

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,                    )  
  )  
                  RESPONDENT,            )  
  )  
VS.                                        ) No. SC89168  
  )  
KEVIN JOHNSON, JR.,                 )  
  )  
                  APPELLANT.             )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 19,  
THE HON. MELVYN WIESMAN, JUDGE

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APPELLANT'S REPLY BRIEF

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## CORRECTIONS AND CLARIFICATIONS

Appellant's Brief refers to Exhibit Q (App.Br. 33). Exhibit Q could not be located, and the parties have stipulated that Appellant's Exhibit A is a true and correct copy of Exhibit Q.

The word "not" was inadvertently omitted from the first sentence of the first full paragraph at App.Br. 62. That sentence should read: "A prosecutor may *not* make arguments contrary to, or misstating, the law or the instructions."

## REPLY ARGUMENT

### **REPLYING TO RESPONDENT’S POINT I – JUROR NONDISCLOSURE:**

Responding to a question as to why she did not say she knew Detective Scognamiglio, Broome said, “Because when McCullough, I’m sorry, sir, he had mentioned it, *it didn’t register to me* because he listed off a bunch of people, and I really didn’t put two and two together because I hadn’t seen him in over at least two and a half years....” (Tr.2355; emphasis added). Respondent interprets “it didn’t register to me” as meaning that Broome didn’t realize that Detective Scognamiglio “was the husband of a former co-worker” (Resp.Br.22).

Broome admitted that she remembered the prosecutor mentioning Detective Scognamiglio’s name, that she knew him through his wife with whom she worked, that she knew him by his first and last names (Don Scognamiglio) and knew those names during voir dire, knew that he was a police officer, but did not know that he was a St. Louis county police officer (Tr.2352-2360). In light of Broome’s testimony, which the trial court found credible, the state’s argument that “it didn’t register” meant Broome didn’t realize that Detective Scognamiglio was the same police officer Don Scognamiglio that she knew and therefore she did not fail to disclose that she knew him is unpersuasive.

The state’s explanation does not take into account Broome’s testimony that she knew Don Scognamiglio as a police officer but didn’t know he was a St. Louis County police

officer. A more likely interpretation, consistent with Broome’s testimony, is that in saying “it didn’t register,” Broome meant that it did not occur to her that the police officer Don Scognamiglio that she knew – and knew at the time of voir dire – was a St. Louis county police officer and that she should respond to the question. Either way, because, as shown below, a review of the entire relevant portions of the voir dire shows that a reasonable juror would have disclosed that she knew an officer Don Scognamiglio and Broome’s failure to respond was unreasonable.

Respondent argues that this Court should limit its review of the voir dire record to the “two questions” the prosecutor asked the venire panelists after reading the names of police officers who might testify in the case. Respondent cites no authority for his argument that this Court’s review of the record should be restricted to only those two questions (Resp.Br.30-31). Instead, respondent says the cases appellant cites as supporting review of the entire voir dire concern strikes for cause (Resp.Br. 30, n.4).

According to respondent, only two questions are relevant to the issue of whether panelist Broome intentionally failed to disclose that she knew Detective Don Scognamiglio and the Court should consider only these questions: 1) whether any of the names read were familiar to the panelists as St. Louis County police officers, and 2) whether any panelists were close friends with any police officers (Resp.Br.30-31).<sup>1</sup>

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<sup>1</sup> The prosecutor asked the following questions after reading a list of St.

Good authority, in addition to the cases cited in appellant's initial brief, refutes respondent's argument and supports thorough review of the entire voir dire by an appellate court asked to rule on a question of nondisclosure.

In *Nadolski v. Ahmed*, 142 S.W.3d 755 (Mo.App.W.D. 2004) the Western District relied on the "context" of the question at issue to reject interpreting it narrowly. *Id.* at 765. The context, which included the questioning attorney's earlier, preliminary, comments "declaring generally that he wanted to know about 'any cases' that any of the panelists or their immediate family members had brought as plaintiffs for personal injury or wrongful death and listing the categories of cases that did not warrant a response," showed that "the inquiry was not restricted to actions against individuals." *Id.* at 765-66. *See also Groves v. Ketcherside*, 939 S.W.2d 393,395 (Mo.App.W.D. 1996)

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Louis County police officers:

Are any of those names familiar to anybody as county police officers?

Anybody – let me start back with the jury box. Anybody know, friends with County police officers – or I won't even limit it to County.

Close friends with police officers, law enforcement officers.

Tr. 877).

(Court considered preliminary comments and directions of counsel in determining whether panelist's failure to respond to subsequent question was unreasonable).

The *Nadolski* court also considered the responses of other jurors in determining whether the question should be interpreted as narrowly as the juror in question did. *Id.* at 766 (“Furthermore, other lay people on the jury did not interpret the question so narrowly as Juror ‘R’ did. Yet Juror ‘R’ remained silent in the face of such responses and did not seek to determine whether her case might require a response as well.”).

*Nadolski v. Ahmed* also supports appellant's argument that the responses of other panelists – as well as Broome's own response concerning her stepbrother who lived in Phoenix whom she hadn't seen in “many many, many years” – should be considered in determining whether a reasonable juror would have responded to the question by disclosing she knew Detective Scognamiglio (App.Br.32, 33, 40-41). *See also Williams v. Barnes Hospital*, 736 S.W.2d 33, 36 (Mo.banc 1987) (finding panelist's explanation that he did not disclose his personal injury claim because “his claim was settled” to be “pale[] in light of the other jurors' responses during voir dire... disclos[ing] claims that were settled out of court.”).

Respondent relies on *Byers v. Cheng*, 238 S.W.3d 717 (Mo.App.E.D. 2007), but *Byers* is inapposite. In *Byers*, the plaintiff's lawyer asked the venire panelists if any of them knew him or anyone in his law firm. *Id.* at 722. Juror “C.C.,” who knew members of the lawyer's family and had worked for the lawyer's aunt, did not respond. *Id.* In a post-trial hearing, C.C. testified that although he knew members of the lawyer's family,

he did not know the lawyer. *Id.* at 722-23. The Court found no nondisclosure:

We defer to the trial court’s credibility finding and accept C.C.’s testimony that he did not know Mr. Pedroli at the time of *voir dire*. Because C.C. did not know Mr. Pedroli at the time of *voir dire*, his silence when Mr. Pedroli asked if any venireperson knew him was complete disclosure.

*Id.* at 723.

Unlike the instant case, or the *Nadolski*, *Groves*, or *Williams* cases discussed above, in *Byers*, the record reflects that the question of nondisclosure concerned only two very specific questions: whether any of the panelists knew the lawyer or his law firm. *Groves*, not *Byers* applies here since, as appellant noted in his initial brief, the prosecutor prefaced his reading of names of potential witnesses with the preliminary direction to “let [him] know if you know any of them, any of the names sound familiar...” (Tr.869; App.Br.31-32). Further, as in *Nadolski* and *Williams*, the responses of other jurors indicated that a reasonable juror would have said, “I know a Don Scognamiglio although I don’t know if it is the same person.”

Applying the law to the facts of this case shows that Broome failed to disclose that she knew state’s witness Don Scognamiglio and that her nondisclosure was intentional. Respondent, however, insists that there was no nondisclosure (Resp.Br. 30-32). But as shown, *supra*, and in appellant’s initial brief, the record in this case simply does not support the prosecutor’s claim that there was no nondisclosure.

Alternatively, respondent argues that if there was nondisclosure it was unintentional

and appellant cannot show prejudice (Resp.Br.32-36). Even if it were assumed, solely for the sake of argument, that Broome's nondisclosure of the fact that she knew a state's witness was unintentional, the very facts of that nondisclosure demonstrate prejudice. In a criminal case, a juror's acquaintance with a state's witness is always a material matter because it implicates the defendant's constitutional right to trial by a fair and impartial jury and due process of law. The evidentiary hearing addressed only the question of nondisclosure, and did not address the question of prejudice arising from the nondisclosure; defense counsel, therefore, did not argue the question of prejudice. But the prejudice is manifest. Had Broome disclosed that she knew Detective Scognamiglio – even that she knew “a” Don Scognamiglio, defense counsel undoubtedly would have questioned her further to determine if she should be struck for cause. Because this juror knew a police officer testifying for the state, and the case concerned the shooting of a police officer, it is likely that defense counsel would have used a peremptory strike to eliminate her from the jury if unable to remove her with a strike for cause. For this reason, alone, appellant was prejudiced.

And there is an additional source of prejudice. Detective Scognamiglio was the lead officer investigating the crime scene (Tr.1499). Detective Scognamiglio, himself, collected shell casings and bullet jackets and took pictures at the top of the hill on Alsobrook, Tr.1511-25, where Sgt. McEntee's car crashed and where Kevin's second shooting of McEntee occurred.(Tr.1349-55, Tr.I.804; StEx-80). The prosecutor relied on the location of the evidence collected by Detective Scognamiglio, the photographs he

took, and his testimony to argue that the “second shooting [was] even more in the way of deliberation” (Tr. 1925-28, 1982-83).

Broome’s nondisclosure violated appellant’s rights to fair jury trial, due process of law, and, because it was a capital case, to reliable sentencing. U.S.Const., Amend’s VI, VIII, and XIV. It deprived appellant and his counsel of the facts necessary and critical to constitutionally adequate jury selection and the informed exercise of peremptory strikes.

## **REPLY TO RESPONDENT’S POINT II:**

Citing *State v. Mason*, 2008 WL 4388227 (Mo.App.W.D. Sept. 30, 2008) \*3, respondent argues that the failure to specifically identify similarly situated venire panelists at the time of the *Batson*<sup>2</sup> challenge waives the claim (Resp.Br. 41). But both the United States Supreme Court and this Court have rejected respondent’s contention. *Miller-El v. Dretke*, 545 U.S. 231, 241, n.2 (2005); *State v. McFadden*, 191 S.W.3d 648, 657, n. 27 (Mo.banc 2006).

Next respondent says appellant focuses on Ms. Cottman’s and the other venire panelists “answers” to the questions instead of “demeanor” which was the prosecutor’s rationale for excluding Cottman (Resp.Br.42-43). Not entirely. In fact, the prosecutor expressly referred to Ms. Cottman’s responses to his questions in giving his explanation for striking her: “Cottman, I felt that when we were questioning her in small groups was not antagonistic towards me but not all that willing to answer the questions regarding the death penalty and other issues surrounding that” (Tr.1051).

“Death qualification” of the jury was conducted using small groups or panels of jurors, and it was during this portion of the voir dire that the attorneys asked questions regarding the possible sentences of life or death. The prosecutor’s voir dire of Ms.

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<sup>2</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

Cottman's group began on page 347 of the transcript and concluded at page 420. On pages 406-08, the prosecutor questioned her about the death penalty.

Nothing about Ms. Cottman's answers indicates she was unwilling or hesitant to respond to the prosecutor's questions. Nor, during his questioning of Ms. Cottman, did the prosecutor ask her about what he subsequently alleged was an unwillingness to answer questions about the death penalty (Tr.406-08, 1051).<sup>3</sup>

Respondent appears to suggest that because appellant's trial counsel "also cited to the demeanor of the excluded venirepersons" in response to the state's *Batson* challenge, any problem with using "demeanor" as an explanation is eliminated (Resp.Br.43). But this Court has cautioned against accepting demeanor as an explanation for a peremptory strike when the party proffering explanation failed to contemporaneously alert opposing counsel and the trial court to the demeanor when it occurs. *See e.g., State v. Edwards*, 116 S.W.3d 511, 550-51 (Mo.banc 2003) Teitelman, J., concurring ("courts should also review more closely attempts to justify peremptory strikes based upon vague references to a venireperson's attire, demeanor, and similar attributes. These attributes are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory

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<sup>3</sup> Although it concerned a different matter, the prosecutor did ask another juror a follow-up question concerning a "note" he had made about the juror the previous day (Tr. 784).

strikes for no real reason except for their race.”).

It is not that demeanor is, *per se*, an unacceptable basis for a peremptory strike. The problem is that unless the attorney who observes what she or he will later claim to be “problematic” demeanor brings it to the attention of the trial court and opposing counsel when it occurs, there is no record to examine to determine the validity of the explanation. Indeed, respondent’s discussion of demeanor, (Resp.Br.42-43), is a mini-brief on the reasons this Court should require attorneys in all cases to provide contemporaneous notification of problematic demeanor or waive demeanor as an explanation.

In addressing the prosecutor’s second explanation – that he struck Cottman because of her association with the Annie Malone Home – respondent takes liberties with the record. Nothing in the record supports respondent’s claim that Cottman’s involvement with Annie Malone was “extensive” (Resp.Br.46). Cottman never indicted how long she had served as a foster parent – just that she had “started” in the 80’s and still had “contact with the people” (Tr.1011). “The people” could have been two people that she fostered beginning in the 1980’s and still saw.

The important fact is this: if a potential juror’s involvement with an agency that provided assistance to Kevin and his family was of such concern that the prosecutor used it as a reason for a peremptory strike, the prosecutor would most certainly have questioned the panelists about this matter. It is revealing that this prosecutor never questioned the jurors about any of the agencies that served Kevin and his family.

Respondent argues that if the prosecutor had tried to engage in additional, follow-up questioning of Ms. Cottman after learning that she had a connection to Annie Malone, the trial judge might not have allowed it (Resp.Br.48). But it is the prosecutor's failure to seek to question on this subject that matters – not whether he was allowed such questioning.

Contrary to respondent's argument, Resp.Br. 50, n.9, the fact that the prosecutor in this case was the elected head of the St. Louis County Prosecutor's office is significant to this Court's review. It is this prosecutor who establishes the policies of that office. In recent years this Court and the Eastern District have held that assistant prosecutors, who are supervised by the elected head, used their peremptory strikes for reasons of racial discrimination. As the head of that office, the elected prosecutor is fully implicated in those cases, and it is entirely appropriate for this Court to consider that fact in reviewing appellant's claim that he struck Ms. Cottman for reasons of race.

### **REPLY TO RESPONDENT’S POINT III:**

Respondent, claiming appellant’s Point 3 is “multifarious,” attempts to split appellant’s Point 3 into “three unrelated claims” (Resp.Br.54). But this attempt must fail: appellant’s Point 3 is that his conviction of first-degree murder is invalid, and it is supported by three, interrelated, record-based or “evidentiary” matters that are correctly considered together.<sup>4</sup>

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<sup>4</sup> See *State v. Clark*, 263 S.W.3d 666, 670 (Mo.App.W.D. 2008) (rejecting the state’s argument that the appellant’s second point was “multifarious” because it challenged “two convictions” because the point raised a claim of “double jeopardy” such that the two convictions “clearly [were] related.”). Respondent does not claim that appellant’s point “fails to give notice... as to the issue presented on appeal.” *Christeson v. State*, 131 S.W.3d 796, 799, n.5 (Mo.banc 2004). Indeed, the first paragraph of respondent’s Point III identifies the three evidence-based supporting appellant’s Point 3 (Resp.Br. 52, 54-55). In a correctly formed point relied on, “[t]he challenged ruling of the trial court is concisely stated, the rule of law ... which it is asserted the court should have applied is set forth[,] and the evidentiary basis upon which it is contended that the asserted rule is applicable is specified.” *Thummel v. King*, 570 S.W.2d 679, 685-86 (Mo.banc 1978). Neither *Thummel v. King* nor any other case prohibits using multiple evidentiary bases

Respondent argues that appellant's point regarding the trial court's denial of his motion for judgment of acquittal is not well-taken (Resp.Br.54). Respondent ignores the fact that appellant did not raise isolated, unrelated claims in his Point 3. Rather, appellant raised interrelated claims that must be considered together. By treating the evidentiary bases appellant relies on as supporting his Point 3 as raising isolated, unrelated claims, respondent fails entirely to address the combined effect of the evidence supporting appellant's point: the paucity of evidence of deliberation, the unconstitutional definition of "deliberation" in the first-degree murder verdict director (Instruction 5), and the prosecutor's arguments that a conscious decision was deliberation.

In *State v. Taylor*, 216 S.W.3d 187 (Mo.App.E.D. 2007), the Eastern District rejected appellant's contention that the evidence was insufficient to sustain his conviction. *Id.* at 190-94. However, the Eastern District, in connection with Taylor's claim of insufficient evidence, found plain error in the state being "allowed to argue and submit its charge of possession of cocaine base without any evidence in support of two of the three instances the State posited in its bill of particulars and argued to the jury." *Id.* at 195. In other words, in *Taylor*, although the evidence was sufficient, the

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to demonstrate errors or show prejudice, and supporting a point with multiple evidentiary bases does not make it multifarious.

prosecutor's arguments misled the jury about what they could rely on to convict the defendant and thus required reversal for plain error. *Id.*

The situation in the instant case, admittedly unusual, is similar to *Taylor*. And it, too, requires reversal. As in *Taylor*, the combined effect of the prosecutor's arguments (that a "conscious" decision or a "knowing" decision was cool reflection and deliberation) and the absence of any correction of that misstatement of the law meant that appellant's jury could have found that he "deliberated" because he knowingly shot Sgt. McEntee.

A conviction founded on insufficient evidence violates the defendant's substantial, constitutional right to proof beyond a reasonable doubt of every element of the offense; it is always manifest injustice and plain error. *State v. Withrow*, 8 S.W.3d 75, 77 (Mo.banc 1999). The risk that a jury in a first-degree murder case relied on a "knowing" or "conscious" shooting as evidence of the element of deliberation is an unacceptable violation of the defendant's right to due process of law in any case. In this case, in which the conviction of first-degree murder was the first step towards a sentence of death, the risk also violates the heightened reliability demanded by the eighth amendment.

Appellant's conviction of first degree murder must be reversed.

#### **REPLY TO RESPONDENT'S POINT IV:**

Respondent, citing *State v. Johnston*, 957 S.W.2d 734, 751 (Mo.banc 1997), claims appellant could not have been prejudiced by the trial court's failure to submit and instruction on second degree murder requiring the state to prove lack of sudden passion and an instruction on voluntary manslaughter because the jury was instructed on conventional second degree murder. *Johnston*, however, does not control because in that case, there was no evidence whatsoever of sudden passion. That the jury was given a conventional second degree murder instruction does not mean that there was no prejudice. Appellant's second-degree murder without sudden passion instruction, Instruction B, would have imposed on the state the additional burden of proving the absence of sudden passion. This additional burden on the state means that a conventional murder instruction is not the equivalent of the second-degree without sudden passion instruction and cannot demonstrate that appellant was not prejudiced.

Further, in this case, in which Kevin admitted shooting and killing Sgt. McEntee, refusing lesser-offense instructions that were supported by the evidence violated Kevin's rights to a defense and to due process of law. U.S. Const., Amend's VI and XIV.

## **REPLY TO RESPONDENT’S POINT X:**

Respondent fails to consider that the position recently taken by this Court in *State v. McLaughlin*, 265 S.W.3d 257 (Mo.banc 2008) and *State v. Zink*, 181 S.W.3d 66 (Mo.banc 2005), regarding Missouri’s “weighing step,” §565.030.4(3), conflicts with what this Court expressly stated in *State v. Whitfield*, 837 S.W.2d 503 (Mo.banc 1992). This Court held that at that step, “the jury must unanimously find that mitigating circumstances weigh less than aggravating circumstances.” *Id.* at 515.

Further, neither respondent nor this Court appears to have considered that taxing the defendant with the burden of proving to a unanimous jury that he is not death-eligible is inconsistent with the United State Supreme Court’s Eighth and Fourteenth Amendment jurisprudence and the need for heightened reliability in capital sentencing. *Cf.*, *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (“[W]e held [in *Mills v. Maryland*, 486 U.S. 367 (1988)] that it would be the ‘height of arbitrariness’ to allow or require the imposition of the death penalty where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence.”).

## CONCLUSION

For the foregoing reasons, and for the reasons stated in his initial brief, as to Points 1, 2, 3, 4, and 6, appellant prays that the Court will reverse the judgment of the circuit court and grant him a new trial; in the alternative, as to Points 5, 7, 8, 9, 10, and 11, he prays that the Court will vacated his sentence of death and resentence him to life imprisonment without probation or parole or, in the alternative, grant him a new penalty phase proceeding.

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 provisions of Missouri Supreme Court Rule 84.06(b). The brief comprises 4,178 words according to Microsoft word count.

The CD ROM disk filed with this brief contains a copy of this brief and complies with Missouri Supreme Court Rule 84.06(g). The disks filed with this Court and served on respondent have been scanned for viruses by a McAfee VirusScan program and according to that program are virus-free.

A true and correct copy of the attached brief and the disk containing a copy of this brief were mailed, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, to Daniel N. McPherson, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, and an email message containing the brief was sent to Dan.McPherson@ago.mo.gov.

\_\_\_\_\_  
Attorney for Appellant