Supreme Court of Kentucky
File No. 2012-SC-130-MR

Michael St. Clair — Appellant

v.

Appeal from Hardin Circuit Court
Hon. Thomas O. Castlen, Judge
Nos. 91-CR-207-2 and 1992-CR-2-2

Commonwealth of Kentucky — Appellee

Reply Brief for Appellant St. Clair

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Certificate of Service:

I hereby certify that a copy of the foregoing Reply Brief has been mailed postage prepaid to Hon. Thomas O. Castlen, Senior Judge, P. O. Box 215, Owensboro, KY 42302; the Hon. Dana M. Todd, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, KY 40601; the Hon. Scott Drabenstadt, Kamenish Law Office, 239 S 5th Street # 1916, Louisville, KY40202-3209; the Hon. Justin Brown, 436 South 7th Street, Suite 100, Louisville, KY 40203; and served by messenger mail to the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601, on January 29, 2014. I hereby further certify that the record was not checked out for the purpose of this Reply Brief.

Susan J. Balliet

PURPOSE OF BRIEF

This reply brief responds to selected issues raised by Appellee. All arguments not addressed here are refuted in the Brief for Appellant.

ISSUES TO BE ADDRESSED

Response to Appellee's preliminary argument:

- **a.** The *Sanders* standard applies to unpreserved error in a death case.
- **b.** *Sanders* does not allow waiver of unpreserved claims.
- **c.** Unpreserved error may be presumed prejudicial.
- **d.** Prejudice is presumed for structural error.
- **e.** Prejudice is presumed when unreliable evidence has violated due process.
- **f.** Prejudice is presumed from any error in a death case.
- **g.** Constitutional errors, preserved and unpreserved, must be proved harmless beyond a reasonable doubt.

1. Retrying Appellant after the 2009 mistrial violated his right to be free of double jeopardy; the Commonwealth intentionally invited a mistrial.

2. Forcing Appellant to trial before a jury paid less than minimum wage denied him due process and a fair and impartial jury.

5. The kidnapping statute only required proof that Brady was not released alive.

6. The law of the case does not prevent review of Appellant's KRE 404(b) argument.

7. Mistrial should have been granted due to violations of KRE 401, 402, 403 and 404(b) when 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.

8. The prosecutor improperly impeached Appellant by repeatedly referring to his two LWOP sentences.

9. Excluding relevant evidence of Reese's prior bad acts violated Appellant's due process right to present a defense.

10. Lisa Hill's testimony should not have been admitted.

12. Reversal is required due to violation of law of the case in *Hardin I* regarding marital communications.

14. The evidence supported a jury instruction on facilitation to kidnapping.

15. Improper, excessively detailed evidence regarding prior convictions violated *Mullikan* and due process.

16. Denial of directed verdict on the prior capital conviction aggravator.

17. Instructing the jury it could select death based on finding the victim was not released alive violated law of the case in *Hardin I.*

18. Instructing the jury that it could select death based on victim-not-released-alive violated the due process rule of lenity.

19. Instructing the jury they could recommend death based on finding the victim was not released alive violated the "fair warning" aspect of due process.

21. All three aggravating circumstances are invalid; this death sentence lacks unanimity under the Kentucky Constitution.

25. Unclear instructions arguably requiring a unanimous jury verdict on mitigation violated the 8th and 14th Amendments.

28. Under current evolving standards of decency Kentucky's death penalty violates the 8th Amendment.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Preliminary argument

a. The *Sanders* standard applies to unpreserved error in a death case.

Appellee concedes the standard of review for unpreserved error on direct appeal in a death case is a two-part inquiry to determine 1) whether there is justification for counsel's failure to object (the trial-strategy prong) and 2) if not, whether the defendant has suffered prejudice (the prejudice prong). *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1990). Yet Appellee persists in urging this Court to apply irrelevant post-conviction ineffective assistance and federal habeas "cause and prejudice" standards instead, standards that are totally inappropriate.

This is a state court appeal, and federal concepts like "firmly established and regularly followed," "cause and prejudice" and federal "default" are irrelevant. *Cf.*, *Wainwright v. Sykes,* 433 U.S. 72, 87-88 (1977); *Willis v. Smith*, 351 F.3d 741, 745 (6th Cir. 2003); *West v. Seabold,* 73 F.3d 81, 84 (6th Cir. 1996). In a Kentucky direct appeal, trial counsel's decisions are neither "presumed reasonable" nor judged under the standard in *Strickland v. Washington*, 466 U.S. 668 (1984). This Court should disregard Appellee's repeated citation of *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). Unlike this case, *West* is a non-capital federal habeas case reviewing state court palpable error. It is irrelevant.

b. Unpreserved error is not subject to waiver in a death case.

In *West,* a garden-variety claim of palpable error was found waived by failure to move for mistrial. But "death is different," and an unpreserved error presented for *Sanders* review is not subject to waiver. The case of *Stanford v. Commonwealth,* 734

S.W.2d 781 (Ky. 1987)—again cited by Appellee[1]—was bad law when Appellee cited it in Appellant's pending Bullitt County appeal and is still bad law due to abrogation by *Roper v. Simmons*, 543 U.S. 551 (2005).

c. Unpreserved error may be presumed prejudicial.

There is no authority for Appellee's argument that prejudice is never presumed to flow from an unpreserved error. Once it is determined there was no trial strategy for failing to raise an issue, there is nothing in *Sanders* to suggest the prejudice prong may not be met by a presumption of prejudice as well as by proof of prejudice. As in the review of any other error, depending on the nature of the error, the Commonwealth must either disprove prejudice or overcome a presumption of prejudice. If the error is constitutional, the Commonwealth must prove it harmless beyond a reasonable doubt. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006), *citing, Arizona v. Fulminante,* 499 U.S. 279, at 306-308 (1991) (no need to show prejudice when 6th Amendment was violated by disqualification of defendant's chosen counsel).

d. Prejudice is presumed for structural error.

Structural error never requires preservation. *Waller v. Georgia,* 467 U.S. 39, 49, n. 9 (1984); *see also Sullivan v. Louisiana*, 508 U.S. 275 (1993). Prejudice is always presumed for structural error regardless of preservation. *Gonzalez-Lopez,* at 2564, n. 4., *citing, Waller v. Georgia,* 467 U.S. 39, 49, n. 9 (1984) (prejudice flowing from structural error is "...frequently intangible, difficult to prove, or a matter of chance"); *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986). Kentucky recognizes when error is structural prejudice

[1] Appellee blithely repeats here the same mis-citations, mis-quotes it made in St. Clair's pending Bullitt County appeal., including *Stanford*. Appellant pointed out in the Reply in that case that *Stanford* is no longer good law.

is presumed. *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012) (holding that erroneous jury instructions are presumed prejudicial, and an appellee claiming harmless error bears a steep burden); *see also, Morgan v. Commonwealth*, 189 S.W.3d 99, 138 (Ky. 2006) (J. Cooper, dissenting) (*overruled on other grounds by Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007)).

e. Prejudice is presumed when a state court determines that unreliable evidence has violated due process.

When a state court concludes that the admission of evidence was error, it becomes "objectively unreasonable, under the tenets espoused by the Supreme Court in *Chambers* [*v. Mississippi,* 410 U.S. 284, 302–03 (1973)], for the state court to [conclude] that this testimony was not prejudicial." *Ege v. Yukins*, 485 F.3d 364, 378 (6th Cir. 2007). A finding of a due-process-violative evidentiary error **is** a finding that the evidence was not only erroneously admitted, it was prejudicial:

> ...due process is violated, and thus habeas relief warranted, only if an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness." [citation omitted] "Whether the admission of prejudicial evidence constitutes a denial of fundamental fairness turns upon whether the evidence is material in the sense of a crucial, critical highly significant factor." *Brown v. O'Dea,* 227 F.3d 642, 645 (6th Cir.2000).
>
> These principles have their roots in the Supreme Court decision of *Chambers v. Mississippi*, 410 U.S. 284, 302–03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), which held that trial errors cannot "defeat the ends of justice" or otherwise deprive a defendant of her right to a fair trial.

Id, 485 F.3d at 375. Neither *Chambers* nor *Ege* use the word "presumption." But both make clear that an evidentiary error that violates due process is necessarily prejudicial: a presumption of prejudice automatically flows from a finding of a violation of due process. *See also, Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" violates due process);

Green v. Georgia, 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within ... [the state's] hearsay rule... its exclusion constituted a violation of the Due Process Clause ...."); *Rogers v. Commonwealth*, 86 S.W.3d 29, 38-39 (Ky. 2002) (holding that reference to a failed polygraph violated due process, compulsory process, and the confrontation clause). The evidentiary violations raised in this appeal are of constitutional magnitude. They are presumptively prejudicial, and they require a new trial.

f. Prejudice is presumed from any error in a death case.

When the maximum sentence is imposed, prejudice is presumed. *Blane v. Commonwealth*, 364 S.W.3d 140, 153 (Ky. 2012) (*citing Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969). This Court will presume any error in this case was prejudicial. The Commonwealth must overcome the presumption of prejudice beyond a reasonable doubt.

g. Constitutional errors, preserved and unpreserved, must be proved harmless beyond a reasonable doubt.

In a death case *all* constitutional errors must be proved harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *Miller v. Commonwealth*, 391 S.W.3d 857, 868-69 (Ky. 2013); *Meece v. Commonwealth,* 348 S.W.3d 627 (Ky. 2011); *Wright v. Commonwealth,* 239 S.W.3d 63, 66 (Ky. 2007) (*citing, Neder v. United States*, 527 U.S. 1, 12-13 (1999). The test "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict ....'" *Neder,* 527 U.S. at 15 (*quoting, Chapman v. California,* 386 U.S. at 24). Nothing in *Sanders* indicates that the harmless-beyond-a-reasonable-doubt standard should **not** apply to unpreserved constitutional error.

Contrary to Appellee's assertion, the Court in *Jones v. United States,* 527 U.S. 373, 388-395, 402-405 (1999), clearly recognized that the harmless-beyond-a-reasonable-doubt standard **does apply** to unpreserved constitutional error in a death case. In upholding the Fifth Circuit, the Supreme Court stated "[w]e think it plain… that the error indeed was harmless beyond a reasonable doubt." *Jones,* 527 U.S. at 404. Appellee again mis-quotes *Rose v. Clark,* 478 U.S. 570 (1986).[2] What *Clark* actually demonstrates at page 576 is that the harmless-beyond-a-reasonable-doubt standard does apply: "And since *Chapman,* "we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside **if**…the constitutional error was harmless beyond a reasonable doubt." (emphasis added). On pages 576-577 of *Rose v. Clark* there is a long discussion of *Chapman,* the case that *established* the harmless beyond a reasonable doubt standard. Appellee's quote from *Clark*— "[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…"— appears at the end of the *Chapman* discussion in *Rose v. Clark,* at p. 579. Appellee again presents this quote out of context by failing to mention that the discussion immediately following this quote states that **all constitutional errors must be found harmless beyond a reasonable doubt** before guilt can be established beyond a reasonable doubt and only then is the interest in fairness satisfied.

1. Retrying Appellant after the 2009 mistrial violated his right to be free of double jeopardy; the Commonwealth intentionally invited a mistrial.

A defendant may invoke the bar of double jeopardy "when the conduct giving rise to the

[2] Appellant pointed out this same mis-quote in St. Clair's *Bullitt III* appeal.

successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). No case defines intent in the specific context of prosecutorial misconduct. But intent may be inferred from a subject's conduct, surrounding circumstances, or a subject's knowledge. Abramson, Ky. Prac. Substantive Crim. L. § 2:11. Intent is inferred "when conduct is certain to cause harm." *Nationwide Mut. Fire Ins. Co. v. Pelgen*, 241 S.W.3d 814, 815 (Ky. App. 2007) (discussing the issue). In Kentucky, extreme wantonness with indifference to the ultimate harm likely to flow from an action is considered equal to intent. *Brown v. Commonwealth,* 174 S.W.3d 421, 425 (Ky. 2005).

The prosecutor here behaved—if not intentionally—then at least wantonly with extreme indifference to the high risk of causing a mistrial. *Cf.*, KRS 501.020(3). The fact the Commonwealth admitted it had doubts whether the prior judges' orders allowed revealing that Reese heard two gunshots and admitted it intentionally *hid* those doubts proves the Commonwealth was indifferent to the risk of a mistrial. The prosecutor's explanation— that he thought the prior orders of three judges forbade only the use of the word "murder" but allowed him to inform the jury Appellant murdered a man in New Mexico—is too strained to be believed and if it is true it demonstrates a wanton *mens rea* equivalent to intent. *Martin v. Commonwealth,* 170 S.W.3d 374, 378 (Ky. 2005).

VOIR DIRE AND JUROR ISSUES

2. Forcing Appellant to trial before a jury paid less than minimum wage denied him due process and a fair and impartial jury.

This issue is not about the jurors' rights. The issue is whether there is any limit to how badly a court system can financially mistreat jurors before it impacts and prejudices

the defendant. This case was decided by 12 people who were subjected to the extreme hardship of working for half a month—nine court days— for less than a subsistence wage. The case of *United States v. Kozminski*, 487 U.S. 931 (1988), does not touch the question presented, whether it violated Appellant's due process and 6th Amendment rights to make him face a jury forced to subsist on $12.50 a day for nine court days over a long half-month period. Kentucky's current practice of automatically excusing all impoverished, low-income jurors *because* of the state's inadequate juror pay is no answer because the practice arguably violates *Batson v. Kentucky*, 476 U.S. 79 (1986). According to SCR 4.300, Kentucky Code of Judicial Conduct, Canon 3, Section B(6), bias or prejudice based on "socioeconomic status" exhibited against "parties, witnesses, counsel, **or others**..." is prohibited. (emphasis added). Appellant urges the Court to grant Appellant a new trial in which the jury is paid at least minimum wage and jurors are not automatically excluded due to their socioeconomic status.

5. The kidnapping statute only required proof that Brady was not released alive.

Kidnapping becomes a capital offense if "the victim is not released alive." KRS 509.040(2). The statute does not use the word "murder"; it uses the more general phrase "not released alive." Thus, to enhance kidnapping to a capital offense, the prosecutor must prove only that the victim was not released alive. Appellant argued that the statutory element to be proved in the guilt phase was not released alive. For the prosecutor to prove murder in the guilt phase would be irrelevant and unduly prejudicial. Brief for Appellant, 31-34.

Previous opinions from this Court favor the Appellant's position. In *St. Clair v. Roark*, this Court held: "the fact that St. Clair was previously convicted and sentenced for Brady's murder does not preclude using the fact of the murder as an aggravating circumstance authorizing imposition of the death penalty for Brady's kidnapping." 10 S.W.3d 482, 487 (Ky. 2000)(overruling *Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989), *Wilson v. Commonwealth*, 836 S.W.2d 872, 890-891 (Ky. 1992), and *Taylor v. Commonwealth*, 821 S.W.2d 72, 77 (Ky. 1990)). Aggravating circumstances that are not necessary to prove guilt must be proved in the capital sentencing phase, not the guilt phase.

This Court reiterated this point in the prior Hardin County opinion. This Court cited *Salinas v. Commonwealth*, 84 S.W.3d 913, 920 (Ky. 2002), to establish that "the fact that the victim was not released alive is not an aggravating circumstance" that authorizes capital punishment. *St. Clair v. Commonwealth*, 174 S.W.3d 474, 483 (Ky. 2005). Rather, it enhances kidnapping to a capital offense. *Id.* Then this Court held that "[i]f 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." This statement implies that the murder instruction should be given in the capital sentencing phase because the details of the murder of Brady would be irrelevant and unduly prejudicial if introduced in the guilt phase.

This Court should reject Appellee's argument because it conflates the guilt phase and capital sentencing phase. If the jury concluded beyond a reasonable doubt that the victim was not released alive in the guilt phase, then in the capital sentencing phase the

prosecutor could offer evidence that the victim was murdered as an aggravator that authorizes the death penalty. To prove murder in the guilt phase when it is not a charged offense enables the prosecutor to prematurely introduce evidence relevant only to the penalty into the guilt phase. Irrelevant evidence of murder was unduly prejudicial.

Appellee argued that the "*manner of death*" was inextricably intertwined with the not released alive element. Brief for Appellee, 16-17; TR XXXII, 4667; emphasis original). While the manner of death should be proved in the capital sentencing phase, the fact of death should be proved in the guilt phase. This could have been done easily: the first police officer on the scene could have testified they found the victim unresponsive; an EMS officer could have testified the victim had no pulse; and the pathologist could have testified the victim was dead.

Irrelevant and unduly prejudicial evidence of the manner of death should have been excluded from the guilt phase. Testimony about the condition of the body such as bruises, cuts, gunshot wounds, and bleeding should have been excluded. Testimony about the position of the body such as whether he was kneeling, or slumped over should have been excluded. Testimony about the cause of death such as the number of gunshots, the paths the bullets took, and the injuries they caused should have been excluded. Reversal is required to omit details like these.

6. The law of the case does not prevent review of Appellant's KRE 404(b) argument.

The law of the case doctrine does not apply to this issue. First, this Court's prior opinion of *St. Clair*, 174 S.W.3d 474, did not specifically analyze this issue. Because that opinion contains no detailed explanation denying relief, the issue is valid. Second, the

law of the case doctrine is a prudential doctrine, not a jurisdictional doctrine. *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010). This Court can choose to exercise discretion to review it.

Third, an intervening change in the law has occurred which warrants addressing the merits of this issue. Since this Court's previous opinion in 2005, this Court has changed how it applies the law to the facts by significantly clarifying the exclusionary nature of KRE 404(b). This exclusionary emphasis has prompted this Court to reverse cases that applied the modus operandi exception too broadly. *Woodlee v. Commonwealth*, 306 S.W.3d 461 (Ky. 2010); *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007); *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky. 2006); *Dickerson v. Commonwealth*, 174 S.W.3d 451, 468-470 (Ky. 2005). This Court has also significantly clarified the meaning of the catch-all phrase "inextricably intertwined." *Major v. Commonwealth*, 177 S.W.3d 700, 707 (Ky. 2005); *Metcalf v. Commonwealth*, 158 S.W.3d 740, 744 (Ky. 2005).

The Court's trend of exclusionary clarification is not limited to the modus operandi and inextricably intertwined exceptions. *Chavies v. Commonwealth*, 374 S.W.3d 313, 321 (Ky. 2012)(evidence of prior marijuana use, possession of pornography, unemployment, and poverty constituted inadmissible character evidence); *Driver v. Commonwealth*, 361 S.W.3d 877 (Ky. 2012)(evidence that a defendant assaulted his former wife was inadmissible in an assault prosecution involving the defendant's current wife); *Dickerson v. Commonwealth*, 174 S.W.3d 451, 464-465 (Ky. 2005)(evidence that defendant was going to shoot a witness, testimony that defendant possessed a shotgun and bullets, and an officer's reference to a sodomy case report was irrelevant and offered only for its prejudicial effect in prosecution of felon in possession of a handgun).

The exclusionary clarification of this Court's KRE 404(b) jurisprudence since the prior opinion supports reversing Appellant's case for a new trial to proceed without the prior bad acts evidence.

7. Mistrial should have been granted due to violations of KRE 401, 402, 403 and 404(b) when 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.

In *Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky. 2006), an admonition cured a reference to Gray's criminal past. But in *Gray*, the defendant "accepted" the admonition. *Id.* St. Clair *refused* the admonition. When—as here—the maximum sentence is imposed, prejudice is presumed. *Blane*, 364 S.W.3d at 153. The Commonwealth has pointed to no evidence **overcoming** the presumption of prejudice from informing St. Clair's jury that before his escape he was already a "max" security risk, that he was already wanted for murder and considered a danger even to his friends. The Commonwealth has failed to suggest a trial strategy for the lack of preservation. Prejudice has not been disproved. Under *Sanders*, relief is mandatory.

8. The prosecutor improperly impeached Appellant by repeatedly referring to his two LWOP sentences.

No inconsistency existed as to Appellant's motive for shooting Trooper Bennett's car. An inconsistency exists when the testimony and the proffered statement yield inconsistent conclusions. *Meece v. Commonwealth*, 348 S.W.3d 627, 673 (Ky. 2011). There must be a material contradiction for there to be an inconsistency:

> With respect to contradiction, . . . "there must of course be a real *inconsistency* between the two assertions of the witness. The purpose is to

> induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true. Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required."

Commonwealth v. Jackson, 281 S.W.2d 891, 895-896 (Ky. 1955)(quoting Wigmore on Evidence, (3rd Ed.) Vol. 3, Section 1040 at 725)(*Jackson* overruled on other grounds by *Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969)).

Appellant's testimony from his 2012 retrial in Hardin County and his testimony at his 2011 resentencing trial in Bullitt County did not lead to inconsistent conclusions because both are true at the same time. In his 2012 Hardin retrial, he testified he intended to disable Trooper Bennett's car; he shot at the radiator to disable the car or to at least get a head start; he was not trying to hit Trooper Bennett; and he wanted to get away from there.[3]

In his 2011 Bullitt testimony[4], he testified that Trooper Bennett activated his lights; Appellant did not want to be arrested and panicked; Appellant shot at the radiator to disable the car; and Appellant had no intention to shoot Trooper Bennett.[5] On redirect in Bullitt County, Appellant said Reese told him that he had a dead body in the truck, and Appellant believed this meant Reese had killed Brady.[6] Then defense counsel asked Appellant if this is what caused him to take the actions he did, and Appellant said "when he said that, I knew for a fact that he killed a man. In my mind, I'm thinking I've got two life without and a life sentence in Oklahoma. And I know that after I escaped, they'd put

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[3] VHR 48, 1/18/12, 2:13:06-2:14:37.
[4] The prosecutor did not submit a transcript of Appellant's 2011 Bullitt testimony. Nor did the prosecutor read a verbatim quote to Appellant to impeach him. Rather, the prosecutor just referenced Appellant's prior testimony and then mentioned the LWOP sentences. The citations in this paragraph are taken from the record in Appellant's Bullitt County appeal, which is currently before this Court in case number 2011-SC-774.
[5] CD3 Trial, 10/27/11, 10:35:30-10:36:15.
[6] CD3 Trial, 10/27/11, 11:48:00.

me in max, McAllister State Prison which is also underground."[7] This was additional information, not inconsistent information.

The codefendant's inconsistency in *Meece* differs substantially. In *Meece*, this Court concluded the witness's "taped statement and her trial testimony lead to totally ***inconsistent*** conclusions." *Meece*, 348 S.W.3d at 674(emphasis added). Here, Appellant's 2011 Bullitt County testimony and 2012 Hardin County testimony lead to totally ***consistent*** conclusions: Appellant shot at the radiator to disable the car so he could get away. His motive for shooting the car was to get away. He said the same thing at both trials. No inconsistency existed. The prosecutor's reference, even just once, to Appellant's LWOP sentences was not relevant because the jury already had a clear – and consistent – understanding of appellant's motive. The prosecutor's badgering and exploitative repetition of LWOP seven times during cross-examination unduly prejudiced Appellant because the prosecutor's use of it ceased to be a good faith attempt to accurately relate evidence and became an improper tool used to bias the jury against Appellant.

9. Excluding relevant evidence of Reese's prior bad acts violated appellant's due process right to present a defense.

While Appellee implies that reverse KRE 404(b) evidence must be identical to the charged crime, Brief for Appellee, 34, the case law does not set such a high standard. To be admissible, reverse 404(b) evidence needs to be similar, not identical:

[7] CD3 Trial, 10/27/11, 11:48:27-11:48:50.

> We recognize that the similarity between the two acts in question (theft of a VCR from the evidence room and theft of money from a crime scene) would not satisfy the high standard of admissibility established for KRE 404(b) evidence offered against an accused. *See Billings v. Commonwealth,* Ky., 843 S.W.2d 890, 893 (1992) (prior acts must be so sufficiently similar to demonstrate a modus operandi). However, as pointed out in the leading case of *United States v. Stevens,* 935 F.2d 1380 (3rd Cir.1991), "a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor."

Blair v. Commonwealth, 144 S.W.3d 801, 810 (Ky. 2004). Appellant's theory of defense was that Reese murdered Brady. The evidence of Reese's murder of Kathy Burns-Emerson—abducting her in her own truck, taking her to a remote area, brutally killing her, leaving her body, and driving off in her truck—was far more similar to the Brady murder than the evidence in *Blair*. The trial court erred by excluding it.

The prejudice, even injustice, inflicted invites relief. The Appellee wrote, "[T]he 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." Brief for Appellee, 33. But the trial court allowed substantial amounts of evidence related to the character, kidnapping, and killing of Tim Keeling. This included new details not previously admitted during Appellant's first trial in Hardin County. In contrast, the trial court did not allow evidence attested to in sworn affidavits by law enforcement officials about the details of the Kathy Burns-Emerson murder that, while not identical, were very similar to the murder of Brady and directly contradicted the testimony of the prosecution's most important witness. This was fundamentally unfair. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); 5th and 14th Amendments, U.S. Constitution. Reversal is required.

10. Lisa Hill's testimony should not have been admitted.

Appellant asserts his *pro se* pleading to prohibit the jury from learning of Tim Keeling's death and his new trial motion preserved this issue.[8] The trial court approved Appellant as co-counsel, and his words preserving this issue must be considered effective. "*Pro se* pleadings are not held to the same standard as those prepared by an attorney." *Jackson v. Commonwealth*, 319 S.W.3d 347, 350 (Ky. 2010)(citing *Case v. Commonwealth,* 467 S.W.2d 367, 368 (Ky. 1971)("Frequently rules are construed liberally in his favor.")). If Appellant objected to the jury learning of Tim Keeling's death, it stands to reason that this objection included the victim impact evidence challenged in this issue.

Even if this Court disagrees, Appellant respectfully requests this Court review the substance of the issue. *Sanders*, 801 S.W.2d at 668. No reasonable explanation exists for failing to object to Lisa Hill's testimony. Her testimony benefited Appellant in no way, and the prosecutor solicited it to prejudice Appellant. This evocative testimony endeared Lisa Hill and her slain husband to the jury and contributed to Appellant's conviction and death sentence. Reversal is required.

12. Reversal is required due to violation of law of the case in *Hardin I* regarding marital communications.

At the single point in *Hardin I* where this Court describes "statement one" by Appellant to his wife this Court includes the nonverbal as well as the verbal components of St. Clair's marital communication:

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[8] Brief for Appellant, 55-61(Issue 10); TR XXXV, 5145; TR XXXIX, 5690-5691; attached at Tab 10 of the Brief for Appellant.

> The first contested statement given by Bylynn was that when she met St. Clair in Texas before St. Clair reached Kentucky, she hugged him and felt something hard on his belt. Over St. Clair's objection, she testified that when she asked if he had a gun, she testified that he, St. Clair, told her he took a gun off that old man whose house he had broken into (the home of Vernon Stephens in Oklahoma).

St. Clair v. Commonwealth, 174 S.W.3d 474, 477 (Ky. 2005) (*Hardin I*). By hugging his wife, St. Clair revealed to her that he was carrying a gun. This Court was well aware in 2005 that the marital privilege protects nonverbal communications. *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997) (describing Kentucky's 100 year history of including nonverbal communications within the marital communications privilege). Failure to conduct a hearing prior to retrial to determine whether Reese "overheard" any part of this communication violated Appellant's marital privilege and law of the case in *Hardin I*. Introduction of the nonverbal portion of the communication violated Appellant's marital privilege, law of the case, and due process.

14. The evidence supported a jury instruction on facilitation to kidnapping.

First, Appellee quoted *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013), at length to establish the standard of review as a reasonable juror standard. Brief for Appellee, 45-46. Appellant argued that the jury could have found reasonable doubt as to kidnapping but could also have reasonably found him guilty of facilitation to kidnapping. Brief for Appellant, 77-79. This analysis satisfied the reasonable juror standard of review as reiterated in *Springfield*.

Second, Appellee failed to respond to, much less refute, Appellant's analysis. Instead, the Appellee merely recounted the argument of the prosecutor below and the judge's ruling. Brief for Appellee, 46-47. These conclusory statements failed to address

cases cited by Appellant, particularly *Hall v. Commonwealth*, 337 S.W.3d 595, 610-611 (Ky. 2011) and *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995), and the application of those cases to Appellant's facts. Reversal is required.

15. Improper, excessively detailed evidence regarding prior convictions violated *Mullikan* and due process.

Appellant disagrees with the Commonwealth's assertion that "the present issue was presented in St. Clair's prior appeal in this case…" and that "this Court's opinion in *St. Clair v. Commonwealth*, 174 S.W.3d 474, 485 (Ky. 2005) (*Hardin I*), expressly rejected this claim." *See* Brief for Appellee, 49. The issue regarding *Mullikan* was never raised in *Hardin I*. That means this Court did not address it then. While this issue was somewhat raised and addressed in *Bullitt I*, the law was changed by *Mullikan*. Further, the "nature of the offense" evidence introduced in the current case was far more egregious and prejudicial than what was deemed not to be error in *Bullitt I*. *See* comparison of *Bullitt I* evidence versus present case evidence in Appellant's Brief at 80-83. Indeed, the only information introduced in *Bullitt I* that would run afoul of the *Mullikan* rule is the introduction of the names of the victims. In contrast, the Commonwealth in the present case presented all of the following inadmissible evidence:

> 1. Appellant hired Kelsey to kill his uncle, Ronnie.
> 2. Ronnie was killed with about nine or ten shots to his upper torso and head with a 0.22 rifle.
> 3. Ronnie's body was found next to his car on a winding country road in Durant, Oklahoma.
> 4. The next night, Kelsey's body was found next to his still-running pickup truck. He was shot in the face and head several times.
> 5. About twelve years earlier, appellant and Ronnie were implicated in the shootings of Ed Large and Mary Smith.

6. Apparently, a few years before the Large and Smith shootings, Appellant's brother had been paralyzed during a shootout between the St. Clair and Large families.
7. Appellant and Ronnie shot Ed Large to avenge appellant's brother.
8. According to the Commonwealth, there was no motive for appellant and Ronnie shooting Mary Smith other than she was in the back of Large's truck and witnessed Ed Large's shooting.
9. Appellant did testify that Smith had stabbed his aunt as part of the feud.
10. The Commonwealth also elicited testimony that Ronnie would have been a witness against appellant in the Large and Smith killings before Ronnie's death, similar to how Kelsey would have been a witness against appellant in Ronnie's death before Kelsey's death.
11. The Commonwealth argued that appellant was a dangerous man who murdered with accomplices, then murdered the accomplices.
12. Appellant was also the type of man that made Mary Smith watch Ed Large's shooting before shooting her.

See Appellant's Brief at 80-81.

Even if this Court believes that the issues addressed in the Bullitt cases are somehow law of the case in the Hardin cases, the Commonwealth's own citations provide for an exception that applies to the current case. *Mullikan v. Commonwealth*, 341 S.W.3d 99 (Ky. 2011), was decided **after** this Court's reversal in *St. Clair Hardin I* (*St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky. 2005)) and *Bullitt I* (*St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004)). Thus, this Court's new "bright line rule" regarding the "nature of the offense" changed after *Hardin I* and *Bullitt I*. Accordingly, and as correctly conceded by Appellee, this Court "is not bound by the [case of the law] doctrine, for example, where there has been an intervening change in the law..." and "may deviate from the doctrine if its previous decision was "clearly erroneous and would work a manifest injustice." *See* Brief for Appellee, 51 (internal citations omitted).

This Court, in dealing with unpreserved *Mullikan*-type errors, has found manifest

injustice and reversed for new sentencing. *See, for example, Webb v. Commonwealth*, 387 S.W.3d 319, 330 (Ky. 2012) (manifest injustice for Commonwealth to introduce "highly prejudicial information concerning the victims of the prior crimes" and a failure of this Court to correct the error "would seriously affect the fairness, integrity, and public reputation of the judicial proceeding.").

At a minimum, this error requires a new sentencing.

16. Denial of directed verdict on the prior capital conviction aggravator.

Appellant's reply brief in *Hardin I* was filed on August 29, 2003. It was six months later in February 2004 that this Court *sua sponte* overruled *Thompson v. Commonwealth*, 862 S.W.2d 871, 877 (Ky. 1993) and retroactively applied that overruling in his second Bullitt appeal, *Bullitt II*, and shortly thereafter in *Hardin I*. Appellant has never been given a fair opportunity to brief or argue this issue. Applying law-of-the-case to this issue would deprive Appellant of notice and opportunity to contest the basis upon which Kentucky proposes to deprive him of his life in violation of due process:

> The requirements of procedural due process ...are intended to " 'minimize substantively unfair or mistaken deprivations of' life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests." *Carey v. Piphus,* 435 U.S. 247, 259–60, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (*quoting Fuentes v. Shevin,* 407 U.S. 67, 81, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)).

TECO Mechanical Contractor, Inc. v. Commonwealth, 366 S.W.3d 386, 393 (Ky. 2012).

The law of the case doctrine does not apply to the sudden retroactive application of the sudden overruling of *Thompson* in *Bullitt II* and *Hardin I*, an issue that was not raised in either appeal because no one could have anticipated the court would rule on it. Matters that were not raised on appeal may be precluded by law-of-the-case, but only if they

should have been raised on appeal:

> "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." C.J.S. *Appeal & Error* § 991 (2008).

Scrushy v. Tucker, 70 So. 3d 289, 303-04 (Ala. 2011); *see also Kortum v. Johnson,* 786 N.W.2d 702, 705 (N.D.2010) and *Judy v. Martin,* 674 S.E.2d 151, 153 (S.C. 2009). The *ex post facto* objection to suddenly changing the law and applying it retroactively is not an issue that *should have been raised* in *Bullitt II* or *Hardin I.*

This Court suddenly created the *Thompson* issue in *Bullitt II,* causing a big "change" in controlling law too late for briefing in *Hardin I.* This Court should not allow the law of the case doctrine to bar the issue in the instant appeal because the controlling law did not change and the issue did not become ripe until the moment of the *Bullitt II* opinion:

> the law of the case doctrine does not apply where controlling law changes in the interim, and the issue is not ripe until the change in controlling law occurs....

Estep v. Commonwealth, 64 S.W.3d 805, 812 (Ky. 2002).

Law of the case applies only to those who have "had their day in court" on the issue:

> [Law of the case] applies only against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. Among reasons assigned for application of the policy are: ... and the essential fairness to both parties, of **affording a single opportunity for the argument** and decision of matter at issue."

LeCourt v. Galatas, 522 So. 2d 665, 667-68 (La. Ct. App. 1988) (footnotes and citations omitted) (emphasis added). Appellant was a party to the case when *Bullitt II* and *Hardin I* were rendered. But he has never had his day in court on the issue, because he has never

been afforded a "single opportunity for argument."

This Court should reconsider and reverse itself on this issue because the sudden retroactive application of the sudden *Thompson* reversal was "clearly erroneous and [worked] a manifest injustice'" by violating the principle of *ex post facto*. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983) *decision supplemented,* 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984)); see also, *Holloway v. Brush*, 220 F.3d 767, 785 (6th Cir. 2000). This Court can and should correct its judicial error in *Bullitt II* and *Hardin I* despite law of the case:

> "The law of the case doctrine is not, however, a barrier to correction of judicial error. It is a rule of convenience and utility and yields to adequate reason, for the predecessor judge could always have reconsidered his initial decision so long as the case remained in his court."

Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983) (citations omitted).

17. Instructing the jury it could select death based on finding the victim was not released alive violated law of the case in *Hardin I.*

This Court in *Hardin I* reinstated the requirement that murder of the victim must be proved in order to sustain a death sentence for capital kidnap. Defense counsel tendered instructions that omitted victim-not-released-alive as an aggravator.[9] Acting as official court-approved co-counsel, Appellant raised an oral *pro se* objection that "**the Kentucky Supreme Court in their last decision made murder an element of kidnap.**"[10] Unless *pro se* objections are to be considered nugatory, this issue must be

[9] Defendant's Proposed Instructions, Instruction #12, at Tab 12 to the Brief for Appellant.
[10] VHR 6, 8/28/08, 2:29:37.

considered preserved.

Even under *Sanders* there is no possible trial strategy for failure to insist on proof that St. Clair personally committed the murder of Frank Brady. Murder would have been harder for the Commonwealth to establish than mere proof that Brady was not released alive. Appellant received the maximum sentence. It must be presumed he was prejudiced when the Commonwealth was allowed to obtain a death sentence on lesser proof.

18. Instructing the jury that it could select death based on victim-not-released-alive violated the due process rule of lenity.

All three aggravating circumstances are invalid. Aggravator One, victim not released alive, is invalid under this Court's opinion in *Hardin I.* The invalidity of Aggravator Two, Appellant's prior record of conviction for capital murder, is set out in Issue #16, above. Aggravator Three, kidnap committed during a robbery, is invalid because the Eighth Amendment prohibits the death penalty for a crime that did not result, and was not intended to result, in the death of the victim. *Kennedy v. Louisiana*, 554 U.S. 407 (2008), *mod. on den. of reh'g,* 554 U.S. 945 (2008). Because at least one aggravator was invalid, Appellant's death sentence is a non-unanimous verdict. Appellee's argument that "it was clear that the jury necessarily found that St. Clair had intentionally kidnapped and killed Brady" is an invitation to this Court to re-weigh the evidence. This entire case has always been Reese's word against St. Clair's. The evidence of St. Clair's guilt has never been "overwhelming."

19. Instructing the jury they could recommend death based on finding the victim was not released alive violated the "fair warning" aspect of due process.

The jury did not "necessarily [find] that St. Clair intentionally kidnapped and killed Brady." None of the aggravating circumstances were valid. The case was Reese's word against Appellant's. There was no "overwhelming" evidence of Appellant's guilt.

21. All three aggravating circumstances are invalid; this death sentence lacks unanimity under the Kentucky Constitution.

All three aggravators are invalid. This Court invalidated the victim-not-released-alive aggravator in *Hardin I*. The robbery/kidnap aggravator is invalid because robbery cannot support a death sentence. *Cf., Kennedy v. Louisiana*, *supra*. As argued above the use of St. Clair's non-final capital priors in aggravation is invalid because it violates *ex post facto* and the fair notice requirement of procedural due process. *Fuentes v. Shevin, supra*; *Bouie v. City of Columbia,* 378 U.S. 347, 354–55 (1964).

If all the aggravators had been valid and supported by the evidence, there might not have been a unanimity violation. *Cf., Hudson v. Commonwealth,* 979 S.W.2d 106 (Ky. 1998). But here all three aggravators were clearly invalid. If even one was invalid, unanimity was clearly violated. This death sentence cannot stand.

Bevins v. Commonwealth, 712 S.W.2d 932 (Ky. 1986), and *Zant v. Stephens*, 456 U.S. 410 (1982) (remanding to the Georgia Supreme Court for an explanation), are distinguishable.[11] In *Zant v. Stephens*, 462 U.S. 862 (1983), after remand, the Court accepted Georgia's "state-law premises" for upholding death despite the failure of one aggravator. But Kentucky's "state-law premises" are quite different. Kentucky's

[11] *Simmons v. Commonwealth*, 746 S.W.2d 393, 398 (Ky. 1988), also cited by Appellee, is irrelevant because in *Simmons* none of the aggravator were invalid.

Constitution Section 7 guarantees a unanimous decision by 12 jurors. *See, e.g., Wells v. Commonwealth,* 561 S.W.2d 85, 87 (Ky. 1978). There was no similar unanimity guarantee under the law of Georgia.

In *Zant*, death was also upheld because all the evidence submitted to establish the invalid aggravator was admissible *aside from* its relevance as an aggravator. *Zant v. Stephens*, 462 U.S. at 863. By contrast, Appellant's non-final prior convictions were inadmissible in sentencing as well as being invalid as aggravators. A prior conviction cannot be introduced during a penalty phase under KRS 532.055 unless the time for appealing the conviction has expired or appeal has been taken and the conviction has been affirmed. *Cook v. Commonwealth,* 129 S.W.3d 351, 365 (Ky. 2004), citing, *Melson v. Commonwealth,* 772 S.W.2d 631, 633 (Ky. 1989). The overruling of *Thompson* did not affect the KRS 532.055 prohibition against introducing non-final convictions during the penalty phase.

25. Unclear instructions arguably requiring a unanimous jury verdict on mitigation violated the 8th and 14th Amendments.

Appellee has waived opposition to this issue by failing to address it and thus conceded Appellant's right to a new sentencing trial. *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 554 (Ky. 2008); *Harris Bros. Constr. v. Crider,* 497 S.W.2d 731, 733 (Ky. 1973).

28. Under current evolving standards of decency Kentucky's death penalty violates the 8th Amendment.

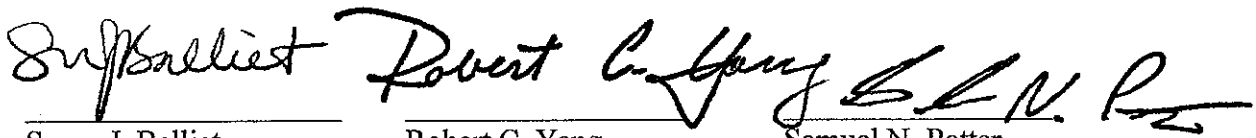
Appellee has waived opposition to this argument apart from arguing that it is "not a judicial argument." Appellee is wrong. This is precisely the sort of judicial argument

the United States Supreme Court relied on in *Atkins v. Virginia*, 536 U.S. 304 (2002), in abolishing the death penalty for the intellectually disabled, precisely the sort of judicial argument relied on in *Roper v. Simmons*, 543 U.S. 551, 564 (2005), in rejecting the juvenile death penalty, and precisely the sort of judicial argument relied on by the Missouri Supreme Court when it claimed the distinction of determining first **at the state level** that the national standards had changed, that "the evolving national consensus bars the imposition of the death penalty on juveniles ...." *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 407 (Mo. 2003) *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005). By failing to address this issue, Appellee concedes that the evolving national consensus now bars the death penalty. *See, American General Home Equity, Inc. v. Kestel, and Harris Bros. Constr. v. Crider, supra.* This Court should follow the example of Missouri and hold that under the 8th Amendment the national consensus in 2014 bars the imposition of the death penalty.

Conclusion

Appellant Michael Dale St. Clair's conviction should be vacated and his death sentence reversed and dismissed with prejudice. In the alternative both a new guilt phase and a new sentencing phase are required. In any retrial, the Commonwealth should be barred from seeking the death penalty.

Respectfully submitted,



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