pursuant to Court order



# Commonwealth of Kentucky
# Kentucky Supreme Court

**No. 2012-SC-000130-MR**

**MICHAEL ST. CLAIR** — **APPELLANT**

v.

Appeal from Hardin Circuit Court
Hon. Thomas O. Castlen, Judge
Indictment No. 91-CR-207-2 and 1992-CR-2-2

**COMMONWEALTH OF KENTUCKY** — **APPELLEE**

---

## Brief for Commonwealth

---

**Submitted by,**

**JACK CONWAY**
Attorney General of Kentucky

**WM. ROBERT LONG, JR.**
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

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 on December 23, 2013, via United States mail to Hon. Thomas O. Castlen, Senior Judge, P.O. Box 215, Owensboro, Kentucky 42302; 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.

Wm. Robert Long, Jr.
Assistant Attorney General

# INTRODUCTION

Michael St. Clair appeals from the Hardin Circuit Court's final Judgment of Conviction for capital kidnapping. 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.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

Michael St. Clair was convicted by a Hardin County petit jury of two counts of receiving stolen property over $100, criminal attempt to commit murder, second-degree arson and capital kidnapping. St. Clair was sentenced to death for the kidnapping of Frank Brady. *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005). In a fractured opinion, this Court reversed both his convictions and death sentence in 2005. Thus, a re-trial began in 2009. Abruptly that trial ended in a mistrial when Judge Ryan believed the Commonwealth had improperly mentioned inadmissible "uncharged crimes" during its opening statement. (VHR 37, 6/08/09, 10:21:40-11:03:10). Thereafter, St. Clair moved to bar retrial arguing that the mistrial was due to intentional prosecutorial misconduct and that double jeopardy had attached. (TR XXXIV at 5016). The trial court denied that motion expressly finding, ". . .that there was no prosecutorial misconduct nor did the prosecutor intentionally provoke the defense into moving for a mistrial." TR XXXIV at 5062).

St. Clair's third trial for the kidnapping of Frank Brady commenced on January 4, 2012, and ended on January 20, 2012, with the jury again finding St. Clair guilty of two counts of receiving stolen property, criminal attempt to commit murder, second-degree arson, and capital kidnapping. (TR XXXIX at 5712). Again, the jury recommend that St. Clair be sentenced to death. *(Id.* at 5713). The Hardin Circuit Court entered its judgment imposing the jury

recommended death sentence on February 1, 2012. (*Id.* at 5711-5717). St. Clair now appeals that Judgment of Conviction.

The facts underlying St. Clair's abduction and murder of Frank Brady were appropriately summarized in this Court's first opinion in this matter and were substantially the same upon re-trial. In that opinion this Court summarized the relevant underlying facts as follows:

> According to the evidence, Appellant escaped from Oklahoma authorities in September of 1991 while awaiting final sentencing for two Oklahoma murder convictions. St. Clair and Dennis Gene Reese stole a pickup truck from a jail employee and fled from the jail in Durant, Oklahoma. The pickup truck eventually ran out of gas and Reese and St. Clair stole another pickup truck, a handgun, and some ammunition from the home of Vernon Stephens and headed for the suburbs of Dallas, Texas. St. Clair's wife at the time, Bylynn St. Clair ("Bylynn"), met with her husband and Reese in Texas, and provided them with money, clothing, and other items. Reese was arrested several months later in Las Vegas, Nevada, and confessed to his involvement in the Kentucky events detailed below.
>
> According to Reese, after escaping from jail in Oklahoma, he and St. Clair traveled to Colorado where they kidnapped Timothy Keeling and stole Keeling's pickup truck. Keeling was later murdered in New Mexico. St. Clair and Reese proceeded to drive Keeling's truck to New Orleans, Louisiana, then through Arkansas and Tennessee before arriving at a rest stop in southern Hardin County, Kentucky. While in Hardin County, they decided to steal Frank Brady's late model pickup truck. They kidnapped Brady and drove him from Hardin County to Bullitt County where St. Clair shot and killed Brady. St. Clair and Reese then returned to

> Hardin County and set fire to Keeling's truck.
>
> Witnesses to the arson gave the Kentucky State Police a description of the Brady truck seen near the location where Keeling's truck was on fire. Based on that description, Trooper Herbert Bennett stopped Reese and St. Clair while they were still driving Brady's truck through Hardin County. St. Clair fired two shots at Trooper Bennett, one of which penetrated the radiator of the police cruiser. A high-speed chase followed, but Reese and St. Clair escaped when Bennett's cruiser became disabled. Reese was arrested two weeks later in Las Vegas and waived extradition to Kentucky. St. Clair was arrested about two months later in Hugo, Oklahoma.

*St. Clair v. Commonwealth*, 174 S.W.3d 474, 477 (Ky. 2005) (Footnotes omitted). 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.

1.

**ST. CLAIR'S RE-TRIAL DID NOT VIOLATE HIS RIGHT TO BE FREE OF DOUBLE JEOPARDY.**

St. Clair claims argues that his right to be free of double jeopardy was violated after he was made to stand trial following the mis-trial grant in this case. More specifically, St. Clair argues that Commonwealth intentionally provoked him into seeking a mistrial. However, there is nothing in the record to suggest that the Commonwealth's comments during its opening statement that led to the mistrial were intended to provoke St. Clair into seeking a mistrial. Thus, the trial court appropriately found that no such intention was present and that re-trying St. Clair did not violate double jeopardy.

As the facts above indicate, this matter was set for re-trial following the reversal of St. Clair's conviction in 2009. During its opening statement, the Commonwealth proper alluded to evidence of many of St. Clair's prior criminal actions outside the state of Kentucky that would later be admitted at trial. (TR XXXIV 4343;VHR 37; 6/8/09, 10:07:51 *et seq.*) However, the Commonwealth included comments in its opening remarks from which a jury could infer that St. Clair murdered Tim Keeling in New Mexico. Based on these specific remarks St. Clair's counsel objected arguing that a ruling by a

previous judge prevented the Commonwealth from admitting evidence that St. Clair murdered Tim Keeling. (VHR 37; 6/8/09, 10:24:30). After much discussion and obvious confusion of all the parties, St. Clair's counsel moved for a mistrial that was granted by the trial court. (*Id.* at 10:24:30-11:37:58). Orally, the trial court ruled as follows:

> Okay, I rule that the Commonwealth has shown that they acted in good faith. I can't find a written order where I precluded this evidence. So, I'll have to go back and look at the pre-trials. I think I made a statement or whatever, but I didn't put it in writing. So, the Commonwealth was acting in good faith when they went by the previous orders of the court. I just don't think that this is so intricately intertwined in these proceedings to make it admissible. It only goes to prejudice the jury. There is a manifest necessity that we declare a mistrial and say in writing that the murder of this person will not be admitted into further proceedings, Keeling.

(*Id.* at 11:36:00). On June 12, 2009, the trial court followed up its oral ruling with a written Order which in relevant part found:

> During the Commonwealth's opening statements, the Commonwealth alluded to many criminal action of the Defendant St. Clair, which took place outside the Commonwealth of Kentucky. Included in th scenario were statements made where the jury could only infer that Mr. St. Clair had murdered Mr. Keeling in New Mexico. The Defense asked to approach the bench and Mr. Yustas made motion for a mistrial, which after consideration and argument, the Court granted.
>
> As stated at the time of the mistrial, the Court finds that the Commonwealth had a good faith basis in believing that the evidence would be

> admitted based upon the prior rulings of other judges and the fact scenario laid out in the Supreme Court case, which reversed Mr. St. Clair's prior kidnapping conviction. However, the Court is of the opinion that granting a mistrial in this case was a manifest necessity.

(TR XXXIV at 4343-4344).

Despite the above rulings clearing evidencing that the trial court did not believe there to be any prosecutorial misconduct, St. Clair moved to bar re-trial arguing that intentional prosecutorial misconduct provoked him into seeking a mistrial and thus, double jeopardy barred retrial. (TR XXXIV at 5016-5020). Once again the trial court (this time a new Judge) found that no such misconduct occurred. (*Id.* at 5062). Specifically, the trial court held that,

> This Court has considered the arguments of counsel, reviewed the relevant portions of the video tape of the proceedings of June 8, 2009, and is otherwise sufficiently advised. The Court FINDS that the declaration of mistrial was not *sua sponte*. It was granted pursuant to defendant's motion for mistrial. In addition, **the court finds that there was no prosecutorial misconduct nor did the prosecutor intentionally provoke the defense into moving for a mistrial.**

(*Id.* at 5062) (emphasis added).

In *Bennett v. Commonwealth*, 217 S.W.3d 871, 874 (Ky. App. 2006), the Kentucky Court of Appeals summarized the relevant Kentucky law on the issue of whether the prosecution intentionally provoked a mistrial motion by the defense finding that,

> A defendant's motion for a mistrial generally removes any bar to retrial. *Stamps v. Commonweath*, 648 S.W.2d 868 (Ky.1983). However, an exception to this rule exists in cases where the prosecutor's conduct was intended to provoke the defendant into moving for a mistrial. *Martin v. Commonwealth*, 170 5.W.3d 374, 378 (Ky.2005), *citing Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). "[T]he conduct giving rise to the order of mistrial [must be] precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." *Martin*, 170 S.W.3d at 378, *quoting Tinsley v. Jackson*, 7715.W.2d331.332 (Ky.1989).

In the present case neither the record nor logic support St. Clair's assertion that the Commonwealth acted in bad faith and intentionally invited or provoked a mistrial. The trial judge that granted the mistrial found that there was no bad faith and the subsequent trial judge that presided over the third trial expressly found no prosecutorial misconduct. Further, it defies logic that the Commonwealth would have benefitted from, sought or otherwise intended to provoke a mistrial. Because the trial court's rulings that there was no prosecutorial misconduct are supported by the record, the trial court did not abuse its discretion in denying St. Clair's motion to dismiss. This Court should give great deference to the trial court in this matter and affirm it ruling.

## NO ERRORS OCCURRED IN VOIR DIRE

2.

### JUROR MICHAEL SMALLWOOD WAS PROPERLY DISMISSED FROM THE VENIRE PANEL.

This claim is unpreserved and must be reviewed under the standard for review of unpreserved error in death penalty cases as set forth in *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991). Nonetheless, St. Clair claims the trial court erred by dismissing Juror Michael Smallwood from jury service. Specifically, St. Clair argues that the trial court's decision was erroneous because: (1) the trial court had no legal basis to excuse this juror; and (2) the trial court failed to permit the attorneys question this juror. However, the record on appeal clearly evidences that this prospective juror was uninterested in serving and did not fully understand his oath or his role as a juror. Thus, the trial court properly exercised his discretion in dismissing Mr. Smallwood from jury service.

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).

Although the trial court's inquiry of Mr. Smallwood was brief, it is readily evident from the video record that Mr. Smallwood was not qualified to serve on the jury. Contrary to St. Clair's assertion, there is no evidence that Mr. Smallwood was having difficultly hearing the trial court's questions, but it is evident that he did not fully understand the court's comments and/or was not interested in diligently performing obligations as a juror. (VR 40; 1/6/12, 9:43:00-9:44:35). Mr. Smallwood's unresponsive answers and poor body language clearly convey that either he had not been paying attention during group voir dire and did not understand his oath or his role as a juror, or he was purposely being uncooperative so as to guarantee his removal from the venire panel. (*Id.*) In either circumstance, Mr. Smallwood demonstrated that either was not able or not willing to properly perform the obligation of a juror. Thus, the trial court properly dismissed Mr. Smallwood from the venire panel on its own motion and without objection from St. Clair or the Commonwealth.

3.

## JUROR ANGELA HOBSON WAS PROPERLY DISMISSED FROM THE VENIRE PANEL.

St. Clair argues the trial court erred when it dismissed Angela Hobson from the venire panel for cause. The trial court did not err. The issue is simply whether this, or any other prospective juror, 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). Since this is a death penalty case, Ms. Hobson was not eligible to serve if her personal views would not allow them to follow the law and impose the death penalty. *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994); *Harper v. Commonwealth*, 694 S.W.2d 665, 668 (Ky. 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, supra.* "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).

Further, it is well settled that a venireman who cannot fairly and conscientiously consider the entire range of statutory penalties, including the death penalty, is not impartial and should be excluded from the jury as not qualified to serve. *Sanders v. Commonwealth,* 801 S.W.2d 665, 672 (Ky. 1990). A juror should not be allowed to serve if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." *Wainwright v. Witt,* 469 U.S. 412, 424 (1985). In this case, it is readily evident that prospective juror, Angela Hobson, held views on the death penalty that would prevent or substantially impair her ability to perform her duties as a juror. Specifically, the trial court found that Ms. Hobson had "flat told" the court that she would not consider the death penalty, unless the victim was a child or elderly person. (VR 41; 1/6/12, 12:30:30). Notably, St. Clair did not specifically object to the trial court's finding. Further, it is readily evident from his own brief on appeal that Ms. Hobson made numerous statement from which the trial court could find that she held views about the death penalty that would substantial impair or even prevent her from considering that sentence in any case that did not involve a victim that was a child or elderly person. Because, Ms. Hobson's testimony clearly evidenced her inability to give proper consideration to all of the sentences authorized by law, the trial court properly exercised its discretion and struck her for cause.

4.

## 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.

## GUILT PHASE ISSUES

5.

## EVIDENCE OF FRANK BRADY'S MURDER WAS PROPERLY ADMITTED.

St. Clair argues that, "[e]vidence of Brady's murder was irrelevant and unduly prejudicial to proving the 'not released alive' element of kidnapping," and should not have been admitted. However, the trial court correctly held that, "proof of the *manner of death* of the victim who was not released alive is admissible in the guilt phase of the trial of this indictment because it is so intertwined with the necessary proof of the fact that the victim was not

released alive." (TR XXXII at 4667). Further, the trial court correctly opined that this issue had been previously addressed in *St. Clair v. Roak*, 10 S.W.3d 482 (Ky. 2000), and in *St. Clair v. Commonwealth*, 174n S.W.3d 474 (Ky. 2005). Thus, no error resulted from the admission of evidence of Mr. Brady's murder and St. Clair's conviction and sentence should be affirmed.

It is well settled that the trial judge is left with sufficient discretion to admit evidence of even uncharged bad acts if it is relevant, probative and the potential for prejudice does not outweigh the probative value of such evidence. *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). The evidence of Brady's murder could not have been separated without causing serious adverse effect on the Commonwealth. It was necessary and appropriate that the jury learn of all the events bearing on the tragedy. The probative value of such evidence clearly outweighed any prejudicial effect on St. Clair. The trial court properly allowed the introduction of such evidence, as it was inextricably intertwined. KRE 404(b)(2).

Furthermore, regarding the need to present the full story to the jury, "[W]here evidence is admissible to provide this 'full presentation' of the offense '[t]here is no reason to fragmentize the event under inquiry' by suppressing parts of the 'res gestae'." *United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980). As further pointed out in Lawson, *The Kentucky Evidence Law Handbook*, Sec. 2.25(II) (3d ed. 1993), the case law from which the

language utilized in KRE 404(b)(2) is extracted suggests "that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective." *See also, Stanford v. Commonwealth*, 793 S.W.2d 112 (Ky. 1990), citing both Lawson and *Smith v. Commonwealth*, 366 S.W.2d 902 (Ky. 1962), in which it was stated:

> . . . [T]he rule [is] that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also approve or tend to prove the commission of other crimes by him or to establish collateral facts.

*Norton v. Commonwealth*, 890 S.W.2d 632, 638 (Ky. App. 1994), quoting, *Smith*, 366 S.W.2d at 906. The Commonwealth had the right to present the whole picture to the jury and the obligation to establish that the victim was not released alive. Thus, the trial court properly found the evidence of Mr. Brady's murder relevant to and necessarily intertwined with the proof the Commonwealth was required to offer at trial.

**6.**

**THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF TIM KEELING'S ABDUCTION AND MURDER.**

St. Clair argues that it was error for the trial court to admit evidence of his involvement in the abduction and murder of Tim Keeling. However,

this Court has already rejected this argument in *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005). Thus, the "law of the case" doctrine dictates that this issue not be readdressed and regardless, this issue is otherwise without merit.

The opinion of this Court in *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005) (plurality opinion) is unanimous insofar as the so-called unaddressed issues are concerned:

> In addition to the claims of error addressed above, Appellant has asserted numerous other claims. **Most asserted claims were not error, frivolous, or are not likely to recur upon retrial.**

*Id.*, at 485 (emphasis added).

The very next sentence in the same paragraph makes clear that what is to follow is a discussion limited to only issues likely to recur upon re-trial:

> However, we will address a few such claims of error that may recur upon retrial if the evidence is substantially similar.

*Id.* (emphasis added).

Immediately following is a heading entitled, "III. Various Other Claims". *Id.* What next immediately follows is a sentence beginning, "The first error likely to recur upon retrial is the introduction of the testimony of Mary Weedman . . . ." *Id.* One paragraph later, the opinion of the Court states, "The second error . . . ." *Id.* The next paragraph begins, "Finally, we

will address St. Clair's last valid assertion of error." *Id.* (emphasis added).

As is already obvious to even a casual reader, the opinion of the Court devotes parts I and II to the issues pivotal in its decision. Quoted above, the lead-in to part III expressly rejects all other claims of error save those likely to recur on retrial. Part III is then confined to a discussion of the likely to recur issues. As the present issue was presented in St. Clair's prior appeal in this case, the lead-in to part III of this Court's opinion in *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005), expressly rejected this claim.

Under the "law of the case"doctrine this Court should exercise its discretion and refuse to revisit this claim, which was rejected in its 2005 opinion. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005). 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).

Because St. Clair does not argue that there has been an intervening change in the law nor has he sufficiently demonstrated that this Court's prior rejection of this issue was clearly erroneous resulting in manifest injustice, the "law of the case" doctrine applies and operates to preclude further review of this previously rejected claim.

Nonetheless, this issue is meritless. On appellate review of a trial court's ruling with regard to admission of the evidence, the applicable standard for review is whether or not the trial court committed an abuse of discretion. *Parker v. Commonwealth*, 952 S.W.2d 209 (Ky. 1997). The evidence in question all directly related to St. Clair's continuous course of conduct from the time that he escaped from an Oklahoma jail, and the ensuing crime spree leading up to the crimes related to, both before and after, the kidnapping and murder of Frank Brady. Therefore, the trial court properly exercised its discretion in allowing the evidence pursuant to KRE 404(b).

KRE 404(b), states in pertinent part:

> (b) 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 (2) could not be accomplished without serious adverse effect on the offering party.

Review of the facts of this case indicate that the evidence objected to by appellant satisfied not only one, but both the criteria set forth in KRE 404.

The death penalty case of *Sanders v. Commonwealth*, 801 S.W.2d 665, 675 (Ky. 1990) is directly on point. In *Sanders* the defendant was tried for the robbery and murder of two people at a Madison County convenience store. This Court approved of "other crimes" evidence concerning a similar robbery and murder committed at a Lincoln County bait shop one month previously. *Id.* at 674. The defendant in *Sanders* filed a KRE 404(b) motion in limine to exclude evidence of the Lincoln County crimes. In that case, "The trial court denied the motion, on grounds that the evidence was admissible to show intent or common scheme or plan." *Id.* at 674.

This Court also found that such evidence was admissible to prove identity:

> In a criminal prosecution, the Commonwealth bears the burden of proving each element of the statutory offense beyond a reasonable doubt. Intent is an element of the crime of intentional murder . . .. Moreover, identification of the defendant as the perpetrator of the crime charged is an essential element in any criminal prosecution.

*Id.* at 674 (citations omitted). This Court, in *Sanders*, went on to analyze and emphasize the number of similarities between the Madison County crimes and the prior Lincoln County crimes:

> The record discloses a remarkable similarity between the respective crimes in Madison and Lincoln counties. In each, a victim, alone in a rural shop or store, was shot in the back of the head and robbed. The same weapon was used in both crimes. Witnesses reported having seen a blue Chevrolet Blazer in the vicinity of each offense at the critical

> time. In addition, in the last of his disparate statements to investigators, the appellant's description of the crimes indicated a common modus operandi.

*Id.* at 674-675.

The above-quoted passage from *Sanders* found seven (7) points of similarity to be "remarkable". *Id.* Review of the facts of the present case indicate there are even more similarities between the Tim Keeling crimes and the Frank Brady crimes. The most remarkable similarities are set forth as follows:

> 1. Each time, St. Clair decided when to obtain a new getaway vehicle, and selected the vehicle, each time selecting a small, late model pickup truck.
>
> 2. Each time, the victim selected was a male and was alone.
>
> 3. Each time, the motive for theft of the vehicle was avoidance of capture.
>
> 4. St. Clair bound each victim with handcuffs, using the same distinctive set of handcuffs (enlarged keyhole), with the victim's hands being bound in front rather than behind the back.
>
> 5. In each instance, the stolen truck was used to transport the victim to the execution site, with the motive for the murder being the car-jacking of the victim's truck in furtherance of the escape.
>
> 6. In each instance, the victim was terrorized for a lengthy period of time.
>
> 7. In each instance, the victim continuously begged for his life.

8. St. Clair coaxed each victim out of the truck by use of a pretext, leaving Reese waiting in the truck.

9. St. Clair used the same gun both times to force the victims to comply with his wishes, then used the gun to shoot each victim twice, execution-style.

10. St. Clair laughed immediately after each execution, commented that something was wrong with the gun because it had taken two shots to kill the victim, and remarked that killing the victim was as easy as killing a dog or that killing became easier after the first one.

11. In each instance, the victim's truck was used to get away from the scene of the execution in furtherance of escape.

*Sanders* authorizes the introduction of evidence showing a prior killing (Tim Keeling). Authority for the introduction of evidence showing a subsequent attempted murder (State Trooper) is found in *Bowling v. Commonwealth*, 942 S.W.2d 293, 300-301 (Ky. 1997). The death sentence was affirmed in *Bowling* because, again, the method of operation in the subsequent attempted murder was similar to the method of operation in the charged murder. *Bowling* constitutes authority for the introduction of such evidence to prove identity, intent, common plan or scheme, or absence of mistake or accident.

KRE 404(b)(1) codifies the long-standing general rule which admits evidence of other crimes, wrongs or acts if offered for a legitimate purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Phillips v. Commonwealth*, 17

S.W.3d 870 (Ky. 2000); *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), *cert. denied*, 525 U.S. 1153, 119 S.Ct. 1056, 143 L.Ed.2d 61 (1999). Evidence of other crimes, wrongs or acts is admissible if it tends to show "motive, identity, absence of mistake or accident, intent or knowledge, or common scheme or plan." *Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985).

In *Rearick v. Commonwealth*, 858 S.W.2d 185 (Ky. 1993), this Court stated that evidence of other acts offered to prove the existence of a common scheme or plan must be so similar to the crime on trial as to constitute a so-called signature crime. Common facts rather than common criminality are the keystone of such an examination. *Lear v. Commonwealth*, 884 S.W.2d 657, 659 (Ky. 1994). The evidence in this case was admissible to show common facts, as indicated by the extensive list above, not merely as evidence of character or common criminality. The similarities of the prior acts could easily support the decision of the trial court to allow the evidence to be admitted. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999); *Lear v. Commonwealth, supra*; *Bell v. Commonwealth*, ____ S.W.2d 882 (Ky. 1994); *Adcock v. Commonwealth*, 702 S.W.2d 440 (Ky. 1986). Therefore, the trial court's decision to admit evidence of Tim Keeling's abduction and murder by St. Clair was proper and should be affirmed.

7.

**THE TRIAL COURT PROPERLY OVERRULED ST. CLAIR'S REQUESTS FOR A MISTRIAL.**

St. Clair argues that the trial court erred in failing to grant a mistrial after the jury was told; "1) that before his escape appellant was considered a 'max' security risk, 2) that he was already wanted for murder, and 3) he was a danger even to the friends who sheltered him." (Appellant's Brief at 40). Although St. Clair did move for a mistrial following the admission of some of the above statements, it is conceded that statement one was not objected to at trial. Thus, review of the admission of statement one 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. Each statement will be addressed in order below.

The statement indicating that St. Clair was a "max" security risk was his own prior sworn testimony admitted during the 2001 trial of this same case. St. Clair concedes that neither the Constitution nor the hearsay rules bar the admission of his prior testimony, but instead complains that the trial court should have, despite no objection to the previously admitted testimony, applied the rigors of KRE 401, 402, 403, and 404(b) in order to *sua sponte* exclude the testimony. (Appellant's Brief at 40-41). St. Clair's brief offers no authority that would require action by the trial court. St. Clair's prior

testimony indicating that he was serving time in "isolation" because he was a "max" risk prior to his escape and the violent crime spree that resulted in Frank Brady's abduction and murder was relevant to demonstrate St. Clair's motive for avoiding re-capture at all costs. Further, the testimony was relevant to show St. Clair's state of mind. Thus, the trial court properly admitted this testimony without objection from St. Clair.

The second and third statements St. Clair believes should have entitled him to a mistrial were Trooper Bennett's testimony indicating that he had been informed by FBI agent Phil Lewter that St. Clair was wanted for "murder" and "numerous other crimes," and Agent Perry Unruh's testimony indicating that police believed even St. Clair's friends could be in danger. Although the Commonwealth does not concede that the admission of either of these statements was error, the trial court sustained St. Clair's objections to the testimony and admonished the jury to disregard both Trooper Bennet's and Agent Unruh's testimony. The admonition given following Trooper Bennet's testimony was given over St. Clair's objection. The only relief St. Clair desired in either instance was a mistrial. Fortunately, the trial court denied that request and gave an appropriate admonition that effectively cured any error that may have resulted from the admission of these statements.

A trial court must use "utmost caution" in declaring a mistrial, as it must avoid the possibility of creating a situation in which double jeopardy

will ensue. *United States v. Zorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Hunt v. Commonwealth*, 483 S.W.2d 128, 133 (Ky. 1972). It is universally agreed that a mistrial is an extreme remedy and appropriate only where the record reveals "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985); *See also, Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001), *Maxie v. Commonwealth*, 82 S.W.2d 860, 863, (Ky. 2002), *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000). This Court has held that for an "urgent or real necessity" to exist, ". . .the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." *Commonwealth v. Maxie*, 82 S.W.2d at 862; *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996).

The propriety of a mistrial is determined on a case by case basis. *Commonwealth v. Scott*, 12 S.W.3d at 684. It is well recognized that the trial court has "broad discretion" in determining whether a mistrial is necessary. *Gosser v. Commonwealth*, 31 S.W.3d 897, 906 (Ky. 2000). The trial judge "is best situated intelligently" to determine whether or not "the ends of substantial justice cannot be attained without discontinuing the trial...." *Id.* Thus, a trial court's decision regarding whether a mistrial is warranted "should not be disturbed, absent an abuse of discretion." *Neal v. Commonwealth*, 95 S.W.3d 843, 852 (Ky. 2003); *Clay v. Commonwealth*, 867

S.W.2d 200, 204 (Ky. App. 1993). To prevail in his argument, St. Clair must show that the court's failure to declare a mistrial was "clearly erroneous." *Commonwealth v. Scott*, 12 S.W.3d at 684.

In the present case St. Clair has failed to demonstrate that the trial court's failure to declare a mistrial was "clearly erroneous." Further, St. Clair fails explain how the admonition given by the trial court failed to cured any possible error. "It is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). Likewise, it is well recognized that a prompt, clear admonition to the jury to disregard an improper comment "cures the error" created by improvident remarks. *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001); *Smith v Commonwealth*, 634 S.W.2d 411, 413 (Ky. 1982); *Napier v. Commonwealth*, 426 S.W.2d 121, 123 (Ky. 1968). Additionally, it is presumed that the jury heeds an admonition. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003); *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999); *Napier v. Commonwealth*, 426 S.W.2d at 123. An appropriate admonition "renders the possibility of prejudice too remote to warrant serious consideration of reversal." *Napier v. Commonwealth*, 426 S.W.2d at 123. This presumptive efficacy only falters when there is an "overwhelming probability" that the jury will be unable to follow the admonition and there is a "strong likelihood"

that the effect of the inadmissible evidence would be "devastating" to the defendant or the question preceding the testimony is "inflammatory" and it has no factual basis. *Johnson v. Commonwealth*, 105 S.W.3d at 441; *Alexander v. Commonwealth*, 862 S.W.2d 856, 859 (Ky. 1993), overruled, other grounds: *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997); *Price v. Commonwealth*, 59 S.W.3d at 881.

St. Clair fails to even address why he believes the trial court's admonitions were insufficient. Thus, this Court should follow well-settled precedent and find that the trial court's admonitions cured any possible error that may have resulted from Trooper Bennet's and/or Agent Unruh's testimony.

8.

**ST. CLAIR WAS PROPERLY IMPEACHED.**

St. Clair claims that the trial court erred when it permitted the Commonwealth to impeach him with his prior testimony. However, the trial court correctly held that St. Clair's prior testimony was admissible to show motive.

During retrial St. Clair testified that he shot at Trooper Bennett's car to disable it so he could allude capture. The Commonwealth sought, and was given permission, to impeach that testimony with St. Clair's prior testimony that he fired at Trooper Bennett because he had two Life Without the Possibility of Parole (LWOP) sentences. St. Clair's singular argument on

appeal is that his statement that he shot at the trooper because had had two LWOP sentences was not inconsistent with his re-trial testimony that he simply fired shot so he could get away. The fallacy in St. Clair's argument is obvious. While both statements express St. Clair's desire not to be captured, his retrial testimony denotes only a generic desire not to be immediately apprehended for what could be any reason, but his prior testimony clearly evidences his true desire to do anything, criminal or not, to avoid serving the two LWOP sentences imposed on him for other crimes. St. Clair's statement at re-trial permits a myriad of inferences as to why he might not want to be immediately apprehended; i.e., a desire to hide evidence, a desire to visit spouse/significant other, a desire to be housed in a different jail, a settle personal affairs or scores before being incarcerated, etc. Whereas, St. Clair's prior testimony makes it abundantly clear that St. Clair intended to do anything and everything in his power, including killing a state trooper, to avoid the LWOP sentences hanging over his head.

Because the statements are decidedly inconsistent and because St. Clair's prior testimony more clearly evidenced his motive for firing shots at Trooper Bennett, the trial court correctly permitted the Commonwealth to impeach St. Clair with his prior testimony. See KRE 404(b).

9.

## EVIDENCE OF REESE'S PRIOR BAD ACTS WAS PROPERLY EXCLUDED FROM TRIAL.

St. Clair argues that the trial court erred when it excluded evidence of Dennis Reese's prior bad acts. More specifically, St. Clair argues that he should have been permitted to introduce reverse 404(b) evidence in form of details regarding Reese's murder of a nurse, Kathy Burns, in an attempt to show that Reese committed the abduction and murder of Frank Brady. However, the evidence St. Clair was prevented from introducing did not directly involve or otherwise relate to the abduction and murder of Frank Brady and was properly excluded by the trial court.

At trial St. Clair sought to introduce the fact that Reese that he had capital charges pending against him in Oklahoma when he gave his statement to Detective Carr implicating St. Clair in the abduction and murder of Frank Brady. (VHR 43; 1/11/12, 8:44:00, 8:54:30, 9:40:25). Additionally, St. Clair sought to introduce the details of that capital charge, the murder of Kathy Burns, in an effort to prove that Reese's *modus operandi* was such that the jury could believe he abducted and killed Mr. Brady. (*Id.* at 8:44:00 *et seq*). Although the trial court allowed St. Clair's counsel to inquire of Reese if he was facing capital charges in Oklahoma when he gave his statement to Detective Carr (*Id.* at 9:39:00-9:40:30), the trial court ruled that the details of the Burns case could not be admitted. (*Id.* at 9:37:38).

More specifically, the trial court found that the details of Burns' murder were not similar enough to the abduction of Frank Brady to show *modus operandi* and that the details of the crime did not help to show bias. (*Id.* at 9:37:38-9:39:00).

The proof offered during the hearing by counsel for St. Clair and the Commonwealth supported the trial court's ruling. First, St. Clair conceded to the Court that the method of killing was quite different; Ms. Burns had been bludgeoned while Frank Brady, and Tim Keeling for that matter, had been executed by gun shots to the head. (*Id.* at 8:49:47). The murder of Ms. Burns further differed from the Brady crime in that; (1) Reese knew Ms. Burns, (2) had consensual sex with Ms. Burns, (3) was not charged with robbery, (4) there was no abduction, (5) Reese used Ms. Burns' truck with her consent, (5) Reese's motive kill involved a belief Ms. Burns had crossed him a drug related situation, and (6) the method and weapon used to accomplish the murder was a board not a gun. (*Id.* at 9:13:54-9:17:00).

Review of the lengthy and thorough cross-examination of Reese by defense counsel shows that there were not restrictions placed on cross-examination, and that St. Clair's desire to introduced reverse 404(b) evidence was granted, in part, in accordance with this Court's rulings in *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003), *McPherson v. Commonwealth*, 360 S.W.3d 207 (Ky. 2012), and *Blair v. Commonwealth*, 144 S.W.3d 801 (Ky.

2004). Specifically, the trial court ruled that St. Clair could inquire as to whether Reese was facing capital charges in Oklahoma (VHR 43; 1/11/12, 9:39:00), could inquire into the details of the crimes committed against Alton Rose (*Id.* at 9:41:30), and permitted to explore *modus operandi* evidence involving Reese's crimes against homosexuals and homeless persons (*Id.* at 9:42:00). In no manner did the trial court abuse its discretion regarding the regulation of cross-examination and admission of evidence with regards to reverse 404(b) evidence being offered against Dennis Reese and/or other collateral matters at issue. *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003); *McPherson v. Commonwealth*, 360 S.W.3d 207 (Ky. 2012); and *Blair v. Commonwealth*, 144 S.W.3d 801 (Ky. 2004); *Commonwealth v. Maddox*, 955 S.W.2d 718 (Ky. 1997); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Boggs v. Collins*, 226 F.3d 728 (6th Cir. 2000).

Because the trial court properly reviewed the evidence sought to be introduced and because the court's finding that the evidence was to dissimilar to the Brady abduction and murder so as to justify its exclusion is supported by the record on appeal, no error occurred.

**10.**

**TESTIMONY FROM KEELING'S WIDOW, LISA HILL, WAS PROPERLY ADMITTED.**

Contrary to St. Clair's assertion otherwise, this issue is not preserved. St. Clair's generic 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. (TR XXXV at 5145). In fact, Ms. Hill's testimony was never specifically objected to at trial. 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 specifically object to the admitted testimony. *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 admissible victim background evidence, which has been expressly authorized by this Court. This Court has long held that a prosecutor is always permitted to present the human side of a victim. *Matthews v. Commonwealth*, 997 S.W.2d 449, 453 (Ky. 1999), overruled on other grounds by *Hayes v. Commonwealth*, 58 S.W.3d 879 (Ky. 2001); *citing Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997). In *McQueen v. Commonwealth*, 669 S.W.2d 519, 523, cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984), this Court held that, "[i]t would, of course,

behoove the appellant to be tried for the murder of a statistic, but we find no error in bringing to the attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community." (emphasis added).

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. Although St. Clair may not have yet been convicted of abducting and killing Tim Keeling, it is nonetheless clear from the record that he committed these crimes.

During the guilt phase of St. Clair's trial, the testimony offered, without objection, from Lisa Hill consisted of victim background testimony rather than victim impact testimony. The testimony identified in St. Clair's brief clearly demonstrates that Ms. Hill was allowed to briefly explain to the jury exactly who her husband was. (Appellant's Brief at 55-56). St. Clair does not identify any testimony in which Ms. Hill explains to the jury the negative impact her husband's murder has had on her, his family, his friends, etc. As St. Clair himself admits, this Court has drawn a clear distinction between "victim impact" and "victim background" testimony. (Appellant's Brief at 59-60, *citing Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky.

2005). Thus, 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.

**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 the Commonwealth's questions 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 portions of the record cited to by St. Clair do 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. (VHR 48: 1/18/12; 11:15:01, 11:15:27, 11:15:55).

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 Commonwealth's cross-examination of St. Clair. 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.**

St. Clair argues that reversal is required because the Commonwealth was allowed to admit at trial evidence that he believes should have been excluded based on this Court's opinion in *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005), addressing marital communications. However, St. Clair did not object to the admission of the evidence he now find objectionable. Thus, 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). 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.

In *St. Clair v. Commonwealth*, 174 S.W.3d 474, 477-481 (Ky. 2005), this court reversed St. Clair's convictions finding that two statement made by St. Clair's spouse (Bylynn) were improperly admitted at trial in violation of the marital privilege. The first statement this Court found objectionable concerned St. Clair's statement to Bylynn on the night prior to his arrest that, "St. Clair and Reese had to leave their belongings and that they burned a truck." *Id.* at 478. This statement was not admitted during the most recent retrial. The second statement this Court found to be privileged concerned a telephone conversation between St. Clair and Bylynn. *Id.* at 478. This statement was not admitted during the most recent retrial. Thus, there was no direct violation of this Court's opinion upon retrial.

Although this Court did not expressly find that any other statements offered by Bylynn were privileged, this Court did believe Bylynn's testimony indicating that St. Clair, ". . .told her he took a gun off that old man whose house he had broken into," was potentially problematic and should be examined more closely should its admission be sought upon retrial. (*Id.* at 477, 480). More specifically, this Court's opinion found that St. Clair's statements to Bylynn about the gun were made at a fair, "and apparently

was made in full view of the public eye." *Id.* at 480. However, this Court also found that statements made in public may still be confidential if whispered between spouses and thus, order that upon remand the trial court hear additional evidence regarding the circumstances under which the state was made. *Id.* This Court did not offer any opinion whatsoever regarding any non-verbal information gathered by Bylynn during her physical interaction with St. Clair. Upon retrial the Commonwealth did not specifically introduce the comments St. Clair made to Bylynn about taking the gun, but instead merely read from Bylynnn's prior testimony that, "Michael had a gun. I didn't see one, but when I hugged him I felt something had on his belt line, but I never seen it." (VHR 47; 1/17/12, 2:23:23). Because the Commonwealth did not attempt to admit what St. Clair had told Bylynn about the gun, this Court's prior opinion questioning the admissibility of that statement was not directed implicated and the trial court was not required to determine the circumstance under which St. Clair made his statement about the gun to Bylynn. Thus, St. Clair's "law of the case" argument is simply misplaced and wrong.

Finally, St. Clair's assertion that the admission of Bylynn's testimony that she felt a gun on St. Clair's person when they hugged was non-verbal communication privileged by the KRS 421.210(1) is also wrong. First, there is nothing contained in Bylynn's testimony indicating that any non-verbal communication was going on. There is nothing to indicate that St. Clair was

attempting to communicate anything with her, other than his affection, when she hugged him. It is axiomatic that communication requires a party to intend to express oneself to another. Simple observations made by one spouse about there counterpart are not privileged communications under Kentucky law. Thus, there was nothing for St. Clair's counsel to object to and no error occurred.

Finally, 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.

13.

**ALLEGED IMPERMISSIBLY SUGGESTIVE IDENTIFICATION.**

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 prior trial, failed to raise it in his original direct appeal, and failed to object to the identification testimony being admitted during the latest re-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 his prior trial or its admission during the latest re-trial, and his failure to raise it in his prior direct appeals operates as a waiver of this claim. *Id.* at 610-611.

**14.**

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

St. Clair complains the trial court erred when it failed to instruct the jury on facilitation. However, there was no factual basis to support the giving of such and instruction. Thus, the trial court did not err.

Recently this court again explained how the refusal to give a jury instruction is to be reviewed on appeal explaining,

> We review the refusal to give a jury instruction of a lesser-included offense by the 'reasonable juror' standard established in *Allen v. Commonwealth*:
>
> > As noted, we review a trial court's decision not to give a criminal offense jury instruction under the same "reasonable juror" standard we apply to the review of its decision to give such an instruction. *See Commonwealth v. Benham*, 816 S.W.2d 186 (Ky.1991). Construing the evidence favorably to the proponent of the instruction, we ask whether the evidence would permit a reasonable juror to make the finding the instruction authorizes. We typically do not characterize our review under this standard as either de novo or for abuse of discretion, but in some recent cases we have and it may appear that we have done so inconsistently.
> >
> > *See Hunt v. Commonwealth*, 304 S.W.3d 15, 31 (Ky.2009) ("The trial court's decision not to give a jury instruction is reviewed for abuse of discretion."); *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky.2009) ("We review the trial court's rulings with respect to jury instructions for abuse of discretion."); *Morrow v. Commonwealth*, 286 S.W.3d 206, 209 (Ky.2009) ( "Because this matter turns on the trial court's determination as to whether to tender a jury instruction, we will engage in a de novo review."). In this context, the characterization makes little difference and so the inconsistency is more apparent than real. On the one hand, if the evidence supports an instruction that is otherwise appropriate, the proponent is entitled to the instruction as a matter of law, and to

> emphasize that entitlement, as we did in Morrow, our review can be characterized as de novo. On the other hand, to emphasize that the sufficiency of the evidence is measured against a reasonableness standard—the reasonable juror—as we did in Cecil, our review can be characterized as for abuse of discretion. Regardless of the characterization, however, the "reasonable juror" is the operative standard, in the appellate court as well as in the trial court.
>
> 338 S.W.3d 252, 255 (Ky.2011). Therefore, in evaluating the refusal to give an instruction we must ask ourselves, construing the evidence favorably to the proponent of the instruction, whether the evidence would permit a reasonable juror to make the finding the instruction authorizes

*Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013).

In this case the trial court denied the instruction because he believed the testimony of St. Clair and Reese to be mutually exclusive. (VHR 49; 1/9/12, 9:16:43, 9:21:14, 9:26:37). The trial court even indicated that he would be inclined to err on giving a defense requested instruction if he could see any factual basis for such an instruction. (*Id.* 9:21:14). Even St. Clair's counsel agreed that the testimony of Reese and St. Clair was mutually exclusive but advocated that the jury be permitted great discretion to speculate as they wish. (*Id.* at 9:23:38.) As the Commonwealth correctly argued, the proof at trial was such that jury could find either St. Clair was the principle that abducted and killed Frank Brady and that Reese was his accomplice or that Reese acted alone and St. Clair was innocent. (*Id.* at

9:25:25). There simply was no version of the facts from which a jury could infer and reasonably believe that St. Clair somehow participated and/or provided material assistance to Reese without intending the commission of the crime. (*Id.* at 9:26:00). To find a basis for facilitation the jury would have to speculate as to possible facts not contained in the testimonies of Reese or St. Clair and then draw an inference from that speculation. An instruction on a lesser-included offense instructions is not required when the evidence does provide a basis for that instruction. *Campbell v. Coyle*, 260 F.3d 531, 541 (6th Cir. 2001). Thus, the trial court properly found that there was simply no factual basis to give the jury an instruction on facilitation to commit kidnapping.

**15.**

**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).

The opinion of this Court in *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005) (plurality opinion) is unanimous insofar as the so-called unaddressed issues are concerned:

> In addition to the claims of error addressed above, Appellant has asserted numerous other claims. **Most asserted claims were not error, frivolous, or are not likely to recur upon retrial.**

*Id.*, at 485 (emphasis added).

The very next sentence in the same paragraph makes clear that what is to follow is a discussion limited to only issues likely to recur upon re-trial:

> However, we will address a few such claims of error that may recur upon retrial if the evidence is substantially similar.

*Id.* (emphasis added).

Immediately following is a heading entitled, "III. Various Other Claims". *Id.* What next immediately follows is a sentence beginning, "The first error likely to recur upon retrial is the introduction of the testimony of Mary Weedman . . . ." *Id.* One paragraph later, the opinion of the Court

states, "The second error . . . ." *Id.* The next paragraph begins, "Finally, we will address St. Clair's last valid assertion of error." *Id.* (emphasis added).

As is already obvious to even a casual reader, the opinion of the Court devotes parts I and II to the issues pivotal in its decision. Quoted above, the lead-in to part III expressly rejects all other claims of error save those likely to recur on retrial. Part III is then confined to a discussion of the likely to recur issues. As the present issue was presented in St. Clair's prior appeal in this case, the lead-in to part III of this Court's opinion in *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005), expressly rejected this claim.

Further, this Court expressly ruled that detailed evidence of St. Clair's Oklahoma crimes was admissible as KRE 404(b) evidence during the guilt phase of the Bullitt Circuit Court trial for the murder of Frank Brady. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-36 (Ky. 2004). 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 and thus, this issue was not presented to the trial court. 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).

Under the "law of the case"doctrine this Court should exercise its discretion and refuse to revisit this claim, which was rejected in its 2005 opinion. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005). 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).

In this Court's 2004 opinion affirming St. Clair's conviction for the murder of Frank Brady 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).

*St. Clair v. Commonwealth*, 140 S.W.3d 510, 535-536 (Ky. 2004).

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. Given that the complained of evidence was in fact admissible under this

Court's prior rulings, the evidence St. Clair now complains of was properly admitted during the most recent re-trial.

**16.**

**ST. CLAIR WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE "PRIOR CAPITAL CONVICTION" AGGRAVATOR.**

St. Clair argues that the trial court violated due process by denying a directed verdict on the "prior capital conviction" aggravator. However, this issue has previously been rejected by this Court in St. Clair's first Bullitt Circuit Court direct appeal for his murder of Frank Brady. *St. Clair v. Commonwealth*, 140 S.W.3d 510, 568-71 (Ky. 2004). Likewise, this Court reiterated this holding in St. Clair's first Hardin Circuit Court direct appeal opinion holding that,

> The determination of level of finality for a "prior record of conviction" under KRS 532.025(2)(a)(1) was determined to be an accepted guilty plea or a guilty verdict rendered by a judge or jury.[34] Our decision held that for the purposes of KRS 532.025(2)(a)(1) that a pending appeal does not impact the finality of the "prior record of conviction for a capital offense."[35] **As a matter of law, St. Clair had two prior capital convictions for the 1991 murders before he committed the kidnapping. Therefore, on retrial, the jury should be instructed accordingly.**

*St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005) (emphasis added and footnotes omitted). Since this Court has twice reviewed and rejected this

claim of error in St. Clair's own cases, the "law of the case" doctrine dictates that this issue not be readdressed.

Under the "law of the case"doctrine this Court should exercise its discretion and refuse to revisit this claim, which was rejected in its 2005 opinion. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005). 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).

Although St. Clair argues that there has been an intervening change in the law, close examination of his brief evidences that no such intervening change has occurred. Instead, St. Clair merely refers this Court to the dissenting opinions authored by a single Justice of this Court in St. Clair's prior Bullitt and Hardin Circuit Court appeals. This Court has twice rejected St. Clair's argument and twice disagreed with Justice Cooper's dissents. Further, in its previous Hardin Circuit Court case this Court directed that the jury should be instructed, with regard to the "prior record of conviction" aggravator just as the jury was in this case. *St. Clair,*174 S.W.3d at 485. Thus, the "law of the case" doctrine applies and operates to preclude further review of this previously rejected claim.

## 17.

## THE JURY WAS PROPERLY INSTRUCTED.

St. Clair argues that the trial court failed to follow this Court's directive when instructing the jury as to the "victim was not released alive" aggravator. However, St. Clair failed to point this fact out upon retrial and failed to specifically object to the instruction given by the trial court. This Court has consistently held that pursuant to RCr 9.54(2), a party cannot assign error to instructions unless that party makes a specific objection to the giving or failure to give an instruction before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection. *Davis v. Commonwealth*, 967 S.W.2d 574, 580-581 (Ky. 1998); *See also Grooms v. Commonwealth*, 756 S.W.2d 131 (Ky. 1988); *Perdue v. Commonwealth*, 916 S.W.2d 148, 160 (Ky. 1996); *Long v. Commonwealth*, 559 S.W.2d 482 (Ky. 1977); *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky. 1995). Additionally, in order for the issues regarding jury instructions to be preserved, the defendant must do more than simply tender a piece of paper to the trial court. Having failed to specifically object to portion(s) of the instructions of which he now complains, or having failed to specifically present the Court with requested instructions and supporting arguments for those portions sought, St. Clair failed to fairly and adequately present his position to the trial court and thereby preserve the issue for review on those issues. RCr 9.54(2); *Long, supra.*

Nonetheless, any error with regard to the jury instruction for the "victim was not released alive" aggravator that may have resulted from the trial court's failure to strictly comply with this Court's direction on retrial is harmless. In *St. Clair v. Commonwealth*, 174 S.W.3d 474, 483 (Ky. 2005), this Court specifically directed that,

> If the evidence on retrial is substantially the same, the jury shall be instructed that capital punishment may not be imposed unless the jury finds that St. Clair murdered Frank Brady during the course of the kidnapping.

In the present case the trial court and both parties overlooked this Court's direction and failed to instruct the jury that capital punishment could not be imposed unless the found that St. Clair had murdered Frank Brady. However, in Kentucky, a jury can properly sentence a defendant to death so long as at least one (1) statutory aggravator is found. In this case the jury unanimously found the presence of two other proper and supported statutory aggravating circumstances. Thus, any error resulting from the trial court's failure to require the jury to find that St. Clair murdered Frank Brady was necessarily harmless beyond all reasonable doubt. Three aggravating circumstances were set forth by the jury in its verdict form. (TR XXXVIII, 5611). All that is needed is one, *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky. 1988), which renders appellant's complaint moot. *Bevins v. Commonwealth*, 712 S.W.2d 932 (Ky. 1986), *citing, Zant v. Stephens*, 456 U.S. 410 (1982). The case against St. Clair was strong, and the outcome of the case

was supported by the evidence presented to the jury. Further, it is uncontroverted and unquestionable that Brady was in fact not released alive. Evidence presented to the jury was such that it was clear that the jury necessarily found that St. Clair had intentionally kidnapped and killed Brady. Therefore, St. Clair has failed to show how this alleged error resulted in any actual prejudice to him, much less manifest injustice requiring reversal. Considering the overwhelming evidence of St. Clair's guilt, the alleged error cannot be found to be prejudicial to St. Clair.

**18.**

**THE DUE PROCESS RULE OF LENITY WAS NOT VIOLATED.**

St. Clair argues that, "[i]nstructing the jury that it could select death based on victim-not-released-alive violates the due process rule of lenity." (Appellant's Brief at 92). However, appellant did not specifically object to the instruction he now complains of and did not in any way raise this claim of error before the trial court. 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.

Nevertheless, any error that may have resulted from instructing the jury that they could recommend a sentence of death by merely finding beyond a reasonable doubt that the kidnapping victim was not released alive is

harmless. In Kentucky, a jury can properly sentence a defendant to death so long as at least one (1) statutory aggravator is found. In this case three aggravating circumstances were set forth by the jury in its verdict form. (TR XXXVIII, 5611). The jury unanimously found the presence of two other proper and supported statutory aggravating circumstances. All that is needed is one, *Simmons v. Commonwealth,* 746 S.W.2d 393 (Ky. 1988), which renders appellant's complaint moot. *Bevins v. Commonwealth,* 712 S.W.2d 932 (Ky. 1986), *citing, Zant v. Stephens,* 456 U.S. 410 (1982). Thus, any error resulting from the trial court's failure to require the jury to find that St. Clair murdered Frank Brady was necessarily harmless beyond all reasonable doubt.

The case against St. Clair was strong, and the outcome of the case was supported by the evidence presented to the jury. Further, it is uncontroverted and unquestionable that Brady was in fact not released alive. Evidence presented to the jury was such that it was clear that the jury necessarily found that St. Clair had intentionally kidnapped and killed Brady. Therefore, St. Clair has failed to show how this alleged error resulted in any actual prejudice to him, much less manifest injustice requiring reversal. Considering the overwhelming evidence of St. Clair's guilt, the alleged error cannot be found to be prejudicial to St. Clair.

**19.**

## THERE WAS NO VIOLATION OF THE "FAIR WARNING" ASPECT OF DUE PROCESS.

St. Clair argues that, "[i]nstructing the jury they could recommend death based on finding the victim was not released alive violated the 'fair warning' aspect of due process. (Appellant's Brief at 96). However, any error that may have resulted from instructing the jury that they could recommend a sentence of death by merely finding beyond a reasonable doubt that the kidnapping victim was not released alive is harmless. In Kentucky, a jury can properly sentence a defendant to death so long as at least one (1) statutory aggravator is found. In this case three aggravating circumstances were set forth by the jury in its verdict form. (TR XXXVIII, 5611). The jury unanimously found the presence of two other proper and supported statutory aggravating circumstances. All that is needed is one, *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky. 1988), which renders appellant's complaint moot. *Bevins v. Commonwealth*, 712 S.W.2d 932 (Ky. 1986), *citing, Zant v. Stephens*, 456 U.S. 410 (1982). Thus, any error resulting from the trial court's failure to require the jury to find that St. Clair murdered Frank Brady was necessarily harmless beyond all reasonable doubt.

The case against St. Clair was strong, and the outcome of the case was supported by the evidence presented to the jury. Further, it is uncontroverted and unquestionable that Brady was in fact not released alive.

Evidence presented to the jury was such that it was clear that the jury necessarily found that St. Clair had intentionally kidnapped and killed Brady. Therefore, St. Clair has failed to show how this alleged error resulted in any actual prejudice to him, much less manifest injustice requiring reversal. Considering the overwhelming evidence of St. Clair's guilt, the alleged error cannot be found to be prejudicial to St. Clair.

**20.**

**ST. CLAIR WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE ROBBERY AGGRAVATOR.**

St. Clair argues that the trial court should have granted a directed verdict as to the robbery aggravator because the Commonwealth did not specifically offer any proof of the robbery during the penalty phase. However, it is uncontroverted that the Commonwealth did present more than sufficient evidence of the robbery aggravator during the guilt phase of St. Clair's trial. Pursuant to KRS 532.025(1) the evidence presented to the jury during the penalty phase of the trial is evidence in addition to the evidence presented to the jury during the guilt phase. Likewise, the trial court's instruction specifically informed the jury that the evidence presented during the penalty phase was "additional" evidence. Thus, it was readily apparent to the jury that they could consider proof introduce during the guilt phase of trial when determining whether the Commonwealth had met its burden in proving the robbery aggravator. Thus, no error occurred.

21.

## THE JURY PROPERLY FOUND THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES.

St. Clair argues that all of the aggravating circumstances are invalid, or at a minimum his death sentence lack unanimity as required by the Kentucky Constitution. As demonstrated in arguments 16, 17 & 20 above, the jury was properly instructed on the statutory aggravating circumstances. Those arguments, along with this Court's own prior ruling in this very case, make it clear that at least the "robbery" and "prior conviction of a capital offense" aggravators are unassailable on appeal. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 484-85 (Ky. 2005).

In Kentucky, a jury can properly sentence a defendant to death so long as at least one (1) statutory aggravator is found. In this case three aggravating circumstances were set forth by the jury in its verdict form. (TR XXXVIII, 5611). The jury unanimously found the presence of all three statutory aggravating circumstances. All that is needed is one, *Simmons v. Commonwealth*, 746 S.W.2d 393 (Ky. 1988). St. Clair's brief fails to demonstrate any, much less all three, of the aggravating circumstances are invalid. So long as one statutory aggravator is properly found to exist by the jury, St. Clair's complaints are moot. *Bevins v. Commonwealth*, 712 S.W.2d 932 (Ky. 1986), *citing, Zant v. Stephens*, 456 U.S. 410 (1982). Because, it is clear that at least one of the aggravator's were properly found to exist beyond

a reasonable doubt by the jury any error potentially invalidating one of the other aggravators is necessarily harmless beyond all reasonable doubt.

**22.**

**THERE IS NO OBLIGATION TO INSTRUCT ON "INNOCENCE OF THE DEATH PENALTY."**

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.

## 23.

## "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 tendered "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 it 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.

**24.**

**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. 2 - Mitigating Circumstances contained in the appendix to St. Clair's Brief at tab #2, TE XXXVIII at 5610).

25.

**NON-UNANIMOUS MITIGATORS.**

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 this 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.[1] The Sixth Circuit has ruled that the jury need not be instructed to be 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.

**26.**

**WRITTEN MITIGATION FINDINGS.**

This issue is upreserved. 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*.

---

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

## 27.

## 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 123). 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).

## 28.

## THE DEATH PENALTY IS CONSTITUTIONAL.

It is well-settled that the death penalty is constitutional. *Baze v. Rees*, 553 U.S. 35 (2008). St. Clair's argument on this point is not a judicial

argument but a legislative one. Thus, his death sentence should be affirmed by this Court.

**29.**

**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 129-131). However, the heinous nature of St. Clair's crimes coupled with the presence of the unanimous finding by the jury of statutory aggravators make is 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).

**30.**

## 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. The only thing that has changed since St. Clair made this argument in his prior direct appeal is the issuance of an American Bar Association report criticizing Kentucky's death penalty. However, both this Court and the Sixth Circuit have previously rejected St. Clair's complaints. *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).

Further, 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)(c) 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.[2]

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

---

[2]In 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. Geogia*, 408 U.S. 238 (1972), in conducting proportionality review.

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."

Finally, St.Clair's reliance on the ABA's published report criticizing Kentucky's death penalty is misplace. First, it is a severe overstatement for St. Clair characterize a report published by a sub-group of private organization, which is actively advocating for legislative abolishment of the death penalty, as authority. Second, it is readily acknowledged that the ABA's recommendations and standards are far from mandatory requirements and are nothing more than guides. *Bobby v. Van Hook*, 130 S.Ct. 13 (2009). In his concurring opinion in *Van Hook*, Justice Alito noted his understanding that the ABA Guidelines have no "special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, at 20 (ALITO, concurring). In so concluding, it was noted that:

> The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private

> group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

*Van Hook*, at 20 (ALITO, concurring).

Similarly, if the ABA's guidelines and standards have no "special relevance" in determining the standards required of counsel by the Sixth Amendment, then the views of the advocacy sub-committee of the ABA that published the report cited by St. Clair can hold no special relevance on determining the constitutional sufficiency of this Court's proportionality review. This is especially true given that the Constitution does not require such review in the first place.

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

**31.**

**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 and 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).

**32.**

**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.

**33.**

**THE TRIAL COURT PROPERLY SENTENCED APPELLANT.**

This issue is unpreserved. St. Clair claims that the trial court failed to properly consider mitigating factors when sentencing him to death. More specifically, St. Clair is concerned that the trial court did not specifically reference his upbringing, his alleged childish mentality, or the fact his estranged wife and friends stood by him 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 was guilty of three aggravating circumstances 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.

**34.**

**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).

**35.**

**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).

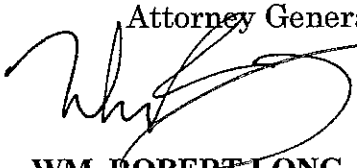
The Counterstatement of the Case herein exhaustively details the evidence and proof of St. Clair's guilt. This evidence proved guilt beyond a reasonable doubt and the jury so found. There is no residual doubt herein, and that legal standard is sufficient to satisfy constitutional requirements.

## CONCLUSION

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

Respectfully Submitted

**JACK CONWAY**
Attorney General of Kentucky



**WM. ROBERT LONG, JR.**
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Commonwealth