

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
RESPONDENT,)	
)	
vs.)	No. SC84452
)	
CECIL L. BARRINER,)	
)	
APPELLANT.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WARREN COUNTY
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE EDWARD D. HODGE, JUDGE**

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

On December 27, 2000, this Court reversed Cecil L. Barriner's convictions, vacated his sentences of death, and remanded for a new trial. *State v. Barriner*, 34 S.W.3d 139 (Mo.banc 2000). On retrial, a Warren County jury convicted Cecil of two counts of first

degree murder, §565.020, RSMo. 1994, and assessed sentences of death.¹ The trial court, the Honorable Edward D. Hodge, imposed sentences of death. This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

In December, 2000, this Court reversed Cecil Barriner's convictions for the murders of Irene and Candi Sisk holding that the trial court abused its discretion in admitting and allowing the state to present to the jury evidence of Cecil's sexual relations with his former girlfriend Shirley Niswonger (Candi's mother), his collection of sex toys, magazines, and home-made sex videos; and his threats to Shirley's son.² Finding prejudice--in that despite a strong state's case it could not be said that the evidence "did not contribute to the jury's verdict"--the Court ordered a new trial.³

Shortly before retrial, Prosecutor Bock gave an interview about the case to a reporter for the St. Louis Post-Dispatch. The day before retrial began, the Post published Prosecutor Bock's comments in a story about the case.⁴ After recounting this Court's reversal of Cecil's convictions and death sentences because the jury heard inadmissible evidence of his sexual activities and his threat to kill someone, the article revealed

¹ Statutory references are to RSMo 1994 unless otherwise noted.

² *State v. Barriner*, 34 S.W.3d 139 (Mo.banc 2000).

³ *Id.* at 149-52.

⁴ A2; Prosecutor Bock was the only attorney who served at both trials.

inadmissible information from a case that had been dismissed: that Cecil had been charged in an unrelated murder.⁵

Defense counsel found the article in newspapers at two different locations when she arrived in Warren County the night before the trial.⁶ The following morning, before voir dire began, counsel alerted the trial court that the article appeared in the newspaper and on the internet.^{7,8}

Warren County readers learned Cecil had "received the death sentence for the stabbing deaths of two women in New Madrid County in 1996."⁹ They learned this Court "overturned" Cecil's conviction and ordered a new trial--that would take place in

⁵ A2.

⁶ T5.

⁷ T2-3. Appellant will cite to the Record as follows: T=Trial Transcript; MT=Supplemental Trial Transcript (Motions hearing, pretrial); ST=Sentencing Transcript; LF=Legal File; PrevT=Transcript of First Trial; PrevLF=Legal File from First Trial; A_=Appendix to this Brief.

⁸ The article appeared at the top of page 6 of the "Metro" section beneath this headline:

Retrial is set for Monday in killing of 2

Font size here is slightly smaller than the actual headline in the newspaper. *See* Appendix, A2, for the actual headline.

⁹ T3,A2.

Warrenton--because the jury saw and heard inadmissible evidence: a videotape showing sexual bondage between Barriner and the younger victim's mother and her testimony "that Barriner had threatened to kill one of her children."¹⁰ The article advised:

Barriner, who was using methamphetamine, apparently feared he was going to fail a drug test and violate his probation from another case, said New Madrid County prosecutor H. Riley Bock...

[Shirley] Niswonger was in prison on a drug charge at the time, Bock said, and Barriner, seeking money, drove to the Sisks' home. Bock said Barriner had taken them to a bank where they wrote a check for him. He then took them home, tied them up, tortured them, and murdered them, Bock said.

The grandmother was stabbed 17 times in the chest. Candace¹¹ Sisk was stabbed several times in her neck and sexually assaulted after her death, Bock said.

"It is an unbelievably brutal crime," he said.¹²

The article reported Cecil "was charged" in an unrelated murder case:

¹⁰ T3-4, A2.

¹¹ Appellant will use "Candi" as this spelling appears most frequently in the record; appellant will refer to Irene Sisk as "Irene." Throughout his brief, appellant may use only the first names of other witnesses; appellant does so for clarity and to avoid confusion and intends no disrespect.

¹² T4, A2.

In 1997, Barriner was charged in Butler County with the stabbing death of Maggie Jean Moore, 32, in December 1994. After Barriner was found guilty in the double homicide case, prosecutors dismissed the Moore case, but they may file it again depending on what happens in Warren County.¹³

Counsel argued the prosecutor's statements to the press violated "the ethical rules as they apply to lawyers handling cases" and cited Missouri Supreme Court Rule 4-3.6(b)(5)¹⁴ prohibiting lawyers from "releas[ing] information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create substantial risk of prejudicing an impartial trial." "This article lists virtually every issue that could possibly have been deemed inadmissible."¹⁵

Acknowledging "some of the matters" in the article "were addressed in the appellate decision" and available to anyone, counsel pointed out that "there are quotes from Mr. Bock relating to other matters not mentioned in that opinion and which, I believe, were deliberately designed to inflame this jury panel."¹⁶ Counsel said when she asked Mr. Bock about the article that morning, he first said, "Well, it's all a matter of public record anyway." Then he said "he tried to get the reporter to run the article at a later date"

¹³ T4, A2.

¹⁴ See Appendix: A1.

¹⁵ T5.

¹⁶ T5-6.

tacitly admitting that he did make the statements.¹⁷

Defense counsel moved to dismiss the charges "with prejudice" based on the prosecutor's "ethical misconduct." Assistant Attorney General Smith objected to dismissing the charges and denied "any ethical violations or misconduct" claiming "[a]nything in that article is clearly a matter of public record." AAG Smith did not specifically address the dismissal or nolle prosequi of the Butler County murder charges.¹⁸ The court refused to dismiss.¹⁹

The trial court refused defense counsel's request that the court "[inquire]²⁰ of Prosecutor Bock what statements he made to the press and when [he] made them" because this was relevant to know whether the prosecutor acted deliberately. The court refused and said defense counsel could ask the jurors whether they had seen the article and might be affected by it.²¹

Noting the Post was the paper that venire members who subscribed to a daily paper would receive, defense counsel moved for a continuance and a change of venue. In the alternative, counsel proposed "we go to another county to select this jury." The court

¹⁷ T6. Bock never denied speaking to the reporter or making the quoted statements.

¹⁸ T6-7.

¹⁹ T6-7.

²⁰ Although the transcript uses the word "require," based on the context, the correct word here would appear to be "inquire."

²¹ T7-8.

denied both motions.²²

The trial court commenced voir dire by questioning small panels, before general voir dire, as to hardship, publicity and death qualification.²³ The trial court did not give the venire any instructions, information, or admonishments before the first panel of 18 potential jurors was questioned.²⁴

Jurors on each panel were asked if they had read, heard, or seen something about the case; approximately 31 jurors knew something about the case as a result of reading the newspaper article or hearing about the article.²⁵

Prosecutor Bock asked the fourth small panel if "anyone ha[d] heard anything, or read anything or seen anything on the Internet about this case?"²⁶ Only jurors Hunt, Davolt, Rauh, Rogers, Difani, and Layton responded.²⁷

During defense voir dire of panel four, juror Difani said he heard something about the case while in the waiting room.²⁸ Subsequently, juror Schnaath said he, too, heard

²² T8-10.

²³ T9.

²⁴ T286-92.

²⁵ *E.g.*, T24-28,30-32,112-26,192-94,262-97,273-74,282,286-91,366-79,496-97.

²⁶ T262.

²⁷ T263-67.

²⁸ T273.

something in the waiting room.²⁹ "Somebody just--basically, word for word [restated] what they read."³⁰

The court then allowed defense counsel to specifically ask the panel if any of them had heard anything about the case at the courthouse from another juror.³¹ For the first time, Jurors Woodson, Thomas, Harrelson, Scott, Orf, Schwarzen, and Simpson admitted they heard other jurors discussing the case in the jury waiting room.³²

Ms. Thomas did not respond initially to Prosecutor Bock's question. In response to defense counsel's inquiry, Ms. Thomas said although she wasn't "right by it" she could hear another juror talking about the case. Based on what she heard, Ms. Thomas formed an opinion that she could not set aside.³³

Defense counsel moved to quash the "entire [fourth] panel based on the fact that they were discussing this case or discussing what one particular juror had read."³⁴ The trial court denied that motion.³⁵ Counsel asked to "voir dire individually each of the

²⁹ T274.

³⁰ T282.

³¹ T286.

³² T286-92.

³³ T287.

³⁴ T292.

³⁵ T295,298.

jurors who have indicated they have heard something.³⁶ The court denied that motion and denied it a second time when it was renewed.³⁷ The defense included the trial court's rulings on the defense motions regarding publicity--those concerning the prosecutor's misconduct in speaking about the case and the various motions concerning voir dire and the jurors--in the motion for new trial.³⁸

The evidence adduced at trial showed the following:³⁹

On Sunday afternoon, December 15, 1996, Candi Sisk, her grandmother Irene Sisk, her Aunt Debbie Dubois, Candi's boyfriend Jeremy Bennett, and Jeremy's mother were at the Sisk home, south of Tallapoosa, where Candi was recovering from back surgery.

³⁶ T295.

³⁷ T295,300.

³⁸ LF231-33,237-40.

³⁹ When appellant challenges the sufficiency of the evidence, the Court views the evidence in the light most favorable to the verdict. *State v. Anderson*, 79 S.W.3d 420,433 (Mo.banc2002). Because appellant here is not challenging the sufficiency of the evidence but whether the trial court abused its discretion in its rulings, the appellate court must consider evidence beyond that favorable to the verdict. *See, e.g., State v. Bowles*, 23 S.W.3d 775,781 (Mo.App.W.D.2000). Appellant therefore will present all evidence necessary--regardless of source--to provide a complete picture of the facts leading to the charges and convictions against appellant and relevant to the points raised on appeal.

They left the hospital in Cape Girardeau in the early afternoon and arrived at the Sisk house "around 3:00, 3:30." Candi rode in the Bennetts' car, and Debbie and Irene went in Debbie's car.⁴⁰

After settling Candi, Debbie drove to Malden, a nearby town, for supplies. Returning, Debbie found the Bennetts had brought dinner to the Sisk house.⁴¹ The Bennetts, the Sisks, and Debbie ate dinner at the Sisks' house; Debbie stayed there "for a good long while."⁴²

Debbie remained with Candi into the evening. Debbie's and the Bennetts' cars were at the Sisk house. It was dark when the Bennetts and Debbie left the Sisks. The Christmas lights were not on and the yard was dark.⁴³

That same Sunday, at about 4:00 p.m., Cecil Barriner drove his mother's white Ford Taurus to Malden to visit Samantha and Daniel Simmons.⁴⁴ Saying someone owed him money, Cecil left at about 4:30 to go to Tallapoosa. Sometime later, between 5:00 and 5:30 p.m., possibly as late as 6:00 p.m., Cecil returned saying "the people" weren't home.⁴⁵

⁴⁰ T559,562-66.

⁴¹ T567.

⁴² T567, 591.

⁴³ 590-92.

⁴⁴ T633-35.

⁴⁵ T637,649.

Samantha and Daniel went with Cecil to a gas station to check his tires then drove with him to Tallapoosa. It was dark when they left Malden and reached Tallapoosa.⁴⁶

Cecil drove past a house twice, and the second time said "the note was still on the door that he left." Samantha identified a photograph of the Sisk home as the house with the note. She said the Christmas lights were on outside the house when they drove by with Cecil but no lights were on inside the house. There were no cars at the house.⁴⁷

Cecil never said the people at that house owed him money. "He just pointed and said, "There's the note on the door." Samantha testified that she could see a yellow note on a side door; she also acknowledged that a bush concealed the side door. Samantha and Daniel arrived back home at about 8:00 p.m.⁴⁸

A day or two later, while at her father's house Samantha heard on the 10:00 p.m. nightly news that "they" were "looking for a clean-cut man in a white Ford Taurus" in the Tallapoosa area. That night, Samantha, her sister, and Daniel drove back to the Sisks' house and saw the yellow tape around it. The next morning they spoke to the Dexter Police.⁴⁹

On cross-examination, Samantha said she was not working in December of 1996 and could not remember if Daniel was working; there were times when he was not

⁴⁶ T639.

⁴⁷ T640,656.

⁴⁸ T652-53.

⁴⁹ T644-46,657.

working.⁵⁰ She remembered that in Tallapoosa, Cecil pointed out a house and said it was where "Junior Deprow" lived.⁵¹

Samantha thought, but was not sure, that the first news she had of the Sisk murders was the 10:00 news broadcast she heard at her father's house on the Wednesday night following the murders. She thought she saw something in the paper but not until after the news broadcast.⁵²

When defense counsel attempted to ask Samantha if she "was aware" or "heard" about a newspaper article "talking about this case and offering a reward," the state objected. The trial court sustained the objections, and the defense included this ruling in the motion for new trial.⁵³

The next day, Monday, December 16th, Sarah Walker left her house to drive to school at about 8:00 a.m. She noticed a mid-size white car driving very slowly down the road drove past the Sisk house. Sarah did not recognize the car as one she knew from the area.⁵⁴

The driver had a dark complexion and was alone. Sarah was not sure that he was

⁵⁰ T646.

⁵¹ T651.

⁵² T57,658.

⁵³ T658;LF246-47.

⁵⁴ T669-70.

Caucasian.⁵⁵

Sometime that morning, Candi called Debbie at work at the Risco High School because Irene had said there was a man at the entrance to the carport who was acting strange. Candi said the man told Irene that he had a Christmas present for Candi from her mother in prison--or in jail. The man also told Irene he had been in Tallapoosa on Sunday asking people where she and Candi lived. Candi was scared because she knew her mother was angry that Candi had refused to give her money. Irene did not know the man; Candi did not see him, but she did see his car: a white Ford Taurus. Debbie told Candi to call immediately if the man returned.⁵⁶

Shortly after 9:00 a.m. that Monday morning, Farmers State Bank teller Christy Evans--who had known Candi her entire life--waited on "Candi and Cecil" at the bank's drive-through window. Cecil was driving; the driver's side was facing Christy's window. She believed it was "Cecil's car" and was either a Ford Taurus or Ford Sable. At that time she did not know who Cecil was; Candi was in the front passenger seat and a person she could not identify was in the back seat.⁵⁷

Cecil put in a check for \$1,000 signed by Candi. It was not unusual for Candi to withdraw that amount of money; she had withdrawn a similar amount about two weeks earlier. Cecil asked to receive the cash in "hundreds" but for one hundred in "twenties."

⁵⁵ T671,673.

⁵⁶ T571-73.

⁵⁷ T707-11.

Candi signed a "cash-out" receipt but did not say anything. She was wearing night clothes and had a blanket covered her legs.⁵⁸ During a recess following Christy's direct examination, because she had consistently referred to Cecil by name, the defense attorneys and AAG Smith interviewed her to see if she had ever made an identification of Cecil. Christy told the attorneys that the police had shown her photographs of Cecil. Because the defense was never given discovery reflecting that Christy had been shown photographs or made a photo identification of Cecil, defense counsel asked for a continuance to allow time to take Officer Stephen Hinesly's deposition to ask him if he had ever shown any photographs to anyone and whether anyone had made an identification based on the photos. The trial court denied this motion. The defense then requested that the testimony of the witness be excluded and the jury instructed to disregard it. The judge denied that motion and a final request for a mistrial.⁵⁹

Later that morning Debbie called both phone lines at the Sisk house. No one picked up the phone, and the answering machine did not answer. Debbie, worried, called the Bennetts then drove to the Sisk house. She went inside and found Candi's body on her bed with a knife in her chest. Across the hall, Debbie found Irene's body on her bedroom floor next to the bed.⁶⁰

A pathologist, Dr. Zaricor, testified Candi died from blood loss resulting from stab

⁵⁸ T711-12,731.

⁵⁹ T718-25.

⁶⁰ T574-79.

wounds to her carotid artery and jugular veins. Candi had a possible bite mark on her left breast. She received vaginal and rectal injuries close to the time of her death.⁶¹ Irene received numerous stab wounds to her chest; the amount of blood from those injuries that accumulated around her lung indicated she lived from fifteen minutes to an hour after receiving those wounds before dying. Irene's death was caused by blood loss from cuts to her throat and arteries.⁶²

The living room phone was gone, so Debbie drove to a nearby store for help. Officers from Tallapoosa, Risco, New Madrid County, and the Missouri State Highway Patrol responded. They secured, documented, and investigated the crime scene and seized evidence from the Sisk house and, eventually, Cecil's residence.⁶³

Highway Patrol Officer Stephen Hinesly learned that Candi's mother, Shirley, had had a relationship with Cecil and that Cecil had been to the Sisk residence.⁶⁴ Officer Hinesly's investigation led him to Poplar Bluff and to a white Ford Taurus at Cecil's parents' house. The Barriners' car matched the description of the car seen at the Risco Bank.⁶⁵

Hinesly asked Cecil, who was living at his brother's house in Poplar Bluff, to go to

⁶¹ T1060-67.

⁶² T1075-82.

⁶³ T605-10,611-20,767-72,775-893.

⁶⁴ T1085-86.

⁶⁵ T1086-93.

the Highway Patrol Headquarters for an interview, and he agreed. Hinesly advised Cecil of his rights, and Cecil told Hinesly that he knew the Sisks, that he had been to their house with Shirley when she went there to borrow money from them.⁶⁶

Hinesly asked Cecil if he had killed the Sisks and he said no. When Hinesly asked Cecil where he had been on Sunday and Monday, Cecil said he spent Sunday night at the Tower Motel in Poplar Bluff having sex with Danny Moore's sister Debbie. At 8:00 the next morning--Monday--he borrowed his mother's car, drove from Poplar Bluff to Dexter, back to Poplar Bluff, then to Sikeston, then to Cape Girardeau, and returned to Poplar Bluff by noon.⁶⁷

Hinesly told Cecil it was impossible to cover that territory in 3½ hours. Cecil was reluctant to "snitch anybody out" but finally said he got his parents' car Monday morning at 7:00-7:30 and went to see his friend Kevin. Kevin was not there, so Cecil "drove around." When Kevin returned, Cecil bought \$25 worth of drugs from Kevin and "did the drugs there." Cecil put up some sheetrock for Kevin and was home before noon.⁶⁸

Hinesly called Kevin saying he "was investigating a homicide, and ... the whereabouts... [of] Cecil Barriner." Hinesly gave Kevin a chance to get rid of any drugs. Kevin denied selling drugs to Cecil on the Monday morning in question. Kevin

⁶⁶ T1092-96.

⁶⁷ T1098-1100.

⁶⁸ T1101-02.

said Cecil's visit was Monday at 5:00 or 6:00 p.m. Cecil brought Kevin a VCR he said he found in the trash for Kevin to use in his TV-VCR repair business. Hinesly looked at the VCR's; they did not match the one missing from the Sisks'.⁶⁹

Hinesly told Cecil what Kevin said, and Cecil wasn't surprised--"he didn't think anybody would voluntarily tell a police officer if they were doing drugs with him." Cecil again said he did not kill Irene and Candi. He said that if Hinesly kept doing his job, he would learn that Cecil did not kill those ladies.⁷⁰

Cecil remained in the Butler County jail while Hinesly continued to receive information about the case. Hinesly learned Cecil had checked into the Tower Motel--where everyone pays cash--on Monday afternoon. Samantha and Daniel Simmons told Hinesly that Cecil had driven a white Ford past the Sisk house several times on Sunday evening. Hinesly learned the results of the searches of the Barriner's car and of Cecil's residence.⁷¹

With this information, Hinesly re-interrogated Cecil. The interrogation began about 9:00 p.m. on the 19th with Hinesly stating he knew Cecil killed the Sisks and wanted to know why.⁷²

Hinesly had never audio-taped or video-taped an interrogation and did not tape this

⁶⁹ T1102-03,1126-28.

⁷⁰ T1104,1128.

⁷¹ MT100-01;T1104-07,1125,1129-30.

⁷² MT102,T1107,1129-30.

one.⁷³ Hinesly said he read Cecil his "rights" and Cecil understood them. Cecil did not sign the Butler County "Waiver of rights" form and did not put his statement in writing. Hinesly wrote on the form: "Refused to sign."⁷⁴

Hinesly's interrogation of Cecil continued for several hours.⁷⁵ It took place in a small room; both Hinesly and Deputy Johnston--who was also in the room--wore weapons that were visible to Cecil.

During the interrogation, Cecil began acting weird. His eyes rolled up into his head. "He was acting strange." Hinesly was concerned for Cecil's welfare and his own; he kept saying, "Stay with me, Cecil. Stay with me, Cecil." At that point he handcuffed Cecil. Cecil was incoherent. Hinesly didn't know if Cecil was having a seizure and decided medical attention was not necessary.⁷⁶

Hinesly told Cecil that Irene's nephew was a former Highway Patrol Officer who now "was a sheriff in southern Missouri." Hinesly talked about Irene's nephew and talked about what he would like to see happen to Cecil.⁷⁷

After three hours of interrogation, Cecil 'dropped his head and he started crying, and he stated that he didn't mean to kill them and he didn't mean for it to happen. He said,

⁷³ T1135.

⁷⁴ T1131-34;DefExCC.

⁷⁵ T1107,1115,1137.

⁷⁶ T1136-38.

⁷⁷ T1138-39

"But they wouldn't quit screaming and wouldn't shut up." He used the words, "I shut them up."⁷⁸ Hinesly said:

[H]e went there to borrow money; that he needed to leave town; that he was afraid that he would be going to jail, because he had failed a urinalysis test, and he wanted money to leave town. And that he was just--after paying the money, he was going to tie them up long enough for him to leave...

Irene--Ms. Sisk had started to write a check, and then stopped and decided not to. And that her and Candi argued about whether or not to go ahead and give him the money. So Candi decided to write the check, and he drove both of them down to this bank and cashed his check...

And he had, basically, just tied their hands, and as he got outside the house, he turned around and looked and saw--and he said, "I saw Irene already standing at the kitchen window staring at him..."

He stated he went back into the house, tied Irene's hands to her feet, and that they were screaming. And that he said at that point, Irene started reaching for something underneath the bed covers, and he said, "It was that god-damned knife..."

He said that they continued to scream, and his voice was getting louder. He said, "They wouldn't shut up. They wouldn't shut up." And then he said, "Then

⁷⁸ T1109,1140.

Candi was still screaming." He said, "I went in and shut her up..."⁷⁹

Cecil told Hinesly he had blood on his jacket and threw it out of the car.⁸⁰

He returned the car; feeling as though he was being followed, he got his van and checked into the Tower Motel. The next day he still felt as though he was being watched and after buying some things at two stores, he rented a different room at the motel.⁸¹

Cecil told Hinesly there would not be fingerprints because he wore gloves. He denied sexually assaulting Candi and said the police "could check him for semen or anything..." He denied taking anything from the Sisk residence.⁸² The bloody jacket Cecil said he threw out of the window was never recovered.⁸³

Prior to seizing the Barriner's white Ford Taurus, Officer Windham examined it at the Barriner's house one night. He was not wearing gloves. He opened the door and looked around with a flashlight. He did not notice any blood or anything to collect.⁸⁴ When he searched Cecil's house and the Barriner's car, Windham did not find any

⁷⁹ T1110-11.

⁸⁰ T1111-12.

⁸¹ T1112

⁸² T1114-15.

⁸³ T1116.

⁸⁴ T835,878-79.

bloody clothes.⁸⁵

The Taurus was seized and taken to the Highway Patrol Headquarters. Among the items Officer Windham collected from the car--while wearing gloves--was the driver's side door handle.⁸⁶ Kerry Maloney, Highway Patrol Crime Lab Supervisor for the DNA section, tested the sexual assault kits from Candi and Irene and found no semen.⁸⁷ He prepared blood samples from Candi, Irene, and Cecil for DNA testing.⁸⁸

Maloney received StEx20, the driver's side door handle, and determined that the stain was blood. From the stain, he prepared a sample for DNA testing by criminalist Hoey.⁸⁹

Maloney did not test the stain to determine if it was human blood or animal blood, and had "no way of telling" if the blood from the door handle was human blood. Other blood samples from the car, when tested, proved to be deer blood.⁹⁰ The blood on the handle could have been deer blood, rabbit blood or squirrel blood.⁹¹

Maloney testified that a sample of the stain from the door handle was prepared for

⁸⁵ T877-79.

⁸⁶ T836,839.

⁸⁷ T898,905-06.

⁸⁸ T906-09.

⁸⁹ T919-21.

⁹⁰ T9927-28,931-32.

⁹¹ T946.

testing by putting water on a sterile swab and wiping the wet swab on the stained area of the door handle. Only stained areas of the door handle were "swabbed."⁹²

The areas of the door handle right next to the stain were not swabbed to provide a sample of the DNA that was on the door handle itself. The door handle was worn and used. Maloney admitted that there could already be DNA on the door handle at the time the stain was left because anytime a person touches something, skin cells may be left.⁹³ It was also possible that a person who touched the door handle after the stain was made could have left his or her DNA on the stain.⁹⁴ The most Maloney could say was that there was DNA on the handle; he could not say it came from the stain on the handle.⁹⁵

Notes from Maloney's testing of the *Barriner's* Ford Taurus were mislabeled "*Sisk's* Ford Taurus." It did not surprise Maloney that an incorrect label had been placed on the sample. Maloney indicated that mistakes occur in the lab, also, and that his own DNA ended up in an evidence sample once despite all the precautions and care taken in the lab.⁹⁶

Criminalist Brian Hoey did a DNA analysis of the samples prepared by Maloney.⁹⁷

⁹² T933-35.

⁹³ T933-37.

⁹⁴ T946.

⁹⁵ T947.

⁹⁶ T939-41.

⁹⁷ T948-54.

Hoey extracted a DNA profile from StEx20--the driver's side door handle of the Barriner's Taurus--using the swab from the stain.⁹⁸ Hoey testified on direct examination that the sample from the door handles "was consistent with being a mixture of at least two individuals" and "the major component of the mixture was consistent with the DNA profile from Irene Sisk, but not Candi Sisk or Cecil Barriner."⁹⁹ Hoey explained that at one of the "six genetic areas" examined, "one genetic component was darker than the other" and that he would expect to see the same intensity of DNA in each component. For this reason, as to that area, he wrote "possible mixture" in his notes.¹⁰⁰

On cross-examination, Hoey said that at the bottom of his lab notes, DefExT and DefExS, next to asterisks he had written notes reading: "indicates light alleles¹⁰¹ could indicate mixture" and "may indicate a mixture." Hoey had used an asterisk with the results of the swab of the driver's side door handle.¹⁰²

Hoey agreed that "may be a mixture" also meant "may not be a mixture." Similarly, "could be a mixture" also meant "could not be a mixture."¹⁰³

Hoey agreed that Irene's blood, at a particular DNA site was an "A" meaning she got

⁹⁸ T957-58.

⁹⁹ T958-59

¹⁰⁰ T959.

¹⁰¹ "Alleles" are indicated by A,B, C or other letters. T970-71.

¹⁰² T963-67;DefEx'sS,T,&U.

¹⁰³ T967.

one A from her mother and another A from her father.¹⁰⁴ The result of the tests on the driver's side door handle showed an AB at the same site: "an A with a minor B component." Hoey said the asterisk indicated a light allele.¹⁰⁵ He agreed his use of the asterisk meant the sample could be a mixture and that it also could not be a mixture or may not be a mixture.

Hoey agreed that if the driver's door handle was one person's DNA, it was not consistent with Irene Sisk's DNA--because there was an extra "B."¹⁰⁶

Hoey agreed that his determination of "lighter" or "darker" alleles was based on his own visual inspection.¹⁰⁷

To avoid repetition, further facts will be presented as necessary in the appropriate portion of the argument.

POINTS RELIED ON

POINT ONE

The trial court erred in sustaining the state's objection, overruling defense offers of proof, and excluding evidence that hair found on Candi's thigh and in her

¹⁰⁴ T969.

¹⁰⁵ T969-70.

¹⁰⁶ T970.

¹⁰⁷ T971.

bed and in the knots of the ropes binding Irene's hands--hair that was seized, photographed, and tested by the state--did not match Candi's hair, Irene's hair, or Cecil Barriner's hair; the court plainly erred in then allowing the state to argue that Cecil must be guilty because "there is not one shred of evidence in this that points any direction but to him." This violated Cecil's rights to due process of law and fair trial, a defense, confrontation and cross-examination of witnesses, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const., Art. 1, §§10,18(a),& 21. The non-matching hair was admissible: not to identify a third person as the perpetrator, but as crucial evidence of Cecil's defense that he did not commit the crime. Excluding this evidence prejudiced Cecil because the non-matching hair--found in places strongly suggesting it was left by the perpetrator--was exculpatory, relevant, and crucial to Cecil's defense: that he was not the person who killed the Sisks. The prejudice was compounded by Assistant Attorney General Smith's closing argument telling the jury Cecil must be guilty because "there is not one shred of evidence in this that points any direction but to him."

State v. Thompson, 68 S.W.3d 393 (Mo.banc2002);

State v. Butler, 951 S.W.2d 600 (Mo.banc1997);

Chambers v. Mississippi, 410 U.S. 284 (1973);

Hoffman v. State, 800 So.2d 174 (Fla.2001);

Missouri Supreme Court Rule 4-3.4(e).

Point Two

The trial court erred in sustaining the state's objection and refusing to allow the defense to cross-examine Samantha about whether she "was aware" or "heard" of a newspaper article about the case offering a reward and in excluding Defendant's Exhibit B: the newspaper article about the Sisk killings and the reward. This violated Cecil's rights to due process, fair jury trial, confrontation and cross-examination of witnesses, a defense, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const.,Art. 1,§§10,18(a),&21. A witness's motive is always relevant; the excluded evidence was relevant to impeach Samantha's credibility by showing financial reward as a motive to implicate Cecil in the offense. Judge Hodge prejudiced Cecil by excluding this evidence because Samantha's testimony--that Cecil drove past the Sisk house the day before the murders and said he would get money from them--was the next best thing to eyewitness testimony and important to the state to corroborate its theory that Cecil was the person who committed the murders. Absent this impeaching evidence, the jury had no reason to think that Samantha, Cecil's friend, might have given a statement implicating him in the crime for any reason other than the truth.

Delaware v. Van Arsdall, 475 U.S. 673 (1986);

State v. Colton, 227 Conn. 231, 630 A.2d 577 (Conn.1993);

State v. Howard, 693 S.W.2d 888 (Mo.App.W.D.1985);

State v. Ray, 945 S.W.2d 462 (Mo.App.W.D.1997).

Point Three

The trial court erred and plainly erred in overruling defense objections and allowing the state to elicit Shirley's testimony that when she, from time to time, broke up with Cecil, he would "get mad" and "angry" and "show up" at her mother's house and that she received a letter from Cecil in November, 1996, that "disturbed" her. This violated Cecil's rights to due process of law and fair trial, meaningful access to the courts, freedom from cruel and unusual punishment, reliable sentencing, and to be tried, convicted, and sentenced only for offenses charged. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const.,Art. 1,§§10,17,18(a),&21. Evidence that Cecil got "angry" and "mad" when Shirley broke up with him, that he went to her mother's house, and that his letter "disturbed" her was no more logically or legally relevant or probative of the charged offenses at this trial than evidence of Cecil's conduct involving Shirley and her son Shawn Tutor was at the last trial. No valid reason, certainly not Shirley's state of mind, warranted admitting this evidence. Cecil's letter contained references to his sexual behavior -- not to his being angry or mad at Shirley or at anyone in the case. Cross-examination of Shirley concerning the actual, sexual content of the letter would have dispelled the innuendo that it disturbed her because in it Cecil was "mad" or "angry" at her or someone else or it made her fear Cecil would "show up" some place, but counsel could not do this because it would have opened the door to prejudicial evidence of Cecil's sexual relationship

with Shirley. Evidence of Cecil's anger at Shirley and the "disturb[ing]" letter was unrelated to the charged offenses but prejudiced Cecil by allowing the jury to consider evidence of, or suggestive of, bad acts or uncharged misconduct as evidence that he was of bad character--therefore likely to have committed the charged offenses--and as proof of his guilt of the charged offenses.

State v. Barriner, 34 S.W.3d 139 (Mo.banc2000);

State v. Sladek, 835 S.W.2d 208 (Mo.banc1992);

State v. Randolph, 698 S.W.2d 535 (Mo.App.E.D.1988);

State v. Copple, 51 S.W.3d 11 (Mo.App.W.D.2001).

POINT FOUR

The trial court erroneously overruled defense motions based on Prosecutor Bock's misconduct in making statements to the press resulting in Warren County jurors reading and hearing about a St. Louis Post-Dispatch newspaper article concerning the case and an unrelated murder case previously charged against Cecil. Denying motions for a continuance and venue change or, alternatively, to select a jury from another county or, alternatively, for individual voir dire of jurors who had read or heard about the case violated Cecil's rights to due process, fair jury trial, fundamental fairness, freedom from cruel, unusual punishment and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const.,Art1,§§10,18(a),&21. Cecil was prejudiced because jurors reading or hearing about the article learned this Court could--did--reverse the convictions

and death sentences assessed by a previous jury. They learned about inadmissible evidence requiring reversal: a videotape of Cecil and Shirley--"the younger victim's mother"--engaged in "sexual bondage," and that Cecil "threatened to kill one of [Shirley's] other children." Attributing prosecutor Bock as the source of the information, the article previewed the state's evidence against Cecil: Cecil was using methamphetamine at the time of the crime and feared failing a drug test and violating his probation on another case; he sought money from the Sisks, took them to a bank where they cashed a check for him, "took them home, tied them up, tortured them and murdered them..." He stabbed the "grandmother ... 17 times in the chest" and stabbed Candi "several times in her neck and sexually assaulted [her] after her death..." Jurors who read the article knew in advance of trial that in Bock's opinion, "It is an unbelievably brutal crime."

Without identifying a source, the article reported information not then a matter of public record: "In 1997, Barriner was charged in Butler County with the stabbing death of Maggie Jean Moore, 32, in December 1994. After Barriner was found guilty in the double homicide case, prosecutors dismissed the Moore case, but they may file it again depending on what happens in Warren County."

In the Matter of Litz, 721 N.E.2d 258 (Ind.1999);

In re Zimmerman, 764 S.W.2d 757 (Tenn.1989);

Hughes v. State, 437 A.2d 559 (Del.1981);

Bush v. Commonwealth, 839 S.W.2d 550 (Ky.1992);

Missouri Rule 4-3.6(a).

Point Five

The trial court erred in overruling Cecil's amended motion to suppress statements and his objections at trial and in admitting evidence of Cecil's oral statements. This violated his rights to due process of law and fair trial, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VIII, and XIV; Mo.Const., Art. 1, §§10 and 21. Cecil's statements were not voluntarily, knowingly or intelligently made as shown by: Cecil's refusal to sign a form waiving his rights, his incoherent and semi-conscious condition during interrogation, and Officer Hinesly's revelation of the fact that Irene Sisk's nephew was a sheriff to intimidate and threaten Cecil. Admission of Cecil's oral statements prejudiced him because they admitted guilt.

Arizona v. Fulminante, 499 U.S.279 (1991);

State v. Inman, 657 S.W.2d 395 (Mo.App.W.D.1983);

State v. Smith, 944 S.W.2d 901 (Mo.banc1997);

State v. Trenter, 85 S.W.3d 662 (Mo.App.W.D.2002).

Point Six

The trial court erred in imposing death sentences on Counts I and II. This violated Cecil's rights to due process of law, a defense, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel, unusual punishment. U.S.Const.,Amend's XIV,VI,&VIII; Mo.Const., Art.1,§§10,14,18(a),&21;

RSMo. §565.035.3(3). Among the factors that undermine confidence in the reliability of these death verdicts, demonstrate their excessiveness, and require they be vacated are: the exclusion of exculpatory evidence, the admission of prejudicial evidence including the coerced confession, the questionable identifications, and the strong mitigating evidence at penalty phase.

The state legislature has established life imprisonment without probation or parole as an appropriate sentence for an aggravated first degree murder; under the Due Process Clause, the Court may not uphold the sentences of death without considering whether the less severe punishment of life imprisonment would be adequate to satisfy the goals of punishment.

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001);

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996);

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994);

State v. Chaney, 967 S.W.2d 47 (Mo.banc1998).

Point Seven

The trial court erred in overruling Cecil's motion to quash the information and exceeded its jurisdiction in imposing sentences of death on counts I and II. This violated his rights to due process of law, jury trial, prosecution only by indictment or information, freedom from cruel, unusual punishment, and reliable sentencing. U.S. Const. Amend's VI, VIII, & XIV; Mo. Const., Art. 1, §§ 10, 17, 18(a), & 21; §565.030.4(1), RSMo. Missouri authorizes a sentence of death only upon a finding

of at least one of seventeen statutory aggravating circumstances. Missouri's aggravating circumstances comprise both alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase punishment for first degree murder from life imprisonment without probation or parole (LWOPP) to death. As the information in the present case failed to plead any aggravating circumstances as to the two charged offenses of first degree murder, the information did not charge facts necessary to increase punishment from LWOPP (for a murder without aggravating factors) to death. The offenses charged against Cecil were unaggravated first degree murders for which the only authorized sentence is LWOPP. The trial court lacked jurisdiction to sentence Cecil to death; the death sentences imposed for the charged offenses were unauthorized. The judgment must be reversed and Cecil's death sentences vacated.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Jones v. United States, 526 U.S. 227 (1999);

Harris v. United States, 122 S.Ct. 2406 (2002);

Ring v. Arizona, 122 S.Ct. 2428 (2002).

ARGUMENT

As to Point One: The trial court erred in sustaining the state's objection, overruling defense offers of proof, and excluding evidence that hair found on Candi, in Candi's bed and in the ropes binding Irene's hands--hair seized,

photographed, and tested by the state--did not match Candi's, Irene's, or Cecil Barriner's hair; having excluded the non-matching hair evidence at the state's request, the trial court plainly erred in allowing Assistant Attorney General Smith to blatantly ignore the law and the rules of ethics and argue to the jury that "there is not one shred of evidence in this that points any direction but to him." This violated Cecil's rights to due process, fair jury trial, a defense, confrontation and cross-examination of witnesses, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; it violated the Rules of Professional Conduct, Rule 4-3.4(e). The non-matching hair was admissible: not to identify a third person as the perpetrator, but as crucial evidence establishing Cecil's defense that he did not commit the crime. Excluding this evidence prejudiced Cecil because the non-matching hair--found in places strongly suggesting it was left by the perpetrator--was exculpatory, relevant, and a defense against the state's evidence. The state's argument that Cecil must be guilty because "there is not one shred of evidence in this that points any direction but to him" compounded the prejudice, violated the rules of ethics and long-standing precedent, and was plain error in its own right.

Prosecutor Bock opened his case by depicting an investigation in which no evidence was overlooked and in which all the evidence supported the state's decision to charge Cecil.¹⁰⁸ Bock emphasized the state's painstaking care in securing, documenting, and

¹⁰⁸ T530-51.

seizing evidence from the crime scene.¹⁰⁹

In particular, Prosecutor Bock promised the jurors they would hear about meticulous measures the officers took to locate, preserve, and collect evidence. Missouri Highway Patrol Officer Don Windham would explain "the method with which he gathers evidence at a crime scene ... the things that he gathered at the Sisk residence" and "the method with which the bodies of Candi and Irene Sisk, the hands were wrapped, and how they were prepared for removal for an autopsy and an evidence examination."¹¹⁰

But Prosecutor Bock deliberately withheld some information from the jury: information concerning certain items of evidence seized from the crime scene and from the victims' bodies. Bock did not tell the jurors that the state would never present--and would object to the defense presenting--evidence of hairs seized by investigating officers from Candi's thigh, from underneath Candi's body, from her pillow and her bedroom floor, and from the ropes binding Irene. Bock did not mention that the state had tested these hairs and they did not match Candi or Irene or Cecil.¹¹¹

The jurors never heard about the non-matching hair evidence. Although Officer Windham had, moments earlier, testified on direct exam to collecting "body samples"--hair, saliva, and blood--from Cecil,¹¹² when the *defense* asked Windham if he had

¹⁰⁹ T539-40,547-51.

¹¹⁰ T539-40.

¹¹¹ T859.

¹¹² T843-44.

"collected a number of hairs" at the scene,¹¹³ AAG Smith objected that the non-matching hair evidence was not exculpatory and inadmissible:

MS. SMITH: Your Honor, I'm going to make a motion in limine at this time to [preclude] getting into any hair evidence relating to this case. There has been no connection of the hair evidence in any of this to any individuals connected in this case. It's simply a matter by the defense in an attempt to open and raise a specter of some unknown, unidentified phantom person committing these murders... Even if there were evidence connecting to an individual, which there is not, even [if] there were, the defense can't get into it unless that evidence rises to the level under the law of excluding their client. So this whole line of things is to throw some red herring in here that simply does not exist.¹¹⁴

Defense counsel responded: "hair evidence that is seized from the scene, sent to the lab, compared with the Defendant, and ruled to exclude the Defendant and the victims in this case is no different than a fingerprint from a scene, taken to the lab, compared with the suspect's, and found not to be the suspect's." Counsel added that the non-matching hair evidence was "exculpatory evidence" she wished to present as a defense: "to deny our right to present that evidence would violate every constitutional right

¹¹³ T859.

¹¹⁴ T859-60.

[delineated] in the stipulation previously filed."¹¹⁵

Judge Hodge had his own view of "exculpatory": "How is it exculpatory evidence? It doesn't point to anyone else..." AAG Smith argued: "how does that exclude or is exculpatory towards her client? It simply is not."¹¹⁶ She added, "I would just remind the Court that the defense attempted the same thing in the first trial of this matter. The trial Court had the same ruling that this Court [has] had and that part of the opinion wasn't to [sic] found to be in error or challenged..."¹¹⁷

In an offer of proof, Officer Windham testified he had located, photographed, and seized, seven hairs from on or near Candi's bed including one hair from Candi's leg, one from underneath her body, one from her pillow, and one from the floor near her body. Officer Windham received and took to the lab knotted ropes and hairs removed during Irene's autopsy.¹¹⁸ Judge Hodge overruled the offer of proof and refused to allow the defense to cross-examine Officer Windham about the non-matching hair evidence.¹¹⁹

¹¹⁵ T860; LF34-36; MT75.

¹¹⁶ T861.

¹¹⁷ T873. As defense counsel subsequently pointed out to the trial court, T988-89, evidence of the non-matching hair *was* admitted at the first trial. PrevT1233. Since the non-matching hair evidence was admitted at the last trial, there was no error regarding the non-matching hair to challenge in that appeal.

¹¹⁸ T863-72; DefEx'sC,D,E,F,G,H,L,O.

¹¹⁹ T873-74.

Before criminalist William Randall testified for the state, the defense provided Judge Hodge with, and quoted from, this Court's opinion in *State v. Butler*¹²⁰ in an attempt to explain why the non-matching hair was exculpatory:

And in that case, trial counsel failed to present evidence that there was physical evidence on the body of the victim that was not consistent with the Defendant... They called it exculpatory evidence. That's a subparagraph of this opinion. And I'm going to hand you the case so you can read along with me, Judge. Beginning where it says "exculpatory evidence." "Other evidence that was introduced at the motion hearing," this would have been [the] PCR motion, "but was not discovered or presented at trial would have weakened the prosecution's case. For example, Richard Booth," and he was an evidence tester, "performed tests on fingernail scrapings taken from the victim and fibers taken from Butler's clothing. The fibers compared in Booth's analysis did not match, nor did Booth find any blood on Butler's clothing... Finally, a proper investigation of this case would have brought out substantial weaknesses in the prosecutions' case..." This lawyer was found ineffective for not eliciting that testimony...¹²¹

Defense counsel then asked leave to "recross-examine Officer Windham, get into this testimony, and then get this testimony from this next witness [criminalist Randall]

¹²⁰ 951 S.W.2d 600 (Mo.banc1997).

¹²¹ T990-91.

in front of this jury."¹²²

Despite the fact that the prosecution paraded before the jury numerous witnesses who testified in excruciating detail about other items of evidence documented, collected, preserved, and tested,¹²³ --indeed, Officer Windham affirmed his "job was to package any evidence" he found in the Sisk home that "might be remotely related" to the case" and "anything at all that might appear to be connected to this case,"¹²⁴ --AAG Smith insisted that evidence of the non-matching hair that the state had seized from scene and tested was inadmissible: "This is not exculpatory evidence. It does not eliminate the Defendant as the suspect in this case, and it certainly doesn't eliminate him for having caused the death of this young lady, or of Irene Sisk."¹²⁵

Before denying the defense request to recall Officer Windham, Judge Hodge criticized *State v. Butler*:

Well, I'm not sure I understand the Butler case, but it seems to be totally contrary to my understanding of the definition of exculpatory evidence. And to accuse the defense counsel of being inadequate for not offering evidence that -- there wasn't any physical evidence to connect Butler to the murder, that seems to me an

¹²² T990-91. Defense counsel noted that contrary to the state's representations, evidence of the non-matching hair *was* introduced at the first trial. T988-89.

¹²³ See, e.g., T859-61;612-15,620;622-232;767-71;777-855;89-914;948-59;1000-20.

¹²⁴ T855,857.

¹²⁵ T992.

absurd statement...¹²⁶

To augment its case and theme that the ropes and other evidence found at Cecil's house and at the Sisk's "identified" Cecil as the guilty party, the state presented criminalist William Randall's testimony that he examined thirty-two ropes from Cecil's house and seven ropes found on the Sisks or in their house. Many were not similar.¹²⁷ Randall could not eliminate four ropes found at the Sisk residence as coming from either one of two ropes found at Cecil's residence.¹²⁸ Randall's comparison of two of the ropes from Cecil's residence with the ropes binding Irene showed no "dissimilarities."¹²⁹

But because Judge Hodge excluded the non-matching hair evidence, the defense was not allowed to cross-examine Randall to elicit the results of his testing of seized evidence: none of the hairs collected from Candi, from the Sisk house, and from the knotted rope at Irene's wrists, matched Cecil.¹³⁰

At the end of all evidence, immediately before closing arguments, defense counsel tried yet again to explain that the non-matching hair evidence was admissible and its exclusion prejudiced the defense:

¹²⁶ T993-94.

¹²⁷ T1014.

¹²⁸ T1015.

¹²⁹ T1017-18;StEx's14&50.

¹³⁰ T995-99; DefEx's AA & Y. This evidence was presented in a testimonial offer of proof with criminalist Randall.

Had the court allowed me to present the evidence of the hairs from the crime scene that were compared with [the] hairs from Cecil Barriner, Irene Sisk, and Candi Sisk, I would have argued two important pieces of evidence; one, that there was a hair in a knot that was seized from the ropes that bound Irene Sisk's hands, and that I felt that was compelling evidence to suggest that that hair would have to have belonged to the person who tied that knot. And the fact that that hair did not match Cecil Barriner, to me, was information that would have been important to argue to this jury. And the Court's rulings have prevented me from making such an argument.

The second argument I would make would be with respect to a hair on the thigh of Candi Sisk. I would have argued that, because there was evidence that her panties had been removed, that any hairs on her legs, prior to the removal of her panties, would have been [sic] fallen off when those panties were removed. And the fact that there was a hair on her thigh after her panties were removed or when she was found to move,¹³¹ suggested that that hair, too, had to have come from the killer. And the evidence that that hair did not match Cecil Barriner would have been information that I would have argued to this jury.¹³²

Defense counsel asked the court to "reconsider reopening that matter so that I can

¹³¹ The transcript reads: "found to move." Counsel may actually have said, "found in the room."

¹³² T1182-83.

present that evidence."¹³³

AAG Smith again insisted, "there is no evidence to suggest that those hairs are in any way exculpatory of the Defendant. And there is nothing to suggest that that evidence would have, in any way--it wasn't in any way relevant to the issue at hand."¹³⁴

Judge Hodge refused to reopen: "Well, it was the Court's conclusion at the time of its ruling, and it is now, that that is not exculpatory evidence, and the Court's ruling will stand."¹³⁵

At the hearing on the motion for new trial, defense counsel provided Judge Hodge with this Court's opinion in *State v. Thompson*.¹³⁶ Counsel argued that although the issue in *Thompson* was the right to make an opening statement, the evidence that the defense claimed supported that right was "physical evidence at the crime scene that does not match the defendant." Defense counsel pointed out that in *Thompson*, the defense was allowed to elicit the non-matching evidence on cross-examination of the state's witnesses.¹³⁷

When Judge Hodge asked the state to address the defense "argument that this evidence was admitted in that case and that is an indication that we should admit similar

¹³³ T1183.

¹³⁴ T1183.

¹³⁵ T1183.

¹³⁶ ST3; 68 S.W.3d 393 (Mo.banc2002).

¹³⁷ ST3-4.

evidence in this case," AAG Smith claimed the defense was "talking apples and oranges" and that the hairs were never tested:

In our case, there is no exculpatory evidence that would tend to suggest that the defendant is innocent. Defense counsel is alleging that there were a couple of supposed hairs found on a bed that no one has ever tested. That is very different than *Thompson* where there were bloody shoe prints that the police tried to match and couldn't. *Thompson* had evidence that would at least on its face be potentially exculpatory so they were prohibited from cross-examining about it... No, they were allowed to cross-examine about it but they weren't allowed to do an Opening Statement about that evidence. That is markedly different than what we have in this case.

In this case, defense counsel was never precluded from giving an Opening Statement. They just elected as a matter of trial strategy not to do so. In this case, the only limitation was the discussion of some irrelevant hairs that had no probative value ... Defense counsel very zealously and very artfully attempts to twist [*Thompson*] to stand for something that, in reality, it does not.¹³⁸

Defense counsel replied: "Ms. Smith said these hairs were not tested. In fact they were tested and ... did not match those of the defendant or the victim."¹³⁹

¹³⁸ ST6.

¹³⁹ ST7.

Judge Hodge denied the motion for new trial.¹⁴⁰

The proffered defense evidence that it was not Cecil's hair in the knotted rope binding Irene and not Cecil's hair found on Candi's leg, on her bed, and on her bedroom floor would have undermined the state's case against Cecil Barriner. Because the state relied extensively on the rope evidence throughout its case,¹⁴¹ evidence that hair not matching Cecil was found in the knotted rope binding Irene's wrists would have been an effective means of establishing reasonable doubt that Cecil was guilty of her murder. Similarly, evidence that hair not matching Cecil had been found underneath Candi, on her pillow, on her bedroom floor, and on her leg, would have created reasonable doubt that Cecil was guilty of her murder.

That the hair in the knotted rope binding Irene's hands did not come from Cecil suggests that someone other than Cecil tied that knot. If someone other than Cecil tied the knot, then under the state's own theory, someone other than Cecil killed Irene.

Likewise, the hairs on Candi's thigh, bed, and floor created reasonable doubt as to the state's theory that Cecil killed Candi and sexually assaulted her shortly before or

¹⁴⁰ ST7.

¹⁴¹ In the opening portion of the state's guilt phase argument, Prosecutor Bock returned time after time to the rope evidence to persuade the jury of Cecil's guilt (T1194,1196-97,1198,1199-1200,1201-02,1204). At one point in the transcript, Prosecutor Bock's argument about the ropes consumes an entire page--and then some (T1199-1200).

after her death.¹⁴² When Candi's body was found, her underwear had been removed; the state's theory was that it had been removed by whoever sexually assaulted and killed her.¹⁴³ Any loose hairs on Candi's legs would have been brushed off or fallen off when her underwear was removed. Hair found on her leg after she had been sexually assaulted and killed would have been left by the person who committed these crimes. Non-matching hair found underneath Candi, on her pillow, and on the floor next to her bed would very likely have been left by the person who sexually assaulted and killed her. Somebody other than Cecil left the hair. Somebody other than Cecil sexually assaulted and killed Candi.

Non-matching hairs found on one victim would have been exculpatory. That non-matching hairs were found on *both* victims is beyond exculpatory: it is startling evidence that a jury could not ignore.

Judge Hodge's error in excluding this defense evidence, robbed Cecil Barriner of his defense--innocence--and his constitutional rights to present a defense, confront and cross-examine witnesses, due process, freedom from cruel, unusual punishment, and reliable sentencing.¹⁴⁴

¹⁴² *E.g.*, T1060-62,1194,1203,1224,1227,1388,1391.

¹⁴³ *E.g.*, 531,551,577,1194,1203.

¹⁴⁴ U.S.Const., Amend's V,VI,VIII,&XIV; *Rock v. Arkansas*, 483 U.S. 44 (1987) ("Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a

The right to present exculpatory evidence is protected by the constitution.

The Fourteenth and Sixth Amendments guarantee to the accused the right to defend himself. He may establish his theory of defense and the evidence to support it solely through cross-examination.¹⁴⁵ "Trial courts have discretion to determine the relevancy

witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55); *Chambers v. Mississippi*, 410 U.S. 284 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* at 294).

¹⁴⁵ 'Cross-examination may establish facts. State witnesses may know facts that support the defense, because the State, like any party, must take its witnesses as it finds them. *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423,424-25 (Mo.banc1985). Generally, State witnesses may be cross-examined on any and all matters in the case, including matters not within the scope of direct examination. *State v. Gardner*, 8 S.W.3d 66,71 (Mo.banc1999). Even cross-examination limited to prior inconsistent statements may yield substantive evidence. See Section 491.074 RSMo. 1994. ***Thus, through cross-examination alone, the defense can establish facts, a defense, or theory of the case.***'

State v. Thompson, *supra*, 68 S.W.3d at394; emphasis added; *see also*, *Chambers v. Mississippi*, *supra*.

of evidence,"¹⁴⁶ but "[a] criminal trial is a search for truth, and this search can be distorted when relevant information is withheld."¹⁴⁷ "As a general rule, a court should encourage, not discourage, the introduction of relevant factual data."¹⁴⁸ Further, "exclusion of testimony of a witness for the defense as in the instant case ... may violate a defendant's rights under the 6th and 14th Amendments to the United States Constitution..."¹⁴⁹

Relevant evidence includes evidence "favorable to an accused"--exculpatory of the charged offenses.¹⁵⁰ It includes physical evidence that links the perpetrator to the charged offense but excludes or fails to identify the accused as a source of the physical

¹⁴⁶ *State v. Wolfe*, 13 S.W.3d 248,258 (Mo.banc2000).

¹⁴⁷ *State v. Gibson*, 760 S.W.2d 524,526 (Mo.App.E.D.1988) (Judge Hodge's error in excluding defense witness--because witness had violated order excluding testifying witnesses from courtroom--prejudiced defendant and required reversal; testimony of witness did not relate to any evidence she may have improperly heard, and her testimony was crucial to impeaching credibility of state witness).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Brady v. Maryland*, 373 U.S. 83,87 (1963); *United States v. Bagley*, 473 U.S. 667,676 (1985) (Exculpatory evidence is "'evidence favorable to an accused" so that, if disclosed and used effectively, it may make the difference between conviction and acquittal').

evidence.¹⁵¹

For example, in *State v. Thompson*, this Court identified as evidence favorable to the defendant: the lack of any "forensic evidence [in the defendant's car] linking him to the murder," the fact that "[f]ingerprints found by the police near the crime scene did not match Thompson's," and the fact that "[t]he police were unable to match the bloody shoeprints found at the crime scene with the shoes Thompson was wearing at the time he turned himself in..."¹⁵² Similarly, in *State v. Butler*,¹⁵³ "fibers taken from Butler's clothing ... did not match" and there was no "blood on Butler's clothing." The non-matching fibers and lack of blood was exculpatory evidence favorable to the accused that "would have weakened the prosecutor's case."¹⁵⁴

Hair comparison evidence is admissible: what's good for the goose is good for the gander.

To prove a defendant's guilt, Missouri prosecutors regularly present evidence that hair seized in connection with a crime--*i.e.*, from the victim or the crime scene--has been tested and matches the defendant.¹⁵⁵ When hair has been tested and found not to

¹⁵¹ *State v. Butler*, *supra*, 951 S.W.2d at 606-10.

¹⁵² 68 S.W.3d 393,395 (Mo.banc2002).

¹⁵³ *Butler*, 951 S.W.2d at 608.

¹⁵⁴ *Id.* Failing to present this exculpatory evidence was one reason this Court found Butler's counsel ineffective.

¹⁵⁵ *E.g.*, *State v. Ferguson*, 20 S.W.3d 485,493 (Mo.banc2000); *State v. Rockett*, 87

match, courts in Missouri and elsewhere have ruled that evidence of the "non-matching" hair is exculpatory and admissible.¹⁵⁶

S.W.3d 398,403-05 (Mo.App.W.D.2002); *State v. Hoff*, 904 S.W.2d 56,59 (Mo.App.SD.1995); *State v. Wagner*, 587 S.W.2d 299,302 (Mo.App.E.D.1979).

¹⁵⁶ *DiLosa v. Cain*, 279 F.3d 259, 261,263-65 (5thCir.2002) ("evidence in question related to the presence of hair of unknown type on the rope around [victim's] neck"); *Hoffman v. State*, 800 So.2d 174,178-180 (Fla.2001) ("Hair evidence found in the victim's clutched hand could tend to prove recent contact between the victim and a person present in that room at the time of her death. With the evidence excluding [defendant] as the source of the clutched hair, defense counsel could have strenuously argued that the victim was clutching the hair of her assailant, but that assailant was not [defendant]"); *Snowdell v. State*, No.ED80515 (Mo.App.E.D. 11/5/2002) 2002 WL 31454541*1,3 (hair samples were "tested and the results were introduced into evidence before the jury. The results proved that [defendant] was not the source of the pubic hair found on the victim"); *State v. Hicks*, 536 N.W.2d 487,489-92 (Wis.App.1995) (testimony excluding defendant as source of hair found on victim would have created reasonable doubt as to his guilt); *Onken v. State*, 803 S.W.2d 139,141-42 (Mo.App.W.D.1991) ("evidence favorable to and tending to exculpate" defendant comprised lab technician's notes stating that "one strand of hair discovered in the victim's bed did not match those of defendant" or infant victim's mother"); *State v. Glear*, 696 S.W.2d 820,821 (Mo.App.E.D.1985) (evidence seized at scene and admitted

In light of the foregoing authorities, AAG Smith's claim--that the defense could not present the non-matching hair evidence unless "there were evidence connecting [it] to an individual, which there is not" and "even [if] there were, the defense can't get into it unless that evidence rises to the level under the law of excluding their client"--is flat wrong. That claim and Judge Hodge's ruling are unsupported by authority.¹⁵⁷

To the contrary, good authority--not to mention the Constitution--supports Cecil's claim that the non-matching hair evidence was relevant, exculpatory evidence favorable to him and admissible at his trial.

An additional reason that Judge Hodge erred in precluding the defense from questioning state witnesses about the non-matching hair evidence is, simply, that this

at trial included "[h]air fragments found on the victim's body [that] did not match hair samples taken from defendant").

¹⁵⁷ Perhaps AAG Smith was thinking of the rule providing that "[e]vidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *State v. Chaney*, 967 S.W.2d 47,55 (Mo.banc1998) (citations omitted); *see also State v. Butler*, *supra*, 951 S.W.2d at 606; *State v. Woodworth*, 941 S.W.2d 679,690 (Mo.App.W.D.1997). As Cecil was *not* attempting to identify a particular person as the guilty party--Cecil was simply attempting to present evidence to show that he did not commit the crime--this rule is inapplicable.

was fair cross-examination of their direct exam testimony. The proposed cross-examination addressed Officer Windham's direct examination testimony that he collected "body samples" from Cecil--including " head and pubic" hair--at the Dent County Sheriff's Department.¹⁵⁸ Likewise, on direct examination criminalist William Randall testified for the state that his comparison of some of the ropes seized from the Sisk house and from Irene and Candi with ropes seized from Cecil's residence showed similarities.¹⁵⁹ This evidence tended to link the ropes from Cecil's house with the ropes found at the Sisk house and used by the perpetrator in committing the crime. Fair cross-examination defending against that evidence could elicit evidence of non-matching hairs found at the Sisk house and in the knot binding Irene's hands.

*State v. Clark*¹⁶⁰ explains:

"[W]here either party introduces part of an act, occurrence, or transaction, * * * the opposing party is entitled to introduce or to inquire into other parts of the whole thereof, in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary, or prove his version with reference thereto. * * * This rule has been

¹⁵⁸ T843-44.

¹⁵⁹ T1011-20. On cross-examination, Randall also testified that two of the ropes from the Sisk house did not match any ropes seized at Cecil's house (T1024).

¹⁶⁰ 646 S.W.2d 409,412 (Mo.App.W.D.1983) citing *State v. Odom*, 353 S.W.2d 708,711 (Mo.1962).

held to apply * * * even though the evidence was in the first place illegal * * *." 22A C.J.S. Criminal Law § 660(c), pp. 655, 657, 658.

Finally, §491.070, RSMo. 2000, provides: "[a] party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness ... on the entire case..." Even if Officer Windham and criminalist Randall had not testified about ropes seized in this case, under §491.070 the defense could have properly cross-examined both of these state witnesses about the non-matching hair evidence.

For these reasons, Judge Hodge erred in excluding the evidence. For the reasons that follow, his error was prejudicial, reversible error.

Refusing to let the defense show the jury that hair found on and around Candi and Irene and in the knots binding Irene's hands did not match Cecil prejudiced the defense by suppressing its most potent tool: evidence creating reasonable doubt about the state's evidence and claim that Cecil was guilty.

The state presented extensive testimony and exhibits concerning the physical evidence--especially the ropes--to show that the physical evidence supported the state's charge that Cecil committed the murders. That the rope evidence, in particular, was important to the state in proving Cecil's guilt is shown by the substantial amount of time and testimony devoted to this subject. In its case in chief, through state's witnesses Windham, Randall, Zaricor, and others, the state presented testimony, a videotape, and photographs depicting the state's detailed collection, documentation, and preservation of evidence including the knotted ropes binding Irene and Candi, ropes and twine found at

the Sisk house, photographs of ropes found at Cecil's home along with the actual knots, rope, and twine seized from the two houses.¹⁶¹ Shirley testified she had seen Cecil tie knots.¹⁶² As promised in Prosecutor Bock's opening statement, Officer Hinesly testified that in Cecil's oral statement he admitted tying Candi and Irene's hands.¹⁶³

Having succeeded in excluding the non-matching hair evidence, in her closing argument AAG Smith gloated over the lack of defense evidence to support Cecil's defense that he did not commit the crimes:

Now ladies and gentlemen, defense counsel would have you believe that this individual is an innocent man. *There is not one shred of evidence in this that points any direction but to him.*¹⁶⁴

Without the non-matching hair evidence, the defense had nothing to dispel the impression created by the extensive testimony and exhibits presented by the state: that all the physical evidence supported the state's charge that Cecil committed the murders. Cecil could defend himself only by showing the problems--such as discrepancies and inconsistencies--in the state's case.

¹⁶¹ T614,776-83,784,793-94,796,798-801,806,820-22,824,827,830-31,842-43,846-47,1047-49,1069-70,1072; StEx's10,11,14,17,32,44,50,51,52,121,134,138,150C,150D, 151B,151C,151D.

¹⁶² T704.

¹⁶³ T546-47,1110-11.

¹⁶⁴ T1225; emphasis added.

The non-matching hair evidence was important because it was the heart of the defense that Cecil was innocent. It was defense evidence of a completely different nature than mere cross-examination bringing out discrepancies and inconsistencies in the state's case. It was physical evidence showing someone other than Cecil had been in very close contact with Irene and Candi at the time of their murders.

The non-matching hair evidence would have turned the state's careful preservation and collection of evidence against the state: the state's careful preservation and collection of evidence would have shown that someone other than Cecil left his or her hairs on Candi's leg, on her pillow, underneath her, on her floor, and in the rope knotted around Irene's hands. The state's own evidence would have shown that someone other than Cecil was at the murder scene at or very close to the time of the murders.

Judge Hodge's error in excluding this evidence was not harmless. While the state's evidence was sufficient; it was not an airtight, overwhelming case. Moreover, the state's case had problems.

The state's evidence--through Debbie Dubois--showed the man who committed the crime was a stranger to Irene.¹⁶⁵ Cecil, however, was not a stranger. Cecil had been to Irene's house previously when he drove Shirley to pick up Candi or to get money from Obie Sisk, and he may have gone up to the door or into the house.¹⁶⁶

Further, whether or not Cecil went into the Sisk house, Irene was devoted to

¹⁶⁵ T571-73.

¹⁶⁶ T604,680,690-95.

Candi.¹⁶⁷ Particularly in light of the kind of situation that Irene had seen at Shirley's,¹⁶⁸ Irene would never have let Candi simply walk out the door with Shirley without meeting the person driving Candi away from her. Irene would have scrutinized that person.

The physical descriptions provided by witnesses who allegedly saw Cecil in a white Ford Taurus on the morning the Sisks were killed did not match Cecil. The person Sarah Walker saw was so dark that Sarah couldn't be sure he was Caucasian. Cecil does not have a dark complexion.¹⁶⁹

Bank teller Christy Evans helped to create a composite that failed to include a prominent mole on Cecil's left cheek--the side facing Christy at the drive-through window.¹⁷⁰

The credibility of Samantha Simmons' testimony--that Cecil said someone in Tallapoosa owed him money but they weren't home and that she and her husband were with Cecil when he drove past the Sisk house several times at about 6:00 p.m. on the night before the murders and he said "the note was still on the door that he left"¹⁷¹--was questionable because it was refuted by other evidence. Samantha herself admitted it

¹⁶⁷ T1278-81;StEx153A.

¹⁶⁸ T1278-80,1283.

¹⁶⁹ T671,673,1208-09.

¹⁷⁰ T734-35,1208;DefExA.

¹⁷¹ 637,639-640.

was physically impossible to see the side door because it was blocked by a bush.¹⁷² The police never found any note. Samantha's testimony that the lights *outside* the Sisk house were on, the lights *inside* were off, and there were no cars outside was refuted by Debbie Dubois' testimony: that Candi arrived home from the hospital between 3:00 and 4:00 p.m., that Debbie, Candi's boyfriend Jeremy, and Jeremy's mother were also there, everyone ate supper at the Sisk house, and it was dark when the Bennetts and Debbie left.¹⁷³ Debbie testified the lights were not on outside.¹⁷⁴

Had the defense been able to cross-examine Samantha about a reward for information concerning the Sisk murders that was advertised in a newspaper article about the murders,¹⁷⁵ Samantha and her testimony would have been even less credible.

The rope evidence may have been extensive but it was hardly overwhelming proof of guilt. Numerous ropes found in the Sisk home were not similar to any ropes found at Cecil's house.¹⁷⁶ Criminalist Randall could not say that any of the ropes from Cecil's house "matched" those at the Sisks; the most he could say was that some of the ropes at the Sisk house were not dissimilar to ropes at Cecil's house.¹⁷⁷ Likewise, the piece of

¹⁷² T653;StEx104.

¹⁷³ T559-67,590-92.

¹⁷⁴ T592.

¹⁷⁵ See argument as to Point 2, *infra*.

¹⁷⁶ T1014.

¹⁷⁷ T1015-18.

duct tape found at the Sisk house did not match the duct tape at Cecil's house.¹⁷⁸

The state's claim that the "Independence Day" video found at Cecil's house came from the Sisk house was speculation. The state's own evidence showed that "Independence Day" was a top selling video.¹⁷⁹

Cecil's alleged oral, non-documented confession was hardly credible.¹⁸⁰ There is no record of Cecil's statements because Officer Hinesly never records his interrogations.¹⁸¹ Hinesly admitted Cecil was incoherent for part of the time that he was being interrogated. And Officer Hinesly admitted that shortly before Cecil "started making ... incriminating statements," Hinesly let Cecil know that Irene Sisk's nephew was a sheriff in southern Missouri and "what [he--Hinesly] thought that he [Sheriff Bartlett] would feel about" his aunt's death.¹⁸² Hinesly admitted that he mentioned what he thought Sheriff Bartlett "might would like to see happen to" Cecil.¹⁸³ Even if this Court decides that Cecil's confession need not be suppressed, the fact remains that Cecil--given his own unstable physical and mental condition, the fact that it was midnight or later, he'd already been interrogated for 3 hours, and Hinesly was starting to make threats--may

¹⁷⁸ T1033.

¹⁷⁹ T1145;StEx47.

¹⁸⁰ See argument as to Point 5, *infra*.

¹⁸¹ MT113.

¹⁸² MT108-09.

¹⁸³ MT116.

have simply said what Hinesly wanted him to say. Hinesly, after all, knew everything already.¹⁸⁴

The blood stains on the door handle of the Barriner's Taurus did not prove much of anything; the state never even checked to see if the blood was human blood. There was human DNA in a swab of the stain on the door handle, but the state's witnesses admitted that the DNA did not necessarily come from the stain: the DNA picked up by the swab could have been left on the door handle before or after the stain was made. The DNA testing of the swab of the blood stain showed that it "might" be a mixture of human DNA and not DNA from just one individual. If the DNA was a mixture, it was consistent with Irene's blood. If the DNA was from one person, it could not be Irene's blood.¹⁸⁵

Further, the scientist's lab notes only said the DNA "might" possibly be a mixture.¹⁸⁶ They did not say "likely" a mixture or "probably" a mixture. This is conclusive of nothing--certainly not overwhelming.

In Cecil's trash can, Office Windham found an index card saying "things for [first]¹⁸⁷ entrance; gun for bag; handcuffs pocket; twelve foot of rope for legs in two six-foot pieces." He also found a note with a list of women's names and phone numbers,

¹⁸⁴ T1130.

¹⁸⁵ T898-971: Testimony of criminalists Maloney and Hoey.

¹⁸⁶ T959-67.

¹⁸⁷ Transcript reads "forced."

including "Candace" and a different note with directions and "lives four miles south of Risco on 153."¹⁸⁸

Cecil had known Candi for years, through Shirley; and the age of the card and notes was not known. The Sisks were not killed with a gun. How long ago Cecil had written down the list of names and phone numbers and directions was anybody's guess. Again, this evidence is not overwhelming.

The receipts from the Dollar Store and Walmart showed that Cecil tendered \$20.02 at the Dollar Store and \$100 at Walmart. There was approximately \$123 dollars in Cecil's wallet when it was seized.¹⁸⁹ Even taking into account the amount spent at the Tower Motel, this falls well short of the \$1,000 that the person who took Candi to the bank received. There is no indication that Officer Windham or any other officer found any other money at Cecil's residence. The less than \$300 that the evidence showed Cecil had might be just about the amount of payment for a small roofing job.

Finally, despite a very bloody crime scene, there were no bloody clothes found at Cecil's house or in the Barriner car.¹⁹⁰

Against this less than overwhelming evidence, the non-matching hairs would have made a difference in the outcome of the trial.

As a separate matter, AAG Smith's argument that there was "not one shred of

¹⁸⁸ T829,StEx's34&33.

¹⁸⁹ StEx's 35,36&139.

¹⁹⁰ StEx's118-121;T835,877-79.

evidence in this that points any direction but to him" not only contributed to the prejudice resulting from exclusion of the hair evidence, on its own it was plain, reversible error.¹⁹¹ Rule 4-3.4(e) of the Missouri Supreme Court Rules of Professional Conduct provides: "A lawyer shall not... (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence..."

"It is an established rule in our state that it is improper for a prosecutor, or defense attorney, to argue matters that the court has excluded."¹⁹²

In *State v. Weiss*, the Western District found that "plain error occurred when the trial court allowed the State to tell the jury during closing argument that Defendant [charged with stealing money from another "Weiss's" bank account] failed to present any evidence that another source of funds [for Weiss' own account] existed when the State knew such evidence did exist and that it had not been introduced only because the State had successfully argued that it should be excluded."¹⁹³ The prosecutor's actions "constituted ... affirmative misrepresentation and affirmative misconduct" that required the Court "to reverse and remand for a new trial."¹⁹⁴

¹⁹¹ Rule 30.20.

¹⁹² *State v. Price*, 541 S.W.2d 777,778 (Mo.App.E.D.1976) citing *State v. White*, 440 S.W.2d 457,460 (Mo.1969) and *State v. Williams*, 376 S.W.2d 133,136 (Mo.1964).

¹⁹³ 24 S.W.3d 198,202 (Mo.App.W.D.2000).

¹⁹⁴ *Id.*

In *State v. Price*, the defense failed to comply with the state's "discovery request for witnesses" and at the request of the state the trial court excluded the defense witnesses.¹⁹⁵ In closing argument, the prosecutor called attention to the fact that the defendant testified she was with other people at the time of the offense but none of those people (her proposed witnesses) had testified at trial.¹⁹⁶ The Eastern District found prejudice and reversed despite the fact that "the state's case at trial was strong," because "a good deal of its strength was a result of the prosecutor's ability to discredit the appellant through cross-examination and in his closing argument."¹⁹⁷

The defendant in *State v. Luleff* was charged with receiving stolen property.¹⁹⁸ When defense counsel attempted to introduce a sales receipt for the property, the trial court sustained the state's objections and excluded the evidence.¹⁹⁹ Even though, on appeal, the Eastern District assumed the excluded evidence was inadmissible, the Court held it was plain error for the prosecutor to argue to the jury: "Where's the receipt?" ... no receipt."²⁰⁰

In the present case, as did the prosecutors in *Weiss*, *Price*, and *Luleff*, AAG Smith

¹⁹⁵ 541 S.W.2d at 778.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ 729 S.W.2d 530,535(Mo.App.E.D.1987).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 535-36.

"intention[ally]" and "deliberate[ly]" made "positive misrepresentations to the jury" that favorable evidence did not exist or that the defense was a fabrication: "***there is not one shred of evidence in this that points any direction but to him.***"²⁰¹ AAG Smith certainly knew, as did the prosecutors in *Weiss*, *Price*, and *Luleff*, "that [Cecil] had tried to introduce the [evidence] but [s]he had successfully argued that [it] should be excluded..."²⁰²

"Error committed in a criminal case is presumed prejudicial, but that presumption is not conclusive and may be rebutted by the facts and circumstances of the case."²⁰³ However, where the court is convinced that the error contributed to the result reached by the jury, the judgment should be reversed. Such is the case here."²⁰⁴

The "facts and circumstances" of this case do not rebut the prejudice to Cecil arising from Judge Hodge's exclusion of the non-matching hair evidence. As shown above, the "facts and circumstances of the case" *prove* the prejudice.

For all the foregoing reasons, the cause must be reversed and remanded for a new trial.

²⁰¹ *Weiss*, 24 S.W.3d at 203; *Price*, 541 S.W.2d at 778-79; *Luleff*, 729 S.W.2d at 535-36; T1225; emphasis added.

²⁰² *Id.*

²⁰³ *State v. Ray*, 945 S.W.2d 462,469 (Mo.App.W.D.1997) citing *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10,22 (Mo.banc1994).

²⁰⁴ *Id.* citing *State v. Baker*, 741 S.W.2d 63,67 (Mo.App.W.D.1987).

As to Point Two: The trial court erred in sustaining the state's objection and refusing to allow the defense to cross-examine Samantha about whether she "was aware" or "heard" of a newspaper article about the case offering a reward and in excluding Defendant's Exhibit B: the newspaper article about the Sisk killings and the reward. This violated Cecil's rights to due process, fair jury trial, confrontation and cross-examination of witnesses, a defense, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const.,Art. 1,§§10,18(a),&21. A witness's motive is always relevant; the excluded evidence was relevant to impeach Samantha's credibility by showing financial reward as a motive to implicate Cecil in the offense. Judge Hodge prejudiced Cecil by excluding this evidence because Samantha's testimony--that Cecil drove past the Sisk house the day before the murders and said he would get money from them--was the next best thing to eyewitness testimony and important to the state to corroborate its theory that Cecil was the person who committed the murders. Absent this impeaching evidence, the jury had no reason to think that Samantha, Cecil's friend, might have given a statement implicating him in the crime for any reason other than the truth.

Prosecutor Bock claimed the defense should not be allowed to question Samantha about a "reward that was advertised in the paper on the same day that she and her husband went to the police" because Samantha had said in her deposition that "she did

not know about the reward." Referring to the newspaper article about the reward,²⁰⁵ AAG Smith said, "that's not the real purpose for this article." The trial court sustained the state's objection and refused to allow defense counsel to cross-examine Samantha about the reward or the article .²⁰⁶

Samantha's testimony was sufficiently important to the state that Prosecutor Bock called it the "third spoke" of the case in his opening statement to the jury. Bock emphasized that Samantha and her husband "were friends of Cecil Barriner." Bock talked about Samantha and Daniel: Cecil's friends whom he visited and took with him to drive past the Sisks' house, for a page and a half of the transcript.²⁰⁷ Before concluding his opening statement, Bock returned again to Samantha--reminding the jury that because of her and her family members' concern, she went to the police.²⁰⁸ Finally, in closing argument, Bock relied on and cited Samantha's testimony more than once as proof of Cecil's guilt.²⁰⁹

Bock did not even need to ask the rhetorical question: why would Cecil's friends turn him in if he wasn't guilty? And because the reward money evidence was excluded, defense counsel could not answer that unasked rhetorical question: why would

²⁰⁵ DefExB.

²⁰⁶ T663;LF275-76.

²⁰⁷ T534.

²⁰⁸ T544.

²⁰⁹ T1195,1202,1204.

someone's friends turn him in if he wasn't guilty? Because the reward money evidence was excluded, defense counsel could not ask the jury to consider that evidence in evaluating the credibility of Samantha's testimony and her motivation in testifying for the state. Counsel could, and did, argue that Samantha's testimony--about Christmas lights being on at the Sisk house and cars not being there--was inconsistent with Debbie Dubois' testimony, and that Samantha's testimony about the "yellow note" was physically "impossible."²¹⁰ But without the reward money evidence, counsel had no evidence from which to argue that the jury should disbelieve the essence of Samantha's testimony: that Cecil was talking about getting money and driving past the Sisks' house the night before they were murdered.

"[C]onstitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to ... harmless-error analysis."²¹¹ "Whether such an error is harmless ... depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the

²¹⁰ 1209-11.

²¹¹ *Olden v. Kentucky*, 488 U.S. 227,232 (1990) quoting *Delaware v. Van Arsdall*, 475 U.S. 673,684 (1986).

prosecution's case."²¹² "[E]xclusion of relevant and admissible evidence is not always reversible error."²¹³ "[W]here the court is convinced that the error contributed to the result reached by the jury, the judgment should be reversed."²¹⁴

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense."²¹⁵ "The denial of the opportunity to present relevant and competent evidence negating an essential element of the [S]tate's case may, in some cases, constitute a denial of due process."²¹⁶

"Cross-examination of a witness within the permitted limitations is a matter of right, and one of its permissible purposes is to bring out facts that may tend to show that the testimony of the witness on direct examination is untrue or is not entitled to belief."²¹⁷

"Motive for false accusation of one charged with a crime by a witness for the state is a proper subject for inquiry in a criminal prosecution, and evidence to prove the motive

²¹² *Id.* at 232-33.

²¹³ *State v. Ray*, *supra*, 945 S.W.2d at 469.

²¹⁴ *Id.*

²¹⁵ *Crane v. Kentucky*, 476 U.S. 683,688 (1986) *citing Strickland v. Washington*, 466 U.S. 668,684-85 (1984).

²¹⁶ *State v. Copeland*, 928 S.W.2d 828,837 (Mo.banc1996).

²¹⁷ *State v. Thompson*, 280 S.W.2d 838,840 (Mo.1955) *citing Alford v. United States*, 282 U.S. 687,691 (1931).

may be developed either by cross-examination or by impeachment."²¹⁸ "The danger that the trial will become bogged down in collateral issues and the jury distracted and confused does not outweigh defendant's interest in showing the accusing witness' bias."²¹⁹ "The bias of an accusing witness is never a 'collateral' matter but is directly and intimately involved in the issues of the case."²²⁰

'[A] trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant..."²²¹

The Supreme Court has warned against frustrating the "the truth-seeking function of a trial" by limiting the scope of a prosecutor's cross-examination.²²² The converse is also true: it does not serve the truth-seeking function of a trial to insulate a state's witness from questions asking if she knew about a financial reward for information about the offense.

²¹⁸ *State v. Lampley*, 859 S.W.2d 909,911 (Mo.App.E.D. 1993) *citing State v. Woods*, 508 S.W.2d 297,301 (Mo.App.1974).

²¹⁹ *Id. citing State v. Hedrick*, 797 S.W.2d 823,827 (Mo.App.1990).

²²⁰ *Id. citing State v. Johnson*, 700 S.W.2d 815,817 (Mo.banc1985).

²²¹ *Olden v. Kentucky*, *supra*, 488 U.S. at 232 *quoting Delaware v. Van Arsdall*, *supra*, 475 U.S. at 679.

²²² *Doyle v. Ohio*, 426 U.S. 610, 636n.7 (1976).

Here, defendant's right to impeach Samantha's testimony by showing a motive-- financial reward--for false accusation was not merely subject to reasonable limitations: it was denied altogether. The trial court's exclusion of "all evidence" that would have demonstrated Samantha's motive to falsely accuse Cecil and to testify favorably for the state was error.²²³

It is not just ironic that in a case where the state claimed that the defendant committed murders for money,²²⁴ the state objected to cross-examining a state's witness

²²³ *State v. Colton*, 227 Conn. 231,250, 630 A.2d 577,588 (Conn.1993) (Appropriate to question state's witness about receiving reward for providing information about offense; "Inquiry into the possible financial stake of a witness in the outcome of a case in which the witness is testifying is a proper subject of impeachment") *citing Wheeler v. United States*, 351 F.2d 946,947 (1stCir.1965); *State v. Howard*, 693 S.W.2d 888,890-91 (Mo.App.W.D.1985) (excluding all evidence of victim's juvenile offender status and record violated defendant's right to confrontation and required reversal because it prevented defendant from establishing motivation of witness to testify for the state); *State v. Hunter*, 544 S.W.2d 58 (Mo.App.K.C.D.1976) (trial court's error in refusing to allow cross-examination of bank teller who identified defendant as person who attempted to cash a forged check as to her possible motivation for testifying--whether her fear of losing her job compelled her to testify and to identify the defendant--prejudiced defendant and required reversal).

²²⁴ LF202-03,209-10;T535,538,540,546,1196,1199,1202,1204.

with regard to her motive: whether she was aware of a newspaper article offering a financial reward for information about the murders. As shown above, the total exclusion of such cross-examination was prejudicial error. For the foregoing reasons, the cause must be reversed and remanded for a new trial.

As to Point Three: The trial court erred and plainly erred in overruling defense objections and allowing the state to elicit Shirley's testimony that when she, from time to time, broke up with Cecil, he would "get mad" and "angry" and "show up" at her mother's house and that she received a letter from Cecil in November, 1996, that "disturbed" her. This violated Cecil's rights to due process of law and fair trial, meaningful access to the courts, freedom from cruel and unusual punishment, reliable sentencing, and to be tried, convicted, and sentenced only for offenses charged. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const.,Art. 1,§§10,17,18(a),&21. Evidence that Cecil got "angry" and "mad" when Shirley broke up with him, that he went to her mother's house, and that his letter "disturbed" her was no more logically or legally relevant or probative of the charged offenses at this trial than evidence of Cecil's conduct involving Shirley and her son Shawn Tutor was at the last trial. No valid reason, certainly not Shirley's state of mind, warranted admitting this evidence. Cecil's letter contained references to his sexual behavior -- not to his being angry or mad at Shirley or at

anyone in the case. Cross-examination of Shirley concerning the actual, sexual content of the letter would have dispelled the innuendo that it disturbed her because in it Cecil was "mad" or "angry" at her or someone else or it made her fear Cecil would "show up" some place, but counsel could not do this because it would have opened the door to prejudicial evidence of Cecil's sexual relationship with Shirley. Evidence of Cecil's anger at Shirley and the "disturb[ing]" letter was unrelated to the charged offenses but prejudiced Cecil by allowing the jury to consider evidence of, or suggestive of, bad acts or uncharged misconduct as evidence that he was of bad character--therefore likely to have committed the charged offenses--and as proof of his guilt of the charged offenses.

Prior to trial, the court granted defense motions to exclude letters Cecil wrote to Shirley containing details of their sexual relationship and other evidence of Cecil's sexual relationships.²²⁵

At trial, AAG Smith asked Shirley about her periodic "break-ups" with Cecil and a "disturb[ing]" letter Shirley received from Cecil:

Q. [AAG Smith] If you would break up with the defendant, how would he react to that?

A. [Shirley] He would get mad. He would show up, like, come to my mom's and --
MS. BEIMDIEK [defense counsel]: Objection, Your Honor. May we

²²⁵ MT36-37. Motions 30 and 30A were filed prior to the first trial and may be found at PrevLF93-96,&111-14; A2-A9.

approach?

THE COURT: Yes.

MS. BEIMDIEK: I don't know how far she intends to go with this, but I know there are some allegations of fights between the two of them.

MS. SMITH: Uh-uh. We're not going to do any of that.

MS. BEIMDIEK: I mean, that's irrelevant, so, just with that understanding.²²⁶

THE COURT: All right.

Q. (by Ms. Smith) Without getting into specifics, if you would break up with the defendant, how would he react?

A. [Shirley] He would be mad. He would be angry.

Q. Okay. And in August of 1996, what was your relationship when you got sent to the prison?

A. Well, we had split up, and we both was [sic] trying to get back together. And

²²⁶ T684. Although the motion for new trial included as a point of error, "overruling defendant's objection to [Shirley] Niswonger describing how the defendant behaved during times they would break up..." it is not clear from the record whether counsel is objecting to any testimony concerning how Cecil reacted when Shirley broke up with him, or whether the objection is only to testimony concerning "fights between the two of them." Accordingly, insofar as the Court should find the point not fully preserved, appellant respectfully requests review for plain error. Rule 30.20.

when I went back to Tipton, he wrote me a letter.

Q. Okay. So, during this time then when you went back to prison, you were still talking?

A. And corresponding. I called him when I got--I guess, when I got to Renz over the phone several times...

Q. At any point in there, did you finally break off your relationship with the defendant?

A. Yes. I told him that it was probably better that he go his way and I go my way, because we were just making both--each other miserable. And I wasn't going to go back down to Poplar Bluff after I got back out again.

Q. Okay. And did you hear from the defendant again after that?

A. I got a letter from him around November of '96, and it was real--

MS. BEIMDIEK: Objection. May we approach?

THE COURT: Is it necessary?

MS. SMITH: She's not going to get into the substance of the letter, but it goes to show the state of mind of the witness.

THE COURT: Do you still object?

MS. BEIMDIEK: Yes.

THE COURT: All right. Come up.

MS. BEIMDIEK: I think she's going to say what the letter read.

MS. SMITH: And that it was weird. And that after that, she decided not to contact him at all.

MS. BEIMDIEK: We need to hold it down.

MS. SMITH: Can they hear us?

THE COURT: What is your objection to that?

MS. BEIMDIEK: Well, she says that the letter--the stuff that was weird--

MS. SMITH: She is not going to talk about that. Absolutely not.

That's why we're not going into specifics of the letter. But the thing is that her breaking it up and calling off the things with the defendant and not getting back with him is one of the reasons he picked Candi. It's motive.

THE COURT: All right. But you're not going into the contents?

MS. SMITH: No, sir. No, sir. No.

THE COURT: Okay. Overruled.

Q. (by Ms. Smith) Without getting into the contents of that letter, simply what was your reaction to it?

A. [Shirley] I was disturbed by it.

Q. Okay. And after that, did you have any contact or correspondence with the defendant until after the time your daughter died?

A. No.²²⁷

The defense included these rulings in the motion for new trial.²²⁸

²²⁷ T684-87.

Shirley's testimony that when she broke up with Cecil, he would get "mad," "angry," "show up," and "come to" her mother's house served no legally probative purpose. It functioned solely to prejudice the jury against Cecil by implying he was of bad character, guilty of bad acts and uncharged misconduct, and by allowing the jury to speculate about Cecil's intentions toward Shirley and possibly her mother and others.

Heightening the prejudice was Shirley's testimony that she was "disturbed" by a letter she received from Cecil in November of 1996. The jury was not told, and could only speculate, why the letter "disturbed" her. The jury was free to provide its own speculative ideas of what it was in the letter that "disturbed" Shirley. Especially because these two pieces of evidence were juxtaposed -- the "disturbing" letter right after Shirley's testimony that Cecil would get "angry" and "mad" and "show up" at her mother's house--the jury logically would conclude that Cecil's letter expressed anger or alarmed or scared Shirley or that he threatened to "show up" at Shirley's mother's house or somewhere else.

Eliciting Shirley's testimony that the letter "disturbed" her deliberately misled the jury into believing that in some manner it was connected to or foreshadowed the charged offense. The speculation it aroused was prejudicial, but what made this evidence truly malevolent was that although the letter contained no expressions of anger or madness or violence or threats, any attempt by the defense to cure that implication by cross-examining Shirley about the actual content of the letter would have opened the

²²⁸ LF242-43.

door to evidence of Cecil's sexual behavior.²²⁹

Shirley's "state of mind" was not relevant to any issue in the case.

AAG Smith first justified eliciting Shirley's reaction to Cecil's letter on the grounds "it goes to show the state of mind of the witness."²³⁰ The "state of mind" exception to the hearsay rule concerns the state of mind of the *declarant*--in this case, Cecil--not the state of mind of the person who was on the receiving end of the declaration--in this case, Shirley.²³¹ In *State v. Copple*, the victim in the case testified to a statement made by her mother regarding the time that an event occurred.²³² The Western District found "the statement," that "of a declarant who is neither the witness nor the victim," did not fall within the state of mind exception, and was inadmissible.²³³

²²⁹ T686-87; LF242-43. 'When evidence is inadmissible because it is not relevant, it can nevertheless become admissible because a party has opened the door to it with a theory presented in an opening statement. Therefore, a defendant's opening statement can open the door to evidence of a prior crime.' *State v. Rutter*, 2002 WL 31863839 (Mo.banc 12/24/2002)*8.

²³⁰ T686.

²³¹ "Out-of-court statements offered to prove knowledge or state of mind of the declarant are not hearsay." *State v. Brown*, 998 S.W.2d 531,546 (Mo.banc1999) *citing State v. Basile*, 942 S.W.2d 342,357 (Mo.banc1997).

²³² 51 S.W.3d 11,17 (Mo.App.W.D.2001).

²³³ *Id.*

Further, even if admissible as a state of mind exception to the hearsay rule, a statement may not be admitted unless it is relevant. The statements in this case are those made by Cecil in the letter to Shirley concerning their sexual relationship or his sexual behavior, and this Court has already ruled such evidence inadmissible.²³⁴

Absent threats to Candi or Irene, neither Cecil's on-and-off relationship with Shirley nor her reactions to his sexually explicit letters were logically or legally relevant to the charged offenses. Shirley's testimony was inadmissible evidence of bad character, bad acts, or misconduct that prejudiced Cecil. This evidence does not fit the motive exception: "It's deja vu all over again."²³⁵

At Cecil's first trial, the state elicited that Cecil "had once told [Shirley] that he would take her son into the woods and shoot him."²³⁶ On appeal, this Court rejected the state's assertion that this testimony was "properly admitted under the motive exception..."²³⁷

The state contends [Shirley's] testimony, *along with evidence that [Shirley] had ended her relationship with appellant several months before the murders*, was both logically and legally relevant to establish appellant's animus toward [Shirley] and, thus, motive for the murders. The state asserts that appellant killed

²³⁴ *State v. Barriner, supra.*

²³⁵ Yogi Berra.

²³⁶ *State v. Barriner, supra*, 34 S.W.3d at 148.

²³⁷ *Id.*

Irene Sisk and Candy Sisk in a gruesome fashion to say "go to hell Shirley..."²³⁸

This Court disagreed:

[Shirley's] testimony was not legally relevant to prove appellant's motive. *Stewart*,^[239] cited by the state, is distinguishable. In *Stewart*, the defendant threatened both his victim and the victim's mother. *Stewart*, 18 S.W.3d at 86. In the present case, there is no allegation that appellant threatened Candy Sisk or Irene Sisk. Nor is there evidence that appellant threatened Candy's mother, [Shirley] Niswonger. The prejudicial effect of [Shirley's] testimony substantially outweighs its probative value in that it may have led the jury to convict appellant on propensity evidence. The trial court erred in admitting the evidence.²⁴⁰

As this Court held on appeal from the previous trial, the status of Cecil's romantic relationship with Shirley had no connection to the charged offenses. Shirley's testimony here, as at the first trial, improperly suggested to the jury that Cecil was of bad character and had a propensity to commit bad acts. It invited the jury to use that evidence, and whatever they imagined Cecil might have said that "disturbed" Shirley, to convict Cecil.

Lacking the benefit of instruction or admonition otherwise, the jury would certainly consider Shirley's testimony about Cecil's behavior and "disturb[ing]" letter as evidence that Cecil killed Shirley's daughter, Candi, and Candi's grandmother. The jury would

²³⁸ *Id.*; emphasis added.

²³⁹ *State v. Stewart*, 18 S.W.3d 75 (Mo.App.E.D.2000).

²⁴⁰ *Barriner*, 34 S.W.3d at 148.

not know that Cecil's relationship with, and letters to, Shirley were unrelated matters unconnected to, not probative of, the charged offenses and should not be used as evidence of guilt. No valid purpose existed for admitting this evidence; it served only, improperly, to tarnish Cecil's character, document a propensity to commit bad acts and misconduct and imply he had committed the charged offenses.²⁴¹

“To testify to similar criminal acts is error.”²⁴²

The long-standing rule in Missouri is that evidence of uncharged crimes, wrongs, or acts (“other crimes”) for which the accused is *not* on trial is inadmissible to demonstrate the defendant's propensity for similar acts.²⁴³ The rule applies to conduct that “could have been the subject of a criminal charge” and probably to other acts and conduct that the jury would perceive to be wrongful, criminal or that would arouse in the jury the same kind of prejudice against the defendant that would be created by “a disclosure that the defendant has engaged in criminal conduct.”²⁴⁴

Evidence of a defendant's prior misconduct may be admitted if it is “logically

²⁴¹ See, *infra*, note 251, *State v. Lancaster*, *State v. Sexton*, and *State v. Olson*.

²⁴² *State v. Randolph*, 698 S.W.2d 535,541 (Mo.App.E.D.1988) (evidence defendant may have been involved in previous incident similar to charged offense prejudiced defendant and required reversal).

²⁴³ *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993) *citing State v. Reese*, 274 S.W.2d 304,307 (Mo.1954).

²⁴⁴ *State v. Sladek*, 835 S.W.2d 208,313n.1 (Mo.banc1992).

relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect."²⁴⁵ Exceptions to this rule allow admission of evidence of uncharged bad acts or misconduct to establish motive, intent, absence of mistake or accident, a common scheme or plan, or identity.

Demonstrating bad character and propensity to commit a particular crime are not among the purposes or exceptions under which "other crimes" evidence may be admitted at trial.²⁴⁶ "Reputation or character testimony is admissible only when a defendant has put his own reputation in issue."²⁴⁷ Cecil did not put his character in issue here.

Shirley's testimony that Cecil got "mad" and "angry" and then "show[ed] up" at her mother's house was evidence the jurors would use to find that Cecil had done a similar thing in this case: he was mad and angry at Shirley, he went to her daughter's house, and he killed Shirley's daughter and her grandmother. This was exactly what the state argued:

He went there because Shirley had dumped him, finally, and he killed her daughter and left her, Shirley, the ultimate calling card--the knife right in the

²⁴⁵ *Id.*, 835 S.W.2d at 311; citations omitted.

²⁴⁶ *Id.*

²⁴⁷ *State v. Hernandez*, 815 S.W.2d 67,70 (Mo.App.S.D.1991).

middle of Candi's chest. That was the final greeting or get-back at Shirley.²⁴⁸

For this reason, the evidence was highly prejudicial.²⁴⁹

Contrary to AAG Smith's contention,²⁵⁰ that Cecil would get "mad" and "angry" and "come to [her] mother's house" when Shirley broke off their relationship was no more logically or legally relevant at this trial than was Shirley's testimony at the first trial: that Cecil had threatened to kill her son.

There was no evidence the murders occurred because Shirley broke up with Cecil; there was only the state's assertion that this was Cecil's motive. Neither Shirley's "disturbed" testimony nor her "mad" and "angry" testimony nor any other testimony supports the state's claim that Cecil's "motive" in "pick[ing]" Candi was because Shirley broke up with him.

Nor does the family connection--Candi was Shirley's daughter--make Shirley's "mad" "angry" and "disturbed" testimony any more logically or legally relevant at this trial than her testimony about her relationship with Cecil and his threats against her son were at the last trial.²⁵¹ Moreover, this theory could not explain Irene's murder because

²⁴⁸ T1226.

²⁴⁹ *Id.* at 536-40.

²⁵⁰ T687: "But the thing is that her breaking it up and calling off the things with the defendant and not getting back with him is one of the reasons he picked Candi. It's motive."

²⁵¹ *See, e.g., State v. Lancaster*, 954 S.W.2d 27 (Mo.App.E.D.1997) (admission of

there was no evidence that Irene was related to Shirley or that Cecil believed that Shirley had affection for Irene such that killing Irene would "get-back" at Shirley.

For the foregoing reasons, as at the last trial, the trial court's error in admitting this irrelevant evidence prejudiced Cecil. It violated his right to be tried, convicted, and sentenced only for, and on good evidence of, the crimes actually charged.²⁵²

Where erroneously admitted evidence taints the proceedings, a new trial is required--

evidence of defendant's uncharged abuse of other family members was prejudicial error requiring reversal); *State v. Sexton*, 890 S.W.2d 389 (Mo.App.W.D.1995) (evidence of defendant's uncharged sexual misconduct involving two step-daughters inadmissible at defendant's trial for raping and sodomizing third step-daughter from different marriage); *State v. Olson*, 854 S.W.2d 14 (Mo.App.W.D.1993) (Testimony of complaining witness, defendant's eight-year-old stepdaughter, that defendant gave beer and pornographic literature to his six-year-old son not relevant and "served only to inflame and prejudice the jury as to Olson's character"); *State v. Kitson*, 817 S.W.2d 594,598 (Mo.App.E.D.1991) (where defendant was charged with sodomy of his son, and evidence showed defendant inserted inanimate objects into son's anus, evidence that defendant had inserted inanimate objects into his own anus and into his wife's anus was reversible error).

²⁵² *State v. Barriner*, *supra*, 34 S.W.3d at 144 citing *State v. Clover*, 924 S.W.2d 853,855 (Mo.banc1996); *State v. Burns*, 978 S.W.2d 759,760 (Mo.banc1998); U.S.Const., Amend's V,VI,XIV; Mo.Const., Amend's 10,17,&18(a).

even if the evidence is overwhelming.²⁵³ As shown in the portion of the argument addressing Point 1, *supra*, the state's evidence against Cecil was sufficient but not overwhelming. It cannot be said "that the inadmissible evidence did not contribute to the jury's verdict."²⁵⁴ The cause must be reversed and remanded for a new trial.

As to Point Four: The trial court erroneously overruled defense motions based on Prosecutor Bock's misconduct in making statements to the press resulting in Warren County jurors reading and hearing about a St. Louis Post-Dispatch newspaper article concerning the case and an unrelated murder case previously charged against Cecil. Denying motions for a continuance and venue change or, alternatively, to select a jury from another county or, alternatively, for individual voir dire of jurors who had read or heard about the case violated Cecil's rights to due process, fair jury trial, fundamental fairness, freedom from cruel, unusual punishment and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const.,Art1,§§10,18(a),&21. Cecil was prejudiced because jurors reading or hearing about the article learned this Court could--did--reverse the convictions and death sentences assessed by a previous jury. They learned about inadmissible

²⁵³ *State v. Charles*, 572 S.W.2d 193 (Mo.App.K.C.D.1978) (notwithstanding lack of defense objections, prosecutor's repeated injection of evidence of other crimes required reversal).

²⁵⁴ *State v. Barriner*, *supra*, 34 S.W.3d at 152.

evidence requiring reversal: a videotape of Cecil and Shirley--"the younger victim's mother"--engaged in "sexual bondage," and that Cecil "threatened to kill one of [Shirley's] other children." Attributing prosecutor Bock as the source of the information, the article previewed the state's evidence against Cecil: Cecil was using methamphetamine at the time of the crime and feared failing a drug test and violating his probation on another case; he sought money from the Sisks, took them to a bank where they cashed a check for him, "took them home, tied them up, tortured them and murdered them..." He stabbed the "grandmother ... 17 times in the chest" and stabbed Candi "several times in her neck and sexually assaulted [her] after her death..." Jurors who read the article knew in advance of trial that in Bock's opinion, "It is an unbelievably brutal crime."

Without identifying a source, the article reported information not then a matter of public record: "In 1997, Barriner was charged in Butler County with the stabbing death of Maggie Jean Moore, 32, in December 1994. After Barriner was found guilty in the double homicide case, prosecutors dismissed the Moore case, but they may file it again depending on what happens in Warren County."

When he spoke to the newspaper reporter before retrial, Prosecutor Bock was well aware that certain evidence would be inadmissible. Bock knew he could not bring into the courtroom evidence of Cecil's sexual activities with Shirley and Cecil's threats against her son. He knew this because this Court had held that Bock's use of the sexual evidence and the threats at the first trial prejudiced the jury and required a new trial. And, at a pretrial hearing on a defense motion to exclude evidence of the threats to

Shirley's son, this Court's opinion was discussed, Bock acknowledged that evidence of the threats was inadmissible, and the trial court stated it was inadmissible.²⁵⁵

Prosecutor Bock also knew he could not bring into the courtroom evidence that Cecil had been charged with murder in an, unrelated case. Bock knew this evidence was inadmissible because: 1) such "other crimes" evidence is generally inadmissible, 2) Judge Hodge had already excluded evidence of the unrelated murder charges, and 3) Bock had told the defense he "did not intend to initiate in its evidence or testimony, evidence about that particular homicide."²⁵⁶

Knowing this evidence was not admissible and he could not use it at Cecil's retrial, Prosecutor Bock never said a word about it in the courtroom. Instead, via the press, Bock broadcast this evidence across Warren County into the homes of the venire members before they ever stepped into the courthouse. The impact of this article was such that people in Warren County read it to friends and discussed it with each other. Discussion of the article did not stop at the courthouse door: jurors in the waiting room participated in, or listened to, discussions about the article.²⁵⁷

Prosecutor Bock's comments could not have been inadvertent. He had a perfect

²⁵⁵ MT42-46.

²⁵⁶ *State v. Barriner*, *supra*, 34 S.W.3d at 144 *citing State v. Bernard*, *supra*, 849 S.W.2d at 13; T24,26.

²⁵⁷ Out of court: T25,112-16,192-93,263-67,370,372,496-97. In the jury waiting room: T28,273-82,286-91,367-68,373.

opportunity to defend or explain his conduct when defense counsel raised the matter before trial. Bock never said a word.²⁵⁸

Prosecutor Bock never claimed that he did not intend such publicity or that he did not deliberately, as the ethical rules put it, "make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication..." Bock had to "know[] or reasonably should [have] know[n] that [his comments would] have a substantial likelihood of materially prejudicing an adjudicative proceeding."²⁵⁹

Appellate Courts have consistently ruled that attorney conduct comparable to Prosecutor Bock's is improper. For example, in *In the Matter of Litz*, the Indiana Supreme Court found that a defense attorney violated Indiana Professional Conduct Rule 3.6(a) by writing letters about the case that appeared in three local newspapers while retrial was pending following reversal of the defendant's conviction on appeal and remand for a new trial.²⁶⁰ Attorney Litz's letters contained a "description of evidence that could have been inadmissible at trial (i.e., the fact and result of the lie detector test), and his opinion that his client did not commit the crime for which she was charged..."²⁶¹

The Indiana Court found that Litz's letters violated Indiana Rule 3.6(a)--identical to

²⁵⁸ T2-9.

²⁵⁹ Missouri Supreme Court Rule 4-3.6(a).

²⁶⁰ 721 N.E.2d 258 (Ind.1999).

²⁶¹ *Id.* at 259-60.

Missouri Rule 4-3.6(a):²⁶²

The respondent's letters to area newspapers created a substantial likelihood of material prejudice to the pending jury retrial of the respondent's own client. Some of the statements contained therein presumptively presented that risk: his description of evidence that could have been inadmissible at trial (i.e., the fact and result of the lie detector test), and his opinion that his client did not commit the crime for which she was charged...²⁶³

Similarly, in *In re Zimmerman*,²⁶⁴ the Tennessee Supreme Court upheld the trial court's determination that a prosecuting attorney "technically" violated the state's disciplinary rules based on two incidents in which he spoke "informally" to the press and the prosecutor's statements appeared in newspapers. The Court found that discipline was warranted even though the prosecutor "did not act maliciously or with intent to interfere with a fair trial ... to influence the trial judge in imposing sentence..."²⁶⁵

²⁶² "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

²⁶³ *Id.*

²⁶⁴ 764 S.W.2d 757 (Tenn.1989).

²⁶⁵ *Id.* at 759-60.

Delaware prosecutors violated that state's ethical rules by making comments about the case--concerning inadmissible and unsupported, speculative evidence--reported in a newspaper during the trial in *Hughes v. State*.²⁶⁶

The present case, of course, was not a disciplinary proceeding but a retrial in a criminal case. Nevertheless, the foregoing cases are solid authority for this Court to find that Bock's conduct was improper. Further, as in those cases, Bock's conduct here was prejudicial.

The defense (as Prosecutor Bock told the jurors at the start of the general voir dire) had taken a change of venue to move the trial from New Madrid County.²⁶⁷ Bock's statements to the press, however, effectively voided that change of venue. Bock's statements succeeded in bringing the small-town knowledge of New Madrid, the scene of the crime, to Warren County. Everyone in Warren County might not know everyone else, but Bock tried to make sure they all knew Cecil.

Because Bock's comments to the press appeared in the newspaper and created "a substantial likelihood of materially prejudicing an adjudicative proceeding,"²⁶⁸ Judge

²⁶⁶ 437 A.2d 559,575 (Del.1981).

²⁶⁷ T431. Bock explained that "in rural Missouri, in small counties, small populations of which we [New Madrid] are one, a defendant has a right, an absolute right to take a trial out of your county, and that right was exercised in this case, as it is in many cases. And so we end up here in Warren County."

²⁶⁸ Rule 4-3.6(a).

Hodge needed to take action to avoid that prejudice from occurring. The defense motions suggested three possible ways for Judge Hodge to take corrective action.

The defense motions for a continuance to allow a change of venue or to select a jury from a different county²⁶⁹ were feasible means of avoiding the prejudice. Bock's misconduct in speaking to the press was deliberate, thus any prejudice to the state resulting from a continuance and change of venue or selection of a jury from another county would be prejudice of the state's own making. There was, simply, no good reason to deny the defense request to ensure a fair trial by changing venue or changing the source of the jury.

That was what the Kentucky Supreme Court held in a case much like the present case. In *Bush v. Commonwealth*,²⁷⁰ comments by the prosecutor were featured in a newspaper article appearing on the day of trial. Twelve potential jurors had read the article (compared to 31 in the present case), but only two jurors were excused; one juror was not excused even though she admitted being influenced by the article.²⁷¹ The Kentucky Supreme Court held:

Clearly, the trial court should have granted a continuance in this case to permit sufficient time to pass to dispel the prejudice caused by the article.

Alternatively, the trial court could have changed venue to a place where the

²⁶⁹ T8-9.

²⁷⁰ 839 S.W.2d 550,554 (Ky.1992).

²⁷¹ *Id.*

prejudice from the article would not have been a factor. The prosecutor committed a clear violation of the Kentucky Rules of Professional Conduct, Rule 3.6, Trial Publicity (SCR 3.130), and in particular of RPC 3.6(a) and of (b)(4), (5) and (6). Among other things, these rules prohibit dissemination of information that would be inadmissible evidence at trial. The limit of what is permitted in a criminal case is described in RPC 3.6(c)(7), and was far exceeded in this case. *We have no hesitancy in condemning such conduct and declaring it grounds for reversal, thereby denying the prosecutor an advantage improperly obtained.*²⁷²

A motion for change of venue is "within the discretion of the trial court" and the court's ruling will be upheld on appeal "unless it was a clear abuse of discretion."²⁷³ In the present case, not granting the motion was an abuse of discretion. Of the 97 prospective jurors who were summoned, 31--almost one third--had read or heard about the article featuring Bock's statements and opinions about the case, the convictions and death sentences, the reversal, and the unrelated, uncharged murder case. As in *Bush v. Commonwealth*, the trial court should not have allowed the state to benefit from "an advantage improperly obtained." "[T]he trial court should have granted a continuance in this case to permit sufficient time to pass to dispel the prejudice caused by the article" or "changed venue to a place where the prejudice from the article would not have been a

²⁷² *Id.*; emphasis added.

²⁷³ *State v. Baumruk*, 85 S.W.2d 644,649 (Mo.banc2002).

factor."

Having declined to continue the case to allow a change of venue or selection of a jury from another county, there still remained to Judge Hodge an alternate means of ensuring that Bock's comments to the press and other information in the article would not taint the trial: the defense motion for individual questioning of jurors who had read or heard about the article. This option was, in fact, what an Illinois trial judge did in *People v. Aleman*.²⁷⁴

Faced with the a high-profile retrial in a criminal case²⁷⁵ and the defendant's concern about pre-trial publicity, the circuit court employed a two-step process to select the jury, first, individually questioning members of the venire (outside the presence of others) as to their knowledge about the case or defendant. Those members who had been exposed to pre-trial publicity were questioned further as to their knowledge of the facts and the effect, if any, of the exposure. This "special," individual questioning by the court occurred outside

²⁷⁴ 313 Ill.App.3d 51, 729 N.E.2d 20 (Ill.App.2000).

²⁷⁵ Aleman was indicted in 1976 for a 1972 murder and acquitted after a bench trial in 1977. In 1990, after the trial judge learning that he was being investigated by the FBI for bribery, the judge committed suicide. The defendant was indicted again in 1993. After a circuit court rejected Aleman's double jeopardy claim, he was tried by a jury and convicted. 313 Ill.App.3d at 54, 729 N.E.2d at 25.

the courtroom with only the attorneys and defendant present.²⁷⁶

The procedure employed by the *Aleman* trial court ensured that contrary to the defendant's claim on appeal, 'the jury selection "atmosphere"' at that trial was not "publicity-tainted."²⁷⁷

But not so here. Unfortunately, here, Judge Hodge refused individual questioning of jurors who had heard about or read the newspaper article about the case.²⁷⁸ This meant the attorneys--and the judge--had no way of knowing which jurors had read or heard about the inadmissible evidence of Cecil's sexual activities with Shirley. The attorneys and the judge had no way of knowing which jurors were aware a jury previously had convicted Cecil and sentenced him to death. Nor did the attorneys and the judge have any idea which jurors knew that Cecil had been charged in an unrelated murder, those charges had been dismissed, and the prosecutors in that case would make a decision on whether to refile charges depending on what happened in this case.

Of course, this lack of knowledge about what the jurors knew would not prejudice the state. It could not hurt the state not to know if the jurors were aware that a previous jury had convicted Cecil and sentenced him to death or if the jurors knew that Cecil had engaged in sexual bondage with Candi's mother or if they knew that prosecutors in another county thought Cecil was responsible for another murder.

²⁷⁶ *Id.* at 58, 729 N.E.2d at 27- 28.

²⁷⁷ *Id.* at 58-59, 729 N.E.2d at 27-28.

²⁷⁸ *E.g.*, T292,295,298.

Finally, in light of what occurred during voir dire of the fourth small panel, this Court cannot ratify the trial court's refusal to quash that panel or to allow more detailed questioning of all jurors who indicated they had heard or read about the article. Despite the fact that Prosecutor Bock expressly asked the fourth panel if they had "heard anything, discussed anything, or read anything or seen anything on the Internet about this case" no less than 7 jurors failed to respond to that question until asked individually.²⁷⁹

Certainly it did not help matters that Judge Hodge began the jury selection process with voir dire of small groups and that he failed to instruct all the jurors that they were not to discuss the case.²⁸⁰ Nor did it help that at least seven jurors, and perhaps more, failed to respond when asked if anyone had "heard" or "read" about the case.²⁸¹

It is worth noting that it was only after specific probing that seven jurors--who had not initially responded to Prosecutor Bock's question--finally admitted they had heard of the article. One of the jurors who did not respond, Ms. Thomas, ultimately admitted that she had formed an opinion she could not set aside.²⁸² With this in mind, the

²⁷⁹ T286-92. Jurors Woodson, Thomas, Harrelson, Scott, Orf, Schwarzen, and Simpson eventually admitted they heard other jurors discussing the case in the jury waiting room.

²⁸⁰ The trial judge acknowledged that he didn't think "anyone" told the jurors not to discuss the case while waiting to be called for voir dire (T295).

²⁸¹ T262.

²⁸² T287.

concerns expressed by defense counsel prior to voir dire are well taken. Counsel expressed concern "that even today when we voir dire these jurors about publicity, that some of them may be so inflamed by the information they have now learned that they may not be candid with us about what they have been exposed to so that they can set Cecil Barriner up, so that they can serve on this trial, and then poison the jury with what they have learned and taken with them into the jury room."²⁸³

Prosecutor Bock's misconduct created the problem. Bock's comments to the press violated his "obligation ... in a criminal prosecution" not to make sure he would "win a case" but to ensure "that justice shall be done."²⁸⁴

Bock struck a "hard" and "foul" blow when he spoke to the newspaper reporter before trial. He violated the ethical rules and destroyed the integrity of the judicial proceeding that he convened to prove Cecil's guilt. Judge Hodge's restrictions on the attorneys, and his denial of the motions for a continuance and venue change or, alternatively, to select the jury from another county, and his refusal to let the attorneys ask jurors who had "heard" or "seen" something what it was they heard or saw, did nothing to ensure an untainted trial.

The record of what transpired -- before trial: Bock's discussion of the charged murder and the uncharged murder in the newspaper; what occurred the morning of trial: Judge Hodge's denial of curative pretrial motions; and what occurred at trial during voir

²⁸³ T6.

²⁸⁴ *Berger v. United States*, 295 U.S. 78,88 (1935).

dire: Judge Hodge's restrictions on questioning the prospective jurors -- does nothing to inspire confidence in the verdicts at either stage of trial.

Unfortunately, it is left to this Court, belatedly, to cure Prosecutor Bock's misconduct. As it is now too late for a continuance and change of venue or to select jurors from another county, or to question those Warren County jurors who heard or read about the case individually, the Court should reverse and remand for a new trial.

As to Point Five: The trial court erred in overruling Cecil's amended motion to suppress statements, his objections at trial, and admitting evidence of Cecil's oral statements. This violated his rights to due process of law, fair trial, silence, non-incrimination, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V,VIII,&XIV; Mo.Const.,Art.1, §§10,19,&21. Cecil's statements were not voluntarily, knowingly or intelligently made as shown by the totality of circumstances: Cecil's refusal to sign a waiver of his rights, his incoherent condition during interrogation, Officer Hinesly's intimidating and threatening revelation that Irene's nephew was a sheriff, and both officers' display of their guns. Admission of Cecil's oral statements prejudiced him because they admitted guilt.

Pretrial, the defense filed and litigated an amended motion to suppress statements.²⁸⁵ The amended motion alleged that Cecil's statements were involuntarily made and were

²⁸⁵ LF152-59;MT99-117.

coerced because he was under the influence of drugs affecting the nervous system, specifically, methamphetamine; following his arrest and deprivation of drugs, his physical and mental state deteriorated to the point that he became incoherent and had to be handcuffed for safety; Hinesly threatened Cecil during interrogation by displaying his weapon and by telling Cecil that Irene had a nephew--a retired trooper now working as a sheriff--who would see to it that Cecil was harmed in jail and Hinesly would not ensure Cecil's safety if he did not confess to the killings.²⁸⁶

The interrogation began about 9:00 p.m. on the 19th with Hinesly stating he knew Cecil killed the Sisks and wanted to know why.²⁸⁷

Hinesly had never audio-taped or video-taped an interrogation and did not tape this one.²⁸⁸ Hinesly read Cecil his "rights" and Cecil understood them. Cecil did not sign the Butler County "Waiver of rights" form and did not put his statement in writing. Hinesly wrote on the form: "Refused to sign."²⁸⁹

Hinesly's interrogation of Cecil continued for several hours.²⁹⁰ It took place in a small room; both Hinesly and Deputy Johnston--who was also in the room--wore weapons that were visible to Cecil.

²⁸⁶ LF154-55.

²⁸⁷ MT102,T1107,1129-30.

²⁸⁸ T1135.

²⁸⁹ T1131-34;DefExCC.

²⁹⁰ T1107,1115,1137.

During the interrogation, Cecil began acting weird. His eyes rolled up into his head. "He was acting strange." Hinesly was concerned for Cecil's welfare and his own; he kept saying, "Stay with me, Cecil. Stay with me, Cecil." At that point he handcuffed Cecil. Cecil was incoherent. Hinesly didn't know if Cecil was having a seizure and decided medical attention was not necessary.²⁹¹

Hinesly told Cecil that Irene's nephew was a former Highway Patrol Officer who now "was a sheriff in southern Missouri." Hinesly talked about Irene's nephew and mentioned what her nephew would like to see happen to Cecil.²⁹² Eventually, after at least three hours of interrogation, Cecil made statements implicating himself.

During Prosecutor Bock's opening statement, immediately before he began discussing Cecil's statements, the defense objected, and the trial court overruled the objection.²⁹³ Defense counsel objected again during Hinesly's direct examination before he testified about Cecil's statement. Judge Hodge overruled the objection and allowed it

²⁹¹ T1136-38.

²⁹² T1138-39

²⁹³ T542-43. Defense counsel's objection renewed the previously filed motions. At the conclusion of the hearing on the motion, Judge Hodge said he was taking the motion "under advisement" and would rule on it after reviewing the transcript of the previous hearing. MT117-18. Judge Hodge may have issued a ruling or an order pertaining to the suppression motion, but undersigned counsel has not located an order or ruling. The parties, however, treated the motion as overruled.

to continue. These rulings were included in the motion for new trial.²⁹⁴

Cecil's statement was coerced by a combination of circumstances. Viewed in "the totality of these circumstances,"²⁹⁵ it is apparent that Cecil's statement was coerced and not voluntary.

One prominent circumstance was Cecil's poor physical and mental condition. Hinesly himself acknowledged that Cecil's condition had deteriorated to the point that, during the interrogation, there was a period where Cecil was incoherent. Hinesly admitted that Cecil's eyes rolled up into his head and that his behavior became "weird" and "strange." Hinesly was sufficiently concerned for Cecil's welfare and his own that he handcuffed Cecil to a chair.

Hinesly admitted he did not know whether or not Cecil was having a seizure, but he decided not to seek medical attention for Cecil. Instead, he continued to press Cecil to make a statement saying, "Stay with me, Cecil. Stay with me, Cecil."²⁹⁶

A second factor was Hinesly not-very-veiled threat regarding Irene Sisk's nephew and what he would like to do to Cecil.²⁹⁷ The clear implication was that if Cecil did not

²⁹⁴ T1094;LF258,261.

²⁹⁵ *Arizona v. Fulminante*, 499 U.S.279,285-86 (1991).

²⁹⁶ T1136-38.

²⁹⁷ At the first trial, Hinesly acknowledged saying the following at his deposition: 'I told him that he (pause) [""]whether he realized it or not that Irene's nephew was a sheriff now in the State of Missouri and that I could assure you [Cecil] what he would like to

make a confession or statement, he would end up in Irene's nephew's jail.

United States Supreme Court cases have "made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient."²⁹⁸ That Court has 'said, "coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition."²⁹⁹

The circumstances surrounding the statement at issue in *Arizona v. Fulminante* are similar to those in the present case. In *Arizona v. Fulminante*, Fulminante was a suspect in the murder of his 11-year old stepdaughter. Arizona never filed charges against Fulminante and he moved to New Jersey. He was later convicted on federal charges of being a felon in possession of a firearm and sent to prison.³⁰⁰

While in prison, Fulminante and an inmate named Sarivola, who was then serving a 60-day sentence for extortion, became friends. Sarivola was in actuality "a paid informant" for the FBI, but in prison "he masqueraded as an organized crime figure." Having overheard rumors that Fulminante was a suspect in a child's death in Arizona, Sarivola started raising the subject with Fulminante; Fulminante made inconsistent statements to Sarivola. When Sarivola passed this information to the FBI, they told him

do to him in his jail["] and those kind of things and stuff.' Prevt1292-93.

²⁹⁸ *Arizona v. Fulminante*, *supra*, 499 U.S. at 287.

²⁹⁹ *Id.* citing *Blackburn v. Alabama*, 361 U.S. 199,206 (1960).

³⁰⁰ 499 U.S. at 282.

"to find out more."³⁰¹

One evening Sarivola told Fulminante that he knew other inmates were starting to give him "tough treatment" because of the rumor. "Sarivola offered to protect Fulminante from his fellow inmates, but told him, " 'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'" After that, Fulminante admitted killing his stepdaughter.³⁰²

Less than a year later, Fulminante was charged with murdering his stepdaughter, and he moved to suppress his confession to Sarivola.³⁰³ The Arizona Supreme Court held that the confession was coerced. The Supreme Court granted the State's petition for certiorari on the question of whether "a coerced confession is subject to a harmless-error analysis." In *Arizona v. Fulminante*, the Supreme Court held that a coerced confession is subject to harmless error analysis,³⁰⁴ but that Sarivola had indeed coerced Fulminante's confession and affirmed the judgment of the Arizona Supreme Court finding that admission of his confession was not harmless error.³⁰⁵

The Supreme Court agreed with the Arizona Supreme Court that Fulminante faced "a credible threat of physical violence" unless he confessed. Because the totality of the

³⁰¹ *Id.* at 282-83.

³⁰² *Id.* at 283.

³⁰³ *Id.* at 284-85.

³⁰⁴ *Id.* at 285.

³⁰⁵ *Id.* at 297-302.

circumstances of that case parallels those of the present case, they bear repeating here. First, "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates." Second, 'Sarivola was aware that Fulminante had been receiving "rough treatment from the guys.'" Aware of that treatment "Sarivola offered to protect Fulminante in exchange for a confession to" his stepdaughter's murder; responding to "Sarivola's offer of protection, [Fulminante] confessed.

The Supreme Court "accept[ed] the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence," and "agree[d] with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion."³⁰⁶

Hinesly's implicit threat--that if Cecil did not confess, he would end up in the hands of the sheriff who was Irene's nephew--and Hinesly's implicit promise--that if Cecil confessed to Hinesly, Hinesly would make sure that Cecil did not get sent to Irene's nephew--are more circumstances at least as coercive as those in which Fulminante confessed.

Hinesly admitted that he told Cecil that Irene's nephew was a sheriff and made comments about what Irene's nephew would like to see happen to Cecil as a tactic to get Cecil to confess. The threat to Cecil was real; actual violence was not necessary.

In addition, Cecil's mental and physical condition deteriorated to the point that he

³⁰⁶ *Id.* at 288.

was incoherent--possibly having a seizure--and very vulnerable to such coercive tactics. Cecil may well have simply stated whatever he thought Hinesly wanted to hear and would accept to end the risk of being sent to Irene's nephew and to end the interrogation.

These circumstances show that Cecil made his statement not because it was his voluntary act. They show that Cecil was so worn down by the interrogation--or by methamphetamine withdrawal--that he became incoherent and out of contact with reality; Hinesly was not saying "Stay with me, Cecil, Stay with me Cecil" because Cecil was in control of what he was doing.

"The issue of whether a confession is voluntary is whether it is the product of a capable intellect and where the evidence is conflicting, the admission of the confession is a subject in which deference is given to the trial court's decision on the credibility of witnesses."³⁰⁷ "Once the admissibility of a statement has been challenged, the State has the burden of proof to demonstrate by a preponderance of the evidence that the statement was voluntary."³⁰⁸ "[E]vidence presented on a motion to suppress is reviewed in the light most favorable to the ruling."³⁰⁹

In this case, there is no question of credibility. Hinesly was the only witness, and it was his testimony that established the coercion that produced Cecil's statement.

³⁰⁷ *State v. Inman*, 657 S.W.2d 395,397 (Mo.App.W.D.1983).

³⁰⁸ *State v. Smith*, 944 S.W.2d 901,910 (Mo.banc1997).

³⁰⁹ *Id.*

Assuming Hinesly is credible, Cecil's confession was coerced.

The relevant evidence came from Hinesly. There was nothing to contradict Hinesly's testimony that he told Cecil about Irene's nephew, the sheriff, and what he would probably like to see happen to Cecil. Nor was there any other way to view Hinesly's testimony that Cecil was incoherent and that Hinesly kept trying to bring him back.

The state's own evidence showed that Cecil's statements were coerced and should be suppressed. Assuming Judge Hodge ruled otherwise, that ruling was clearly erroneous.³¹⁰

Finally, the state's use of Cecil's statements cannot be considered harmless at either stage of trial. The state used these statements extensively at each phase of the trial: opening statements, evidence, closing argument and penalty phase.³¹¹

For the foregoing reasons, the statements should have been suppressed. In failing to suppress these statements and in allowing the state to use them at trial, Judge Hodge's erred, and the error prejudiced Cecil.

The cause must be reversed and remanded for a new trial at which the state may not use the statements.

As to Point Six: The trial court erred in imposing death sentences on Counts I and

³¹⁰ *State v. Trenter*, 85 S.W.3d 662,668 (Mo.App.W.D.2002).

³¹¹ *E.g.*, T544-47,1094-1118,1199,1202,1240,1367-68.

II. This violated Cecil's rights to due process of law, a defense, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel, unusual punishment. U.S.Const.,Amend's XIV,VI,&VIII; Mo.Const., Art.1,§§10,18(a),&21; RSMo.§565.035.3(3). Among the factors that undermine confidence in the reliability of these death verdicts, demonstrate their excessiveness, and require they be vacated are: the exclusion of exculpatory evidence, the admission of prejudicial evidence including the coerced confession, the questionable identifications, and the strong mitigating evidence at penalty phase.

The state legislature has established life imprisonment without probation or parole as an appropriate sentence for an aggravated first degree murder; under the Due Process Clause, the Court may not uphold the sentences of death without considering whether the less severe punishment of life imprisonment would be adequate to satisfy the goals of punishment.

Appellant has, elsewhere in this brief, argued that his convictions of first degree murder must be reversed because Judge Hodge prejudiced Cecil by excluding exculpatory evidence (points 1 and 2), by improperly admitting evidence of bad acts, misconduct and bad character (point 3), by admitting Cecil's coerced statements (point 5), and by denying defense motions regarding change of venue, selection of a jury from another county, and individual voir dire made in response to Prosecutor Bock's improperly making statements to a newspaper reporter resulting in a newspaper article discussing the facts of the case, Bock's comments and opinions, and an unrelated

murder formerly charged against Cecil (point 4). Even if the Court should disagree and find all error harmless with regard to the convictions of first degree murder, the Court must still determine--considering the crime, the nature and strength of the evidence, the specific errors occurring at trial, and the defendant himself--whether the sentences of death imposed in this case violate Cecil's rights to due process of law, freedom from cruel and unusual punishment, reliable sentencing, and proportionate sentencing.³¹² With regard to "appropriate punishment," this Court has noted that life imprisonment is an appropriate punishment where a defendant is incapable of rehabilitation.³¹³

³¹² U.S.Const., Amend's V,XIV,&VIII, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,441-43 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (to determine whether monetary punitive damage award is excessive, Fourteenth Amendment's Due Process Clause requires reviewing court to consider penalties imposed for comparable misconduct; reviewing court may not uphold penalty "on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal..." *Id.* at 584); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (Due Process Clause requires judicial review of monetary punitive damage awards to ensure they are not "excessive"); *Ford v. Wainwright*, 477 U.S. 399,427-28 (1986) (O'Connor, J., conc'g and diss'g); *Wolff v. McDonnell*, 418 U.S. 539,557-58 (1974); *Wilkins v. Bowersox*, 933 F. Supp. 1496,1524-26 (W.D.Mo.1996); *State v. Chaney*, 967 S.W.2d 47,60 (Mo.banc1998).

³¹³ *State v. Olinghouse*, 605 S.W.2d 58,64 (Mo.banc1980).

"With regard to the sentence," this Court "shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and... (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant."³¹⁴

Although the Court evidence may be "sufficient" to support Lewis' convictions of first degree murder, sufficiency alone is not enough to support a sentence of death. In the present case, "the strength of the evidence" fell below the "compelling nature usually found in cases where the sentence is death" and is inadequate to support sentences of death.³¹⁵

There is good reason to find the state's evidence insufficiently strong to support a sentence of death in this case. Perhaps the strongest reason is evidence that the jury never got to hear: that hairs found on Candi's thigh, on her pillow, underneath her, on her bedroom floor, and in the knots of the ropes binding Irene's wrists did not match Cecil or Candi or Irene. Based on the location of these hairs, in all probability they were left by the person who killed Candi and Irene. The non-matching hairs are strong evidence that the person who killed Candi and Irene was not Cecil

In considering whether the evidence is strong enough to support the sentences of death, the Court must consider the reliability of the evidence. As argued elsewhere in

³¹⁴ §565.035.3, RSMo.

³¹⁵ *State v. Chaney, supra*; §565.035.3(3).

appellant's brief, (Point 2) Cecil's "friend," Samantha, told the jury that she was with Cecil when he drove past the Sisks' house the night before the murders. Although evidence that would have demonstrated that Samantha had a motive to falsely implicate Cecil never went to the jury, this Court should consider that evidence in evaluating whether the evidence is strong enough to support Cecil's sentences of death.

Cecil's statements Hinesly were coerced. Cecil was in bad shape: he was incoherent, his eyes were rolling back in his head, and Hinesly was concerned about Cecil's condition. This circumstance, plus the fact that Hinesly implied that if Cecil did not confess to him, Irene Sisk's nephew, who was a sheriff, might like to see certain things happen to Cecil, would have been more than enough for Cecil to make a statement telling Hinesly whatever was necessary to put an end to the interrogation and the threat that Irene's nephew would end up being Cecil's jailer. In view of these circumstances, Cecil's statements are not the kind of strong, reliable evidence necessary to support death sentences.

In fact, as noted in the portion of the argument to Point 1 addressing whether the error was harmless, *supra*, none of the state's evidence, DNA included, proved much of anything. It was not strong. Even if credible enough for a conviction, the evidence in this case is not sufficient to support sentences of death under the Eighth Amendment.

A further reason for vacating Cecil's sentences of death and resentencing him to life imprisonment without probation or parole is that errors in the exclusion of evidence and in the admission of evidence may have improperly influenced the jury, misled them into

convicting Cecil of first degree murder, and, ultimately, sentencing him to death.³¹⁶ The Eighth Amendment exacts a "heightened "need for reliability in the determination that death is the appropriate punishment in a specific case.""³¹⁷

Appellant is cognizant that in 1984, in *Pulley v. Harris*, the Supreme Court held that the Eighth Amendment did not require state appellate courts to conduct a "comparative" proportionality review in which the court would "compare the sentence in the case before it with the penalties imposed in similar cases."

Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime... [T]his Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime.³¹⁸

Recently, in *Atkins v. Virginia*,³¹⁹ in determining whether the Eighth Amendment prohibited sentencing a mentally ill defendant to death, the Court did not look at

³¹⁶ See *Cooper Industries, Inc.*, *supra*, 532 U.S. at 441-43 (proportionality review required by due process clause must consider effect of errors at trial on jury's determination of punitive damages).

³¹⁷ *Caldwell v. Mississippi*, 472 U.S. 320,340 (1985) citing *Woodson v. North Carolina*, 420 U.S. 280,305 (1976).

³¹⁸ 465 U.S. 37,43-44 (1984).

³¹⁹ 122 S.Ct. 2242 (2002).

whether a particular sentence was "proportionate" with regard to "a particular crime or category of crime." Rather, the Court was concerned with whether the sentence in question -- the death penalty -- was proportionate or excessive with regard to a particular defendant. *Atkins* held that executing a mentally retarded offender was an "excessive" punishment prohibited by the Eighth Amendment.³²⁰ The Court's proportionality review in *Atkins* thus departed from the traditional proportionality review of *Pulley* and embraced the comparative review rejected by *Pulley* but approved in a recent line of cases including *Cooper, supra, BMW, supra, and Honda, supra.*

If the Fourteenth Amendment requires comparative proportionality review in civil cases--where the "punishment" involves the defendant's money not the defendant's life--it cannot require anything less in capital murder cases where the punishment in question is death. In capital cases the Fourteenth and Eighth Amendments require comparative proportionality review that will consider similar cases with "similar" determined by the facts of the case--regardless of sentence--including but not limited to the circumstances of the crime, the defendant, the mitigating evidence, and the aggravating evidence.

Truly meaningful proportionality review will require creation of a database accessible to the Court as well as to the Attorney General's Office and attorneys representing a death-sentenced appellant. Pending implementation of such a database, and an opportunity for further briefing on the issue of the proportionality of the sentences of death imposed upon Cecil Barriner, the Court should suspend proceedings

³²⁰ *Id.* at 2252.

in the instant case.

Finally, this Court must also consider the defendant.³²¹ Cecil's family and friends testified to the many things that make his a life worth preserving. He fixed roofs for his friends in the rain, and cleared them of ice, snow and leaves.³²² He found ways to make himself useful to people who needed help.³²³ For the three years that Cecil was in the army, he sent money home--unasked--so his parents could pay their mortgage.³²⁴ Since his incarceration, he has been a model prisoner. Cecil was so steadfast that when he was in the Dent County jail awaiting trial, Sheriff Wofford counted on Cecil to help him keep an eye on "suicidal inmates or inmates that needed to be kept an eye on or some type of contraband that might get into the jail." Cecil "was always willing to help [the sheriff] keep an eye on people that need be."³²⁵ Paul Delo, former superintendent of Potosi Correctional Center, testified that he reviewed several hundred pages of records from Potosi. The record showed that during the entire time that Cecil had been incarcerated at Potosi, he had only two conduct violations: 1) he failed to stand for a count, and 2) while working in the kitchen, he threw a food tray into some rinse water

³²¹ *Cooper Industries, Inc.*, *supra*; §565.035.3(3).

³²² T1323,1338.

³²³ T1334-36,1338.

³²⁴ T1344.

³²⁵ T1316.

and it splashed on an officer who wrote him up for an assault.³²⁶

Mr. Delo also spoke to people he knew at Potosi. "[A]ll of them, to the person, said that [Cecil] was very easily managed and a very cooperative inmate. No problems, in other words."³²⁷

Mr. Delo himself, found Cecil to be "as well-adjusted [an inmate] as any, well, that I've ever seen. He has done very well for himself. He's always worked or gone to school, and has stayed out of trouble. Two violations in the length of time that he has been incarcerated is almost hard to believe, really."³²⁸

In an offer of proof, which Judge Hodge overruled, Mr. Delo testified that to get into an "honor dorm" at Potosi, a person had "to be violation free for a number of months and sometimes years." They could not have a history of violence at the institution, and they had to be attending school or working. Cecil had been placed in an honor dorm.³²⁹

This Court is bound to consider all the evidence in its review to determine if the sentences of death imposed on Cecil are disproportionate and excessive. The legislature has decreed that a sentence of life imprisonment without probation or parole is, in the appropriate case, an adequate and sufficient sentence for first degree murder.

For the foregoing reasons, the Court should find that this is an appropriate case for a

³²⁶ T1170-72.

³²⁷ T1173.

³²⁸ T1173.

³²⁹ T1177.

sentence of life imprisonment without probation or parole, that Cecil's sentences of death are excessive and disproportionate, and re-sentence him to life imprisonment without the chance of probation or parole.

As to Point Seven: The trial court erred in overruling Cecil's motion to quash the information and exceeded its jurisdiction in imposing sentences of death on counts I and II. This violated his rights to due process of law, jury trial, prosecution only by indictment or information, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const. Amend's VI,VIII,&XIV; Mo.Const.,Art.1,§§10,17,18(a),&21; §565.030.4(1),RSMo. Missouri authorizes a sentence of death only upon a finding of at least one of seventeen statutory aggravating circumstances. Missouri's aggravating circumstances comprise both alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase punishment for first degree murder from life imprisonment without probation or parole (LWOPP) to death. As the information in the present case failed to plead any aggravating circumstances as to the two charged offenses of first degree murder, the information did not charge facts necessary to increase punishment from LWOPP (for a murder without aggravating factors) to death. The offenses charged against Cecil were unaggravated first degree murders for which the only authorized sentence is LWOPP. The trial court lacked jurisdiction to sentence Cecil to death; the death sentences imposed for the charged offenses were unauthorized. The

judgment must be reversed and Cecil's death sentences vacated.

Prior to trial Cecil moved³³⁰ to quash the Information for failure to comply with *Apprendi v. New Jersey*,³³¹ and *Jones v. United States*.³³² At a pretrial hearing, defense counsel renewed the motion arguing that *Apprendi* and *Jones* required that "the aggravation that makes a murder case a death penalty case has to be pled out as one of the elements of the crime within the information or the indictment. And under Missouri law that does not happen." The trial court denied Cecil's motion; he preserved the point in the motion for new trial.³³³

In *Apprendi, supra*, the Court referred back to *Jones*:

We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, *any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.*" ... *The Fourteenth Amendment commands the same answer in this case involving a state statute.*³³⁴

Missouri expressly provides by statute that LWOPP is the maximum sentence for first

³³⁰ LF77-86.

³³¹ 530 U.S. 466 (2000).

³³² 526 U.S. 227 (1999).

³³³ MT77-78; LF258,261.

³³⁴ 530 U.S. at 476 *citing Jones*, 526 U.S. at 243,n.6 (emphasis added).

degree murder unless the trier finds at least one statutory aggravating circumstance beyond a reasonable doubt.³³⁵ "The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence."³³⁶

Missouri's statutory aggravating circumstances function as do the sentencing-enhancing facts at issue in *Apprendi*. Missouri's aggravators are facts that increase "the maximum penalty for a crime" - first degree murder - from life imprisonment without the possibility of probation or parole to the ultimate penalty of death.³³⁷ This is consistent with the United State's Supreme Court's understanding of "aggravating" "facts" or "circumstances" as expressed in its post-*Apprendi* cases:

A crime was not alleged, and a criminal prosecution not complete unless the indictment and the jury verdict included all the facts to which the legislature had

³³⁵ §565.030.4(1),RSMo.2000 ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032....").

³³⁶ *State v. Shaw*, 636 S.W.2d 667,675 (Mo.banc1982) quoting *State v. Bolder*, 635 S.W.2d 673,683 (Mo.banc1982); *State v. Taylor*, 18 S.W.3d 366,378,n.8 (Mo.banc2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty").

³³⁷ *Apprendi*, 530 U.S. at 476.

attached the maximum punishment. Any "fact that ... exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" ... would have been, under the prevailing historical practice, an element of an aggravated offense...

Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense...

These aggravating circumstances, 'setting the outer limits of a sentence, and of the judicial power to impose it, are the [alternate] elements of the crime [of "aggravated" first degree murder] for the purposes of the constitutional analysis.'³³⁸

Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," ... the Sixth Amendment requires that they be found by a jury.³³⁹

Although §565.020 ostensibly establishes a single offense of first degree murder for which the punishment is either LWOPP or death, §§565.020 and 565.030.4 establish two kinds of first degree murders. One is "unenanced" first degree murder--a killing

³³⁸ *Harris v. United States*, 122 S.Ct. 2406,2417-19 (2002) *citing Apprendi*, 530 U.S., at 483,n.10.

³³⁹ *Ring v. Arizona*, 122 S.Ct. 2428,2443 (2002) *citing Apprendi*, 530 U.S. at 494,n.19.

done knowingly and with deliberation for which the punishment is LWOPP. The second is "aggravated" or "capital" first degree murder which requires proof beyond a reasonable doubt of the additional element of at least one aggravating circumstance listed in §565.032.2³⁴⁰ and for which the authorized punishment increases to include not only LWOPP but death also.

³⁴⁰ Missouri's 17 statutory aggravating circumstances provide 17 alternate (but not mutually exclusive) elements of the offense of aggravated first degree murder. They are not 17 distinct offenses but different or alternate methods of committing the single offense of aggravated first degree murder.

The use of alternate elements providing different methods of committing a single offense occurs throughout Missouri's criminal code. *See, e.g., State v. Lee*, 841 S.W.2d 648 (Mo.banc1992) (569.020, RSMo.1986, "provides that a person can commit robbery in the first degree by one of several different methods"); *State v. Davison*, 46 S.W.3d 68,76 (Mo.App.W.D.2001) ([T]he single crime of "receiving stolen property," ... may be committed in different ways"); *State v. Barber*, 37 S.W.3d 400,403-04 (Mo.App.E.D.2001) (different means of committing offense of unlawful use of a weapon); *State v. Pride*, 1 S.W.3d 494,501 (Mo.App.W.D.1999) ("Forgery is a crime which may be committed in several ways"); *State v. Jones*, 892 S.W.2d 737,738 (Mo.App.W.D.1994) ("five different ways" of committing third-degree assault of a law enforcement officer); *State v. Burkemper*, 882 S.W.2d 193,196 (Mo.App.E.D.1994) (two different ways to commit trespass).

The information here charged Cecil with two counts of first degree murder for knowingly killing Irene (Count 1) and Candi (Count 2) "after deliberation." It pled no aggravating circumstances.³⁴¹

""[N]o person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information..."³⁴² "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."³⁴³ "[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense."³⁴⁴ "The indictment or information must actually charge that a crime has been committed and "[t]he test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense."³⁴⁵

The state's failure to plead any aggravating circumstances in the information means

³⁴¹ LF84-86.

³⁴² Mo.Const.,Art.1,§17.

³⁴³ *Jackson v. Virginia*, 443 U.S. 307,314 (1979) citing *Cole v. Arkansas*, 333 U.S. 196,201 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978).

³⁴⁴ *State v. Parkhurst*, 845 S.W.2d 31,35 (Mo.banc1992) citing *Montgomery v. State*, 454 S.W.2d 571,575 (Mo.1970).

³⁴⁵ *State v. Stringer*, 36 S.W.3d 821,822 (Mo.App.S.D.2001) quoting *State v. Haynes*, 17 S.W.3d 617,619 (Mo.App.W.D.2000) quoting *State v. Pride*, *supra*, 1 S.W.3d at 502.

it did not include facts necessary to increase the punishment for first degree murder from LWOPP to death. It means Cecil was charged with, and convicted of, "simple" first degree murder: an offense punishable only by LWOPP--not by death.

For the foregoing reasons, Cecil's sentences of death are illegal, unconstitutional, and unauthorized. The judge had no authority or jurisdiction to sentence Cecil to death. His death sentences violate his rights to due process, jury trial, freedom from cruel, unusual punishment, and reliable sentencing.³⁴⁶ The judgment must be reversed and Cecil's death sentences vacated.

³⁴⁶ U.S.Const.,Amend's VI,VIII,&XIV; Mo.Const.,Art.1, §§10,17,18(a),&21.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that the Court reverse the judgment and sentences and remand for a new trial, or, in the alternative, for a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b).

The brief comprises 27,403 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were delivered, this ___ day of _____, 2003, to the Office of the Attorney General, 1530 Rax Court, Jefferson City, Missouri 65109.

Attorney for Appellant