

27. A Death sentence influenced by "passion and prejudice" violates the 8th and 14th Amendments.

Preservation. This issue is unpreserved. KRS 532.075 (3) (a) requires this Court

to determine whether this death sentence was "imposed under the influence of . . . passion, prejudice or any other arbitrary factors." The Report of the Trial Judge (RTJ) erroneously reports that the jury was **instructed** "to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence."[191] This is false. **The jury was not instructed to avoid passion or prejudice.**[192] The RTJ also errs in stating there was **no evidence** that could have influenced the jury **to be led** by passion, prejudice, or any arbitrary factor when imposing sentence.[193] This is incorrect. The prosecution evidence included –among other passionate and prejudicial details--the passionate testimony of Tim Keeling's widow and Frank Brady's daughter, the repetition of Appellant's answer that it was "a little hard" to kill Mary Smith because she covered her head, Dennis Reese's testimony describing Appellant's execution style killing of Keeling and Brady, and Reese's testimony that Appellant said killing a person was like killing a dog.

It must be noted that the prosecutor **cried and choked up repeatedly** during his closing argument.[194] Whether this was a display of real human emotion or pure artifice is a good question. But this action by the prosecutor during closing argument was in itself inflammatory, substantially prejudiced the defense, and contributed to a violation of Appellant's constitutional right to a fair trial and due process. *Major v. Com.*, 177 S.W.3d 700, 711 (Ky. 2005). The jury **should have been instructed not to be influenced** by passion or prejudice. Instead, the prosecutor **encouraged** the jury to be influenced by passion and prejudice by eliciting and presenting chilling evidence of prior crimes that

[191] Report of Trial Judge, November 17, 2011, Court file, 7 at Tab 12.
[192] Jury Instructions and Verdict Forms, TR3-IV, 552-560, at Tab 7.
[193] Report of Trial Judge, November 17, 2011, Court file, 8 at Tab 12.
[194] CD3 Trial, 10/28/11, 10:02:32 - 10:04:00.

the prosecutor should have known was inadmissible and improper, by repeating and bolstering Dennis Reese's self-serving testimony, by crying and choking in front of the jury, and by telling the jury **not to consider anything but a death sentence.**

In *California v. Brown*, 479 U.S. 538 (1987), the U.S. Supreme Court said an instruction against passion and prejudice "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors...." *Id.* at 543. This Court should overrule its holding in *Perdue v. Commonwealth*, 916 S.W.2d 148, 169 (Ky. 1996), that no such instruction is required.

28. Appellant is ineligible for death because he has the mental age of a child.

Preservation. This issue is preserved. Appellant moved *pro se* to exclude the death penalty on the ground that he has a mental age of a child and is functionally a juvenile. The court overruled the motion.[195]

Argument. When Frank Brady was murdered in Kentucky, Michael St. Clair was 34 years old but according to psychologist Dr. Eric Engum, he was functioning at a third to fifth grade level, like a child.[196] Because the Eighth Amendment bars the execution of those who commit crimes as juveniles, executing Appellant is arguably constitutionally prohibited. *Roper v. Simmons,* 543 U.S. 551 (2005) (execution of offender under eighteen at time of crime is prohibited by the 8th and 14th Amendments); see also *Graham v. Florida*, __U.S.__, 130 S. Ct. 2011 (2010), as modified, (8th Amendment prohibits sentence of life without the possibility of parole for juvenile offender who did not commit a homicide). The only permissible purposes of imposing a death sentence of LWOP -- retribution and deterrence of prospective offenders-- would not be served by executing

[195] CD3 Voir Dire, 10/17/11, 10:08:26 – 10:18:18.
[196] Neuropsychological and Psychological Evaluation by Dr. Eric S. Engum, at Tab 10.

Appellant because his mental age is eight or nine. *Simmons*, 125 S.Ct. at 1196; *Atkins v. Virginia*, 536 U.S. 304 (2002); *Gregg v. Georgia*, 428 U.S. 153 (1976).

In striking down the death penalty for juveniles, the Court held that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* at 1197. Indeed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* at 1195 [*quoting, Eddings v. Oklahoma*, 455 U.S. 104 (1982)]. The language in *Simmons* presents no basis for distinguishing between a mental age juvenile and a chronological juvenile; *Simmons* could be applied to prohibit the execution of anyone functioning at the mental age of a juvenile. Mental age juveniles have the same lack of maturity, underdeveloped sense of responsibility, and increased vulnerability as chronological juveniles. *See also Enmund v. Florida*, 458 U.S. 782 (1982) (punishment must be tailored to the personal responsibility and moral guilt of the individual offender). The imposition of the death penalty on mental age juveniles as well as chronological juveniles is precluded by the 8th Amendment, because mental age juveniles equally lack maturity and responsibility, and suffer from poor impulse control and increased vulnerability. *Simmons* 125 S.Ct. at 1183, 1195.

The imposition of the death penalty on juvenile offenders is precluded by the 8th Amendment based on reasons that apply equally to Appellant. *Simmons* 125 S.Ct. at 1194.

Drawing the line at the chronological age of 18 "is indefensibly arbitrary." *Id.*, at 1214 (O'Connor, J., dissenting). Justice O'Connor's dissent was based on her sense that some juveniles do have the maturity of an adult and therefore should be eligible for the

death penalty. But her argument that "chronological age is not an unfailing measure of psychological development" is two-edged, and equally supports a prohibition on the execution of mentally juvenile offenders. *Id.*

The United States Supreme Court has recognized that the only two justifications for the death penalty are retribution and deterrence. *Simmons* 125 S.Ct. at 1196. To comport with the 8th Amendment, an execution must serve one of these purposes. Because neither of these purposes is satisfied by executing a person with the mental age of a juvenile, executing Appellant would constitute cruel and unusual punishment.

Juveniles are less likely to be deterred than adults. *Id.*; *see also*, Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 Applied Dev. Psych. 257, 264-270 (2001). Juveniles – like Appellant -- are impulsive, irresponsible, and unlikely to consider the possibility of execution. Imposing the death penalty on Appellant is unlikely to deter another mental age juvenile. Because neither retribution nor deterrence of similarly situated prospective offenders is satisfied by executing mental age juveniles, this Court must hold that executing Appellant is cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution.

29. Failure to consider mitigation violated the 8th and 14th Amendments.

Preservation. This issue is unpreserved.

At final sentencing, the court made no mention of any mitigating factor, and the Report of Trial Judge (RTJ) indicates the only mitigating evidence was the evidence that

Appellant acted as an accomplice.[197] The court said nothing about Appellant's upbringing. The only glancing mention of non-statutory mitigation was that Appellant was "anti-social" and suffered from something "organic."[198] The court's consideration of mitigation was so abbreviated that it must be considered a refusal to consider mitigation. See *Hitchcock v. Dugger*, 481 U.S. 393, 398-399 (1987) (after hearing numerous mitigating factors, judge listed to only one, the defendant's youth; holding that sentencer may neither refuse to consider nor be precluded from considering any relevant mitigating evidence). This was a violation of *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (failure to give independent mitigating weight to aspects of the defendant's character and circumstances of the offense violated the 8th and 14th Amendments); *see also*, *Skipper v. South Carolina,* 476 U.S. 1 (1986).

30. Cumulative Error.

Preservation. This issue is preserved.[199]

Argument. If this Court denies relief on the individual errors, it should still grant relief based on cumulative error because even where individual errors do not rise to the level of prejudice necessitating relief, the combined effect of constitutional errors can do so. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Williams v. Anderson,* 460 F.3d 789, 816 (6th Cir. 2006). The cumulative effect of the errors denied Appellant's right to a fair and rational jury determination, leading to his death sentence. U.S. Const. amend. 5, 6, 8 and 14 and Ky. Const. § 1, 2, 3, 7, 11, 17, 26. Appellant's conviction and sentence must be set aside and vacated. *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1993);

[197] CD3 Hearings, 11/16/11, 9:41:39 – 9:43:45; see also Report of Trial Judge, p. 4, at Tab 12.
[198] Report of Trial Judge, p. 2, at Tab 12.
[199] CD3 Hearings, 10/17/11, 9:40:38 – 9:42:22.

Sanborn v. Commonwealth, 754 S.W.2d 534, 542 – 549 (Ky. 1988).

31. Residual doubt bars death sentence.

Preservation. This issue is preserved.[200]

Argument. Residual doubt about a capital defendant's moral culpability can be considered and can legitimately support a sentence less than death. *Lockhart v. McCree*, 476 US 162, 181-182 (1986). This Court implicitly acknowledged that the existence of a genuine, if not reasonable, doubt about guilt is a proper and necessary factor to consider in determining whether death is appropriate by inclusion of item C(11) in the trial judge's report form, which asks whether the evidence "forecloses all doubt respecting the defendant's guilt?" In response to this question, the trial judge responded the evidence did not foreclose all doubt.[201] This case boils down to the word of Dennis Reese, a convicted murderer who was highly motivated to cast blame on Appellant, against the word of Appellant. Because therefore a genuine doubt exists about Appellant's guilt, his death sentence violates the 8th and 14th Amendments of the United States Constitution and §§ 2, 3, 11, 17, and 26 of the Kentucky Constitution.

Conclusion

Appellant Michael Dale St. Clair's conviction should be vacated and his death sentence reversed. Both a new guilt phase and a new sentencing phase are required.

Respectfully submitted,

Susan J. Balliet | Robert C. Yang | Samuel N. Potter

December 19, 2012

[200] CD3 Hearings, 10/17/11, 9:36:21 – 9:40:05

[201] Report of Trial Judge, attached at Tab 12.

supplemented by Ct. order 1/25/13

32. Because there was insufficient proof that Appellant stood "convicted" of a capital offense at the time of Brady's murder, the court erred by denying directed verdict and instructing on death and LWOP25; Appellant's right to 5th and 14th Amendment due process was violated.

Preservation. This issue is preserved. At the close of the Commonwealth's case, Appellant moved for directed verdict asking the court not to instruct on the death penalty and citing the specific ground that the Commonwealth failed to meet its burden to prove the aggravators or take them to the jury. The court acknowledged that if no aggravators were shown it would remove the death penalty and LWOP25 from consideration, and denied the motion.[202] Appellant renewed his objection at the close of all the proof by objecting to instruction on the death penalty or "LWOP."[203] Counsel specifically objected to instruction on aggravating circumstances and to "any" instructions. The trial court again overruled counsel's objections.[204]

Argument

In 1991 KRS 532.025(2)(a)(1) referred --as it does now-- to an aggravator as a "prior record of conviction." At that time it had already "long been held" by Kentucky courts that a conviction "of course" meant a final judgment. *Thompson v. Commonwealth*, 862 S.W.2d 871, 877 (Ky. 1993) *overruled by St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004) (*St. Clair I*). Accordingly, St. Clair moved for directed verdict on the aggravators in his 1998 trial on the ground that the proof showed none of his alleged prior murder convictions were final judgments. Two of Appellant's alleged four prior murders had not even gone to trial and the other two did not become final judgments until six weeks after Brady was killed. These facts have

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[202] CD3 Trial, 10/27/11, 9:00:01- 9:01:14.
[203] CD3 Trial, 10/27/11, 12:06:28. At Appellant's request the jury was not instructed on LWOP. When Appellant referred here to "LWOP," he undoubtedly meant LWOP25.
[204] CD3 Trial, 10/27/11, 12:06:27 to 12:07:24.

never been disputed.

On this issue the *St. Clair I* court in 2004 was strongly divided. The majority upheld the denial of directed verdict on the non-final aggravators and St. Clair's death sentence by overruling *Thompson* and *immediately* applying that overruling. This was the only way the *St. Clair I* Court could justify reliance on St. Clair's testimony that he had been "convicted" of two murders by a jury but was still awaiting final sentencing when Brady died to sustain the aggravator and the death penalty:

> The trial court also correctly denied Appellant's motion for a directed verdict of acquittal with respect to the KRS 532.025(2)(a)(1) aggravating circumstance. Although the final judgments were not entered in Appellant's first two Oklahoma Murder convictions until November 22, 1991, or approximately six (6) weeks after Brady's murder, Appellant acknowledged during his culpability phase testimony that he had been convicted of those two (2) counts of Murder following a trial...
>
> ***
>
> Because these two (2) murder convictions demonstrated that Brady was murdered by "a person with a prior record of conviction for a capital offense," the trial court correctly denied Appellant's motion for a directed verdict as to the aggravating circumstance.

St. Clair I, 140 S.W.3d at 570-571.

Justices Cooper, Keller, and Stumbo dissented in *St. Clair I* because all three believed that directed verdict should have been granted on the aggravators and that Appellant was ineligible for the death penalty. Justice Keller (joined by Justice Stumbo) reasoned that under the rules of statutory construction, under the "rule of lenity," and under federal Due Process, *Thompson* should not have been overruled, and St. Clair should not have been found eligible for the death penalty:

> In my view, the trial court further erred when it denied Appellant's motion for a directed verdict as to the KRS 532.025(2)(a)(1) aggravating circumstance. Accordingly, I would hold that, if Appellant were to be found guilty upon remand for a new trial (or upon remand for a new sentencing proceeding, as ordered by the majority opinion), he should receive a sentence of imprisonment

of between twenty (20) to fifty (50) years or life. In *Thompson v. Commonwealth,*[12] this Court *correctly* interpreted KRS 532.025(2)(a)(1)'s "prior record of conviction for a capital offense" to mean a *final judgment* of conviction for a capital offense. By overruling *Thompson* and adopting a contrary and novel interpretation of the same language, today's opinion not only is inconsistent with Appellant's rights of due process[13] but also turns its back on common sense and its own rules of statutory construction. The Opinion of the Court concedes that the term "conviction" is inherently ambiguous and is susceptible to different interpretations, but then fails to apply the "rule of lenity" that "require[s] us to give it the more lenient interpretation"[14] when faced with such ambiguity. The opinion correctly observes that KRS 446.080(4) states that "[a]ll words and phrases shall be construed according to the common and approved usage of language[.]"[15] However, the statute continues further, "but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed according to such meaning."[16] And, although the popular meaning of "conviction" may apply where rights of persons other than the "convict" are involved, in situations "where legal disabilities, disqualifications, and forfeitures are to follow, the strict legal meaning is to be applied, absent some indication of contrary intent."[17] In *Melson v. Commonwealth,*[18] this Court adhered to this principle when it interpreted KRS 532.080(2)'s "having been convicted of one (1) previous felony" language to require a final judgment of conviction.[19] Today's Opinion of the Court interprets KRS 532.025(2)(a)(1)'s "prior record of conviction for a capital offense" language in a manner inconsistent with the technical meaning of "conviction" and thereby creates an anomaly of epic proportions where a non-final capital "conviction" would be insufficient to trigger PFO enhancement, but sufficient to render a defendant death-eligible. "The death penalty cannot be imposed simply because we or the jury believe the actions or motives of a particular defendant are deserving of capital punishment[,]"[20] and this Court must interpret the scope of KRS 532.025(2)(a)'s aggravating circumstance in the same manner that it interprets any legislative enactment—*i.e.*, by applying the rules of statutory construction. A proper application of those rules demonstrates that the Commonwealth was unable to prove that Brady's murder "was committed by a person with a prior record of conviction for a capital offense." Accordingly, the trial court should have directed a verdict in Appellant's favor and instructed the jury to fix Appellant's punishment at a sentence of imprisonment between twenty (20) years to fifty (50) years or life.

[12] Ky., 862 S.W.2d 871 (1993).

[13] *See Gall v. Parker,* 231 F.3d 265, 305 (6th Cir.2000) ("If the new interpretation was ... unforeseeable, if it was applied to events occurring before its enactment, and if the interpretation disadvantages the offender affected by it, then ... due process is violated just as the *ex post facto* clause would be."); *Tharp v. Commonwealth,* Ky., 40 S.W.3d 356, 362–63 (2000) (" '[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that

neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.' ") (*quoting United States v. Lanier,* 520 U.S. 259, 266, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997)).

[14] *Young v. Commonwealth,* Ky., 50 S.W.3d 148, 162 n. 23 (2001) (referencing the rule of lenity in the context of interpreting the KRS 532.025(2)(a)(4) aggravating circumstance).

[15]KRS 446.080(4).

[16] *Id.*

[17] 21A AM. JUR. 2D *Criminal Law* § 1313 at 571–72 (1998).

[18] Ky., 772 S.W.2d 631 (1989).

[19] *Id.* at 633.

[20] *Young,* 50 S.W.3d at 161.

St. Clair I, 140 S.W.3d at 577-578 (Keller, dissenting, with Stumbo joining).

Justice Cooper agreed with the majority in *St. Clair I* that *Thompson* should be overruled. But Cooper argued in dissent that federal Due Process was violated when the Court applied the overruling of *Thompson* ex-post-facto style[205] to St. Clair's case:

> ...I dissent from the majority's conclusion that Appellant is eligible for the death penalty in this case.
>
> ***
>
> ...the Due Process Clauses of the Fifth and Fourteenth Amendments preclude us from retroactively applying our decision to overrule *Thompson* to Appellant's case. In 1798, the United States Supreme Court identified four types of prohibited ex post facto laws:
>
> > 1st. Every law that makes an action, done before passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.* 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.

[205] When a legislature retroactively renders behavior criminal, it's an ex post facto violation; when a court does it, it's a violation of due process. *Bouie v. City of Columbia,* 378 U.S. 347, 354–55 (1964).

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798) (emphasis added). These four categories are still recognized today. *Rogers v. Tennessee,* 532 U.S. 451, 456, 121 S.Ct. 1693, 1697, 149 L.Ed.2d 697 (2001).

In 1964, the United States Supreme Court held that a judicial decision that has the same effect as retroactive legislation violates the "fair warning" requirement of the Due Process Clause:

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend (his) substantive right." When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

Bouie v. City of Columbia, 378 U.S. 347, 354–55, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964) (citation omitted). While *Bouie* involved a retroactive application of a judicial interpretation of a statute defining substantive criminal conduct, its holding has been consistently applied to judicial interpretations that increase punishment beyond what the defendant could have foreseen at the time of the offense. *E.g., Davis v. Nebraska,* 958 F.2d 831, 833 (8th Cir.1992); *Helton v. Fauver,* 930 F.2d 1040, 1044–45 (3d Cir.1991); *Dale v. Haeberlin,* 878 F.2d 930, 934 (6th Cir.1989); *Devine v. N.M. Dep't of Corr.,* 866 F.2d 339, 344–45 (10th Cir.1989); *People v. King,* 5 Cal.4th 59, 19 Cal.Rptr.2d 233, 851 P.2d 27, 40 (1993); *State v. LeCompte,* 538 A.2d 1102 (Del.1988) (per curiam); *Stevens v. Warden,* 114 Nev. 1217, 969 P.2d 945, 948 (1998); *Commonwealth v. Davis,* 760 A.2d 406, 410 (Pa.Super.Ct.2000). In *United States v. Newman,* 203 F.3d 700 (9th Cir.2000), the United States Court of Appeals for the Ninth Circuit declined to extend *Bouie* to prohibit judicial retroactive increases in punishment, *Id.* at 702, but specifically exempted from its holding cases involving retroactive constructions of aggravating factors for imposition of the death penalty. *Id.* at 702 n. 2.

Thus, I conclude that the aggravating factor set forth in KRS 532.025(2)(a)(1) cannot be applied to Appellant because *Thompson* was the law of this Commonwealth at the time his offense was committed. Accordingly, I concur in the affirmance of Appellant's conviction but would reverse the sentence and remand for a new sentencing phase trial at which life imprisonment would be the maximum possible penalty.

St. Clair v. Com., 140 S.W.3d 510, 574-575 (Ky. 2004) (Cooper, dissenting).

There was no petition for rehearing on this issue after *St. Clair I*, and therefore

this Court has never fully considered or ruled on the federal constitutional Due Process issues raised by the dissents of Justices Cooper and Keller (joined by Stumbo). Out of an abundance of caution, Appellant adopts all the arguments and authorities contained in Justice Cooper's and Justice Keller's dissents in *St. Clair I* as his own and presents them here for consideration and a ruling by this Court in the instant appeal. Appellant urges the Court to overrule *St. Clair I* insofar as *St. Clair I* overruled *Thompson*. If the Court is unwilling to reinstate the holding of *Thompson*, Appellant urges the Court nonetheless to overrule *St. Clair I* at least insofar as that opinion applied *Thompson* retroactively to Appellant, in violation of the rules of statutory construction, in violation of the rule of lenity, and in violation of federal Due Process. A new sentencing trial is required in which the jury is not allowed to consider the death penalty, LWOP25, or LWOP.

APPENDIX

Tab Number	Item Description	Record Location
1	Judgment of Conviction [and Death Sentence]	TR3-IV, 591-593
2	1998 [Judgment and] Sentence of Death	TR 1, 1040-42
3	Court of Appeals Order Dismissing	From 2011-CA 146
4	FBI Letter to the Commonwealth	
5	Trial Court Order on Status Conference Held March 2, 2011	TR3-I, 24-27
6	Defendant's Requested Instructions	TR3-I, 137-150; TR3-II, 151-152
7	Penalty Phase Jury Instructions	TR3-IV, 552-560
8	Unpublished case: *Halvorson v. Commonwealth*, 2005 WL 3488266 (Ky. App. 2005)	
9	ABA Report, Kentucky Death Penalty Assessment Report, Chapter 10 – Capital Jury Instructions	
10	Neuropsychological and Psychological Evaluation by Dr. Eric S. Engum	Brief for Appellant, 2001-SC-209, Appendix, pp. A21-38
11	Report of Dr. Candace Walker	Brief for Appellant, 2001-SC-209, Appendix, pp. A39-49
12	Report of Trial Judge	Court Exhibit Files