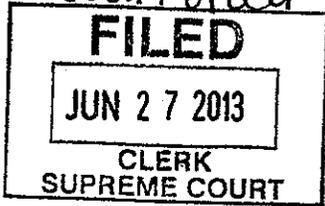
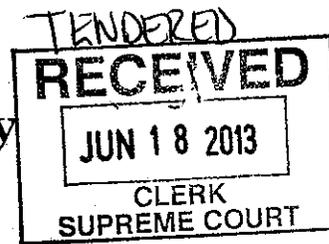


pursuant to
court order



Commonwealth of Kentucky
Kentucky Supreme Court
No. 2011-SC-000774-MR



MICHAEL ST. CLAIR

APPELLANT

v.

Appeal from Bullitt Circuit Court
Hon. Geoffrey P. Morris, Judge
Indictment No. 92-CR-00010-2

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served June 18, 2013 via United States mail to Hon. Geoffrey P. Morris, Special Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202; and via Kentucky messenger mail service to the Hon. Susan J. Balliet, Hon. Robert C. Yang, and Hon. Samuel N. Potter, attorneys for the appellant, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

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INTRODUCTION

Michael St. Clair appeals from the Bullitt Circuit Court's final Judgment of Conviction for capital murder. For this conviction, Mr. St. Clair was sentenced to Death.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal are adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

Michael St. Clair was convicted by a Bullitt County petit jury for the murder of Frank Brady and a sentence of death was imposed by the Bullitt Circuit Court in 1999. *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004); (TR 1; Vol. 7 at 1040-1042). This Court reversed that death sentence in 2004 because, “the trial court’s instructions erroneously failed to permit the jury to consider a sentence of life without the possibility of parole (“LWOP”).” *Id.* at 524. Thus, a new capital sentencing trial was held in 2005. Again, a second jury recommended that appellant be sentenced to death and the Bullitt Circuit Court entered its final judgment imposing a death sentence on October 5, 2005. (TR 2 at 490). In an opinion rendered on September 23, 2010, this Court again reversed the death sentence because the trial court had failed to follow the statutory language in instructing the jury on the applicable aggravating circumstance. *St. Clair v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010).

A third capital sentencing trial lasting nine days occurred in October, 2011. After deliberating for just over two hours, the third jury to hear St. Clair’s case returned a verdict, which again recommended a sentence of death. (CD3, Trial, 10/28/11, 11:18:59-1:52:45). The Bullitt Circuit Court entered its judgment imposing the jury recommended death sentence on November 16, 2011. (TR3-IV at 591-593). St. Clair now appeals that Judgment of Conviction.

The facts underlying St. Clair's murder conviction appear in detail in this Court's first opinion in this matter. In that opinion this Court affirmed St. Clair's murder conviction and summarized the relevant underlying facts as follows:

In September 1991, while he was awaiting final sentencing for two (2) Oklahoma state Murder convictions, Appellant escaped from a jail in Durant, Oklahoma, accompanied by another inmate, Dennis Gene Reese ("Reese"). The two men fled from the facility in a vehicle—a pickup truck—stolen from a jail employee and, when that truck soon ran out of gas, stole another pickup truck, a handgun, and some ammunition from the nearby home of Vernon Stephens ("Stephens") and fled Oklahoma for the suburbs of Dallas, Texas. Appellant's then-wife, Bylynn, met the men in Texas and brought them money, clothing, and other items. When Reese was subsequently arrested several months later in Las Vegas, Nevada, he confessed to his involvement in an ensuing crime spree.

According to Reese, after hiding out in Dallas for a few days, the men: (1) boarded a Greyhound bus bound for the Pacific Northwest but disembarked in Colorado, where Appellant kidnapped a man, Timothy Keeling ("Keeling"), and took his vehicle—again, a pickup truck—and Appellant and Reese began driving back towards Texas; (2) while driving through New Mexico, but approaching the Texas border, Appellant used the stolen handgun to execute Keeling in the desert; (3) the men then drove Keeling's pickup truck to New Orleans, Louisiana, for a brief time and then drove north through Arkansas and Tennessee before ending up in Hardin County, Kentucky, where Appellant kidnapped another man, Frances C. Brady ("Brady") and took his vehicle—another pickup truck; (4) the men then set fire to Keeling's pickup truck in order to destroy any incriminating

evidence and Appellant used his handgun to execute Brady in a secluded area of Bullitt County, Kentucky; (5) shortly thereafter, when Kentucky State Trooper Herbert Bennett ("Trooper Bennett") initiated a traffic stop of Brady's vehicle, which Appellant and Reese were then driving, Appellant fired shots from his handgun that struck Trooper Bennett's cruiser; and (6) during an ensuing flight—initially in Brady's pickup and subsequently on foot—Reese was able to split away from Appellant and had no further contact with him prior to his arrest.

In February 1992, a Bullitt County Grand Jury returned an indictment that charged that "[o]n or about the 6th day of October, 1991, in Bullitt County, Kentucky, [Reese and Appellant] did commit capital murder by shooting Frances C. Brady with a pistol." Subsequently, the Commonwealth filed a Notice of Intent to Seek Death Penalty as to Appellant in which it stated that "[p]ursuant to KRS 532.025, the Commonwealth will introduce evidence of aggravating circumstances sufficient to warrant imposition of the death penalty, specifically that the defendant has a prior record of conviction for capital offenses[.]" Reese entered into a plea agreement with the Commonwealth and agreed to testify against Appellant. Appellant pled not guilty and his case was tried before a jury in August and September 1998.

At trial, Appellant employed an alibi defense and contended that, although he had accompanied Reese to New Orleans for a few days after their initial flight to Dallas, the men had parted ways upon their return to Dallas, and soon thereafter he returned to Oklahoma where he hid out on the farm of a family friend until shortly before he was recaptured in December 1991. Appellant denied accompanying Reese to Colorado or New Mexico and further denied that he had ever been in Kentucky. Accordingly, the primary issue for jury

resolution at trial was whether Appellant or someone else—specifically Reese and/or an unidentified accomplice—had murdered Brady.

The Commonwealth's theory of the case was that Appellant himself shot and killed Brady. In addition to Reese's testimony, the Commonwealth proved its case through (1) Trooper Bennett's identification of Appellant as the man who had fired two shots in his direction on the night of the murder; (2) another man's identification of Appellant and Reese as being in possession of a vehicle similar to Brady's vehicle at a gas station/convenience store in the area; (3) testimony relating to telephone calls made to Appellant's friends and relatives back in Oklahoma from a payphone located at this same gas station/convenience store; (4) testimony identifying items found in Kentucky—on the victim's person and in his pickup truck—as similar to or the same items that Appellant's then-wife had given to Appellant and Reese when she met them in Texas; (5) a jailhouse informant, Scott Kincaid ("Kincaid"), who testified that Appellant had admitted his involvement in the crime; (6) ballistics evidence demonstrating that the same handgun could have fired the shots that killed both Keeling and Brady and damaged Trooper Bennett's cruiser and bullet composition evidence suggesting that bullets from the same box killed Keeling and Brady; and (7) testimony to the effect that Appellant's fingerprints were found both on items recovered from inside the Brady vehicle and on the outside door of the same vehicle.

At the conclusion of the culpability phase, the jury found Appellant guilty of Murder under the only Murder instruction given by the trial court:

INSTRUCTION NO. 1—MURDER

You will find the defendant guilty of Murder under this Instruction if, and only if, you believe from the evidence beyond a reasonable

*doubt that in this county on or about October 6, 1991, and before the finding of the Indictment herein, he, alone or in complicity with another, intentionally killed Frances C. Brady.*²[footnote omitted]

The case then proceeded to a capital sentencing phase where the jury found the only aggravating circumstance identified in the trial court's instructions, *i.e.*, "the Defendant has a prior record of conviction for murder, a capital offense," and fixed Appellant's punishment at death.

St. Clair v. Commonwealth, 140 S.W.3d 510, 524-25 (Ky. 2004). Further relevant facts will be presented as needed in the Argument Section.

ARGUMENT

PRELIMINARY ARGUMENT

PRESERVATION—DEFAULT—WAIVER

The standard for review of unpreserved error in death penalty cases is set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991):

Where the death penalty has been imposed, we nonetheless review allegations of these quasi [unpreserved] errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, *e.g.*, whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, *i.e.*, whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. All unpreserved issues are subject to this analysis. [Citations omitted.]

Also see Perdue v. Commonwealth, 916 S.W.2d 148, 154 (Ky. 1996); *Tamme v. Commonwealth*, 973 S.W.2d 13, 21 (Ky. 1998); *Mills v. Commonwealth*, 966 S.W.2d 473, 479 (Ky. 1999); *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). *Cf. West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989), *habeas corpus relief denied, sub nom. West v. Seabold*, 73 F.3d 81 (6th Cir. 1996). With respect to unpreserved errors, this Court may constitutionally require that an appellant demonstrate cause and prejudice or ineffective assistance of counsel. *West v. Commonwealth*, 780 S.W.2d at 602-603; *Murray v. Carrier*, 477 U.S. 478, 485-496 (1986); *Smith v. Murray*, 477 U.S. 527, 535 (1985); *Strickland v. Washington*, 466 U.S. 668, 687-696 (1984). The United States Supreme Court has reiterated the rule that the constitutional right to effective assistance of counsel, even in a death penalty case, focuses on whether the defendant received a fundamentally fair trial, not a perfect trial. *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Mickens v. Taylor*, 535 U.S. 162, 165 (2002). *Also see Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987). The record in this case reflects that counsel specifically objected to certain matters and did not object to others. Such action by trial counsel indicates that counsel decided not to object to the admission of such an item of evidence. *See West v. Commonwealth, supra*. Trial counsel's decisions on such matters are presumed reasonable under *Strickland*.

RCr 9.22 requires a contemporaneous objection to exclude evidence,

unless the Court has ruled upon a fact specific, detailed motion in limine that fairly and adequately apprised the Court of the specific evidence (not a class of evidence) to be excluded and basis for the objection. *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), overruling in part, *Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996); *Davis v. Commonwealth*, 147 S.W.3d 709, 722-723 (Ky. 2004). A motion for new trial does not convert an unpreserved error into a preserved error. *Patrick v. Commonwealth*, 436 S.W.2d 69 (Ky. 1968); *Byrd v. Commonwealth*, 825 S.W.2d 272, 273 (Ky. 1992). In some instances trial counsel for St. Clair objected on grounds different from those grounds that are asserted in appellant's brief; when the grounds presented to the trial court were different than the grounds presented to the appellate court, the issue has not been properly preserved for appellate review. *Todd v. Commonwealth*, 716 S.W.2d 242, 247-249 (Ky. 1986); *Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998); *Henson v. Commonwealth*, 20 S.W.3d 466, 471 (Ky. 2000). An appellant must obtain a ruling by the trial court upon the motion or objection to preserve the issue for appeal. *Bell v. Commonwealth*, 473 S.W.2d 820 (Ky. 1971); *Thompson v. Commonwealth*, 147 S.W.3d 22, 40 (Ky. 2004).

Finally, the Commonwealth would point out that on some unpreserved issues, St. Clair may contend that this Court should presume that the alleged errors are prejudicial. Under the *Sanders* standard there is no presumption

of prejudice regarding unpreserved errors. Likewise, as a general rule, the federal courts in reviewing a death penalty conviction on direct appeal do not presume prejudice regarding unpreserved issues. *United States v. Chandler*, 996 F.2d 1073,1086 (11th Cir. 1993), opinion on collateral attack, *Chandler v. United States*, 218 F.3d 1035 (11th Cir. 2000)(en banc); *Jones v. United States*, 527 U.S. 373, 388-395, 402-405 (1999). The U.S. Supreme Court has indicated that in reviewing unpreserved constitutional error, the harmless beyond a reasonable doubt standard does not apply. *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Cotton*, 535 U.S. 625 (2002); *Jones v. United States*, *supra*, upholding federal death sentence.

HARMLESS ERRORS

Pursuant to RCr 9.24, the Commonwealth submits under the evidence in this case, that if any error has occurred, the error was harmless, regardless of the specific argument portion of this brief regarding each of the issues raised by St. Clair. As to non-constitutional errors, see *Commonwealth v. Chandler*, 722 S.W.2d 899 (Ky. 1987); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). As a general rule, the erroneous admission of evidence in violation of state law is not a federal constitutional error. As the United States Supreme Court noted in *United States v. Hasting*, 461 U.S. 499, 509 (1983), “the Court has consistently made it clear that it is the duty of the reviewing court to consider the entire record as a whole and to ignore errors that are harmless,

including most constitutional violations[.]” As noted in *Rose v. Clark*, 478 U.S. 570, 576-577 (1986), “[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.” Harmless error analysis even applies to instructional error omitting an element of the offense, which was objected to at trial, if the error was harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1 (1999) (finding that objected to omission of an element of the offense was harmless beyond a reasonable doubt). Harmless error analysis also applies to the penalty phase of death penalty trials. *Clemons v. Mississippi*, 494 U.S. 738, 744-745 (1990); *Zant v. Stephens*, 462 U.S. 862 (1983); *Romano v. Oklahoma*, 512 U.S. 1 (1994); *Jones v. United States*, 527 U.S. 373, 402-405 (1999); *Brown v. Sanders*, 126 S.Ct. 884, 890-894 (2006). With respect to any alleged erroneous comments by the prosecutor or a witness, an admonition to the jury to disregard is normally sufficient to cure any improper comments. See *Greer v. Miller*, 483 U.S. 756 (1987); *Boyde v. California*, 494 U.S. 370, 384-386 (1990); *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky.1999). Therefore, the Commonwealth contends that St. Clair’s convictions and sentences should be affirmed regardless of any errors that may have occurred during the course of the trial.

**A NEW GUILT PHASE IS NOT REQUIRED AS
ST. CLAIR'S GUILT HAS PREVIOUSLY BEEN
AFFIRMED BY THIS COURT.**

1. **Forensic Evidence:** St. Clair alleges that the trial court erred by not granting his RCr 10.02 motion for a new trial based on newly discovered evidence. (TR 3rd Appeal, Vol. I at pg. 6).¹ Specifically, St. Clair argues that newly discovered evidence indicated that the admission of testimony from a FBI firearms expert regarding Comparative Bullet Lead Analysis (CBLA) was false and/or misleading. As a result of the admission of this questionable testimony, St. Clair believes the guilt-phase verdict convicting him of murdering Frank Brady is unreliable and must be reversed. Further, St. Clair boldly accuses the Commonwealth of compounding the magnitude of this alleged error by repeating the introduction of the CBLA evidence at the third capital sentencing trial. (See Appellant's Brief at 11). However, appellant's own citation to the relevant portions of the record clearly demonstrates this final assertion to be blatantly false. Given, this Court's previous affirmation of appellant's conviction, the overwhelming evidence of appellant's guilt absent the CBLA evidence, and Appellant's blatant mis-characterization of the evidence admitted in 1998 and during the

¹Appellant's brief refers to this motion as a CR 60.02; however, the record reflects that the motion was made expressly pursuant to RCr 10.02 and that appellant's counsel continually maintained that the motion was made pursuant to that rule. See (TR 3rd Appeal, Vol. I at 6; Vol. II at 166).

re-sentencing, it is readily apparent that this claim lacks merit.

Much of St. Clair's argument on appeal is premised on the inaccurate assertion that the CBLA evidence "...was the only evidence in 1998 providing a (supposedly) direct link between Appellant and Brady's murder." (Appellant's Brief at 10). This premise is absolutely false. At St. Clair's 1998 trial testimony was elicited from two separate FBI experts with regard to ballistic evidence. One expert, Ernest Peel offered cautious, equivocal testimony regarding CBLA and its application to St. Clair's case. Conversely, a second expert, Richard Crum, offered scientifically reliable and unchallenged testimony linking bullet evidence from the Brady murder with the murder of Tim Keeling, the crimes in Oklahoma and the shots fired at Trooper Bennett's vehicle. As St. Clair's RCr 10.02 motion made clear, the newly discovered evidence consisted of a letter forwarded to the defense by the Commonwealth in which the Federal Bureau of Investigation (FBI) indicated testimony only regarding CBLA was problematic. (TR 3rd Appeal, Vol. I at 6). St. Clair's RCr 10.02 motion did not in anyway challenge the admissibility, reliability, or accuracy of the Agent Richard Crum's expert testimony linking the bullet evidence recovered from the Brady murder, the Keeling murder and the shots fired at Trooper Bennett. (*Id.*) In fact, the trial court's denial of St. Clair's RCr 10.02 motion largely relied on the traditional ballistic evidence offered by Agent Crum to demonstrate the inconsequential nature of CBLA evidence.

The trial court denied St. Clair's RCr 10.02 motion by Memorandum and Order [Revised] entered on January 11, 2011. (TR 3rd Appeal, Vo. II at 204-210). In that decision the trial court thoroughly review this Court's precedents and the factual underpinnings of St. Clair's convictions. Specifically, the trial court highlighted that,

FBI Agent Richard Crum testified that he had received the .357 Winchester bullets and some empty casings from Mr. Stephens' house as well as fired bullets and bullet fragments from the Keeling and Brady investigations. His analysis of the physical remains of the bullets and bullet fragments was that the markings on a Keeling bullet fragment was similar to those on the bullets from the Brady case and the bullets from the Brady case had been fired by a Ruger .357 Blackhawk.

(TR 3rd Appeal, Vol. II at 208-209). Agent Crum's opinion was based on traditional ballistic analysis that focused on the rifling markings left on a bullet when fired from a weapon. St. Clair's RCr 10.02 did not challenge this testimony. After reviewing the expert ballistic testimony and the Commonwealth's opening and closing arguments, the trial court concluded that,

If the Commonwealth is seeking to ask the jury to place significant emphasis on the challenged bullet lead composition analysis, it is not clear from [sic] these comments in the closing argument. **What is clear is that at best eight lines of closing argument out of 63 pages "might" allude to the disputed theory, but also may allude to undisputed and traditionally accepted ballistic analysis which was presented to the jury.**

(TR 3rd Appeal, Vol. II at 209)(emphasis added).

Before concluding its memorandum order denying St. Clair's RCr 10.02 motion, the trial court also focused its attention on FBI Agent Ernest Peel's actual testimony, which was the true focus of St. Clair's RCr 10.02 motion. Examination of that testimony reveals it to be so equivocal that it could not have had a substantive impact on the ultimate verdict reached by the jury. As the trial court's decision points out, "[i]n his direct testimony, Mr. Peel was extremely cautious in his conclusions." (*Id.* at 209). Further, the trial court pointed out that on cross-examination Mr. Peel expressly agreed with defense counsel that, "...you can't rule out that they [bullets] may have in fact come from a different boxes just manufactured at the same time." (*Id.* at 210).

Ultimately, the trial court overruled St. Clair's motion for new trial finding that even if the admission and use of CBLA evidence during the guilt phase of St. Clair's trial was error that error was harmless. Specifically, the trial court found,

...weighing this evidence against the other ballistic testimony, **and**, against **all** of the other evidence presented to the jury and summarized in the opinion of the Supreme Court in the cases at bar, the bullet lead composition analysis is inconsequential, and its use, if error, was harmless.

(*Id.* at 210).

St. Clair's attempt to bolster this claim of error on appeal by refusing

to acknowledge the undisputed traditional ballistic evidence incriminating St. Clair and by falsely accusing the Commonwealth of repeating the introduction of the CBLA evidence at the capital re-sentencing is outrageous. The record, as well as this Court's prior opinion, evidence that CBLA evidence was not the only ballistic evidence introduced against the appellant. Further, examination of the video citations contained in St. Clair's brief at footnote 51 reveals that the summary of Agent Crum's testimony read to the jury addressed only traditional ballistics evidence and not CBLA. Further, it was admitted without any objection by St. Clair's counsel.

For all of the above-mentioned reasons, the trial court properly denied St. Clair's RCr 10.02.

2. **KRE 404(b) Evidence:** St. Clair argues that he is entitled to a new guilt phase trial due the improper admission of evidence regarding his prior bad acts. Although he acknowledges that this Court has already rejected this argument when affirming his convictions in *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004), St. Clair believes the "law of case" doctrine does not apply due to what he characterizes as "significant" changes in the law regarding the admission of evidence under KRS 404(b). For the reasons explained below, the "law of the case" doctrine does apply and regardless, this issue is otherwise without merit.

In *Brown v. Commonwealth.*, 313 S.W.3d 577, 610-11 (Ky. 2010), this Court explained the "law of the case" doctrine in great detail. Specifically,

this Court stated:

“Law of the case” refers to a handful of related rules giving substance to the general principle that a court addressing later phases of a lawsuit should not reopen questions decided by that court or by a higher court during earlier phases of the litigation. 18B Wright, Miller, and Cooper, *Federal Practice and Procedure*, 4478 (2002). One of the rules, for example, the so-called mandate rule, provides that on remand from a higher court a lower court must obey and give effect to the higher court's express or necessarily implied holdings and instructions. *Id.* *Buckley v. Wilson*, 177 S.W.3d 778 (Ky.2005).

Where multiple appeals occur in the course of litigation, another law-of-the-case rule provides that issues decided in earlier appeals should not be revisited in subsequent ones. Wright, Miller, and Cooper, *supra*; *Inman v. Inman*, 648 S.W.2d 847 (Ky.1982). These rules serve the important interest litigants have in finality, by guarding against the endless reopening of already decided questions, and the equally important interest courts have in judicial economy, by preventing the drain on judicial resources that would result if previous decisions were routinely subject to reconsideration.

Law of the case is a prudential doctrine, however, not a jurisdictional one. “Law of the case directs a court's discretion, it does not limit the tribunal's power.” *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); *Sherley v. Commonwealth*, 889 S.W.2d 794 (Ky.1994). As such, the doctrine is subject to exceptions. A court is not bound by the doctrine, for example, where there has been an intervening change in the law. *Id.* An appellate court, moreover, may deviate from the doctrine if its previous decision was “clearly erroneous and would work a manifest injustice.” *Arizona v. California*, 460 U.S. at 618 n. 8, 103

S.Ct. 1382.

Id. at 610-11, (emphasis added).

Under the “law of the case” doctrine this Court should exercise its discretion and refuse to revisit this claim, which was rejected in its 2004 opinion affirming St. Clair’s conviction. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-536 (Ky. 2004). In that opinion, this Court found no error with the admission of the other bad acts evidence as follows:

Appellant complains that much of the Commonwealth's evidence at trial was inadmissible evidence of bad character that demonstrated nothing more than Appellant's propensity towards criminal activity. Appellant primarily focuses upon the testimony as to his jail escape, burglary, and vehicle theft in Oklahoma and the ensuing manhunt, a kidnapping and vehicle theft in Colorado and a murder in New Mexico, and the shooting incident involving Trooper Bennett. We hold that no reversible error occurred from the introduction of any of the evidence identified in Appellant's brief.

On appeal, the applicable standard of review is whether the trial court was clearly erroneous in its factual findings that permitted the Commonwealth to introduce the evidence. KRE 104(a). *Cf. Parker v. Commonwealth*, Ky., 952 S.W.2d 209 (1997). Here, the trial court properly permitted the Commonwealth to introduce evidence of Appellant's prior crimes and bad acts that were part of a continuous course of conduct in the form of a “crime spree” that began with Appellant's escape from an Oklahoma jail and ended with his flight from Trooper Bennett. KRE 404(b) provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not

admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party.

The trial court correctly ruled that testimony as to Appellant's criminal conduct in Oklahoma, Colorado, and New Mexico prior to his Murder of Brady as well as his post-murder shooting at and flight from Trooper Bennett was relevant and admissible under both KRS 404(b)(1) & (2). "[I]dentification of the defendant as the perpetrator of the crime charged is an essential element in any criminal prosecution." *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 674 (1990). In this case, the evidence concerning Appellant's crime spree, among other things: (1) proved how Appellant came into possession of the murder weapon, *see Stanford v. Commonwealth*, Ky., 793 S.W.2d 112, 116 (1990) ("Appellant's theft of the gun used to commit the crimes charged and theft of the automobile to transport the victim to the point of the murder are so interwoven with the Commonwealth's proof as to render this evidence admissible despite the fact that it tended to prove collateral uncharged criminal conduct."); (2) demonstrated a motive for his abduction of Brady by illustrating Appellant's penchant for late-model small pickup trucks; (3) linked the items found in Brady's abandoned truck to Appellant; and (4) suggested similarities between the execution-style killings of Keeling in New Mexico and Brady in Kentucky that created a reasonable inference that Appellant had committed both murders. *See Sanders*, 801 S.W.2d at 674

("The record discloses a remarkable similarity between the respective crimes[.]") As such, "[i]t is difficult to ignore that after his escape ... appellant went on a crime spree and along the way murdered two victims. We have found no basis to disturb the trial court's rulings on the admission of the challenged evidence." *Haight v. Commonwealth*, Ky., 938 S.W.2d 243, 252 (1996). Nor do we agree with Appellant's contention that the Commonwealth committed "overkill" by presenting this other bad acts evidence in excess detail. "If evidence of other crimes is admissible to show intent or identity or a common scheme or plan, the jury must weigh such evidence for what it is worth[.]" *Sanders*, 801 S.W.2d at 675 (1990).

Id. at 535-36.

St. Clair asks this Court to ignore its prior holding on this issue and look at the claim of error anew due to what he characterizes as "significant" changes to controlling precedent regarding KRE 404(b). However, on page 18 of his brief, St. Clair expressly, "...acknowledges that the underlying principles of prior bad acts law have not changed in the past eight years." (Appellant's Brief at 18). Despite this concession, St. Clair argues that recent opinions rendered by this Court have clarified application of the fundamental principles of prior bad acts law, that have not changed.

Review of St. Clair's argument does not reveal any significant change in this Court's prior bad acts jurisprudence. Instead, St. Clair has merely cited different cases to support the same arguments previously rejected by this Court. Although the cases he cites may be newer, none of the cases purport to make an significant change to the law. Further, St. Clair's use of

these cases is really limited to trying to somehow compare the facts of his case to the facts of those newer cases. St. Clair's attempt to discredit this Court's prior ruling is unpersuasive and should be rejected by this Court.

3. Unpreserved Identification Claim: This issue is not preserved. Pursuant to RCr 10.26 this Court may address an alleged error not properly preserved for review only if the alleged error is palpable and affects the substantial rights of a party. The standard for review of unpreserved error in death penalty cases is set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991):

Where the death penalty has been imposed, we nonetheless review allegations of these quasi [unpreserved] errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. All unpreserved issues are subject to this analysis. [Citations omitted.]

Also see Perdue v. Commonwealth, 916 S.W.2d 148, 154 (Ky. 1996); *Tamme v. Commonwealth*, 973 S.W.2d 13, 21 (Ky. 1998); *Mills v. Commonwealth*, 966 S.W.2d 473, 479 (Ky. 1999); *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). *Cf. West v. Commonwealth*, 780 S.W.2d 600 (Ky.

1989), *habeas corpus relief denied, sub nom. West v. Seabold*, 73 F.3d 81 (6th Cir. 1996). Further, RCr 9.22 requires a contemporaneous objection to exclude evidence. *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), overruling in part, *Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996); *Davis v. Commonwealth*, 147 S.W.3d 709, 722-723 (Ky. 2004).

It is unreasonable to permit St. Clair the opportunity to litigate this claim after he failed to object to the admission of this testimony during his 1998 trial, failed to raise it in his original direct appeal, and failed to object to the summary of the testimony for being admitted during the latest capital sentencing trial. These repeated failures to raise this claim suggest that the simple reason for not raising it before was that the claim lacked merit. Assuming for the purpose of argument only that there is no reasonable explanation for the failure to preserve this claim, it is still readily evident from the overwhelming evidence of St. Clair's guilt and the heinous nature of the crime that the death penalty would have still been imposed.

Additionally, the "law of the case" doctrine should be utilized and this Court should not revisit nor disturb its prior decision affirming St. Clair's guilt for the murder of Frank Brady.

As this Court explained in *Brown, supra*, the rules encompassed in the "law of the case" doctrine, "...serve the important interest litigants have in finality, by guarding against the endless reopening of already decided questions, and the equally important interest courts have in judicial

economy, by preventing the drain on judicial resources that would result if previous decisions were routinely subject to reconsideration.” *Id.* at 610-11. To the extent that the “law of the case” doctrine does not direct this Court’s discretion away from reopening the question of St. Clair’s guilt, St. Clair’s failure to object to the admission of this testimony at 1998 trial or its admission during the latest capital sentencing trial, and his failure to raise it in his prior direct appeals operates as a waiver of this claim. *Id.* at 610-611.

NO ERRORS OCCURRED IN VOIR DIRE

4.

THE PROCEDURE USED TO EMPANEL THE JURY DID NOT VIOLATE THE ADMINISTRATIVE PROCEDURES OF THE COURT OF JUSTICE AND WAS EXPRESSLY AGREED TO BY THE APPELLANT.

This issue is unpreserved. St. Clair argues that he is entitled to a fourth sentencing trial because the trial court failed to fully comply with the Administrative Procedures of the Court of Justice during voir dire. This argument is maintained despite St. Clair’s concession that his counsel, the counsel for the Commonwealth, and the Court all expressly agreed to follow the voir dire procedure typically utilized in Jefferson County. (Appellant’s Brief at 29; CD3, Hearings 3/02/11, 9:48:55 and 7/26/11, 9:31:32). In fact, St. Clair concedes that his counsel not only agreed to the procedure utilized, but expressly informed the Court that the Jefferson County method was preferred. (Appellant’s Brief at 29; CD3, Hearings, 7/26/11, 9:31:32). Thus,

the record clearly evidences that appellant, through his counsel, expressly agreed to the jury selection procedure utilized by the trial court and thus, waived this claim of error.

In *Parson v. Commonwealth*, 144 S.W.3d 775, 783 (Ky. 2004), this Court, citing to numerous examples, found that,

even “the most basic rights of criminal defendants are subject to waiver.” *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 663, 145 L.Ed.2d 560 (2000) (internal quote omitted). Eg., right to a speedy trial, *Barker v. Wingo*, 407 U.S. 514, 529, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101 (1972), *Dunaway v. Commonwealth*, Ky., 60 S.W.3d 563, 571 (2001); right to a public trial, *Levine v. United States*, 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960); right to a trial by jury, *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942), *Short v. Commonwealth*, Ky., 519 S.W.2d 828, 832-33 (1975), superseded by rule as stated in *Jackson v. Commonwealth*, Ky., 113 S.W.3d 128, 131-32 (2003); right to counsel, *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975), *Wake v. Barker*, Ky., 514 S.W.2d 692, 695-96 (1974); right to testify on one's own behalf, *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987), *Crawley v. Commonwealth*, Ky., 107 S.W.3d 197, 199 (2003); right to be present at all stages of trial, *United States v. Gagnon*, 470 U.S. 522, 528, 105 S.Ct. 1482, 1485, 84 L.Ed.2d 486 (1985), *Fugate v. Commonwealth*, Ky., 62 S.W.3d 15, 19 (2001); right to appeal, *Johnson v. Commonwealth*, Ky., 120 S.W.3d 704, 706 (2003).

If even constitutional rights can be waived, it is axiomatic that an appellant is entitled to waive strict compliance with administrative procedural rules

governing jury selection. Because appellant expressly agreed to the voir dire procedure utilized by the trial court, the current claim of error on appeal was waived.

Undersigned counsel has been unable to find a published opinion of this Court directly addressing this matter. However, on March 21, 2013, in the case of *Benton v. Commonwealth*, No. 2011-SC-000411-MR (Ky. 2013)² (Final as of 4/11/13), this Court issued an unpublished unanimous opinion dealing with circumstances nearly identical to those presently before the Court. In *Benton* this Court refused to review this claim of error due to counsel's express agreement to the voir dire procedure utilized in that case.

Specifically, this Court explained the matter as follows:

Benton next argues that the Fayette Circuit Court's jury empanelling practice violated Kentucky's Administrative Procedures of the Court of Justice, Part II, Sections 1 and 10. On March 25, 2011, Benton filed a "Motion for Fair and Efficient Jury Selection" and a hearing on the motion was conducted. The trial judge, in "the spirit of compromise," attempted to appease all parties by allowing the venire panel to be split into two smaller groups of thirty-eight and forty-three, respectfully, for the purpose of general voir dire. **When asked if the tailored voir dire selection process was acceptable, Benton's counsel stated "yes" and at no point objected. For**

²CR 76.28(4)(c) expressly permits the citation of unpublished decision of this Court that were rendered after January 1, 2003, if there is no published opinion that would adequately address the issue before the Court. Pursuant to that same rule a copy of the Slip Opinion in *Benton v. Commonwealth*, 2011-SC-000411-MR (Ky, 2013) is contained in the appendix to this brief.

those reasons, we believe this issue is not preserved for our review. *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997).

Benton v. Commonwealth, 2011-SC-000411, Slip Opinion at pg. 5-6 (Ky. 2013) (emphasis added). Similarly, this Court should refrain from reviewing the merits of this claim given that appellant's counsel not only failed to object, but expressly, agreed to the voir dire procedure utilized in this case.

Further, the sole purpose for the criminal and administrative rules governing jury selection are to facilitate the empaneling of a fair and impartial jury. Appellant makes no showing that the procedure utilized deprived of his right to a fair and impartial jury. In fact appellant does not make any argument attacking any of the jurors selected to serve. Thus, it is readily evident that any deviation from the procedures required by the criminal or administrative rules governing jury selection was harmless under RCr 9.24. As the United States Supreme Court noted in *United States v. Hasting*, 461 U.S. 499, 509 (1983), "[T]he Court has consistently made it clear that it is the duty of the reviewing court to consider the entire record as a whole and to ignore errors that are harmless, including most constitutional violations[.]" As noted in *Rose v. Clark*, 478 U.S. 570 at 576-577 (1986), "Where the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." Further, the any deviation from the procedure prescribed by RCr 9.30 was not substantial, as it was in

Robertson v. Commonwealth, 859 S.W.2d 864 (Ky. 1980), because the procedure used did not, “create[] a problem whereby the parties knew who each replacement could be and could manipulate their strikes to obtain a particular person on the panel.” *Campbell v. Commonwealth*, 260 S.W.3d 792, 798 (Ky. 2008).

Finally, this Court should not entertain St. Clair’s request to characterize this alleged error as palpable under RCr 10.26. Pursuant to RCr 10.26 this Court may address an alleged error not properly preserved for review only if the alleged error is palpable and affects the substantial rights of a party. The standard for review of unpreserved error in death penalty cases is set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991):

Where the death penalty has been imposed, we nonetheless review allegations of these quasi [unpreserved] errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel’s failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. All unpreserved issues are subject to this analysis. [Citations omitted.]

Also see *Perdue v. Commonwealth*, 916 S.W.2d 148, 154 (Ky. 1996); *Tamme v. Commonwealth*, 973 S.W.2d 13, 21 (Ky. 1998); *Mills v.*

Commonwealth, 966 S.W.2d 473, 479 (Ky. 1999); *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). *Cf. West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989), *habeas corpus relief denied, sub nom. West v. Seabold*, 73 F.3d 81 (6th Cir. 1996). In this case it is readily evident that the reason St. Clair's counsel did not object was because the procedure utilized by the trial court was expressly agree upon. Further, St. Clair has not credibly demonstrated that he was prejudiced by this alleged error. Finally, in *Benton, supra*, this Court expressly found that an alleged error nearly identical to the one presented in St. Clair's brief did not result in "manifest injustice" and thus, RCr 10.26 relief was not warranted. (Slip Opinion at 6).

Because appellant expressly waived any error that may have arisen as a result of not strictly adhering to the rules governing jury selection and/or because any error in the deviation from those rules was harmless, appellant's convictions should be affirmed.

**THE VENIRE WAS PROPERLY EXAMINED
AS TO THEIR ABILITY TO CONSIDER THE
FULL PENALTY RANGE.**

St. Clair argues that the trial court improperly limited voir dire to prevent him from specifically inquiry into whether a juror, “might seriously consider the low end of 20 to 50 years as being too lenient.” (Appellant’ Brief at 34). However, the record reflect that trial court properly sustained the Commonwealth’s objection to defense counsel’s attempt to guide juror no. 670 into characterizing 20 to 50 years as being too lenient and directed St. Clair’s counsel to simply inquire whether the juror no. 670 would consider a term of years between 20 to 50 years for the offense for which St. Clair had been unanimously convicted. (CD3, Voir Dire, 10/19/11, 2:20:58-2:21:28). To the appropriate question; i.e., could the juror consider a term of year for the offense of murder, juror 670 unequivocally answered yes. (*Id.* at 2:21:29). Thus, St. Clair’s counsel was not prevented from inquiring into any juror’s ability to consider the full range of sentencing options and the trial court properly used its wide discretion to focus and control the jury selection process.

St. Clair also complains that the trial court unreasonably limited voir dire when it dismissed a juror without first allowing defense counsel the opportunity to clear up a misunderstanding that juror no. 505 had with regard to an aggravator. (St. Clair’s Brief at 35). However, the record

reflects that juror 505 had given the court inconsistent answers regarding whether death would be the only punishment he would consider in certain circumstances and that the trial court sought to clarify the juror's response by directly asking questions of that juror. (CD3, Voir Dire, 10/21/11, 9:50:48). Under judicial questioning, juror 505 confirmed that death would be the only punishment he would seriously consider if the murder was intentional and/or premeditated. (*Id.* at 9:51:30). Thus, the trial court excused this juror without any objection from St. Clair. After the juror had been excused, St. Clair's counsel still did not make any objection, but simply opined that he would have liked to have the opportunity to have cleared up the juror's inconsistencies himself. (*Id.* at 9:51:58). The trial court responded by noting that counsel did not have to, because the trial court had cleared up the inconsistencies and would continue to do so where appropriate. (*Id.* at 9:52:53). St. Clair's counsel conceded that the trial court had in fact cleared up the inconsistency in the juror's testimony and made no further comments. (*Id.*). Thus, no objection was made, no error occurred and there is really nothing for this Court to review on appeal with regard to this claim of error.

Nonetheless, it should be noted that, "it is within the trial court's discretion to limit the scope of voir dire." *Fields*, 274 S.W.3d at 393 (citing *Webb v. Commonwealth*, 314 S.W.2d 543, 545 (Ky.1958)). And, appellate review of such a limitation is one for an abuse of discretion. *Hayes v.*

Commonwealth, 175 S.W.3d 574, 583 (Ky.2005). Further, the United States Constitution does not always entitle the defense to *voir dire* the jury without limitation *Ham v. South Carolina*, 409 U.S. 524, 527 - 528 (1973). *Voir dire* “is conducted under the supervision of the trial court and, a great deal must, of necessity, be left to its discretion.” *Connors v. United States*, 158 U.S. 408, 413 (1895). As the description of the record above demonstrates, the trial court did not limit or in any way prevent St. Clair from inquiring whether a particular juror could consider a sentence on the lower range of the available penalties. Instead, the trial court merely sustained an objection to a question that sought to characterize a sentence as too lenient. St. Clair’s counsel was permitted to ask juror 670 whether or not she could consider a term of year between 20 to 50 years for his crime. Thus, no error occurred.

6.

**THE TRIAL COURT DID NOT ERR IN
REFUSING TO STRIKE JURORS #15, 16 and
448 FOR CAUSE.**

This issue is unpreserved. In *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009), this Court noted that “in order to complain on appeal that he was denied a peremptory challenge by a trial judge’s erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck.” By his own admission, St. Clair concedes that his counsel did not comply with the requirements of *Gabbard*,

supra. (Appellant's Brief at 38). Because St. Clair failed to comply with *Gabbard* and because all of the identified jurors were removed from the venire panel by peremptory or random strike, no prejudice could have resulted from the trial court's refusal to strike jurors #15, 16, and 448 for cause.

Nonetheless, St. Clair argues that the trial court erred when it failed to strike jurors # 15, 16, and 448 for cause. For the reason below it is evident from the record that trial court appropriately exercised its discretion when denying St. Clair's motions to strike these jurors for cause.

The real issue before the Court is whether the jurors identified by Mr. St. Clair held views that "would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Wainwright v. Witt*, 469 U.S. 412, 414 (1985). The determination of whether to exclude a venireman for cause lies within the sound discretion of the trial court and will not be reversed absent a showing that the exercise of this discretion was clearly erroneous. *Grooms v. Commonwealth*, 756 S.W.2d 131, 134 (Ky. 1988); *Simmons v. Commonwealth*, 746 S.W.2d 393, 396 (1988). A juror should be dismissed for cause only if the juror cannot conform his or her views to the requirements of the law and cannot render a fair and impartial verdict. *Mabe v. Commonwealth*, 884 S.W.2d 668 (Ky. 1994). "It is the probability of bias or prejudice that is determinative in ruling on a

challenge for cause.” *Pennington v. Commonwealth*, 316 S.W.2d 221, 224 (Ky. 1958).

Juror #15 - Ms. Hildebrand

Ms. Hildebrand candidly admitted that it might be difficult for her to consider a sentence of 20 to 50 years for an intentional murder. (CD3 Supp., 10/18/11, 1:39:13). However, she also indicated that she believed a 20 year sentence could be a death sentence for Mr. St. Clair and that she could definitely consider the full range of sentencing options. (*Id.* at 1:41:12). She further indicated that she would listen to the circumstances, including mitigation, when considering the full range of sentencing options. (*Id.* at 1:41:46, 1:42:12). In fact, Ms. Hildebrand indicated that she held no belief that would eliminate considering facts that might mitigate the severity of the punishment. (*Id.* at 1:42:45). A juror should be dismissed for cause only if the juror cannot conform his or her views to the requirements of the law and cannot render a fair and impartial verdict. *Mabe, supra*. Ms. Hildebrand made clear that she could conform his views to the law. Thus, it is readily evident that this juror was not impaired and that the trial court properly exercised its discretion in denying St. Clair’s motion to strike her for cause. Ultimately, this juror did not sit on St. Clair’s jury, but was struck by a peremptory challenge. (Appellant’s Brief at 38).

Juror #16 - Ms. Sadderly

Initially, Ms. Sadderly told the court that she had no problem with the full sentencing range and that she could consider the full range of penalties. (CD3 Supp., 10/18/11, 1:48:55-1:50:15). However, during examination by counsel for St. Clair Ms. Sadderly seemed to indicate that the death penalty was the most appropriate penalty for intentional murder. (*Id.* at 1:50:24-1:52:58). Ultimately, Ms. Sadderly's conflicting testimony proved to be the result of her confusion with the questions posed to her by St. Clair's counsel. (*Id.* at 1:55:28, 1:57:06). It appears from the record that Ms. Sadderly misinterpreted St. Clair's questioning as asking her to pick a punishment without knowing anything about the case other than St. Clair had intentionally murdered Mr. Brady. (*Id.*) However, once it was made clear that she was not being asked to pick the punishment, but instead being asked if after hearing all of the evidence (including mitigation) she could consider the full range of sentences, Ms. Sadderly clearly indicated that she could. (*Id.* at 1:53:21-1:57:36). Thus, Ms. Sadderly evidenced that she could give thoughtful consideration to the full range of available sentences and the trial court properly exercised its discretion in denying St. Clair's challenge for cause. Importantly, St. Clair concedes that this juror was removed from the venire panel by random strike. (Appellant's Brief at 39).

Juror #448 - Mr. McDaris

It is obvious from a complete review of Mr. McDaris' examination that he had trouble understanding what the attorneys, on both sides, were really asking when they inquired as to his ability to consider the full range of penalties. (CD3, Voir Dire, 10/21/11, 12:16:41-12:29:00). However, St. Clair's examination of this juror made it clear that he was qualified to served. (*Id.* at 12:24:41-12:29:00). Mr. McDaris' comments to St. Clair's counsel made it clear that he mistakenly believed the attorney had been asking him to pick the punishment without know anything about the case except that St. Clair was guilty of intentionally murdering Frank Brady. (*Id.* at 12:24:41). If forced to set the punishment knowing only that St. Clair had intentionally murdered Frank Brady, Mr. McDaris indicated he would choose death. However, Mr. McDaris made it crystal clear that if he was made part of the jury and permitted to learn the details of the crime and mitigation evidence, he would absolutely be able to thoughtful consider the full range of penalties. (*Id.* at 12:24:41-12:29:00). He further indicated that he did not expect anything from St. Clair or his counsel at trial and expressly declared that he could give real consideration to mitigation and the full penalty range, even the low end, if he knew more about the case. (*Id.*).

In *Hodge v. Commonwealth*, this Court pointed out that "excusal for cause is not required merely because the juror favors severe penalties, so long as he or she will consider the full range of penalties. *Bowling v.*

Commonwealth, Ky., 873 S.W.2d 175 (1993).” Further in *Meece v.*

Commonwealth, 348 S.W.3d 627, 710 (Ky. 2011), this court reiterated that,

“Voir dire examination occurs when a prospective juror quite properly has little or no information about the facts of the case and only the most vague idea as to the applicable law. At such a time a juror is often presented with the facts in their harshest light and asked if he could consider imposition of a minimum punishment. Many jurors find it difficult to conceive of minimum punishment when the facts as given suggest only the most severe punishment.... **A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination.**”

Id. (quoting *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky.1994))

(emphasis added).

Thus, the trial court properly exercised its discretion by denying St. Clair’s challenge for cause. Importantly, this juror did not sit on the jury and it is conceded by St. Clair that he did not use a peremptory on this juror. Instead, Mr. McDaris was removed from the venire by random strike. (Appellant’s Brief at 39).

7.

NO BATSON VIOLATION OCCURRED.

St. Clair argues the trial court erred when it dismissed veniremen #667 at his request due to an economic hardship. Contrary to St. Clair’s assertion this issue is not preserved by his *pro se* motion requesting that jurors be paid at least minimum wage. The record reflects that at the bench

juror #667 asked to be excused because he was, “just barely making it” and needed to work. (CD3, Voir Dire, 10/18/11, 9:46:40). St. Clair’s counsel can be seen at the bench during this exchange and did not object or otherwise question the trial court’s decision to excuse this juror.

Further, St. Clair’s characterization of this claim as a *Batson* issue is misguided and wrong. In *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), the United States Supreme Court set forth a three-step process, for determining whether or not a prosecutor’s use of its peremptory challenges violates the Equal Protection Clause. That case had absolutely nothing to do with review of trial court’s decision to excuse a juror at that juror’s request due to an economic hardship. Simply put, no *Batson* violation occurred.

Further, it is a near certainty that had the trial court refused to excuse this juror St. Clair would now be before this Court claiming that he was prejudiced by the court’s refusal to excuse a juror laboring under a economic hardship. Given that the juror, appellant’s counsel, the Commonwealth, and the trial court all believed it appropriate for juror #667 to be excused, it is clear that trial court did not abuse its discretion in excusing this juror.

8.

**ST. CLAIR WAS TRIED BY A PROPERLY
EMPANELED JURY.**

St. Clair claims he was denied due process and a fair and impartial jury because the jury was paid less than minimum wage for their service.

However, appellant fails to cite any case, statute or regulation that requires jurors to be compensated at any particular rate. Further, jury service is not a job for which one must be compensated. Instead, jury service is a civic duty for which the State and Federal governments may compel their citizens to perform by threat of criminal sanction. *See United States v. Kozminski*, 487 U.S. 931, 943-944 (1988) (defining involuntary servitude to exclude compelled civic duties such as jury service and military service.) Thus, it is evident that this claim of error is meritless.

PENALTY PHASE ISSUES

9.

APPROPRIATE VICTIM IMPACT EVIDENCE WAS ADMITTED AT APPELLANT'S TRIAL.

Contrary to St. Clair's assertion otherwise, this issue is not preserved. St. Clair's *pro se* motion seeking to preclude the introduction of any evidence about the death of Tim Keeling, was insufficient to preserve the argument now presented to this court; i.e., that improper victim impact evidence was elicited from Tim Keeling's widow, Lisa Hill. Thus, this claim of error must be reviewed under the standard for unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991), and laid out in the preliminary argument above.

Under the standard of review for unpreserved errors in death penalty cases an appellant cannot demonstrate error if there is a reasonable

explanation for why counsel did not object. *Id.* In this case that reason is simple, Lisa Hill was a victim as defined by KRS 421.500(1) and thus, her brief testimony regarding Tim Keeling was expressly authorized under KRS 532.055(2)(a)(7). In relevant part, KRS 421.500(1) defines a “victim” as, “...as an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.” Nothing in the definition of “victim” requires a conviction of a crime as suggested by *St. Clair*. Instead, the commission of a crime such as murder and/or kidnapping will suffice.

During the guilt phase of *St. Clair*’s trial, this Court has expressly ruled that evidence of *St. Clair*’s murder of Tim Keeling was admissible as evidence of other crimes/bad acts under KRS 404(b). *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-36 (Ky. 2004). Upon re-sentencing the new penalty phase jury is entitled to, “. . . be given, if requested and in a manner subject to the trial court’s discretion, a meaningful idea of the evidence both sides presented during the guilt phase and the arguments they made.” *Jacobsen v. Commonwealth*, 376 S.W.3d 600, 612 (Ky. 2012), citing *St. Clair v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010) and *Boone v. Commonwealth*, 821 S.W.3d 813 (Ky. 1992). Thus, the new capital sentencing jury was entitled to learn the facts surrounding *St. Clair*’s murder of Tim Keeling and pursuant to KRS 532.055(2)(a)(7), Lisa Hill’s brief

testimony regarding who Tim Keeling was in life was properly admitted and St. Clair's counsel had no valid ground upon which to object.

However, even if it were error to admit Lisa Hill's unchallenged testimony regarding her former husband, Tim Keeling, that error would not be sufficient to believe that St. Clair would not have been sentenced to death given the totality of the circumstances surrounding his murder of Frank Brady. As this Court's decisions in *Jacobson*, *St. Clair*, *Boone*, *supra*, make clear, the new capital sentencing jury was entitled to hear the guilt phase evidence that resulted in St. Clair's conviction. That evidence would include evidence of St. Clair's Oklahoma crimes, his escape, the killing of Tim Keeling, and the his shooting at Trooper Bennett. Adding to that evidence, the convictions constituting the statutory aggravating circumstance and the permissible inclusion or other non-statutory aggravators, it is not reasonable believe that but for the admissibility of Lisa Hill's brief testimony St. Clair would not have been sentenced to death. For these reasons this issue lacks merit and this Court should affirm St. Clair's death sentence.

10.

**EVIDENCE REGARDING ST. CLAIR'S PRIOR
CONVICTIONS WAS PROPERLY ADMITTED
DURING THE PENALTY PHASE RETRIAL.**

This issue is upreserved. St. Clair next claims that the trial court improperly permitted excessively detailed evidence regarding his prior convictions in violation of this Court decision in *Mullikan v. Commonwealth*,

341 S.W.3d 99 (Ky. 2011), and due process. Because St. Clair did not object to the admission of any of evidence he now complains of, this claim of error must be reviewed under the standard for unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991), and laid out in the preliminary argument above. Further, RCr 9.22 requires a contemporaneous objection to exclude evidence. *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), overruling in part, *Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996); *Davis v. Commonwealth*, 147 S.W.3d 709, 722-723 (Ky. 2004).

As mentioned in the previous argument, the new capital sentencing jury was entitled to hear the guilt phase evidence that resulted in St. Clair's conviction. In fact, this Court in *Jacobsen v. Commonwealth*, 376 S.W.3d 600, 612 (Ky. 2012), has recently rejected St. Clair's present argument unreasonably limiting what a new jury empaneled just for re-sentencing can hear. In that case this Court held that,

A re-sentencing jury, simply, does not sentence in the vacuum Jacobsen suggests. As *St. Clair* [*v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010)] and *Boone* [*v. Commonwealth*, 821 S.W.3d 813 (Ky. 1992)] indicate, on the contrary, in addition to the charges and the first jury's verdicts, the re-sentencing jury may be given, if requested and in a manner subject to the trial court's discretion, a meaningful idea of the evidence both sides presented during the guilt phase and the arguments they made. Such a proceeding, we believe, is, in general, fundamentally fair and

adequately protects whatever right a defendant might have to appeal to the jury for leniency on any ground. *Cf. Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) (holding that state re-sentencing procedure that allowed for introduction of transcripts of guilt phase evidence adequately protected any right capital defendant might have to argue “residual doubt” as a mitigating factor).

Id. at 612. Given that this Court has previously ruled that detailed evidence of St. Clair’s Oklahoma crimes was admissible as KRE 404(b) evidence during the guilt phase of the trial, *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-36 (Ky. 2004), that same evidence was appropriately presented to the new capital re-sentencing jury. Because the evidence was admissible under this Court’s decisions in *Jacobson*, *St. Clair*, *Boone*, *supra*, this was no basis on which St. Clair to object. Under the standard of review for unpreserved errors in capital cases, the fact that there is a reasonable explanation for the failure to object precludes the finding of palpable error. *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991). Further, the fact that complained of evidence was in fact admissible under this Court’s prior ruling (see discussion of the “law of the case” doctrine in argument 2 above) the evidence St. Clair now complains of was properly admitted during the most recent re-sentencing and there is not a reasonable likely the outcome of the re-sentencing would have been different.

St. Clair’s reliance on this Court’s decision in *Blane v. Commonwealth*, 364 S.W.3d 140, 152-53 (Ky. 2012), to support his claim that evidence of Tim

Keeling murder should not have been admitted during the re-sentencing is misplaced. *Blane* did not involve the empaneling of a new jury for a new sentencing trial, nor did it involve a situation where the complained of evidence had been properly admitted during the guilty phase of the trial as evidence of other bad acts pursuant to KRE 404(b). As laid out in Argument 9 above, evidence of St. Clair's murder of Tim Keeling was admissible as evidence of other crimes/bad acts under KRS 404(b). *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-36 (Ky. 2004). Thus, pursuant to *Jacobson, St. Clair, Boone, supra*, the evidence was admissible during St. Clair's re-sentencing in order to give the new jury, "...a meaningful idea of the evidence both sides presented during the guilt phase and the arguments they made." *Jacobson, supra* at 612.

For these reasons, this unpreserved claim of error is insufficient to warrant any relief.

11.

**THE APPELLANT WAS APPROPRIATELY
EXAMINED BY THE COMMONWEALTH
WHILE ON THE WITNESS STAND.**

This issue is unpreserved. St. Clair complains that the Commonwealth improperly asked him to, "...call other witnesses liars." Because St. Clair did not object to the admission of any of evidence he now complains of, this claim of error must be reviewed under the standard for unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d

665, 668 (Ky. 1991), and laid out in the preliminary argument above.

Further, RCr 9.22 requires a contemporaneous objection to exclude evidence.

Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005), overruling in part,

Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996); *Davis v.*

Commonwealth, 147 S.W.3d 709, 722-723 (Ky. 2004).

Review of the record reveals all of the instances St. Clair complains about on appeal occurred during the reading of his prior trial testimony during the new capital re-sentencing trial ordered by this Court. This Court's most recent opinion in this case expressly found that,

. . . we find no abuse of discretion in the trial court's denying St. Clair's motion to exclude his earlier trial testimony. Clearly, much of this testimony was relevant for providing background information on the crime; for hearing St. Clair's explanation of what had happened; and for assessing aggravating and mitigation circumstances, both statutory and non-statutory.

St. Clair v. Commonwealth, 319 S.W.3d 300, 311 (Ky. 2010). Thus, this

Court had already found that St. Clair's prior testimony was admissible.

Further, review of the portions of the record cited to by St. Clair does not evidence that the Commonwealth asked St. Clair to call any other witness a liar. Instead, the Commonwealth confronted St. Clair with the adverse testimony that had been offered against him and gave him the opportunity to admit or deny whether that adverse evidence was accurate. (CD3, Trial, 11/26/11, 1:18:14-1:39:34). Because this Court had already found that the

admission of much, if not all, of St. Clair's prior trial testimony appropriate, and because the Commonwealth did not impermissibly ask St. Clair to call other witness's liars, St. Clair's counsel did not have good reason to object to the admission during the most recent re-sentencing trial. Under the standard of review for unpreserved errors in capital cases, the fact that there is a reasonable explanation for the failure to object precludes the finding of palpable error. *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991).

12.

**APPELLANT'S MARITAL PRIVILEGE WAS
NOT VIOLATED.**

Contrary to St. Clair's assertion of preservation, this issue is not preserved. RCr 9.22 requires a contemporaneous objection to exclude evidence, unless the Court has ruled upon a fact specific, detailed motion in limine that fairly and adequately apprised the Court of the specific evidence (not a class of evidence) to be excluded and basis for the objection. *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), overruling in part, *Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996); *Davis v. Commonwealth*, 147 S.W.3d 709, 722-723 (Ky. 2004). A motion for new trial does not convert an unpreserved error into a preserved error. *Patrick v. Commonwealth*, 436 S.W.2d 69 (Ky. 1968); *Byrd v. Commonwealth*, 825 S.W.2d 272, 273 (Ky. 1992). Thus, St. Clair's *pro se* motion for a new sentencing trial was insufficient to preserve this issue for appeal. Because St. Clair did not object

to the admission of any of evidence he now complains of, this claim of error must be reviewed under the standard for unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991), and laid out in the preliminary argument above.

The excerpt of testimony contained in St. Clair's brief does not evidence that any privilege communication was disclosed. (See Appellant's Brief at 66-67). Instead, the excerpt explains how and when St. Clair's ex-wife first saw Dennis Reese, that she met St. Clair following his jail escape in Dallas, and informed the jury what items she brought St. Clair. *Id.* While there is a brief reference to a phone call that facilitated the meeting, there is absolutely no mention of what St. Clair said or told his ex-wife during that call. *Id.* In fact, the excerpt on which St. Clair focuses his attention does not contain a single statement detailing any confidential communications between St. Clair and his ex-wife. Conversely, the excerpted testimony does provide brief detail of witness's own actions. Thus, it apparent from appellant's own brief that his marital privilege was not violated.

Further, KRE 504(a) and (b) makes it clear that both the spousal testimony and marital communications privileges are privileges that must be asserted by a party. By failing to object to the admission of this testimony, St. Clair waived these privileges to the extent they could possibly apply.

Finally, should this Court believe this testimony was erroneously admitted, St. Clair is still not entitled to relief under the standard for

unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991).

13.

**NO PROSECUTORIAL MISCONDUCT
OCCURRED.**

This issue is unpreserved. Because St. Clair did not object to the admission of any of instances of alleged prosecutorial misconduct he now complains of, this claim of error must be reviewed under the standard for unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991), and laid out in the preliminary argument above.

It is well recognized that broad latitude must be allowed counsel in presenting a case to the jury. *Dean v. Commonwealth*, 844 S.W.2d 417, 421 (Ky. 1992), citing *Stasel v. Commonwealth*, 278 S.W.2d 727, 729 (Ky. 1955). Generally, reversal based on misconduct of the prosecutor is only warranted if the misconduct is so severe as to render the entire trial fundamentally unfair. *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). In this case appellant argues that he was unfairly prejudiced by several alleged instances of prosecutorial misconduct. Not only does the record refute all of these allegations, but the record also reveals that St. Clair failed to object to any of the alleged instances of misconduct at trial. Each of appellant's allegations will be addressed in turn below.

New Evidence from Dennis Reese: St. Clair first claims it was prosecutorial misconduct for the prosecutor to elicit testimony from Dennis Reese that was not elicited from this witness during St. Clair's original trial in 1998. Importantly, St. Clair made no objection to the Commonwealth's question or to Mr. Reese's answer as required by RCr 9.22. *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), overruling in part, *Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996); *Davis v. Commonwealth*, 147 S.W.3d 709, 722-723 (Ky. 2004). The standard for review of unpreserved error in death penalty cases is set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991):

Where the death penalty has been imposed, we nonetheless review allegations of these quasi [unpreserved] errors. Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. All unpreserved issues are subject to this analysis. [Citations omitted.]

Also see *Perdue v. Commonwealth*, 916 S.W.2d 148, 154 (Ky. 1996); *Tamme v. Commonwealth*, 973 S.W.2d 13, 21 (Ky. 1998); *Mills v. Commonwealth*, 966 S.W.2d 473, 479 (Ky. 1999); *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky.

2004). *Cf. West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989), *habeas corpus relief denied, sub nom. West v. Seabold*, 73 F.3d 81 (6th Cir. 1996). In this case St. Clair has failed to identify the legal basis upon which his counsel should have objected. As it is readily evident that there was no basis to object to no manifest injustice occurred.

In his appellate brief St. Clair includes in this argument alleges that it was misconduct for the Commonwealth to continue to ask *Moss*-type questions, for the Commonwealth to introduce CBLA evidence, and for the Commonwealth introduce Lisa Hill's testimony regarding her former husband, Tim Keeling. Each of the those claims have been addressed on their own merits in arguments 11, 1, 9 & 10 respectively. Nonetheless, undersigned counsel believes it prudent to emphasize that St. Clair's allegations with each of these additional claims of misconduct are completely unfounded and based on misrepresentations of what actually occurred at trial.

Allegation that the Commonwealth Improperly Instructed the Jury Not to Consider the Full Range of Penalties: As an initial inquiry, a Court must first examine each allegation of prosecutorial misconduct to determine if there was, in fact, an improper comment. If the remark was improper,

[a]n appellate court may reverse for prosecutorial misconduct occurring during closing argument *only*

if the misconduct is “flagrant” or if: (1) the proof of guilt is not overwhelming, (2) an objection is made, and (3) the trial court failed to admonish the jury after sustaining the objection.

Mayo v. Commonwealth, 322 S.W.3d 41, 55 (Ky. 2010)(emphasis added). As a general rule, the Court “must always consider these closing arguments as a whole and keep in mind the wide latitude we [the courts] allow parties during closing arguments.” *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009). Again, St. Clair did not object to Commonwealth’s closing arguments asking the jury to sentence him to death for the murder of Frank Brady. Further, the record reflects that the jury was properly instructed to consider the full range of penalties (See Jury Instructions attached to St. Clair’s Brief at Appendix Tab 7) and St. Clair fails to cite any authority that would prevent the prosecution from asking the jury to prefer one penalty over another. Thus, there was no misconduct and this claim is meritless.

14.

**THE TRIAL COURT PROPERLY
INSTRUCTED THE JURY.**

St. Clair complains the instructions failed to inform the jury that they could return a non-death sentence even if they found the existence of statutory aggravators. (Appellant’s Brief). Although he claims that this issue is “partially preserved” by the offering of another separate instruction, there is no indication that St. Clair ever presented this argument to the trial court.

Thus, this issue is unpreserved and subject to the standard for review of unpreserved error in death penalty cases is set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991).

Nonetheless, this issue has been previously addressed and rejected by this Court. In *Parrish v. Commonwealth*, 121 S.W.3d 198, 207 (Ky. 2003), this Court rejected a similar argument stating that, “[t]he instructions do not violate the statutory system, nor do they invade the province of the jury The instruction allowed the jury to consider options other than death, even when a finding is made as to aggravating circumstances.” *Id.*, citing *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). Further, this Court has held that, “[t]here was no need to instruct the jury that it could impose a life sentence even if it found an aggravating factor beyond a reasonable doubt.” *Caudill v. Commonwealth*, 120 S.W.3d 635, 674 (Ky. 2005); *Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994). Thus, the instruction complained of by St. Clair did not violate his due process rights nor did it in any way render his sentencing trial unreliable.

15.

**THE INSTRUCTIONS TO THE JURY DID
NOT SHIFT THE BURDEN OF PROOF.**

St. Clair argues that Instruction No. 2 dealing with the aggravating circumstance may have misled the jury due to the instructions use of the word “may.” Despite St. Clair’s claim of partial preservation, there is no

indication that this argument was ever presented to the trial court and is therefore, unpreserved. Further, St. Clair waived this claim of error by expressly requesting that the trial court give Instruction No. 2, just as it was worded in this case, in the requested jury instructions filed with court. (See Appellant's Brief, Appendix tab 6, pg. 139). It is abundantly clear from the record that Instruction No. 2, which was specifically requested by St. Clair, did not confuse, mislead or otherwise prejudice St. Clair.

16.

**"REASONABLE DOUBT" MAY NOT BE
DEFINED.**

St. Clair argues that the trial court's failure to define "reasonable doubt" for the jury violated due process. He further claims that this issue is partially preserved by a tender "reasonable doubt" instruction. However, a reading of that proposed instruction reveals that it in no way attempts to define the phrase "reasonable doubt" and there is no other indication that this claim was ever presented to the trial court. Thus, this issue is unpreserved.

Additionally, it is well-settled in Kentucky that neither the parties nor the Court is to define the phrase "reasonable doubt" for the jury. *Gall v. Commonwealth*, 607 S.W.2d 97, 110 (Ky. 1980); *Smith v. Commonwealth*, 599 S.W.2d 900, 911 (Ky. 1980). RCr 9.56 expressly states that the jury should not be instructed as to the definition of "reasonable doubt." In

Commonwealth v. Callahan, 675 S.W.2d 391, 393 (Ky.1984), this Court extended the well-settled prohibition of defining reasonable doubt to all points in a trial's proceedings, stating "trial courts shall prohibit counsel from any definition of reasonable doubt at any point in the trial[.]" That prohibition was in keeping with principles set forth in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) or *Whorton v. Commonwealth*, 570 S.W.2d 627, 631 (Ky.1978) (overruled on other grounds by *Kentucky v. Whorton*, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979)). More recently, this Court has continued to enforce this prohibition and rule that permits counsel to tell a jury what "reasonable doubt" is not. See *Cuzick v. Commonwealth*, 276 S.W.3d 260, 268 (Ky.2009); *Rogers v. Commonwealth*, 315 S.W.3d 303, 307-08 (Ky. 2010).

St. Clair did not seek to define "reasonable doubt" before the trial court nor did he ask the trial court to depart from the well-settled prohibition against defining "reasonable doubt." On appeal he asks this Court to depart from and overrule its well-settled precedent, but fails to articulate how he believes "reasonable doubt" should have been defined in his case and fails to indicate how this unarticulated definition would have provided him greater protection at trial. For these reasons, this Court should not depart from its well-settled precedents.

**A FINDING ON NON-STATUTORY
AGGRAVATORS IS NOT REQUIRED.**

St. Clair argues that his 6th Amendment right to a jury and 14th Amendment due process rights were violated when the jury was not required to identify which, if any, non-statutory aggravators it relied on in reaching its verdict. He further complains that without such findings there is no way to know determine if “. . . non-statutory aggravation was found unanimously or beyond a reasonable doubt.” (Appellant’s Brief at 85). In *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988)(emphasis added), this Court explained the relevant sentencing process as follows:

The death penalty sentencing statute provides seven statutory aggravators . . . KRS 532.025(2)(a). Nevertheless, we have held that a trial court is not bound by these limits in reviewing the verdict at the time of sentencing. **A jury, as trier of fact, by its verdict, must find specified aggravating circumstances in order to pass constitutional muster. A trial judge, on the other hand, plays a different role.** He or she, in the exercise of discretion in determining whether to follow the recommendation of the jury, may examine all the circumstances of the case. **These may go beyond the statutory aggravators to include such considerations as the appellant's remorse, the heinousness of the crime, and the motivation for the murder.** See *Matthews v. Commonwealth*, Ky., 709 S.W.2d 414, 423 (1986). Thus, it was not error for the trial court to consider the non-statutory aggravators when sentencing appellant to death.

The "specified" aggravating circumstance for the jury are defined in KRS 532.025(2) as eight enumerated circumstances and those otherwise authorized by law. There was no requirement, and St. Clair has not cited to any authority, for the penalty-phase jury instructions to include findings for nonstatutory aggravating circumstances. The United States Supreme Court has never imposed such a requirement. *See Tuilaepa v. California*, 512 U.S. 967 (1994).

18.

**ALLEGED FAILURE TO EXPLAIN
MITIGATION, THE STANDARD OF PROOF,
OR MERCY WAS NOT ERROR.**

Contrary to St. Clair's assertion there is no reasonable probability that the jury misunderstood its role in the capital sentencing procedure or that it misunderstood how to properly consider mitigation evidence. The jury was questioned during voir dire with regard to their understanding and willingness to consider mitigation evidence. Further, the record reflects that the trial court properly instructed the jury on the use of mitigation evidence. (See Instruction No. 3 - Mitigating Circumstances contained in the appendix to St. Clair's Brief at tab #7).

NON-UNANIMOUS MITIGATOR.

St. Clair argues the mitigating circumstances instruction given in his case was unconstitutional because when read in context with the instructions as a whole he believes the instruction required the jury to be unanimous in its findings of any mitigating circumstance. However, the penalty phase instructions given by the trial court conformed to Cooper, *Kentucky Instructions to Juries: Criminal*, 4th Ed. (1993), Section 12.04 to 12.10, pp. 637-648; and *Smith v. Commonwealth*, 599 S.W.2d 900 (Ky. 1980).

This Court has considered the exact issue multiple times, and has rejected this issue multiple times. In *Hunt v. Commonwealth*, the Court noted that “Hunt contends that the trial court’s instructions required the jury’s verdict to be unanimous, but did not instruct them that they could individually consider mitigating circumstances.” *Hunt v. Commonwealth*, 304 S.W.3d 15, 50 (Ky. 2009). The Court rejected the argument, noting “[t]he instructions did not imply that unanimity was required on mitigators and there is no requirement that a jury be instructed that their findings on mitigation need not be unanimous.” *Hunt*, 304 S.W.3d at 50 citing *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999) (over-ruled on other grounds by *Padgett v. Commonwealth*, 312 S.W.3d 336, 344 (Ky. 2010). Similarly, in *Bowling v. Commonwealth*, this Court stated that “[a]n instruction on unanimous findings on mitigation is not required. The instructions only

require the jury to consider mitigating circumstances.” *Bowling v. Commonwealth*, 873 S.W.2d 175, 180 (Ky. 1993) citing *Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985). In *Caudill v. Commonwealth*, 120 S.W.3d 635, 673-674 (Ky. 2003), this Court noted:

There is no requirement that a capital penalty jury be instructed that its findings on mitigation need not be unanimous. *Mills v. Commonwealth, Ky.*, 996 S.W.2d 473, 492 (1999); *Tamme*, 973 S.W.2d at 37; *Bowling*, 873 S.W.2d at 180.

St. Clair’s reliance on *Mills v. Maryland*, 486 U.S. 367 (1988), is misplaced and has already been rejected by this Court. In *Caudill v. Commonwealth*, 120 S.W.3d 635, 673-674 (Ky. 2003), this Court denied relief on this same claim noting that :

There is no requirement that a capital penalty jury be instructed that its findings on mitigation need not be unanimous. *Mills v. Commonwealth, Ky.*, 996 S.W.2d 473, 492 (1999); *Tamme*, 973 S.W.2d at 37; *Bowling*, 873 S.W.2d at 180.

Indeed, this Court addressed *Mills v. Maryland* and found no lack of congruence with federal law in *Bowling v. Commonwealth*, 873 S.W.2d 175, 180 (Ky. 1993) when it was held that:

An instruction on unanimous findings on mitigation is not required. *Cf. Skaggs v. Commonwealth, Ky.*, 694 S.W.2d 672 (1985). The instructions only require the jury to consider mitigating circumstances. K.R.S. 532.025(2) requires specific findings beyond a reasonable doubt for aggravating circumstances which is not in this aspect of the case. *Bowling's* argument is

without merit.

Bowling relies on *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) to support his argument that the jury was not properly instructed regarding the use of mitigating factors. *Mills* is distinguished from Bowling's case because the wording of the instructions is totally different. The jury was well aware of the fact that any sentence must be a unanimous decision. Unlike in *Mills*, there was no requirement that they unanimously reach a conclusion regarding the application of any mitigating factor. Each individual juror was free to examine and react to any mitigating factor when determining the appropriate sentence. The instructions are in conformity with *Mills* because any juror who found any mitigating factor of sufficient relevance could individually use that fact to prevent the jury from reaching a unanimous sentence of death. Bowling's argument is without merit.

It is also important to note that unlike Maryland, Kentucky is not a weighing state. In Kentucky, a jury can properly sentence a defendant to death so long as at least one (1) statutory aggravator is found. This is true even if the jury finds the existence of one hundred mitigating circumstances, beyond a reasonable doubt. Thus, cases from weighing states have no application to Kentucky death penalty jurisprudence with regard to this issue.

The United States Court of Appeals for the Sixth Circuit has also held that similar instructions pass constitutional muster. In *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), the trial court gave an unanimity instruction with regard to aggravating circumstances, but not with regard to mitigating ones. The *Coe* Court held:

We find that the instructions challenged by Coe did not violate *Mills*. Their language requires unanimity as to the results of the weighing, but this is a far different matter than requiring unanimity as to the presence of a mitigating factor. Nothing in this language could reasonably be taken to require unanimity as to the presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a *unanimous verdict*, each juror must conclude that the mitigators do not outweigh the aggravators. (Emphasis original.) *Id* at p. 338.

Thus, the Sixth Circuit has held that instructions similar to the ones given herein meet constitutional muster even in “weighing” states.

Likewise, in *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990)(*en banc*), a Kentucky case, the Sixth Circuit held that instructions substantially similar to those herein were constitutionally sound. Judge Kennedy, writing for a majority of the Court on this issue explained: “The instructions carefully stated that finding an aggravating factor required such agreement [unanimity], but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed it would indicate the opposite.” *Id* at p. 1120 - 1121.³ The Sixth Circuit has ruled that the jury need not be instructed to be

³The penalty phase instructions given by the trial court conformed to Cooper, *Kentucky Instructions to Juries: Criminal*, 4th Ed. (1993), Section 12.04 to 12.10, pp. 637-648; and *Smith v. Commonwealth*, 599 S.W.2d 900 (Ky. 1980). Although the U.S. Supreme Court has held that State may not require a jury to unanimously agree on the existence of a particular mitigating circumstance in order to consider it as a reason to decline a death sentence, the Court has never held that a jury must be specifically instructed to be non-unanimous. *Cf. Johnson v. Texas*, 509 U.S. 350, 362 (1993);

non-unanimous on mitigation. *See Coe v. Bell*, 161 F.3d 320, 337-338 (6th Cir. 1998). *See also Skaggs v. Parker*, 27 F.Supp.2d 952 (W.D.Ky.,1998) *reversed on other grounds by Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000).

Because this claim of error has been previously reviewed and rejected by both this Court and the United States Court of Appeals for the Sixth Circuit, this Court should again deny any relief.

20.

WRITTEN MITIGATION FINDINGS.

St. Clair argues the jury should have been instructed to reduce to writing its findings concerning mitigation. The jury is required, per KRS 532.025(3), to reduce to writing its findings concerning aggravating factors. No such requirement exists in regards to mitigating factors. *Smith v. Commonwealth*, 599 S.W.2d 900, 912 (Ky. 1980). St. Clair has shown no compelling reason why *Smith* should be overruled. The Court must decline appellant's request to overturn *Smith*.

Buchanan v. Angelone, 522 U.S. 269 (1998). *Also see, Maynard v. Dixon*, 943 F.2d 407, 418-420 (4th Cir. 1991).

**THE VERDICT FORMS DID NOT CHANNEL
THE JURY AWAY FROM CONSIDERING
MITIGATION.**

Contrary to St. Clair's assertion that this issue is partially preserved, there is no indication any argument regarding the improper channeling of the jury from considering mitigation was presented to the trial court. Thus, this issue is unpreserved.

The verdict forms did not direct the jury away from considering mitigation nor direct the jury to impose the sentence of death if it found the aggravating factors to exist. To the contrary, Instruction No. 5 (Appellant's Brief, Appendix tab # 7), specifically stated that "[of upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment". These same or strikingly similar instructions have been upheld repeatedly in other cases. *Soto v. Commonwealth*, 139 S.W.3d 827, 872 (Ky. 2004); *Caudill v. Commonwealth*, 120 S.W.3d 635, 674-75 (Ky. 2003); *Wheeler v. Commonwealth*, 121 S.W.3d 173, 189 (Ky. 2003); *Mills v. Commonwealth*, 996 S.W.2d 473, 492 (Ky. 1999) citing *Perdue v. Commonwealth*, 916 S.W.2d 148, 168 (Ky. 1995), and *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998). See also *Gill v. Commonwealth*, 7 S.W.3d 365, 370 (Ky. 2000), *Foley v. Commonwealth*, 942 S.W.2d 876, 888-89 (Ky. 1996); *Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1996); *Bussell v. Commonwealth*, 882

S.W.2d 111 (Ky. 1994); *Hodge v. Commonwealth*, 17 S.W.3d 824, 854 (Ky. 2000). As the jury forms in this case did not in any way mislead or misinform the jury, they were wholly proper.

Further, there is no constitutional requirement that the jury instructions define the concept of mitigation circumstances or define the burden of proof. *Tamme v. Commonwealth*, 973 S.W.2d 13, 37-38 (Ky. 1998); *See also, Waters v. Thomas*, 46 F.3d 1506, 1528 (11 Cir. 1995) (“Jury instructions at the sentence stage of a capital trial need not include any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances.”). St. Clair’s apparent desire to “channel” the jury towards and outcome he believed would be more beneficial or advantageous to him does not create error.

Based on the foregoing, the penalty-phase jury instructions in St. Clair’s case were proper and his claims of error are without merit.

22.

PAROLE AND CONSEQUENCES OF VERDICT.

In this unpreserved argument St. Clair claims, “[t]he jury should have been instructed that if they sentenced Appellant to death, he would be executed by lethal injection or electrocuted until dead.” (Appellant’s Brief at 97). He also argues that the jury should have been told that if St. Clair was sentenced to life imprisonment, “. . . he would almost certainly spend the rest of his life in prison; and if it [the jury] sentenced him to a term of year, he

would almost certainly serve the entire term of years in prison.” (*Id.*) St. Clair cites no case law holding that the jury should be so instructed. St. Clair’s argument is an affront to common sense. “We’ve got to give the jury some credit for having some amount of common sense.” *People v. Marlow*, 96 P.3d 126, 140 (Cal. 2004). The jury need not be told that “death means death”, or that a condemned inmate is not eligible for parole, or that life without possibility of parole means just that. *People v. Smith*, 68 P.3d 302, 339 (Cal. 2003); *State v. Bush*, 942 S.W.2d 489, 522-523 (Tenn 1997); *State v. Jones*, 474 So.2d 919 (La. 1985); *State v. Brown*, 293 S.E.2d 569 (N.C. 1982).

23.

THE TRIAL COURT PROPERLY SENTENCED APPELLANT.

This issue is unpreserved. St. Clair claims that the trial court improperly relied on improper factors when sentencing him to death. However, it is well-settled that a sentencing judge is not strictly limited to only considering statutory aggravators when determining whether or not to impose the death penalty. In *Tuilaepa v. California*, 512 U.S. 967, 979-980 (1994), the United States Supreme Court recognized that States may grant the sentencing authority vast discretion to evaluate the circumstances relevant to the particular defendant and the crime he committed in deciding whether to impose a death sentence. The Supreme Court further pointed out:

Once the jury finds that the defendant falls within
the legislatively defined category of persons eligible

for the death penalty, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it is found that the defendant is a member of the class made eligible for that death penalty. [Internal quotation marks and citations omitted.]

Similarly, this Court in *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky.

1988)(emphasis added), explained the relevant sentencing process as follows:

The death penalty sentencing statute provides seven statutory aggravators . . . KRS 532.025(2)(a). Nevertheless, we have held that a trial court is not bound by these limits in reviewing the verdict at the time of sentencing. **A jury, as trier of fact, by its verdict, must find specified aggravating circumstances in order to pass constitutional muster. A trial judge, on the other hand, plays a different role. He or she, in the exercise of discretion in determining whether to follow the recommendation of the jury, may examine all the circumstances of the case. These may go beyond the statutory aggravators to include such considerations as the appellant's remorse, the heinousness of the crime, and the motivation for the murder. See *Matthews v. Commonwealth, Ky.*, 709 S.W.2d 414, 423 (1986).** Thus, it was not error for the trial court to consider the non-statutory aggravators when sentencing appellant to death.

Thus, it is evident from that it was not error for the trial court to consider the four murders St. Clair expressly admitted while on the stand when considering whether or not to impose the death penalty.

THE DEATH PENALTY IS CONSTITUTIONAL.

It is well-settled that the death penalty is constitutional.

The Statutory Scheme of KRS 532.025 is Constitutional: St.

Clair argues that KRS 532.025 is unconstitutional. In particular, appellant argues that KRS 532.025 makes all murder defendants death eligible because murder is a capital offense. St. Clair relies upon a tortured interpretation of *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994) and *Harris v. Commonwealth*, 793 S.W.2d 802 (Ky. 1990). This argument has already been considered, and rejected, by this Court. To the extent he argues that *Jacobs v. Commonwealth* (footnote omitted) amends KRS 532.025 and allows all murders to be eligible for the death sentence is meritless. In *Jacobs*, this Court recognized that the statute provides for the use of nonstatutory aggravators.

Moreover, *Jacobs* is not applicable here because only statutory aggravators were used. As noted by this Court in *Young v. Commonwealth*, 50 S.W.3d 148 (Ky. 2001), a defendant may not be sentenced to death for the offense of murder unless the jury finds at least one statutory aggravating circumstance as set for in KRS 532.025(2) beyond a reasonable doubt, and which is supported by evidence at trial. In *Harris*, it was argued that the capital kidnapping death sentence was improper because the aggravating circumstance—the kidnapping victim was murdered—was not one of the seven

(at that time) aggravators listed in KRS 532.025(2)(a).

This Court noted KRS 532.025(2) directs the jury to consider “aggravating circumstances otherwise authorized by law.” KRS 509.040(2) allows for imposition of the death penalty when a kidnapping victim is not released alive. Thus, the *Harris* Court held that KRS 509.040(2) was an “aggravating circumstance otherwise authorized by law” per KRS 532.025(2). *Harris*, 793 S.W.2d at 805. Therefore, KRS 532.025(3), referencing the “statutory aggravating circumstances enumerated in subsection 2”, meant all of subsection (2), not just the list in subsection (2)(a). Support was also found for this interpretation in subsection 1(b) of the statute - which directs the jury in all death penalty cases to determine the existence of any aggravating circumstances “as defined in subsection (2)” and hence does not limit the jury's consideration to those aggravating circumstances that are specifically enumerated in subsection (2)(a). *Id.* (citing *Stanford v. Commonwealth*, 734 S.W.2d 781, 790 (Ky. 1987). In sum, St. Clair is incorrect in his contention that the holdings in *Harris* and *Jacobs* make all murder defendants eligible for the death penalty.

Further, in *Lowenfield v. Phelps*, 484 U.S. 231, 241-246 (1988), the U.S. Supreme Court upheld a Louisiana death sentence for first degree murder (capital offense), and concluded that Louisiana's definition of first degree murder was sufficient to narrowly define the category of offenders eligible for the death penalty. The *Lowenfield* opinion stated in part, 484 U.S. at 244-245.

and 246:

The use of “aggravating circumstances” is not an end in itself, but a means of generally narrowing the class of death-eligible persons and thereby channeling the jury’s discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of trial or the guilt phase.*** The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury’s finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

The Supreme Court reiterated this ruling in *Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994). The Supreme Court has also narrowly defined when an aggravating circumstance is facially unconstitutional. “If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.” *Arave v. Creech*, 507 U.S. 463, 474 (1993). Also see, *Tuilaepa v. California*, *supra*; *Lewis v. Jeffers*, 497 U.S. 764, 774-778 (1990); *Bell v. Cone*, 125 S.Ct. 847 (2005).⁴

In the instant case, St. Clair was found guilty and sentenced to death for the murder of Frank Brady with the aggravating circumstance that he

⁴The U.S. Supreme Court has also held that even when a jury (hypothetically) relies upon an unconstitutionally vague aggravating circumstance for the death penalty, but finds other valid aggravating circumstances to support the death penalty, the death sentence is not rendered unconstitutional as a result. *Zant v. Stephens*, 462 U.S. 862 (1983).

was a person who had a prior conviction for capital murder as defined in KRS 532.025(2)(a). Thus, St. Clair's argument must be rejected by this Court. His argument is inapplicable to his case and does not establish that the Eighth Amendment was violated with respect to his death sentence. KRS 532.025 is not facially unconstitutional, and the aggravating circumstance for which St. Clair was found guilty by the jury was sufficient to authorize his death sentence under the Constitution. See *Tamme v. Commonwealth*, 973 S.W.3d 13, 40 (Ky. 1998); *Parrish v. Commonwealth*, 121 S.W.3d 198, 205 (Ky. 2003); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 569-570 (Ky. 2004); *Epperson v. Commonwealth*, 197 S.W.3d 46, 62-63 (Ky. 2006).

KRS 532.025 Provides Sufficient Guidance: This Court has specifically held that " KRS 532.025 provides sufficient statutory guidance for the imposition of the death penalty." *Epperson v. Commonwealth*, 197 S.W.3d 46, 62 (Ky. 2006). The Sixth Circuit also has rejected a similar argument against the Kentucky death penalty statute. *McQueen v. Scroggy*, 99 F.3d 1302, 1332 (6th Cir. 1996). In *Tuilaepa v. California*, 512 U.S. 967, 979-980 (1994), the Supreme Court recognized that States may grant the sentencing authority vast discretion to evaluate the circumstances relevant to the particular defendant and the crime he committed in deciding whether to impose a death sentence. The Supreme Court further pointed out:

Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury then is free to

consider a myriad of factors to determine whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it is found that the defendant is a member of the class made eligible for that death penalty. [Internal quotation marks and citations omitted.]

As the Sixth Circuit recognized in *McQueen*, the Kentucky death penalty statute and capital sentencing procedure is substantially the same as that of Georgia, which was approved by the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). See also, *Zant v. Stephens*, 462 U.S. 862 (1983). This conclusion was recognized by this Court in *Epperson*, when it was noted that from that basis, KRS 532.025 was constitutionally sufficient to authorize a death sentence. *Epperson*, at 62.

Prosecutorial Discretion Does Not Make Arbitrariness

Inherent: St. Clair contends that prosecutors have unlimited discretion in determining when the death penalty is sought, allegedly resulting in systemic arbitrary and capricious application of the death penalty. He has cited no persuasive or binding authority for this proposition, nor does he specifically allege a violation of statute or the infringement of any constitutional right. KRS 532.025(2)(a) provides a prosecutor with sufficient guidelines to determine whether or not to seek the death penalty. If a defendant believes the death penalty is disproportionate, he may always seek judicial pretrial relief.

To the extent that plea bargains in other capital cases are at issue, “[n]o defendant has a constitutional right to plea bargain. The prosecutor may engage in it or not at his sole discretion. If he wishes, he may go to trial.” *Commonwealth v. Reyes*, 764 S.W.2d 62, 64 (Ky. 1989), citing *Weatherford v. Bursey*, 429 U.S. 545 (1977). “[W]hether to engage in plea bargaining is a matter reserved to the sound discretion of the prosecuting authority.” *Commonwealth v. Corey*, 826 S.W.2d 319 (Ky. 1992). In this case there is no evidence of abuse of discretion, nor is there merit to this claim. The fact that other jurisdictions choose to issue statewide guidelines or pre-trial review of capital prosecutions does not mean those procedures are required by the constitutions of Kentucky or the United States.

Claim of Danger of Execution the Innocent is Without Merit:

This claim was addressed in *United States v. Quinones*, 313 F.3d 49 (2nd Cir. 2002). In a well reasoned and documented opinion the Second Circuit noted “that binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent.” *Id.* at 63. There is no merit to St. Clair’s argument. The folly in this argument is exacerbated in this case by the fact that St. Clair’s guilt has already been affirmed by this Court. *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004).

**APPELLANT'S DEATH SENTENCE IS NOT
ARBITRARY OR DISPROPORTIONATE.**

In this unpreserved claim St. Clair argues that there are more deserving cases in which death was not imposed and therefore argues death is not proper for him. (Appellant's Brief at 105-107). However, the heinous nature of St. Clair's crimes coupled with the presence of the unanimous finding by the jury of statutory aggravators make it evident that death via execution is proper.

The sentences imposed upon other defendants are not relevant in determining the validity of a death sentence or other sentence. *Marshall v. Commonwealth*, 60 S.W.3d 513, 523 (Ky. 2000); *Caudill v. Commonwealth*, 120 S.W.3d 635, 672 (Ky. 2000). "What is important at the selection stage [of a capital sentencing proceeding] is an individualized determination on the basis of the character of the individual [defendant] and the circumstances of the crime. *Tuilaepa v. California*, 512 U.S. 967, 971-973 (1994). See also, *Zant v. Stephens*, 462 U.S. 682, 879 (1983); *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987); *Romano v. Oklahoma*, 512 U.S. 1, 7-8 (1994).

**THE COURT'S PROPORTIONALITY REVIEW CONDUCTED IN
ACCORDANCE WITH KRS 532.075 IS CONSTITUTIONAL.**

St. Clair repeats the argument made before this Court in numerous cases that, because he disagrees with the manner in which this Court conducts proportionality review under KRS 532.075, it is unconstitutional.

Both this Court and the Sixth Circuit have rejected such arguments. *Thompson v. Commonwealth*, 147 S.W.3d 22, 55 (Ky. 2004), citing, *Sanders v. Commonwealth*, 801 S.W.2d 665, 863 (Ky. 1990), *Foley v. Commonwealth*, 942 S.W.2d 876, 890 (Ky. 1996), *Bowling v. Commonwealth*, 873 S.W.2d 175, 181 (Ky. 1993), *habeas denied, sub. nom. Bowling v. Parker*, 138 F.Supp.2d 821, 919-921 (E.D. Ky. 2001), *affirmed*, 344 F.3d 487, 520-522 (6th Cir. 2003); *McQueen v. Scroggy*, 99 F.3d 1302, 1333-1334 (6th Cir. 1996); *Skaggs v. Parker*, 27 F.Supp.2d 952, 1004-1005 (W.D. Ky. 1998), *reversed on other grounds*, 235 F.3d 261 (6th Cir. 2000). Also see, *Walton v. Arizona*, 497 U.S. 639, 655-656 (1990); *Peterson v. Murray*, 904 F.2d 882, 887 (4th Cir. 1990); *Smith v. Dixon*, 14 F.3d 956, 966-967 (4th Cir. 1994)(en banc); *Foster v. Delo*, 39 F.3d 873, 882 (8th Cir. 1994)(en banc). The manner in which this Court conducts proportionality review is very similar to the methodology used by other States, which has been upheld. See *Lester v. State*, 692 So.2d 755, 801 (Miss. 1997); *State v. Davis*, 63 Ohio St.3d 44, 584 N.E.2d 1192, 1197 (1992); *State v. Cobb*, 234 Conn. 735, 663 A.2d 948, 954-962 (1995).

In *Pulley v. Harris*, 465 U.S. 37 (1984), the United States Supreme Court found, “that proportionality review is not required by the Federal Constitution in a death penalty case.” Further, the U.S. Supreme Court has indicated that it will not look behind a conclusion that a sentence of death is proportional to sentences imposed in similar cases where the State Supreme

Court has undertaken its proportionality review in good faith. *Walton v. Arizona*, 497 U.S. 639, 656 (1990). Finally, most of the arguments made by St. Clair have been rejected by the United States Supreme Court in *Tuilaepa v. California*, 512 U.S. 967 (1994).

In *Walker v. Georgia*, 129 S.Ct. 481 (2008) (Thomas, J., statement respecting denial of certiorari), Justice Thomas pointed out in his statement supporting the denial of certiorari review that,

Proportionality review is not constitutionally required in any form. Georgia [like Kentucky] simply has elected, as a matter of state law, to provide an additional protection for capital defendants. *Pully*, 465 U.S., at 45, 104 S.Ct. 871. In *Pully*, this Court considered the history of Georgia's capital sentencing scheme and dismissed Justice STEVENS' assertion that the constitutionality of Georgia's scheme had rested on its willingness to conduct proportionality review. *Id.*, at 44-46, 50, 104 S.Ct. 871; *id.*, at 58-59, 104 S.Ct. 871 (STEVENS, j., concurring in part and concurring in judgment).

Id. at 482-483, emphasis added.

Furthermore, Justice Thomas accurately pointed out that while this Court has lauded proportionality review as "an additional safeguard against arbitrary imposed death sentences," this Court has never held that without such proportionality review death penalty statues like Georgia's and Kentucky's would be unconstitutional. *Id.* at 483. In *McCleskey v. Kemp*, 481 U.S. 279, 306-307 (1987), this Court when again addressing Georgia's application of the death penalty unequivocally held that, "absent a showing

that the Georgia capital punishment system operates in an arbitrary and capricious manner, [a defendant] cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.” (emphasis in original). That is precisely the case here. St. Clair, in direct contravention of *McCleskey*, attempts to prove a constitutional infirmity through Kentucky’s alleged failure to consider a wider class of cases when applying its proportionality review.

The proportionality review conducted by the Kentucky Supreme Court in St. Clair’s case was undertaken pursuant to Kentucky Revised Statute (KRS) 532.075. KRS 532.075(3)© directs the Kentucky Supreme Court to consider whether the sentence imposed in a particular death penalty case is disproportionate to that imposed in similar cases. KRS 532.075(5) directs the Kentucky Supreme Court to identify whatever cases it took into consideration. KRS 532.075(6)(a) directs the Kentucky Supreme Court to accumulate records for felony cases in which a death sentence was imposed after January 1, 1970, or an earlier date as directed by the Court.⁵

St. Clair complains about his inability to access the data used by this Court in conducting proportionality review. However, this Court has

⁵In the first death penalty case upheld by the Kentucky Supreme Court after enactment of KRS 532.075, *Gall v. Commonwealth*, Ky., 607 S.W.2d 97, 113-114 (1980), the Kentucky Supreme Court explained that it would conduct proportionality review by considering cases after January 1, 1970 in which the death sentence was imposed, even though vacated under *Furman v. Georgia*, 408 U.S. 238 (1972), in conducting proportionality review.

previously noted it does not use secret data but simply compares one death penalty case with that of all other cases in which a death sentence was imposed after January 1, 1970. *Harper v. Commonwealth*, 694 S.W.2d 665, 670, 671 (Ky. 1985); *Sanders v. Commonwealth*, 801 S.W.2d 665, 683 (Ky. 1991). Also see, *Kordenbrock v. Scroggy*, 680 F.Supp.2d 867, 898-900 (E.D. Ky. 1988), *reversed on other grounds*, 919 F.2d 1091 (6th Cir. 1990)(en banc); *Skaggs v. Parker, supra*, 27 F.Supp.2d at 894, citing *inter alia, Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987); *Bowling v. Parker*, 138 F.Supp.2d 821, 920-921 (E.D. Ky. 2001), *affirmed*, 344 F.3d 487 (6th Cir. 2003). Thus, there is no mystery to how the Kentucky Supreme Court conducts proportionality review pursuant to KRS 532.075. The Kentucky Supreme Court has consistently adhered to its ruling in *Gall v. Commonwealth*, 607 S.W.2d 97, 113 -114 (Ky. 1980) that it will consider only those cases in which a death sentence was actually imposed and upheld [including some death sentences set aside pursuant to *Furman v. Georgia*, 408 U.S. 278 (1972)]. As the Kentucky Supreme Court noted in *Sanders v. Commonwealth, Ky.*, 801 S.W.2d 665, 683 (1990), a defendant “need only refer to the death penalty decisions of this [Kentucky Supreme] Court in order to obtain the relevant data.”

Therefore, under the foregoing authorities, the proportionality review conducted by this Court is constitutional.

PASSION AND PREJUDICE.

This issue is unpreserved. St. Clair fails to point out where in the record an instruction on passion and prejudice was requested and fails to even offer the substance of the instruction he now believes should have been given. In any event, such an instruction was not required and there is more than sufficient proof contained in this record to establish for this Court that a death sentence was not, "imposed under influence of passion, prejudice, or any other arbitrary factor." KRS 532.070(3)(a). Further, this Court expressly rejected this same or similar argument in St. Clair's prior appeal. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 571 (Ky. 2010).

ST. CLAIR IS ELIGIBLE FOR THE DEATH PENALTY.

St. Clair argues that he is ineligible for the death penalty, not because he was a juvenile at the time he committed the charged murder, but because he allegedly had the mental age of a child at the time of the murder. More specifically, St. Clair asks this Court to extend the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), to prohibit sentencing to death a defendant with the "mental age" of a juvenile. However, this Court has previously rejected this precise argument.

In *Bowling v. Commonwealth*, 224 S.W.3d 577, 584 (Ky. 2006), this

Court found that like St. Clair,

Bowling has not cited any published authority prohibiting the death penalty based upon “juvenile mental age.” Nor has Bowling demonstrated a national consensus that mental age should be a criterion by which to exclude the death penalty. Without question, the Supreme Court has been presented with and has considered the concept of mental age. *Penry*[v. *Lynaugh*, 492 U.S. 302 (1989)]. Thus, we conclude that *Roper v. Simmons* only prohibits the execution of those offenders whose chronological age was below eighteen at the time of the commission of the offense. *See also Hill v. State*, 921 So.2d 579, 584 (Fla.2006).

Because this Court has precisely addressed and rejected this claim previously and because St. Clair offers no new authority to support the extension of *Roper*, this claim should be summarily rejected.

29.

**THE TRIAL COURT PROPERLY
SENTENCED APPELLANT TO DEATH.**

This issue is unpreserved. St. Clair argues that the trial court failed to indicate with specificity what, if any, mitigating factors it considered before imposing the death sentence recommended by the jury. In particular, St. Clair seems concerned that the trial court did not specifically reference his upbringing when deciding whether or not to impose a sentence of death. Nonetheless, the record reflects that the trial court appropriately reviewed and considered the jury’s recommendation and all of the evidence (including any mitigating evidence) before sentencing St. Clair to death.

In *Tuilaepa v. California*, 512 U.S. 967, 979-980 (1994), the Supreme Court recognized that States may grant the sentencing authority vast discretion to evaluate the circumstances relevant to the particular defendant and the crime he committed in deciding whether to impose a death sentence. The Supreme Court further pointed out:

Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it is found that the defendant is a member of the class made eligible for that death penalty. [Internal quotation marks and citations omitted.]

In this case the jury determined beyond a reasonable doubt that St. Clair had previously been convicted of murder and thus, eligible for the death penalty. Further, the trial judge and the jury heard all of the mitigation evidence at trial and it is evident from the trial court's report [Form AOC-085] that mitigation was appropriately considered. Thus, no error occurred.

**THERE IS NO CUMULATIVE ERROR IN THIS CASE, AND
CUMULATIVE ERROR DOES NOT REQUIRE REVERSAL.**

Appellant argues that if this Court does not find any single error which requires reversal, then the Court should reverse based upon the cumulative effect of non-prejudicial errors. There is no cumulative error in this case.

And, even if there was, cumulative error does not require reversal. *Sanders v. Commonwealth*, 801 S.W.2d 665, 682 (Ky. 1990); *Bowling v.*

Commonwealth, 942 S.W.2d 293, 308 (Ky. 1997); *Tamme v. Commonwealth*, 973 S.W.2d 13, 40 (Ky. 1998); *Hodge v. Commonwealth*, 17 S.W.3d 824, 855

(Ky. 2000); *Stopher v. Commonwealth*, 57 S.W.3d 787, 807 (Ky. 2001);

Caudill v. Commonwealth, 120 S.W.3d 635, 679 (Ky. 2003); *Parrish v.*

Commonwealth, 121 S.W.3d 198, 207 (Ky. 2003); *Garland v. Commonwealth*,

127 S.W.3d 529, 548 (Ky. 2004); *Soto v. Commonwealth*, 139 S.W.3d 827, 875

(Ky. 2004).

**RESIDUAL DOUBT DOES NOT BAR A
DEATH SENTENCE.**

St. Clair presents the standard argument that residual doubt precludes a death sentence. The United States Supreme Court has held that the finding of guilt as to aggravating circumstances for the death penalty is reviewed under the reasonable doubt standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Lewis v. Jeffers*, 479 U.S. 764, 780 (1990). See also, *Victor v.*

Nebraska, 511 U.S. 1 (1994).

The United States Supreme Court and the Kentucky Supreme Court have ruled that residual doubt is not a mitigating circumstance for the death penalty. *Franklin v. Lynaugh*, 487 U.S. 164, 172-174 (1988); *Bussell v. Commonwealth*, 882 S.W.2d 111, 115 (Ky. 1994). This Court has previously rejected the same argument in other death penalty cases. *Garland v. Commonwealth*, 127 S.W.3d 529, 546 (Ky. 2004), citing, *Tamme v. Commonwealth*, 973 S.W.2d 13, 40 (Ky. 1998), and *Bowling v. Commonwealth*, 942 S.W.2d 293, 302 (Ky. 1997); *Caudill v. Commonwealth*, 120 S.W.3d 635, 679 (Ky. 2003). Also see, *State v. McGuire*, 88 Ohio St.3d 390, 686 N.E.2d 1112, 1122-1123 (1997).

The Counterstatement of the Case herein exhaustively details the evidence and proof of St. Clair's guilt. This evidence proved guilt beyond a reasonable doubt and the jury so found. There is no residual doubt herein, and that legal standard is sufficient to satisfy constitutional requirements.

CONCLUSION

For all the foregoing reasons the Judgment and Sentence of the Bullitt
Circuit Court should be affirmed.

Respectfully Submitted

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APPENDIX

1. *Benton v. Commonwealth*,
No. 2011-SC-000411-MR (Ky. 2013) 1-17