

IN THE
MISSOURI SUPREME COURT

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

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,
DIVISION 19, HONORABLE MELVIN W. WIESMAN, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

Deborah B. Wafer, MBE 29351
Office of the Public Defender
Capital Litigation Division
1000 St. Louis Union Station
Suite 300
St. Louis, Missouri 63103
(314) 340-7662, Ext. 236 - Phone
(314) 340-7666 - Fax

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii-xi

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF FACTS 1-19

POINTS RELIED ON & ARGUMENT

1. Juror Broome failed to disclose she knew state’s..... 20/31-43
witness Detective Don Scognamiglio

2. *Batson* Error 21/43-55

3. First-degree murder conviction must be reversed 22/56-75

4. Error to refuse instructions on second-degree murder..... 23/75-88
without sudden passion and manslaughter

5. Kevin’s death sentence is arbitrary, capricious,..... 24/88-97
disproportionate, and unconstitutional

6. Error to strike juror Tompkins for cause..... 25/98-104

7. Admitting Kevin’s statement was plain error..... 26/105-115

8. Penalty phase error: nonstatutory aggravation; 27/116-123
victim impact evidence; instructions

9. Invalid statutory aggravator 28/123-128

10. Error to submit Instruction 14: MAI-CR3d-314.44	29/128-133
11. Death Sentence violates <i>Apprendi</i> and <i>Ring</i>	30/134-139
CONCLUSION	140
CERTIFICATE OF SERVICE AND COMPLIANCE	141
INDEX TO APPENDIX (Separately Bound)	
Sentence and Judgment.....	A1-A3
Given Instructions 1-17	A4-A24
Refused Instructions A,B,C,E,&F	A25-A31
Jury Questions	A32-A35
Jury Verdict at Penalty Phase.....	A36

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	136
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	116,121-22,134-37
<i>Arave v. Creech</i> , 507 U.S. 463 (1993)	126
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996)	90,93
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	45,47,49,53-55

<i>Blair v. Armontrout</i> , 916 F.2d 1310 (8th Cir.1990).....	137
<i>Brines v. Cibis</i> , 882 S.W.2d 138 (Mo.banc 1994).....	37,39,42,43
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981).....	132
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	89
<i>Capano v. State</i> , 889 A.2d 968 (Del.2006)	70
<i>Chicago v. Morales</i> , 527 U.S. 41 (1999).....	65-66
<i>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</i> ,.....	90
532 U.S. 424 (2001)	
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	119
<i>Ex parte Travis</i> , 776 So.2d 874 (Ala.2000)	54
<i>Ford v. Norris</i> , 67 F.3d 162 (8thCir.1995).....	48
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	124
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966).....	65-66
<i>Girouard v. State</i> , 583 A.2d 718 (Md.1991).....	86
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	124-126
<i>Hatfield v. Griffin</i> , 147 S.W.3d 115 (Mo.App.W.D. 2004)	38-40,42-43
<i>Honda Motor Co., Ltd. v. Oberg</i> , 512 U.S. 415 (1994).....	90
<i>Hurtado v. California</i> , 110 U.S. 516(1884)	137
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	36

<i>J.E.B. v. Alabama</i> , 511 U.S. 127 (1994).....	46
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938).....	111-112
<i>Jones v. United States</i> , 526 U.S. 227 (1999).....	136
<i>Joy v. Morrison</i> , 254 S.W.3d 885 (Mo. banc 2008).....	64, 102-104
<i>Martinez v. State</i> , 190 S.W.3d 254 (Tex.App.2006).....	70
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988).....	124-126
<i>Michigan v. Mosley</i> , 423 U.S. 96 (1975).....	114-115
<i>Miller-El v. Dretke</i> , 545 U.S. 231 (2005).....	47-48,53-55
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	110-111,113-115
<i>Missouri v. Seibert</i> , 542 U.S. 600 (2004).....	110
<i>Morgan v. Illinois</i> , 504 U.S. 719 (1992).....	101,104
<i>Newlon v. Armontrout</i> , 885 F.2d 1328 (8th Cir.1989).....	127
<i>North Carolina v. Butler</i> , 441 U.S. 369 (1979).....	112
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	117,118,122
<i>People v. Jenkins</i> , 997 P.2d 1044 (Cal.2000).....	69-70
<i>People v. Palmer</i> , 87 P.3d 137 (Colo.App.2003).....	70
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965).....	119-120
<i>Poland v. Arizona</i> , 476 U.S. 147 (1986).....	132
<i>Purkett v. Elem</i> , 514 U.S. 765 (1995).....	55

<i>Richardson v. United States</i> , 526 U.S. 813 (1999)	68-69
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	121,122,131,134,135
<i>Sattazahn v. Pennsylvania</i> , 537 U.S. 101 (2003)	131-132
<i>Sorrell v. Norfolk Southern Ry. Co.</i> ,.....	67
249 S.W.3d 207 (Mo.banc 2008)	
<i>Snyder v. Louisiana</i> , 128 S.Ct. 1203 (2008).....	46-47,49,53
<i>Stevenson v. United States</i> , 162 U.S. 313 (1896).....	88
<i>State v.</i>	
<i>Avery</i> , 120 S.W.3d 196 (Mo.banc 2003)	75,81
<i>Baker</i> , 580 P.2d 90 (Kan.App.1978)	113-114
<i>Barnes</i> , 942 S.W.2d 362 (Mo. banc 1997).....	136
<i>Barriner</i> , 210 S.W.3d 285 (Mo.App.W.D. 2006)	75,112
<i>Battle</i> , 32 S.W.3d 193 (Mo.App.E.D.2000).....	82,85
<i>Berry</i> , 168 S.W.3d 527 (Mo.App.W.D.2005).....	63-64
<i>Blakeburn</i> , 859 S.W.2d 170 (Mo.App.W.D.1993)	61
<i>Butler</i> , 951 S.W.2d 600 (Mo.banc 1997)	126-127
<i>Butler</i> , 731 S.W.2d 265 (Mo.App.W.D.1987)	48-49
<i>Chaney</i> , 967 S.W.2d 47 (Mo.banc 1998).....	90
<i>Chism</i> , 252 S.W.3d 178 (Mo.App.W.D.2008).....	61
<i>Coats</i> , 936 S.W.2d 852 (Mo.App.E.D.1996)	74

<i>Cornelious</i> , 258 S.W.3d 461 (Mo.App.W.D.2008).....	62
<i>Coyle</i> , 574 A.2d 951 (N.J.1990)	86
<i>Debler</i> , 856 S.W.2d 641 (Mo.banc 1993)	121,122
<i>Doucette</i> , 776 A.2d 744 (N.H. 2001).....	70
<i>Driscoll</i> , 55 S.W.3d 350 (Mo.banc 2001).....	118
<i>Edwards</i> , 116 S.W.3d 511 (Mo.banc 2003)	49
<i>Erskine</i> , 889 A.2d 312 (Me.2006)	69
<i>Feltrop</i> , 803 S.W.2d 1 (Mo.banc 1991)	124
<i>Fuente</i> , 871 S.W.2d 438 (Mo.banc 1994)	109-110
<i>Gardner</i> , 889 N.E.2d 995 (Ohio2008)	69
<i>Glass</i> , 136 S.W.3d 184 (Mo.banc 2005).....	134
<i>Gray</i> , 887 S.W.2d 369 (Mo.banc 1994).....	61
<i>Griffin</i> , 756 S.W.2d 475 (Mo.banc 1998).....	124,125
<i>Grugin</i> , 47 S.W. 1058 (Mo.1898)	87
<i>Hahn</i> , 37 S.W.3d 344 (Mo.App.W.D.2000).....	81,84
<i>Hall</i> , 955 S.W.2d 198 (Mo.banc 1997)	39,40
<i>Hampton</i> , 163 S.W.3d 903 (Mo.banc 1995)	54
<i>Hershon</i> , 45 S.W.2d 60 (Mo.1931).....	60
<i>Hopkins</i> , 140 S.W.3d 143 (Mo.App.E.D.2004).....	54

<i>Jackson</i> , 155 S.W.3d 849 (Mo.App.W.D.2005)	63
<i>Johns</i> , 34 S.W.2d 93 (Mo.banc 2000)	127
<i>Johnson</i> , 968 S.W.2d 686 (Mo.banc 1998).....	128
<i>Johnson</i> , 182 S.W.3d 667 (Mo.App.E.D.2005)	62
<i>Johnston</i> , 957 S.W.2d 734 (Mo.banc 1997)	68-69
<i>Marlowe</i> , 89 S.W.3d 464 (Mo.banc 2002).....	47,48,54
<i>Martin</i> , 755 S.W.2d 337 (Mo.App.E.D.1988)	37-38,43
<i>McFadden</i> , 236 S.W.3d 103 (Mo.banc 2008).....	54
<i>McFadden</i> , 191 S.W.3d 648 (Mo.banc 2006).....	49,54
<i>Metts</i> , 829 S.W.2d 585 (Mo.App.E.D.1992)	49
<i>Nolan</i> , 418 S.W.2d 51 (Mo.1967)	138-139
<i>Parker</i> , 836 S.W.2d 930 (Mo.banc 1992)	55
<i>Parker</i> , 738 S.W.2d 566 (Mo.App.E.D.1987).....	39-40
<i>Parkhurst</i> , 845 S.W.2d 31 (Mo.banc 1992)	136
<i>Pendleton</i> , 725 N.W.2d 717 (Minn.2007)	69
<i>Pinkston</i> , 79 S.W.2d 1046 (Mo.1935)	100-101
<i>Preston</i> , 673 S.W.2d 1 (Mo.banc 1984)	124-125
<i>Price</i> , 928 S.W.2d 429 (Mo.App.W.D.1996)	82-83
<i>Ralls</i> , 918 S.W.2d 936 (Mo.App.W.D.1996).....	74

<i>Redmond</i> , 937 S.W.2d 205 (Mo.banc 1996)	81,84
<i>Roberts</i> , 948 S.W.2d 577 (Mo.banc 1997)	127
<i>Robertson</i> , 182 S.W.3d 747 (Mo.App.W.D.2006)	83
<i>Rousan</i> , 961 S.W.2d 831 (Mo.banc 1998)	61,102
<i>Samuels</i> , 965 S.W.2d 913 (Mo.App.W.D. 1998)	74,125-126
<i>Stidman</i> , 259 S.W.3d 96 (Mo.App.S.D.2008)	73-74
<i>Storey</i> , 40 S.W.3d 898 (Mo.banc 2001)	117
<i>Turner</i> , 152 S.W. 313 (Mo. 1912)	85
<i>Whalen</i> , 49 S.W.3d 181 (Mo.banc 2001)	60
<i>Whitfield</i> , 107 S.W.3d 253 (Mo.banc 2003)	121,122,130,135
<i>Whitfield</i> , 837 S.W.2d 503 (Mo.banc 1992)	121,122,129-30,133,135
<i>Wise</i> , 879 S.W.2d 494 (Mo.banc 1994)	64
<i>Zink</i> , 181 S.W.3d 66 (Mo.banc 2005)	129
<i>Szuchon v. Lehman</i> , 273 F.3d 299 (3rd Cir. 2001)	103-104
<i>Taylor v. Kentucky</i> , 436 U.S. 478 (1978)	70
<i>Tilley v. State</i> , 202 S.W.3d 726, (Mo.App.S.D.2006)	67
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	68
<i>United States v. Christian</i> , 571 F.2d 64 (1stCir.1978)	112-113
<i>Uttecht v. Brown</i> , 127 S.Ct. 2218 (2007)	101

Wainwright v. Witt, 469 U.S. 412 (1985).....101-102,104

Williams By and Through Wilford v. Barnes Hosp.,36-37,39,40,43

736 S.W.2d 33 (Mo.banc 1987)

Witherspoon v. Illinois, 391 U.S. 510 (1968)..... 98,100,101,104

Withrow v. Williams, 507 U.S. 680 (1993) 112

Constitutional Provisions

U.S.Const., Amend. V 98,105,110-115,128,126-137

U.S.Const., Amend. VI.....passim

U.S.Const., Amend. VIIIpassim

U.S.Const., Amend. XIVpassim

Mo.Const., Art. I, §2..... 43

Mo.Const., Art. I, §10.....passim

Mo.Const., Art. I, §17..... 134,136

Mo.Const., Art. I, §18(a).....passim

Mo.Const., Art. I, §19..... 105

Mo.Const., Art. I, §21..... 56,88,98,105,116,134

Statutory Provisions

RSMo. 2000

§494.470.2.....	102
§565.002(1)	82,84
§565.002(3)	60,64,65
§565.002(7)	82
§565.020.....	60,64,65,136
§562.016.2.....	60
§565.021.1.....	60,81,82
§565.023.1.....	82,83
§565.032.2.....	123,124,136
§565..035.3.....	90-94
§565.030, RSMo. (Supp. 2006)	passim

Missouri Supreme Court Rules

Rule 30.20	57,109
------------------	--------

MAI-CR3d Instructions

300.0231	
314.02	70
314.04	75,83
314.08	84

314.40 72,117

314.44 72,122,128-129,131-134

Other Authorities

40 C.J.S. *Homicide* (1944)..... 86

Wharton on Homicide [3d Ed.] §183 85

David Sloss, “*Death penalty: In Missouri, where you live may matter,*” THE BEACON, last updated 23 May 2008, available at [http://www.stlbeacon.org/voices/in_the_news/death
—
penalty_in_missouri_where_you_live_may_matter](http://www.stlbeacon.org/voices/in_the_news/death_penalty_in_missouri_where_you_live_may_matter)

Heather Ratcliffe, “*Prosecutors use discretion differently in death sentencing,*” ST. LOUIS POST-DISPATCH, July 6, 2008. 96-97

JURISDICTIONAL STATEMENT

St. Louis County charged appellant Kevin Johnson, Jr., with first-degree murder-Count I, first-degree robbery-Count III, first-degree assault-Count V, and armed criminal action-Counts II, IV, and VI, and sought the death penalty. The trial court severed Counts II-VI, and the murder charge was tried to a jury. The jury could not reach a verdict as to guilt. The trial court declared a mistrial and set the cause for retrial.

Kevin's retrial began October 31, 2007. The jury found Kevin guilty as charged and assessed the death penalty. The trial court sentenced Kevin to death, and granted him leave to appeal in forma pauperis. Kevin appealed; this Court has jurisdiction. Art. V, §3, Mo.Const. (as amended 1982).

STATEMENT OF FACTS

At trial, the defense opening statement acknowledged that Kevin, following the sudden death of his younger brother, Joseph "BamBam" Long, shot and killed Sgt. McEntee (Tr.1092,1096-98,1101).¹ The only issue for the jury "to decide

¹ Appellant's brief cites the transcript of the trial from which this appeal is taken, Kevin's retrial, as "Tr," the Legal File as "LF," State Exhibits as "StEx" and Defense Exhibits as "DefEx." A DVD of Kevin's testimony from his first trial was

[was] whether or not at any point in time Kevin coolly reflected before pulling the trigger that day” (Tr.1101).

Prior to July 5th,² the Kirkwood police had begun looking for Kevin Johnson, who lived in Kirkwood’s Meacham Park neighborhood and was wanted for violating his probation on a misdemeanor conviction (Tr.1219-21,1272). The police were looking to arrest Kevin (Tr. 1272-73).

Kevin lived at 411 Saratoga with his great-grandmother Henrietta Kimble, his little brother Joseph [BamBam] Long, and his grandfather (Tr.I.757-58;StEx-80). Kevin’s grandmother Pat and other family members lived next door at 413 Saratoga (Tr.1229,1232;StEx’s77-79;StEx-80).

introduced at his retrial as StEx-80 and portions of his testimony were played for the jury (Tr.1287-93). Appellant has provided opposing counsel with a copy of the partial transcript of his first trial, prepared by the court reporter before retrial, and is filing a motion asking the Court to take judicial notice of this record. In his brief, for the convenience of the Court, opposing counsel, and undersigned counsel, in addition to citing StEx-80, Kevin cites to the transcript of the first trial as “Tr.I.”

² Unless otherwise noted, the events recounted in this statement of facts occurred on July 5th, 2005.

On July 5th, about 5:20 p.m., Officer Nelson saw Kevin's car, a Ford Explorer truck, across the street from 413 Saratoga and called Officer Brand for assistance (Tr.1224-25,1228-29,1232;StEx-77;Tr.I.773-74). Kevin was then inside 411 with his daughter Cori, BamBam, and his grandparents (Tr.I.772-73). Kevin saw a Kirkwood police car on Saratoga then saw it in front of 413 and a second Kirkwood patrol car coming down the street (Tr.I.773).

The officers parked their cars near Kevin's truck and began looking in it (Tr.I.774-75;StEx-80). Kevin worried that the officers might tow his truck because there was a warrant for his arrest (Tr.I.775;StEx-80). He gave his keys to BamBam saying, "give these keys to Grandma Pat" and tell "her to act like she's driving it so they don't take my car" (Tr.I.775-76;StEx-80). BamBam immediately "ran over to 413" (Tr.I.776;StEx-80).

The officers had their hands in Kevin's car "looking... through it" and "running" the vehicle identification number to determine the owner (Tr.1232;Tr.I.778; StEx-80). Kevin watched through a window facing 413 (Tr.I.776-78;StEx-80). His Grandma Pat came out of 413 Saratoga and dangled Kevin's keys in the air to show she was "driving" his car and then began yelling for help (Tr. 1232;Tr.I.776;StEx-80). She said BamBam, her grandson, had just had a seizure and was passed out on the living room floor (Tr. 1235;Tr.I.778;StEx-

80).

Kevin saw the officers “look[ing] at each other” as though confused wondering if Grandma Pat was talking to them (Tr.1232-33;Tr.I.778;StEx-80). He saw the officers walk slowly toward the house and go inside (Tr.I.778;StEx-80). Brand³ made an emergency call “requesting paramedics for a 12-year-old that had passed out or had a seizure” (Tr. 1235).

Kevin could not see BamBam on the floor, but thought he must be where people inside were standing in a half-circle (Tr.I.779;StEx-80). The officers “immediately made everybody,” Grandma Pat, Kevin’s Aunt Ivory, and his Uncle Cameron, “get out of the house” (Tr.I.779-80;StEx-80). Nelson walked around “going through the rooms” (Tr.I.780;StEx-80).

A Kirkwood Fire Department ambulance and fire truck and medical personnel arrived approximately four minutes later (Tr.1180-82). Kirkwood police Sgt. McEntee arrived at the house just after the medics; they all went in the house (Tr.1191;Tr.I.782;StEx-80). The medics bent down; BamBam, “had a weak pulse,” “had thrown up black or red sputum, pretty large quantity” and gasped for air (Tr.1182-85,1235-36;Tr.I.782;StEx-80). Kevin could see officers Nelson,

³ Solely for brevity, intending no disrespect, appellant will use single names when possible to refer to the people involved.

Brand, and McEntee talking (Tr.I.782;StEx-80).

Grandma Pat ran to 411 and said that something was wrong with BamBam (Tr.I.783;StEx-80). When Kevin started to go to 411, Grandma Pat told him not to go: he would be arrested (Tr.I.783;StEx-80).

Kevin and BamBam's mother, Jada, arrived; she was very upset and wanted to get inside to BamBam (Tr.1192;Tr.I.783-84;StEx-80). Fire Department Captain Dahm testified that the medics asked McEntee to take her outside (Tr.1192-93). Dahm said Jada was very upset, crying" and McEntee "asked her to come with him" and took her out to the front porch (Tr.1193). Dahm said Jada did not fight with McEntee and did go outside but did "not want[] to leave her son" (Tr.1193).

Kevin testified McEntee blocked Jada's way and wouldn't let her inside and she kept pushing him to get inside (Tr.I.784;StEx-80). Jada "stopped trying to get through the door" and "went to look through the window" to see BamBam (Tr.I.784-85;StEx-80). McEntee pushed Jada away from the window (Tr.I.785;StEx-80). In the process, he almost pushed her off the porch (Tr.I.785;StEx-80). Eventually Jada just went into the yard and cried (Tr.I.785;StEx-80).

Norman Madison, Jada's then-boyfriend, went with her and their daughter, Brittany, to 413 Saratoga when they heard BamBam had collapsed (Tr.1635-39).

Jada tried to get into the house “but they stopped her at the door” (Tr.1640). Jada stayed on the porch and was pretty upset (Tr.1641). Norman, not on the porch, didn’t know if there was physical contact between Jada and the police (Tr.1642).

Attempts to restart BamBam’s heart using CPR chest compressions and shocks were unsuccessful (Tr.1187-89). An ambulance took BamBam to a hospital where he was pronounced dead (Tr.1197-98).

McEntee and Nelson walked to 411 and told Kevin’s great-grandma, sitting on the porch, where the ambulance was taking BamBam (Tr.I.786-87;StEx-80). Kevin had moved to the front window of 411 and heard McEntee ask if he was in the house and his grandma say “in” (Tr.I.787;StEx-80). McEntee saw Kevin “standing in the window” and tapped Nelson’s shoulder (Tr.I.787;StEx-80). “[T]hey both looked and they just started smiling” then got in their cars and left (Tr.I.787;StEx-80).

About 30 minutes later, Grandma Pat told Kevin that they had “lost” BamBam and gave Kevin his car keys (Tr.I.788;StEx-80). Kevin was shocked, and then became “mad” and upset (Tr.I.788;StEx-80).

He left Cori in the house with his grandpa, got in his truck and drove around Meacham Park to clear his mind and think (Tr.I.789;StEx-80). He called Cori’s grandmother to come get her (Tr.I.789;StEx-80).

Kevin drove home and waited but no one came to get Cori, so he decided to take her home (Tr.I.789;StEx-80). On the way he met his cousin Jermaine (Tr.I.789;StEx-80). They started walking to Cori's home at 319 Alsobrook, and Kevin told Jermaine about BamBam; Kevin said the police "act[ed] like they didn't want to save him" (Tr.1426-27). "They wasn't trying to help him, they was too busy looking for me" (Tr.I.791;StEx-80). Kevin testified he repeated this to other people he saw while walking with Jermaine (Tr.I.791;StEx-80).

At some point, Cori's mom came up and took her from Kevin (Tr.I.791;StEx-80). People began coming up to Kevin and asking "are you all right, are you all right," or "what happened, what happened" (Tr.I.792;StEx-80). He wanted to put it out of his mind and kept trying to smile (Tr.I.792;StEx-80).

Jermaine and Kevin had walked to the 300 block of Alsobrook when they saw Kevin's girlfriend, Brittany, in her SUV truck smoking a "blunt" - a marijuana cigarette (Tr.1427-29;Tr.I.793-94;StEx-80). Jermaine got in the car and smoked the blunt with Brittany (Tr.I.795;StEx-80;Tr.1428-29). At about this time, Kirkwood police officer Hayek was driving to Meacham Park concerning a report of "fireworks" when Sgt. McEntee "advised... he was closer and would take the assignment" (Tr.1167-68).

Kevin, not "into" smoking marijuana, decided to go to his father's house in

Berkeley and began walking down Alsobrook toward Orleans (Tr.1433;Tr.I.795-96;StEx-80). Jermaine remained in the SUV with Brittany smoking the blunt (Tr.1433-35). In the rear-view mirror, Jermaine saw a Kirkwood police car turn onto Alsobrook (Tr.1433-35). He gave the marijuana cigarette back to Brittany and ran down the hill toward Kevin (Tr.1435-36).

A lot of people were “in the street” at that time (Tr.1339,1345). Although there is no dispute that at this point Kevin shot McEntee, the witnesses differed on what occurred before, during, and after the shooting.

As Jermaine ran down the street, he saw Kevin in the street at the police car’s passenger window facing the car which had stopped (Tr.1437-42). Jermaine didn’t see anyone on the driver’s side or across the street from the driver’s side but the driver was looking in that direction (Tr.1440).

Jermaine walked past Kevin to the rear of the car (Tr. 1442). Watching from there, Jermaine saw Kevin pull his gun out, put it through the police car window, and shoot (Tr.1442-45). Kevin’s hand was all the way in the car when he began shooting (Tr.1445). Before Jermaine ran between two houses and threw up, he saw Kevin open the police car door (Tr.1442,1448). Kevin had his gun and a Kirkwood police gun when he ran between the two houses past Jermaine (Tr.1450-51). Lamont Chester, Eric Long, and Manu Jones were at Alsobrook and

Orleans at about 7:30 p.m. when McEntee pulled up and talked to them about “popping fireworks”; it was the day after the Fourth of July and fireworks were still being exploded (Tr.1110,1147,1294-96,1316-18;StEx’s-68&69).

While the boys talked to McEntee on the driver’s side of the car, Lamont saw Kevin walking towards the police car on the passenger side (Tr.1298;StEx’s-68&69). Kevin ran up to the passenger front door and started shooting and said to the officer, “you killed my brother” (Tr.1299-1301,StEx-68). Five to seven shots were fired in rapid succession (StEx-68). Lamont got shot in the leg and ran home (Tr.1301;StEx-68). Lamont never saw Kevin reach into the police car (Tr.1314). He didn’t see Kevin open the door or take the officer’s gun (Tr.1314).

Eric didn’t see anyone go to the police car; he heard gunshots then heard, “you killed my brother” (Tr.1320,1325;StEx-69). Eric ran; he looked back while running and saw people running up and down the street (Tr.1324). Kevin was running away from the police car (Tr. 1322,1324).

Manu testified he was talking to McEntee and heard what sounded like fireworks (Tr.1384). He “blacked out” when someone said “you killed my brother,” then he heard gunshots “coming from the passenger side” of the police car (Tr.1384-86). By “blacked out,” Manu didn’t mean he fainted or collapsed; he was still conscious and could see (Tr. 1405). No one got into the car; Manu saw

“an arm in the car” firing shots “and then afterwards reaching for the gun” (Tr.1386). Kevin put his arm into the car, struggled with the officer, and took the officer’s gun (Tr.1386-91). Manu saw Kevin with two guns (Tr.1390). The police car drove up the street and Manu went to Eric’s house and then home to Saratoga (Tr. 1391). Manu saw Kevin on Orleans walking toward his house with a silver gun in one hand and a dark gun in the other hand (Tr. 1390-93). At Kevin’s first trial, Manu testified that Kevin just had one gun when he was walking down Orleans towards Saratoga (Tr.1408-10). Manu did not see Kevin follow the police car down Alsobrook (Tr.1412). Manu testified that at his deposition, he said he saw Kevin in the officer’s car struggling with the officer for the gun; he acknowledged making this statement in his deposition and said it was not accurate (Tr.1395-96).

Norvell Harris was pushing a neighbor’s car into the driveway and noticed a police car on Alsobrook at Orleans (Tr.1338-40,1345). Kevin, on the passenger side of the police car, said something to the officer like “you killed my brother,” stuck a gun into the car window, shot the officer, and ran (Tr.1347-49;StEx-75). Norvell testified at trial that Kevin didn’t try to get into the car or take anything out of the car (Tr.1348). When the police took his statement, Norvell said Kevin reached into the car for something (StEx-75).

The police talked to Jermaine after the shooting; he said he “didn’t know anything” (Tr.1456). Jermaine was then on probation for robbery and had warrants from Kirkwood and Maplewood for other “[d]rugs and traffic” offenses (Tr.1456-58). After being arrested on the warrants, he knew would receive a probation violation on the robbery, and asked to talk to the Kirkwood police (Tr.1460-61). His statement to the Kirkwood police was the same as his testimony at trial, and Jermaine’s robbery probation was never revoked (Tr.1461-62).

Jermaine said BamBam’s death “was a shocker” and he “couldn’t believe it” (Tr.1466). Kevin was more “shocked than” Jermaine; Kevin was “devastated” and was confused (Tr.1467,1469). When they walked together after BamBam’s death, they talked about BamBam’s death; and Kevin never mentioned taking revenge or harming an officer or McEntee or anything like that (Tr.1468-69).

At some point after Norman and Jada returned from the hospital, he heard a lot of people “running past the house going down toward Orleans” (Tr.1649-50). They went outside to look for Brittany (Tr.1650-52). People “were coming back up Orleans toward Saratoga” and a few minutes later, Norman saw Kevin coming down Saratoga toward Orleans (Tr.1653). Kevin had a silver gun in his left hand and nothing in his right hand (Tr.1653-54).

Norman testified that when Kevin reached him and Jada, she asked Kevin

what he had done “and he said, that mother fucker let my brother die, he needs to see what it feel like to die” (Tr.1654). Jada told him, “that’s not true,” and Kevin turned and walked away up Saratoga (Tr.1654-55). Kevin was “highly upset” (Tr.1656).

Patricia Hartman was in her house at Saratoga and Orleans at about 7:30 p.m. when she heard a “popping” sound like fireworks and then screaming behind her house (Tr.1146-47). Hartman called 911 (Tr.1149). She saw Kevin, walking on Orleans and turning right onto Saratoga, with two guns (Tr.1150-52). Kevin was “yelling something” and trying to hide one gun beneath his shirt (Tr.1151-52). He turned left and walked up Saratoga as far as Hartman could see (Tr.1151-54).

The police car drove up Alsobrook and hit a tree (Tr.1349). Everyone ran up the street towards the police car (Tr.1349). Norvell ran partway up the street and saw the officer on his knees outside the driver’s door (Tr.1352;StEx-10). There were a lot of people (Tr.1352). Norvell saw Kevin, with a gun in his hand, come from the front end of the car, past the driver’s door to the sidewalk, telling people to get out of the way (Tr.1352-54StEx-75). Norvell heard a shot; he saw Kevin shoot the officer one time in the back and run off (Tr.1354-55;1373-76). The officer was on his knees “gagging for air” (Tr.1355). Kevin did not go through the

officer's pockets or bend over him (Tr.1356). Norvell ran back down the street (Tr.1356). When the police talked to him the night of the shooting, Norvell said Kevin shot the officer in the head twice at the second shooting (StEx-75). Kevin had only one gun at the first and second shootings (Tr.1377;StEx-75). Norvell made a taped statement to the police that same night (Tr.1357-61;StEx-75).

Vivian Harris and her husband were visiting her sister that evening at 345 Alsobrook (Tr.1705). While in the house, she heard what sounded like fireworks coming from in front of her sister's house then learned they were in gunshots (Tr.1706). Outside, people were "running around yelling and screaming" (Tr.1706).

Vivian's car was parked in front of the house; she saw a police car up the street and people running to it (Tr.1706-08). Vivian walked only as far as the house next to her sister's house (Tr.1708-09). The police car, further up the block, had crashed into a tree (Tr.1709). She testified she didn't see Kevin up the street at the car or by the officer; she saw him "through a yard or from behind the house" and go to the police car (Tr.1710). She did not see him go to the front of the car: "Everybody started running so I went back into the yard" (Tr.1710). She heard shots fired but didn't see Kevin fire any shots (Tr.1710). After the shots were fired, she saw Kevin walking down alsobrook in the middle of the street "yelling

and cursing” (Tr.1710). “He was saying, they killed my brother, I don’t give a fuck, things like that” not talking to anyone in particular (Tr.1711). He had a gun in each hand (Tr.1712).

Vivian acknowledged at trial that when the police took a statement from her and taped it, she said she saw Kevin shoot the officer (Tr.1713). Asked if she was now - at trial - saying she didn’t see Kevin shoot the officer, Vivian said she didn’t see Kevin shoot the officer: “At that time, I felt that I was being bullied and pressured into saying more than what I actually saw...” (Tr.1713). Vivian she initially told the police she didn’t see anything, but an officer came back and told her “he felt [she] saw more” than she had said and she needed to tell them; she felt pressured (Tr.1714). In her statement to the police, Vivian said:

I seen the car hitting the tree.... I started walking up towards the area where the police officer crashed. As I started walking I see Kevin coming through the backyard of the house.... I see the officer open the door and fall to the ground and that’s when I see Kevin walk up to the side and then he walks up to the police officer and then he shoot him. Then he shoot him.... I just know it was a lot of shots. It was a bunch of shots and as he was shooting he was talking and cursing as he was shooting.

(StEx-66).

Cecil Jones was at his home across from 329 Alsobrook when he heard firecrackers and screaming (Tr.1666-67). A police car drove up Alsobrook from Orleans and hit a car at 333 Alsobrook (Tr.1667-69). It rolled backward then started up again and immediately crashed into a tree across the street (Tr.1670-71).

Cecil saw smoke coming from inside the car and went to the car to help (Tr.1672). He saw McEntee bleeding from his mouth and trying to undo his seatbelt (Tr.1673-74). There were wounds on McEntee's face (Tr.1674).

McEntee got his seatbelt unbuckled and Cecil opened the car door (Tr.1675). As McEntee fell out of the car, Cecil grabbed him and McEntee got on his knees on the ground (Tr.1675). McEntee tried to talk but his mouth was full of blood; he stayed on his knees (Tr.1675). The only other person around was a neighbor, "Ms. Sloan," who tried to get some help (Tr.1676).

Cecil went inside and called the Kirkwood police (Tr.1677). He was about to go back out to take some water to McEntee when he heard "more firecrackers" (Tr.1677-78). From his front door, Cecil saw Kevin bending over McEntee, who was flat on the ground, going through his pockets (Tr.1678-79).

Cecil said, "Kevin, man, get out of here, what are you doing?" (Tr.1680). Kevin said, "he killed my brother" ran down the street toward Orleans (Tr.1680-

82). At trial, Cecil said he saw something in Kevin's hand but "wasn't focused on him" (Tr.1682). When Detective Neske took a statement from Cecil, Cecil said that when he came out of his house, Kevin was standing over McEntee with a black firearm in his hand saying, "You killed my brother. You killed my little brother and that's what you get" (StEx-74).

The Kirkwood police dispatcher broadcast a report "of shots fired and possible officer down" in the 300 block of Alsobrook in Meacham Park (Tr. 1249, 1251). Officer Hayek heard that broadcast then heard a woman on the radio "screaming that someone had been shot and... to send help immediately...." (Tr.1169-71,1177). Officer Nelson arrived first; McEntee's police car had hit a tree in front of 329 Alsobrook, and McEntee was lying across the sidewalk, next to the car, in a large pool of blood, unresponsive (Tr.1251-55;1174). He had numerous, serious injuries to his face and head (Tr. 1255-56). An ambulance was called, but McEntee was already dead by the time it arrived (Tr. 1200,1211,1256-57). His gun was missing from the holster on his gun belt and the ammunition pouches on the belt were open and empty (Tr. 1258-65;1279-80).

Forensic pathologist Mary Case's autopsy of McEntee revealed seven gunshot wounds: four to his head; three to his torso (Tr.1770,1791). Stipple at the entrance site to three of these wounds - one to his forehead and eye, one to his

cheek and jaw, and one to his jaw and tongue – indicated they were fired at intermediate range from six to eighteen inches; although serious, these wounds were not fatal (Tr.1779,1793-96,1803-06). Three other wounds – one to the upper back and shoulder, one to the upper chest and shoulder, and one to the upper chest and left arm, also were not fatal (Tr.1798-1800,1806-08). The fatal entrance wound was located behind the right ear; the bullet went into the base of the skull and the jaw (Tr.1797). This wound caused McEntee’s death and would have rendered him “unconscious immediately” (Tr.1809).

The state played a DVD of Kevin’s testimony from the first trial. At the first trial, Kevin testified he had gotten his gun, which was loaded, out of his truck after BamBam went to the hospital and the police left and put it in his pocket because he was worried about the police finding it if they towed his truck (Tr.I.819,821,858;StEx-80).

Kevin testified he first noticed the police car on Alsobrook when it was about 15 feet from him (Tr.I.798;StEx-80). Not wanting to draw the officer’s attention, he did not run; instead, hoping the officer wouldn’t see him, he and Jermaine began walking past the car (Tr.I.798;StEx80).

Reaching the passenger window, Kevin saw the officer was McEntee and stopped (Tr.I.798;StEx-80). McEntee saw Kevin; “he just started smiling”

(Tr.I.798;StEx-80). Kevin said “you killed my brother” and shot McEntee (Tr.1299,1384,1386;StEx-68).

Kevin testified he “flipped out” and shot McEntee seven times (Tr.I.798-99;StEx-80). Afterward, walking toward Orleans, Kevin heard McEntee’s car “taking off” and turned to see it hit a white car up the street (Tr.I.800;StEx-80). Kevin kept walking away(Tr.I.800;StEx-80).

At Saratoga and Orleans, his mother saw him and asked what was wrong (Tr.I.800;StEx-80). Kevin said, “he killed BamBam” meaning “[t]he police, McEntee” killed BamBam (Tr.I.801;StEx-80). Jada said, “BamBam died, nobody killed him”(Tr.I.801;StEx-80). Kevin insisted the police killed BamBam; that was how he felt (Tr.I.801;StEx-80).

Jada asked about Cori; Kevin ran up Saratoga toward Cori’s house (Tr.I.801-02;StEx-80). He cut through several back yards to get to Cori’s house at 319 Alsobrook (Tr.I.802;StEx-1A;StEx-80).

At Alsobrook, Kevin went around the white car and the police car to get to Cori’s house (Tr.I.803;StEx-80). He saw McEntee moving alongside of the police car (Tr.I.804;StEx-80). He “flipped out again” and fired at McEntee hitting him “in the back of the head” (Tr.I.804;StEx-80). Kevin walked toward McEntee, stumbled, and the gun went off again hitting the concrete (Tr.I.805;StEx-80).

Kevin heard Cecil calling his name then heard sirens and began walking towards Orleans(Tr.I.805;StEx-80). He saw his cousin Jamar looking around saying “fuck, fuck, man,” “realized what happened” and began running (Tr.I.806;StEx-80).

He ran to Orleans, cut through some yards on Saratoga and got to his truck(Tr.I.806;StEx-80). As he drove out of Meacham Park, Jermaine flagged him down and said, “give me the gun, give me the gun” (Tr.I.807;StEx-80). He began wondering, “why did I do that?” (Tr.I.808;StEx-80).

Kevin reached his dad’s house in Berkeley, went to his room, and thought about what he had done and BamBam dying (Tr.I.809;StEx-80). His dad came home, and Kevin told him BamBam had died (Tr.I.809;StEx-80). The TV news reported McEntee’s shooting and showed Kevin’s house “surrounded” (Tr.I.810;StEx-80). Kevin told his dad he had shot McEntee(Tr.I.810;StEx-80)..

Kevin’s dad was on parole for murder and said Kevin had to leave: “you know I’m on parole, I can’t be around this... you can’t stay here” (Tr.I.810-11;StEx-80). Kevin’s dad said, “man, you know they going to kill you when they catch you” meaning the police would kill Kevin (Tr.I.811;StEx-80).

Kevin had a key to his cousin’s house and went there (Tr.I.811;StEx-80). He stayed there for three days while his uncle made arrangements for him to turn

himself in to a cousin who was a police officer (Tr.I.812;StEx-80).

On re-cross-exam Kevin said that when he pointed the gun at McEntee and pulled the trigger on the gun, he knew he was doing those things (Tr.I.860;StEx-80). He knew he was shootng McEntee (Tr.I.860;StEx-80). Each time he pulled the trigger, he knew the gun would fire(Tr.I.860-62;StEx-80). He wasn't thinking about killing McEntee; he knew the shots could kill McEntee (Tr.I.862-63;StEx-80).

The last time Kevin shot McEntee, he didn't know why he shot; he "just shot him." (Tr.I.863;StEx-80). He knew if he pulled the trigger the gun would fire a bullet; he knew the gun was pointed at McEntee's head (Tr.I.864;StEx-80).

Firearms examiner Officer Michael Wunderlich testified that the casings and bullet seized from Alsobrook had been fired from a "Hi-Point" .9mm firearm—the same kind of gun Kevin had (Tr.1567;StEx-80). This kind of gun requires the trigger to be pulled each time a bullet is fired (Tr.1571). The Hi-Point is a semi-automatic, and it "would be very easy" to fire six or seven bullets in two to three seconds (Tr.1586). Someone experienced in firing that gun could "fire[] more than eight rounds in less" than two seconds (Tr. 1586-87). Once discharged, a casing or bullet could be moved, inadvertently or intentionally, to a location different than the place it landed (Tr.1591-93).

To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I

The trial court erred in overruling Kevin's motion for a new trial based on juror Broome's nondisclosure she knew state's witness Detective Don Scognamiglio. This violated Kevin's rights to jury trial and due process, U.S.Const., Amend's VI&XIV; Mo.Const., Art.1, §§10&18(a), and MAI-CR3d 300.02. During voir dire, Prosecutor McCulloch read state's witnesses' names, including "Don Scognamiglio" and asked if the venire knew anyone. Broome knew Scognamiglio but didn't respond. After trial, defense counsel learned Scognamiglio knew Broome because she had worked with his wife. Under the "reasonable person" standard, Broome's failure to respond was intentional nondisclosure requiring a new trial.

Williams By and Through Wilford v. Barnes Hosp., 736 S.W.2d 33

(Mo.banc 1987);

Brines v. Cibis, 882 S.W.2d 138 (Mo.banc 1994);

Hatfield v. Griffin, 147 S.W.3d 115 (Mo.App.W.D. 2004);

State v. Martin, 755 S.W.2d 337 (Mo.App.E.D.1988).

The trial court clearly erred in overruling Kevin's *Batson* challenge to the state's peremptorily striking Debra Cottman, a black juror. This violated Kevin's and Cottman's rights to equal protection and his rights to due process and a fair, impartial jury. U.S. Const., Amend's VI and XIV; Mo. Const., Art. I, §§ 2, 10, and 18(a). The prosecutor's reasons for this strike-Cottman was "not all that willing to answer the questions regarding the death penalty and other issues surrounding that" and "was a foster parent for the Annie Malone Children's Home" and still saw "a lot of" her former foster-children-were pretexts concealing discriminatory purpose: similarly situated jurors were not struck, he never asked about connections to Annie Malone or other facilities or agencies that served Kevin; the record does not substantiate these reasons.

Batson v. Kentucky, 476 U.S. 79 (1986);

Miller-El v. Dretke, 545 U.S. 231, 247-48 (2005);

Snyder v. Louisiana, 128 S.Ct. 1203 (2008);

State v. McFadden, 191 S.W.3d 648 (Mo. banc 2006).

The trial court erred and plainly erred in overruling Kevin's motion for judgment of acquittal of first degree murder and objections to Instruction 5: MAI-CR3d-314.02. This violated his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's VI,VIII,&XIV; Mo.Const.,Art.1, §§10,18(a),&21. Repeatedly arguing, contrary to the law, that Kevin's conscious decision to shoot was deliberation, Prosecutor McCulloch misled the jury and created manifest injustice: a conscious decision to kill is a purposeful, intentional, knowing decision and is *second* degree murder; 2) §565.002(3)'s deliberation definition, "cool reflection... no matter how brief," reduces the distinction between first and second degree murder to imperceptibility; 3) Instruction 5, the first-degree-murder verdict-director, failed to require unanimity on each element including deliberation. These errors created an unacceptable risk the jury found Kevin guilty of first-degree murder without finding deliberation.

State v. Whalen, 49 S.W.3d 181 (Mo.banc 2001);

Chicago v. Morales, 527 U.S. 41,56 (1999);

Richardson v. United States, 526 U.S. 813 (1999);

State v. Berry, 168 S.W.3d 527 (Mo.App.W.D.2005).

The trial court erred in refusing Instructions B and C: murder second-degree without sudden passion and voluntary manslaughter. This violated his right to a defense, jury trial, and due process, U.S.Const., Amend's VI and XIV; Mo.Const., Art.1, §§10and18(a), and MAI-CR3d-314.04, Notes on Use, Note 4. Viewed most favorably to the instructions, the evidence, including events within several hours of the shooting—BamBam's collapse; the police not helping BamBam because they were looking for Kevin; the police "smiling" when they saw Kevin before BamBam collapsed; McEntee "smiling" when he spotted Kevin after BamBam went to the hospital—showed that in shooting McEntee when he "smiled," Kevin acted in sudden passion arising from adequate cause. This evidence supported acquittal of first-degree murder and, depending on whether the state proved the absence of sudden passion arising from adequate cause, conviction of second-degree murder or manslaughter. Refusing these instructions deprived Kevin of a viable defense.

State v. Battle, 32 S.W.3d 193 (Mo.App.E.D.2000);

State v. Redmond, 937 S.W.2d 205 (Mo.banc 1996);

State v. Price, 928 S.W.2d 429 (Mo.App.W.D.1996);

State v. Turner, 152 S.W. 313 (Mo. 1912).

The trial court erred in sentencing Kevin to death violating due process, fundamental fairness, and reliable, proportionate sentencing. U.S.Const., Amend's XIV,VI, and VIII; Mo.Const., Art.1, §§10, 18(a), and 21; RSMo.§565.035.3(3). Numerous trial errors, strong mitigating evidence, and a previous jury not finding Kevin guilty of first degree murder show this is an inappropriate case for death. Missouri's lack of standards afford prosecutors unguided discretion in seeking death sentences resulting in inconsistent application of the death penalty. To safeguard against the arbitrariness of unguided prosecutorial discretion, when the state seeks death, it should be required to afford the accused an opportunity to avoid a death sentence by pleading guilty to first degree murder or a lesser offense.

Caldwell v. Mississippi, 472 U.S. 320 (1985);

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);

State v. Chaney, 967 S.W.2d 47 (Mo.banc 1998).

The trial court erred in granting the state's motion to strike juror Tompkins for cause. This violated Kevin's rights to fair jury trial, freedom from cruel, unusual punishment, reliable sentencing and due process. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art I, §§10, 18(a) and 21. Tompkins' opposition to the death penalty did not disqualify her. Her opinion was the death penalty was inappropriate except in extraordinary cases - not that she would never impose a death sentence or automatically exclude it - and never said her views would keep her from following the court's instructions. Tompkins could "be convinced otherwise" about the death penalty depending on the evidence. She was not "closed off" to giving death "in this case."

Witherspoon v. Illinois, 391U.S.510 (1968);

Morgan v. Illinois, 504U.S.719 (1992);

Wainwright v. Witt, 469U.S.412 (1985);

Joy v. Morrison, 254S.W.3d885 (Mo.banc 2008).

The trial court plainly erred in admitting evidence of Kevin's statement. This violated his rights to silence, non-incrimination, due process, and reliable sentencing. U.S.Const., Amend's V,VIII,XIV; Mo. Const., Art. 1,§§10,19,and21. Kevin was advised of, but never waived, his rights; questioning continued after Kevin said he didn't want to talk. Admitting Kevin's statement was a manifest injustice: the prosecutor used it extensively in cross-examining Kevin and arguing he was a liar and his trial testimony unbelievable.

Missouri v. Seibert, 542 U.S. 600 (2004);

Miranda v. Arizona, 384 U.S. 436 (1966);

Johnson v. Zerbst, 304 U.S. 458 (1938);

State v. Baker, 580 P.2d 90 (Kan.App.1978).

The trial court erred in overruling Kevin's objections to: StEx-91-a letter written by Mary and Sgt. McEntee's son, Mary McEntee reading the letter, Instruction 12-MAI-CR3d 314.40, and also erred in refusing Instruction E requiring the jury to find non-statutory aggravating and victim impact evidence beyond a reasonable doubt. These errors violated Kevin's rights to jury trial, confrontation, reliable sentencing, and due process. U.S.Const., Amend's VI, VIII, XIV; Mo.Const., Art.1, §§10, 18(a), & 21. Kevin was prejudiced: admitting StEx-91 and allowing Mary McEntee's to read it violated the rule against hearsay and invited the jury to sentence Kevin to death based on passion and emotion instead of guided discretion. No given instruction told the jury how to consider non-statutory aggravating evidence, including victim impact evidence, or that it must find the existence of non-statutory aggravating evidence beyond a reasonable doubt to use it in sentencing Kevin.

Payne v. Tennessee, 501 U.S. 808 (1991);

Ring v. Arizona, 536 U.S. 584 (2002);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

State v. Driscoll, 55 S.W.3d 350 (Mo.banc 2001).

The trial court erred in overruling Kevin's objections, giving the jury Instruction 12, and sentencing Kevin to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's XIV,VIandVIII. Instruction 12 included §565.032.2(7)'s unconstitutionally vague statutory aggravator: the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." Kevin was prejudiced: absent this unconstitutional aggravator, it cannot be said that the outcome at penalty phase would have been the same.

Furman v. Georgia, 408 U.S. 238 (1972);

Maynard v. Cartwright, 486 U.S. 356 (1988);

State v. Samuels, 965 S.W.2d 913 (Mo.App.W.D.1998);

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989).

The trial court erred in overruling Kevin's objections to Instruction 14, MAI-CR3d-314.44, and refusing Instruction F, MAI-CR3d-314.44-modified. This violated his jury trial, due process, and reliable sentencing rights, U.S.Const., Amend's V,VI,VIII, and XIV; and §565.030.4(3). A defendant convicted of first-degree murder must be sentenced to life imprisonment unless the state proves sentence-enhancing aggravators, but MAI-CR3d-314.44, given here as Instruction 14, which instructs on §565.030.4(3)'s death-eligibility "weighing" step, requires a defendant to establish entitlement to a life sentence by proving mitigation outweighs aggravation. As the state bears the burden of proving death-eligibility, the jury should be instructed the state must prove aggravation outweighs mitigation or mitigation weighs less than aggravation; Instruction F so instructed. MAI-CR3d-314.44 unconstitutionally requires defendant to establish eligibility for a life sentence, and relieves the state of its burden, by instructing defendant must prove to a unanimous jury that mitigation outweighs aggravation.

State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992);

Ring v. Arizona, 536 U.S. 584 (2002);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

11

The trial court erred in overruling Kevin's motion to quash the information or preclude the death penalty, and sentencing him to death. This violated his rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const., Amend's V,VI,&XIV; Mo.Const., Art.1, §§10,17,18(a) & 21. At least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Statutory aggravators are alternate elements of a greater, aggravated form of first-degree murder and must be pled in the charging document to increase punishment to death. Kevin's unauthorized death sentence must be reduced to life imprisonment.

Ring v. Arizona, 536 U.S. 584 (2002);

Apprendi v. New Jersey, 500 U.S.466 (2000);

Almendarez-Torres v. United States, 523 U.S. 224 (1998);

Hurtado v. California, 110 U.S. 516 (1884).

ARGUMENT

I

The trial court erred in overruling Kevin's motion for a new trial based on juror Broome's nondisclosure she knew state's witness Detective Don Scognamiglio. This violated Kevin's rights to fair jury trial and due process, U.S.Const., Amend's VI&XIV; Mo.Const., Art.1, §§10&18(a), and MAI-CR3d 300.02. During voir dire, Prosecutor McCulloch read the state's witnesses' names, including "Don Scognamiglio" and asked if the venire knew anyone. Broome knew Scognamiglio but didn't respond. After trial, defense counsel learned Scognamiglio knew Broome because she had worked with his wife. Under the "reasonable person" standard, Broome's failure to respond was intentional nondisclosure requiring a new trial.

The trial court began jury selection by instructing the venire:

Please listen carefully to all questions.... If, later on, during the examination, you remember something that you failed to answer before, or that would modify an answer you gave before, raise your hand and you will be asked about it. Your answers must not only be truthful but they must be full and complete.

(Tr.59-61;MAI-CR3d-300.02).

During voir dire before reading the names of potential witnesses to see if any jurors knew anyone, prosecutor McCulloch directed the jurors: “think about it for a while and let me know if you know any of them, any of the names sound familiar and we’ll explore that part of it”(Tr.869).

McCulloch first read the “civilian” witness list and asked, “Any of those names sound[] familiar to anybody, think you know any of them?(Tr.870). He repeated, “Let me go through the whole list of that and then you can think about it for a few minutes... then we’ll talk about it if you recognize any of the names...”(Tr.872).

McCulloch then read a list of “firefighters/paramedics”(Tr.873). Juror Myers responded: he knew firearms examiner Bill George from church(Tr.873). Myers socialized with George “very little” and knew him “enough to say hello and goodbye and that’s about it”(Tr.874).

Next McCulloch read the names of Kirkwood police officers and asked, “Anybody know any of these Kirkwood officers?”(Tr.875). Juror Gleason responded, “Travis Franke,” saying she “didn’t even know his last name until [the prosecutor] said it”(Tr.875). Franke was “a friend of a friend” she had seen “a couple of times socially” – enough to “say hi if [she] saw him” (Tr.875).

The last list, St. Louis County police officers, included “Don Scognamiglio”

(Tr.877). McCulloch asked, "Are any of those names familiar to anybody as County police officers?"(Tr.877). "Anybody know, friends with County police officers-- or... friends with police officers, law enforcement officers"(Tr.878).

Broome said her stepbrother, who she hadn't seen "in many, many, many years" was a police officer in Phoenix(Tr.878). Broome didn't talk regularly to him, and was not close to him (Tr.879).

Juror Harr responded that his son was a police officer in "O'Fallon, Missouri"(Tr.906). After McCulloch asked about Harr's son, Harr added:

One other thing. There was a name you brought up, Neske. I don't know that my son mentioned his name or I met him some time. The name sounds familiar. It may or may not be the same Neske, but I did hear the name Neske.

(Tr.906-08).

Broome never said she knew Detective Don Scognamiglio. That Broome knew "Don," Tr.2356,2358, did not come to light until after trial when, in talking to an attorney (unconnected to the case) Scognamiglio said he knew one of the jurors; the attorney contacted a public defender who contacted defense counsel(LF557;2362-65;DefEx-Q). These facts were not disputed.

Kevin included Broome's failure to disclose she knew Scognamiglio in his

motion for new trial (LF556-57). Broome testified at a hearing on this point:

Broome remembered McCulloch asking if anyone knew any potential witnesses and mentioning Det. Scognamiglio(Tr.2352). Broome knew Scognamiglio, and knew he was a police officer, because she worked with his wife, Kelly Scognamiglio, two and a half to three years earlier(Tr.2353-55). Broome wasn't sure how many times Don Scognamiglio being a police officer came up in her conversations with Kelly Scognamiglio(Tr.2355). Broome saw Scognamiglio when he came into the school and "check[ed] in" at the office where she worked; she would speak to him - "say hi" (Tr.2354-55). She "might have gone to an event or something like a Christmas party or something" or "school function" with the Scognamiglios(Tr.2358). She recognized Scognamiglio when he testified(Tr.2355).

Asked why she did not say she knew him, Broome answered:

Because when McCulloch, 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. And when I seen him on the stand, I didn't - I'm like, oh. I didn't know what I could do. I had no idea. If I should have said, I didn't know.

(Tr.2355). After the trial Broome told her husband, “oh, I had seen Don there, and he was one of the ones who had brought evidence in that seemed to be the same evidence as the first time we had seen the previous pictures or trial” (Tr.2356).

Broome admitted calling Det. Scognamiglio “Don” (Tr.2356). She knew his first and last name during jury selection, “but... it did not register... who he was because [she] hadn’t talked to them or really had[n’t] seen them in over two and a half years” (Tr.2356-57). Broome went out to dinner with Kelly Scognamiglio once, “but Don was not present” (Tr.2358).

Broome remembered other jurors responding, “that name sounds familiar, I might know that person” (Tr.2360). She did not respond, “I might know [Scognamiglio,]” because “it did not register together” (Tr.2360).

The trial court denied the motion for new trial, Tr.2371-73, making the following findings regarding Broome’s nondisclosure:

1. After reading the list of County police officer names, the prosecutor asked “Are any of those names familiar to anyone as county police officers?” (Tr.2372,LF583);
2. Broome “did not know Don Scognamiglio as a county police officer, although she was aware that he was a police officer” (Tr.2372;LF583);
3. Broome’s “denial that the mention of his name in the midst of a list of 12

officers did not register with her as someone she knew was credible"; it had been "a few years" since she had contact with him(Tr.2372;LF583);

4. Regarding the prosecutor's follow-up question, "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," the judge found no credible evidence Broome was "close friends" with Scognamiglio(Tr.2372-73;LF583-84).

5. There was no "non-disclosure," and even if there was, it was unintentional and defendant was not prejudiced(Tr.2373;LF584).

In finding Broome's failure to disclose she knew Scognamiglio unintentional, the trial court relied on selected statements lifted from Broome's testimony - not on the entirety of her testimony and the voir dire on this matter. The trial court's ruling conflicts with the record, the law, and the Instructions. Broome's nondisclosure that she knew Scognamiglio was intentional; the trial court abused its discretion in finding otherwise. The cause must be reversed and remanded for a new trial.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717,722, (1961). *Williams By and Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33 (Mo.banc

1987), sets out the law governing juror nondisclosure:

Intentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable....

Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time... or where the venireman reasonably misunderstands the question posed....

[D]etermination of whether concealment is intentional or unintentional is left to the sound discretion of the trial court. Its ruling is disturbed on appeal only upon a showing of abuse of that discretion.

Id. at 36. Intentionally or unintentionally, concealing “material information during voir dire... deprives both litigants of the opportunity to exercise peremptive challenges or challenges for cause in an intelligent and meaningful manner.” *Id.*

“[A] finding of intentional concealment has “become tantamount to a per se rule mandating a new trial.”” *Id.* quoting *Brines v. Cibis*, 882 S.W.2d 138,140 (Mo.banc 1994). “Only where a juror's intentional nondisclosure does not involve

a material issue, or where the nondisclosure is *unintentional*, should the trial court inquire into prejudice.” *Id.* “[W]hether or not a juror intentionally concealed information during voir dire must be left to the trial court's discretion unless the appellate court is able to conclude from the record that an abuse of discretion unmistakably occurred.” *State v. Martin*, 755 S.W.2d 337,339 (Mo.App.E.D.1988).

In *State v. Martin*, defense counsel received “an anonymous letter... after the trial stating that a juror, who later became the foreman, withheld information during voir dire.” *Id.* During voir dire, the juror was “asked whether she or any relatives or close friends had been a victim of crime” and she answered “no.” *Id.* “[T]he juror testified at the hearing on defendant's motion for a new trial that she recalled being asked whether she or a close relative or friend had been a victim of crime, but that she did not remember the murder of her son's father at the time the question was asked.” *Id.* at 340. The Eastern District held “the trial court abused its discretion in failing to find that it was unreasonable for the juror not to have remembered this incident” where “[t]he victim of the murder was the father of the juror's only child; the victim was considered by her to be a close friend; and the murder occurred four or five years prior to defendant's trial.” *Id.*

In *Hatfield v. Griffin*, 147 S.W.3d 115 (Mo.App.W.D. 2004), plaintiff's counsel

asked if the venire or a family member had “been a party to a lawsuit involving claims of either personal injury or death?” *Id.* at 116. Broadening his question, counsel asked if the jurors had “been in a lawsuit, period, that you haven't already told us about, whether it's personal injury, death or anything else?” *Id.* at 117. “[P]anelist Donaldson had been sued for unpaid medical bills” shortly before trial but “did not respond to any of these questions and served on the jury.” *Id.* at 117-18.

At a post-trial hearing, Donaldson testified: “she remembered during voir dire that she had been served with the petition and that she had to go to court to pay medical bills, but she did not know that this was a lawsuit.” *Id.* at 119. She thought the petition and summons “meant that she ‘needed to show up to take care of [her] bill,’ but didn’t think “‘it was a lawsuit.’” *Id.*

The circuit court found Donaldson credible and “her explanation for not revealing the collection suit... reasonable.” *Id.* Given her “unfamiliar[ity] with legal proceedings and terminology... and... the context of the voir dire questions, she reasonably failed to understand the question.” *Id.* The circuit court ruled “Donaldson's nondisclosure was unintentional....” *Id.*

On appeal, the Western District said “Donaldson's explanation” showed “*subjectively*, she had not failed to disclose the lawsuit intentionally.” *Id.*;

emphasis added. But this was the wrong standard: courts are to apply a “reasonable person” standard to determine if nondisclosure is intentional:

In other words, under the first [*Williams*] prong, we ask whether or not a reasonable person would have understood what information was being elicited. If so, under the second prong, the nondisclosure is intentional if the venire person either remembers the lawsuit or his or her forgetting it is unreasonable.

Id. at 119-20; *Brines, supra*. Applying the law and the correct standard of review in this case shows the trial court erred and abused its discretion in finding Broome did not fail to disclose that she knew Scognamiglio.

In determining matters concerning jurors ability to serve fairly and impartially, the trial court should consider the entire voir dire. *State v. Hall*, 955 S.W.2d 198,204 (Mo.banc 1997); *State v. Parker*, 738 S.W.2d 566 (Mo.App.E.D.1987). Here, with regard to its first and second findings – (1) that after reading the names of County police officers, McCulloch asked if any of the names were “familiar to anyone as county police officers,” and (2) Broome knew Scognamiglio as a police officer not a County police officer – the trial court erred, contrary to the law, by considering only part of McCulloch’s voir dire on this subject.

The trial court entirely overlooked McCulloch's preliminary directions to the jurors to "let [him] know if you know any of them" or if "any names sound familiar and we'll explore that part of it" (Tr.869). McCulloch never retracted his initial directions or told the jurors to limit their responses to only the specific questions asked about each group.

"[A] reasonable person would have understood" McCulloch's questions, in the context of the entire voir dire, *Hall, Parker, supra*, to be seeking responses from jurors who knew a police officer in St. Louis County or anywhere else. *Williams, Hatfield, supra*. In fact, Broome's own response concerning her step-brother, a police officer in Phoenix-not St. Louis County-proves the point.

Examining the full voir dire shows McCulloch did not include police officers who were "relatives" in his question; he asked jurors to respond if they "knew" or were friends with County officers and then broadened this inquiry so it was not limited to "County" officers (Tr.878). Broome is not "friends" with her step-brother: they are not "close" and she hasn't seen him in "many" years. He is not a St. Louis County officer. Nonetheless, she mentions him in response to the prosecutor's inquiry. Broome would have only mentioned her step-brother because she understood McCulloch's questions as asking jurors who "knew" a police officer, whether or not it was a "County" officer or they were "friends," to

respond.

McCulloch's questions were reasonably understood as seeking responses from jurors who "knew" a police officer anywhere whether or not they were friends. This is demonstrated by juror Harr's voir dire and McCulloch's response. Harr thought his son, a city police officer in O'Fallon, Missouri, had mentioned the name "Neske," or that he, juror Harr, had met him some time (Tr.906,908). Harr said, "It may or may not be the same Neske, but I did hear the name Neske(Tr.908).

After ascertaining that "about all" Harr remembered was Neske's name, McCulloch said "Okay" and thanked Harr (Tr.908). If McCulloch had not been interested in responses from jurors whose knowledge of a police officer was as limited as Harr's, McCulloch could have explained that to the jury. But instead of narrowing his inquiry, McCulloch asked a follow-up question and thanked Harr for responding. The responses of jurors Myers, Gleason, and Harr show that a reasonable juror in Broome's circumstances would have responded to McCulloch's questions about County officers by disclosing she knew Scognamiglio.

Broome responded before juror Harr and did not have the benefit of hearing his response before she responded. But Broome had heard MAI-CR3d 300.02,

read before voir dire began, and it covers this situation: “If, later on, during the examination, you remember something that you failed to answer before, or that would modify an answer you gave before, raise your hand and you will be asked about it.” If Broome did not initially realize she should say she knew Scognamiglio, Harr’s response and MAI-CR3d300.02 should have prompted her disclosure of the material information that she knew a police officer who was a state’s witness. The trial court’s third finding is an abuse of discretion: it is contrary to the law and ignores this instruction.

The trial court’s finding that Scognamiglio’s name appearing “in the midst of a list of 12 officers” made it credible that it did not “register” with Broome as someone she knew, Tr.2372;LF583, is inconsistent with Broome’s testimony. Broome said she remembered hearing Scognamiglio’s name and knew his name in voir dire (Tr.2352.2356). *Brines, supra*, 882 S.W.2d at 139.

Broome’s testimony shows the name “Don Scognamiglio” did “register” during voir dire as someone she knew. If Broome meant she recognized the name Scognamiglio but didn’t realize that *this* officer Don Scognamiglio was the officer Don Scognamiglio that she knew, her failure to respond is still unreasonable and intentional: Scognamiglio is not a common name; the number of police officer “Don Scognamiglios” would be even rarer.

This is the same kind of “subjective” finding that the Western District in *Hatfield* held an improper basis for determining the juror’s failure to disclose was unintentional. Broome may have been credible in saying that she didn’t respond because it “didn’t register,” but this is not the standard; the standard is what a reasonable juror, hearing a name she knew, particularly an unusual name, would have done. *Williams, Hatfield*. A reasonable juror, at the very least, would have raised her hand and said she knew someone named Don Scognamiglio.

Under the “reasonable juror” standard of *Williams*, the trial court’s ruling is erroneous: Broome’s nondisclosure was intentional. Prejudice is presumed. *Brines, supra*. On this record, the Court must find “that an abuse of discretion unmistakably occurred.” *Martin, supra*. The cause must be reversed and remanded for a new trial.

2

The trial court clearly erred in overruling Kevin’s *Batson* challenge to the state’s peremptorily striking Debra Cottman, a black juror. This violated Kevin’s and Cottman’s rights to equal protection and his rights to due process and a fair, impartial jury. U.S.Const., Amend’s VI and XIV; Mo.Const., Art.I, §§2,

10, and 18(a). The prosecutor's reasons for this strike-Cottman was "not all that willing to answer the questions regarding the death penalty and other issues surrounding that" and "was a foster parent for the Annie Malone Children's Home" and still saw "a lot of" her former foster-children-were pretexts concealing discriminatory purpose: similarly situated jurors were not struck, he never asked about connections to Annie Malone or other facilities or agencies that served Kevin; the record does not substantiate these reasons.

During voir dire, defense counsel asked if anyone had been a foster parent; Cottman responded:

Cottman: For the Annie Malone Children's Home, I was a foster parent.

Ms. Kraft (defense counsel): Okay. Are you familiar with a gentleman by the name of Marvin Echols.

Cottman: No.

Kraft: Okay. Mr. Echols worked at Annie Malone's, but you didn't come into contact with him?

Cottman: No.

Kraft: So you were actually a foster —

Cottman: A visiting foster parent... . They come visit at my home, stay at my home for the weekend.

Kraft: And then they would go back to Annie Malone's?

Cottman: Right.

Kraft: You never had any contact with Kevin during that time, is that right?

Cottman: No.

Kraft: How long did you do that, or are you still doing it?

Cottman: I still have contact with the people. They're adults now so still in my life, but probably about back in the 80's when I first started.

Kraft: Okay. Thank you.

(Tr. 1009-1011).

Using several of its peremptory strikes, the prosecutor struck three black jurors and one white juror from the jury panel and one black juror from the alternate panel (Tr.1048-49;LF518,526,528,531). Kevin challenged the prosecutor's strikes of jurors Clark and Cottman under *Batson*⁴, Tr.1049, and here challenges the prosecutor's strike of Cottman.

The prosecutor said he struck Cottman because:

Cottman, I felt that when we were questioning her in small groups was

⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986).

not antagonistic towards me but not all that willing to answer the questions regarding the death penalty and other issues surrounding that.

Also as a development in the large group, she was a foster parent for the Annie Malone Children's Home. She indicated that she still sees a lot of the kids that she was a foster parent for during that time now that they have grown up some. I don't know what the age group is, but they were around the Defendant's age based on her time frame of when she said she was a foster parent down there. And since there will be evidence in this case, particularly if we get to a second half, there will be evidence that the Defendant was at least for some period of time in Annie Malone's custody, I don't want anybody associated with Annie Malone. I assume she has probably-rightly so I suggest, but a very high opinion of Annie Malone, anything that went on there. I think that's not something that would be favorable to our position regarding the Defendant's time away from home.

(Tr.1051).

Defense counsel responded: white male juror Bayer was a foster parent the state did not strike (Tr.1052). The prosecutor said Bayer was a foster parent for St. Vincent's: "No connection to Annie Malone" (Tr.1052).

The trial court upheld the strike finding no other jurors connected with Annie

Malone and “a racially-neutral basis for the strike” (Tr.1053). Kevin preserved this ruling for review in the motion for new trial (LF556-57).

Excluding a prospective juror for reasons of “race, gender, or ethnicity” violates the Equal Protection Clause of the Fourteenth Amendment. *J.E.B. v. Alabama*, 511 U.S. 127 (1994). Even a single racially-discriminatory strike violates the Constitution. *Snyder v. Louisiana*, 128 S.Ct. 1203,1208 (2008).

Missouri uses a three-part *Batson* procedure: 1) the strike’s opponent must challenge it before the venire is excused and the jury sworn, 2) the strike’s proponent may provide an explanation for the strikes, and 3) the opponent must show the explanation is pretextual. *State v. Marlowe*, 89 S.W.3d 464,468-69 (Mo.banc 2002). The explanations here are facially non-discriminatory; the issue is whether the explanations are pretextual.

A “crucial” factor in determining pretext is whether similarly situated jurors were struck. *Id.* at 469. Seemingly plausible explanations are “undercut” if similar jurors were not struck. *Miller-El v. Dretke*, 545 U.S. 231,247-48 (2005). “Similarly situated” does not mean identical: “potential jurors are not products of a set of cookie cutters.” *Id.* at 247,n.6.

“[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the

explanation is a sham and a pretext for discrimination.'" *Id.* at 246,

The record shows the prosecutor's facially race-neutral reasons for striking Ms. Cottman are classic examples of pretext concealing discrimination. Similarly situated jurors were not struck, the prosecutor did no questioning as to the second reason, and the record does not support either explanation.

Cottman's alleged unwillingness to answer questions

The record shows the prosecutor failed to strike similarly situated jurors. Cottman's death-qualification voir dire responses are identical to, or not significantly different than, approximately 36 other jurors.

The prosecutor questioned virtually every juror about the death penalty (*e.g.*, Tr.100-120,168-210,279-316,391-418,516-47). Jurors Haber, Blakely, Broome, Schlenk, Kidane, Grant, Hecker, Ostmann, Kaveler, and Stack gave one- or two-word answers to these questions (Tr.90-94,97-98,118-19,171-77,184-86,524-26, 529-33). Cottman, and Dalba, Gleason, Morrow, Duggan, Stenslokken, Georger, Hunt, Fredericks, Jackson, Peters, Knoepfel, Becherer, Munger, Stasiak, Oster, Fenton, Molnar, and Desloge occasionally modified their "yes" or "no" answers with a simple sentence such as, "I could," "I would," "I do," or "I can" (Tr.112-14,177-80,197-200,203-06,279-85,302-16,397-99,404-12,546-47,635-37,640-43).

Gibbons, Alexander, Queen, Aikman, Boedeker, Niebrugge, Lehman, and

Nunez further modified their responses by repeating the prosecutor's question in their answers (Tr.120-21,168-71,180-83,191-93,194-97,206-10,415-19).

Cottman's responses are identical to or not significantly different than approximately 36 other jurors' responses. The state's failure to strike any of those other 36 jurors is strong evidence of pretext. *Miller-El; Marlowe, supra*. That the record does not substantiate this explanation is additional evidence of pretext. *Ford v. Norris*, 67 F.3d 162,167-70 (8thCir.1995); *State v. Butler*, 731 S.W.2d 265 (Mo.App.W.D.1987).

Further, Cottman's alleged "unwillingness" to answer questions involves demeanor. Demeanor cannot be evaluated from a cold record; a party proffering demeanor as a reason for a strike should inform the trial court and opposing counsel of the juror's demeanor as it occurs. *State v. Metts*, 829 S.W.2d 585 (Mo.App.,E.D.1992); *State v. McFadden*, 191 S.W.3d 648,655 (Mo.banc 2006) ("strikes based on vague references to attributes like demeanor 'are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race,'" and must be "heavily scrutinized," quoting *State v. Edwards*, 116 S.W.3d 511,550 (Mo.banc 2003), Teitelman,J.,concurring.

This prosecutor never mentioned Cottman's "unwillingness" until required to

give reasons at the *Batson* hearing. “Rather than making a specific finding on the record concerning [Cottman’s] demeanor, the trial judge simply allowed the challenge without explanation.” *Snyder, supra*, 128 S.Ct. at 1209. Accordingly, the Court cannot presume the trial court found this reason credible; there is no fact-finding here entitled to deference. *Id.*

This leaves the prosecutor’s second explanation.

Cottman was a foster parent for Annie Malone

The prosecutor’s second reason-Cottman had been a foster parent for Annie Malone and still saw “a lot of” her former foster children-is also pretext. The prosecutor never questioned the jurors on this subject, failed to strike similarly situated jurors, and the reason is unsupported by the record.

The Annie Malone Home provided services to Kevin through placement by the Division of Family Services (DFS). DFS was a constant presence in Kevin’s life, providing him long-term, ongoing services, from the time DFS placed him with his Aunt Edythe at age 3 or 4 (Tr.2107). DFS retained legal custody of Kevin until age 17 or 18 (Tr.2107,2115). DFS removed Kevin from Edythe’s home when he was about 13; through DFS, Kevin was then placed in various children’s homes: Father Dunne’s, St. Joseph’s Home For Children, Annie Malone, someplace in Rolla (Tr.1003-04,2111-12).

Had the prosecutor truly been concerned about jurors who might think highly

of an agency, facility or institution that provided services for Kevin-his reason for striking Cottman-he would have questioned the jurors to find out if any of them had experiences or contacts with any of the above-named agencies or facilities.

The prosecutor never questioned the jurors on this subject. Only through defense questioning was information about Cottman's foster-parenting for Annie Malone obtained and jurors with professional or personal experiences with DFS and other agencies that served Kevin identified.

Juror Bayer said DFS investigated an allegation that he beat his son and dismissed the claim finding "no merit" (Tr.1004). Bayer said DFS did "their job" and this would not prevent him from listening to a DFS employee at penalty phase (Tr.1004-05). The prosecutor didn't strike Bayer or ask any questions about his experiences with, or opinions about, DFS

Juror Duggan, a teacher employed by the special school district, called DFS three times to report something "going on" with the student that concerned her. (Tr.1005). As a teacher, Duggan would have had an ongoing, daily, relationship with these students; the prosecutor didn't strike her or ask any questions about her experiences with, or opinions about, DFS. Nor did the prosecutor ask Duggan if any of her students were in foster care at Annie Malone's or Father Dunne's.

Juror Georger was a mentor for the Family Court for two or three years "about nine, ten years ago" and had worked with kids "all over the place" (Tr.1003-04,1007). Georger's Family Court mentoring was during the time the Family Court placed and maintained Kevin in DFS custody (Tr.2088,2096,2107). DFS having legal custody meant Kevin had to appear in family court every six months (Tr.2107-08). Georger, a white male, served on the petit jury (LF525,552). The prosecutor never questioned Georger about his experiences with, or opinions about, family court or DFS.

Juror Boedeker worked with "new moms and babies" and occasionally would talk with DFS if DFS was "called in" due to "a positive drug screen on the mother or baby after delivery" (Tr.1007-08). The prosecutor never questioned Boedeker about family court or DFS

Jurors Bayer, Duggan, Georger, and Boedeker had experiences and contacts with DFS which had an ongoing role in Kevin's life for many years. At the very least, this would seem to have these jurors as potentially undesirable for the state as Cottman. But the prosecutor never questioned Cottman, Bayer, Duggan, Georger, or Boedeker about this matter. And the only juror the prosecutor struck was black female juror Debra Cottman.

The record does not support the prosecutor's proffered reasons for striking

Cottman. Although her responses indicated she fostered more than one child, the record nowhere indicates she fostered and still saw “a lot of” children” (Tr.1009-11). Cottman’s answers are consistent with her fostering as few as two children and seeing them as adults.

Further, the prosecutor admitted he speculated about Cottman’s views of Annie Malone. Cottman’s answers contained no information about what she thought of the Annie Malone Home. Nor do her answers support the prosecutor’s claim that because she thought well of Annie Malone, she would be an unfavorable juror for the state. The prosecutor failed to explain how or why Cottman’s opinion of Annie Malone would make a difference in how Cottman viewed the facts of the crime. This was a “makeweight” explanation built on speculation not on facts gleaned from questioning the juror. *Miller-El, supra*, 545 U.S. at 246.

The fact that the prosecutor never asked about this during voir dire – never questioned the prospective jurors about whether they had any contacts or connections to the agencies and facilities that served Kevin – including the Annie Malone Home, Father Dunn’s Home, Catholic Family Services, and Child Protection Services (formerly DFS) – refutes his claim that this was a concern. His “make-weight,” *Id.*, assumption – that Cottman thought highly of Annie

Malone – has no support in the record. If truly concerned about Cottman’s opinion of Annie Malone’s, and whether it would affect her ability to be a fair and impartial juror, the prosecutor would have questioned her about this.

A prosecutor’s “proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent” at the third stage of a *Batson* challenge. *Snyder, supra*, 128 S.Ct. at 1212.

“*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason *in light of all evidence with a bearing on it.*” *Miller-El*, 545 U.S. at 252; emphasis added. Such evidence, which the trial court should have considered here, but did not, includes the St. Louis County prosecutor’s office’s record of discrimination, the prosecutor’s credibility in light of his office’s history, his failure to use all his peremptory strikes, and that of the four strikes he did use, three were used to exclude black jurors.

“Known evidence” of discriminatory practices of the prosecutor’s office may be considered in reviewing a *Batson* claim. *Miller-El*. at 2332-33, 2338-40. No less than four times, recently, this prosecutor’s office has been found to discriminate in jury selection. See *State v. McFadden*, 236 S.W.3d 103 (Mo.banc 2008); *State v. McFadden, supra*; *State v. Hampton*, 163 S.W.3d 903 (Mo.banc

1995); *State v. Hopkins*, 140 S.W.3d 143 (Mo.App.E.D.2004)

This prosecutor fails to inquire about the subject on voir dire “as [he] probably would have done if the [subject] had actually mattered....” *Miller-El*, 125 S.Ct. at 2328. A prosecutor’s failure to inquire ‘is evidence suggesting that the explanation is a sham and a pretext for discrimination.’” *Id.* at 2330,n.8 quoting *Ex parte Travis*, 776 So.2d 874,881 (Ala.2000); *State v. McFadden*, 191 S.W.3d at 653-54.

In *Hopkins*, the prosecutor peremptorily struck two jurors based on matters not addressed in his voir dire. *Id.* at 149-52. Holding the explanations pretextual, the Eastern District cited the prosecutor’s lack of questioning about the matters used as reasons for the strikes: the prosecutor’s “behavior is inconsistent with his stated reasoning....” *Id.* at 151.

Marlowe instructs trial courts to consider “the prosecutor's credibility, based on ‘the prosecutor's demeanor or statements during voir dire,’ and the ‘court's past experiences with the prosecutor....’” 89 S.W.3d at 469. The trial court made no findings on the prosecutor’s credibility. In light of his office’s record, he is not entitled to a presumption of credibility.

The burden of proving discriminatory motive never shifts from the strike’s opponent. *Purkett v. Elem*, 514 U.S. 765,768 (1995). Appellate review of a *Batson*

challenge is for clear error deferring to the trial court's fact-findings. *State v. Parker*, 836 S.W.2d 930,940,n.7 (Mo.banc 1992). "Clear error" exists if review of the entire record leaves the appellate court "with a definite and firm conviction that a mistake has been made." *Id.*

This prosecutor's facially plausible explanations for excluding juror Cottman fail when scrutinized: he excluded her for a racially discriminatory purpose. In approving that strike, the trial court violated the Equal Protection rights of Debra Cottman and Kevin and also violated Kevin's due process and fair jury trial rights. "[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' ... and undermines public confidence in adjudication...." *Miller-El*, 545 U.S. at 238.

A mistake has clearly been made. For the foregoing reasons, the Court must find that the trial court's denial of Kevin's *Batson* challenge was clear, reversible error and grant him a new trial.

3

The trial court erred and plainly erred in overruling Kevin's motion for judgment of acquittal of first-degree murder and his objections to Instruction 5. This violated due process, jury trial, and reliable sentencing, U.S.Const.,

Amend's VI,VIII,&XIV; Mo.Const.,Art.1, §§10,18(a),&21. Repeatedly arguing that Kevin's conscious decision to shoot was deliberation, Prosecutor McCulloch misled the jury, contravened the law, and created manifest injustice: a conscious decision to kill is *second* degree murder; allowing argument that the jury had to acquit Kevin of first-degree murder to consider second-degree murder was plain error contrary to law; 2) §565.002(3)'s definition of deliberation, "cool reflection for any amount of time no matter how brief," reduces the distinction between first and second degree murder to imperceptibility; 3) Instruction 5, the first-degree murder verdict-director, failed to require unanimity as to each element of first-degree murder. These errors created an unacceptable risk that the jury found Kevin guilty of first-degree murder without finding he deliberated.

Kevin moved for judgment of acquittal of first degree murder at the close of all evidence; the trial court denied this motion (Tr.1889-90;LF462-63). At the first-stage instruction conference, Kevin objected to the first degree murder verdict director-Instruction 5, MAI-CR3d-314.02, on the grounds it eliminated the distinction between first and second degree murder (Tr.1877;LF471). The trial court overruled Kevin's objection (Tr.1877). He preserved these rulings for review in the motion for new trial (LF562-63). Although defense counsel, in his closing argument, disagreed with prosecutor McCulloch's claim that a

“conscious decision” is deliberation, there was no objection to those comments. Nor did counsel object to the first degree verdict directed on the grounds that it failed to require jury unanimity on each element. As to the unpreserved portions of this argument, Kevin respectfully seeks plain error review. Rule 30.20.

Prosecutor McCulloch’s opening guilt phase argument repeatedly told the jury Kevin made a conscious, knowing decision to kill or shoot a police officer and that was deliberation and cool reflection:

The issue in this case is the third element. If that’s an issue.
(Tr. 1903-04).

Deliberation, as I said, is the cool reflection upon the matter. It doesn’t mean that you can’t be mad.... *If you can make a conscious decision to follow through on something even if you’re mad about something, even if you are mad about it... and you make a conscious decision to go after somebody and kill them, that is cool reflection.... The idea is that you have an opportunity to make up your mind, to make that conscious decision that this is what I’m going to do....*

He made a conscious decision that he was going to kill Sergeant McEntee, or was he going to kill the first cop who came through... whomever he wanted to take his anger out on... .

I don’t know if he was going to kill the first cop who came around the

corner.... And that's not important. What's important is that he made a conscious decision....

(Tr.1908-09).

And you know from the shots - here we are again with the deliberation. He saw that police car coming around. He walked straight to that police car. *He knew what he was going to do. He knew he was going to shoot that cop.*

(Tr. 1917); emphasis added..

Walking down the street to the police car *knowing he's going to kill him, knowing he's going to shoot this cop* if he's the right guy he wants to kill is cool reflection.

(Tr. 1921); emphasis added.

Defense counsel argued Kevin's conscious decision to shoot "[knowing] he would cause death" was "second degree murder," Tr.1930-32, and was the "second element" of first degree murder - not the element of deliberation (Tr.1934). In rebuttal, McCulloch argued:

You heard the term cool state of mind a number of times. You won't find that anywhere in these instructions. Cool state of mind doesn't exist. It is not the law in Missouri. It is cool reflection.

(Tr.1975).

Find in there in those instructions where it says, not only did he coolly reflect upon it, but he made a smart decision. Is there anybody here in this courtroom who thinks that this was a smart decision that he made. No. Does that mean he didn't coolly reflect upon the matter? Does that mean he didn't think about it?

And it [cool reflection] does mean he made a conscious decision. You know, back to that second element that he knew what he was doing, that's what it goes to. It goes to deliberation. A conscious decision to kill this person, to kill this man, to kill whatever man was in that car, whatever officer was in that car, a specific one, one in general, he made the decision to do that.

(Tr.1977).

Prosecutor McCulloch was incorrect. He merged the elements of "knowing" and "deliberation." A conscious decision to kill someone, without more, is second degree murder.

Murder first degree requires both acting *knowingly* and *deliberately*. "A person commits the crime of murder in the first degree if he knowingly causes the death

of another person after deliberation upon the matter.” §565.020.1.⁵
“‘Deliberation’ means cool reflection for any length of time no matter how brief.”
§565.002(3). “‘Deliberately’ means in a cool state of the blood... *a conscious purpose to kill formed in a cool state of the blood...*” *State v. Hershon*, 45 S.W.2d 60,69 (Mo.1931); emphasis added.

The mental states of “purposely,” “knowingly” and “consciously” are equivalent to each other but not to “deliberation.” “A person ‘acts purposely,’ or with *purpose*, with respect to his conduct or to a result thereof *when it is his conscious object* to engage in that conduct or to cause that result.” §562.016.2; emphasis added. “A person ‘acts knowingly,’ or with knowledge, (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.” §562.016.3. “When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.” §562.021.4.

“To act *purposely* means that it is the actor's conscious object to engage in certain conduct or to cause a certain result, not that he or she act with malice.”

⁵ Unless otherwise noted, all statutory references are to RSMo. 2000.

State v. Whalen, 49 S.W.3d 181,186-87 (Mo.banc 2001); emphasis in original. “Thus, a person will be guilty of purposely causing or attempting to cause serious physical injury to another if the person consciously engages in conduct that causes such injury or it is his or her conscious object to cause such injury.”

Id.

Whether a “decision to kill” was sufficient proof of the element of deliberation was addressed in *State v. Rousan*, 961 S.W.2d 831 (Mo.banc 1998). Rousan argued that in *State v. Gray*, 887 S.W.2d 369 (Mo.banc 1994), the Court “eliminate[d] the distinction between first and second degree murder” when it said that ‘to convict [a defendant of first degree murder], there must be some evidence that defendant made a decision to kill the victims prior to the murder.’” *Id.* at 852 quoting *Gray*, 887 S.W.2d at 376. The *Rousan* Court pointed out that the first degree murder conviction in *Gray* was affirmed only after finding both a “decision” to kill the victims and “sufficient evidence to permit an inference ... that the homicides occurred after [the defendant] coolly deliberated....” *Id.*

Significantly, the Court explicitly rejected the notion that “a decision to kill the victims prior to the murder” or a “knowing” killing is deliberation:

Gray does not equate first degree murder with the lesser included offense of knowingly causing the death of another person. The statutes and this

Court's decisions plainly defeat appellant's claim.

Id.

Prosecutor McCulloch blatantly misled the jury to believe that if Kevin consciously or knowingly decided to kill a police officer, he had “coolly reflected” and deliberated. These arguments eliminated deliberation, cool reflection, from the elements the jury had to find to convict Kevin of first degree murder.

A prosecutor may make arguments contrary to, or misstating, the law or the instructions. *State v. Blakeburn*, 859 S.W.2d 170,174 (Mo.App.W.D. 1993). Misstating the “law during closing argument is impermissible, and the trial court has the duty to restrain such arguments.” *State v. Chism*, 252 S.W.3d 178,186 (Mo.App.W.D.2008) citing *State v. Johnson*, 182 S.W.3d 667,670 (Mo.App.E.D.2005). “[M]isstatement of the law is generally harmless error if the court properly instructs the jury.” *State v. Cornelious*, 258 S.W.3d 461,468 (Mo.App.W.D.2008).

Although the instructions told the jury that “deliberation ... means cool reflection upon the matter for any length of time no matter how brief,” nothing expressly defined “cool reflection” for the jurors. Prosecutor McCulloch’s argument went beyond the instructions and the law by telling the jurors to

equate a “conscious decision” with cool reflection – with deliberation. These arguments were improper and prejudicial.

Finding plain error resulting from statements made during closing argument is so exceptional that relief is often denied without explanation, ... and will only be granted if the defendant demonstrates that the improper remarks had a decisive effect on the verdict.... Generally, such a “decisive effect” exists when a showing is made of a reasonable probability that, in absence of the remarks, the verdict would have been different....

State v. Jackson, 155 S.W.3d 849,853-54 (Mo.App.W.D.2005); citations omitted.

The history of this case shows that Prosecutor McCulloch’s comments had a “decisive effect.” As both sides admitted, the real issue in the case was whether Kevin deliberated. At Kevin’s first trial, the jury was unable to reach a verdict at guilt phase being split, according to what two jurors from that jury said, “ten to two in favor of Murder in the Second Degree” (Tr.2388). At the first trial, McCulloch did not make the arguments challenged here.

A second argument, albeit brief, also requires reversal. Prosecutor McCulloch told the jury: “only if you decide that he didn’t commit Murder in the First Degree that you even get to Murder in the Second Degree” (Tr.1898). This is not the law in Missouri.

“In actuality, the jurors could consider the lesser charge if they could not agree as to second-degree murder.... “Missouri juries do not have to find a defendant ‘not guilty’ of the greater offense before considering the lesser included offense. Instead... Missouri juries are allowed to consider the lesser included offense if they ‘do not find the defendant guilty’ of the greater offense....” In other words, a jury deadlocked on the greater offense has not found the defendant guilty, and can, therefore, consider the lesser included offense....

State v. Berry, 168 S.W.3d 527,533 (Mo.App.W.D.2005) quoting *State v. Wise*, 879 S.W.2d 494,517 (Mo.banc 1994) *overruled on other grounds*, *Joy v. Morrison*, *supra*.

Neither an objection nor a correction by the trial court alerted Kevin’s jury to the fact that Prosecutor McCulloch’s direction was incorrect. The jury was not told it did not have to find Kevin “not guilty” of first-degree murder before considering second degree murder. The jurors were unaware they could consider second degree murder if they could not agree on first degree murder - if unconvinced of Kevin’s guilt of first-degree murder.

These arguments, egregiously improper, threw the balance to a verdict of first degree murder. For the miscarriage of justice created by these arguments, Kevin’s conviction of first degree murder must be reversed.

Prosecutor McCulloch's misleading arguments, alone, require reversal of Kevin's first degree murder conviction. Two additional errors undermining the reliability of the jury's verdict and also require reversal.

First degree murder requires proof that a killing was done deliberately. §§565.020. The second error arises from §565.002(3)'s definition of "deliberation" as "cool reflection for any length of time no matter how brief."

The offense of first degree murder includes the element of deliberation: "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." §565.020.1. But §565.002(3)'s definition of deliberation, "cool reflection for any length of time no matter how brief," blurs the distinction between first and second-degree murder.

Defining "cool reflection" so it can occur in a split second is not only an oxymoron, it also wipes out the distinction between knowing, intentional, purposeful, conscious second degree murder and knowing, intentional, purposeful, conscious AND "deliberated" first degree murder. Section 565.002(3)'s definition of "deliberation" reduces it to the point that it provides no meaningful distinction between first and second degree murder.

If §565.002(3) defined deliberation simply as "cool reflection" or "cool reflection on the matter of killing," there would be no constitutional problem.

The effect of the “no matter how brief” portion of the definition, however, renders the definition of “deliberation” vague.

“Vagueness may invalidate a criminal law for either of two independent reasons.” *Chicago v. Morales*, 527 U.S. 41,56 (1999). “First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement....” *Id.* “[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits....” *Id.* quoting *Giaccio v. Pennsylvania*, 382 U.S. 399,402-403 (1966).

A statutory definition of deliberation that encompasses a range of “cool reflection” from “momentary” to days or weeks of planning and contemplation is unconstitutional because it “leaves the public uncertain as to the conduct it prohibits.” *Chicago v. Morales*, *supra*. As occurred in this case, where the prosecutor insisted that a “conscious decision” was sufficient to establish deliberation, “it may authorize and even encourage arbitrary and discriminatory enforcement....” *Id.*

As defense counsel noted in her objection, the first-degree murder verdict-director, Instruction 5, “leaves really no distinction between Murder in the First

Degree and Murder in the Second degree” (Tr.1877). Instruction 5 gave the jury an unconstitutionally vague definition of deliberation: “cool reflection upon the matter for any length of time no matter how brief” (LF471).

This definition of deliberation reduces the amount of cool reflection required to a split second or less than a split second. When virtually no time at all is required for cool reflection, deliberation becomes an elusive, vague element incapable of being clearly or consistently understood by jurors.

The result of this amorphous definition is prejudice to the defendant: given that the instruction tells them that cool reflection can occur in an instant, jurors will assume there is deliberation. What becomes important is not deliberation - the distinction between murder first degree and murder second degree - but that a decision has been made to kill someone.

In the instant case, this prejudice was heightened to the point of manifest injustice by Prosecutor McCulloch’s argument which told the jurors exactly that: a conscious decision is deliberation. Instruction 5’s definition of deliberation allowed the jury to accept and believe Prosecutor McCulloch’s argument that “a conscious” or “knowing” decision was deliberation; nothing in the definition told them otherwise.

Instructional error constitutes reversible error only when there was error in

submitting the instruction and that error prejudiced the defendant. *Tilley v. State*, 202 S.W.3d 726,733 (Mo.App.S.D.2006). “When used in connection with assessing erroneous jury instructions, “prejudice” is the potential for confusing or misleading the jury.”” *Id.*

Alone, and in combination with Prosecutor McCulloch’s misleading argument, Instruction 5 misdirected, misled and confused the jury and caused prejudice. *Id.*; *Sorrell v. Norfolk Southern Ry. Co.*, 249 S.W.3d 207,209 (Mo.banc 2008). For this reason, also, Kevin’s conviction of first degree murder must be reversed.

There was, however, further instructional error: plain error. Although the jurors were instructed that their verdict of guilt must be unanimous, the jurors were not instructed that in determining whether each element of first degree murder existed they must also be unanimous.

[T]he Constitution protects every criminal defendant “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged....” It is equally clear that the “Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged....”

United States v. Booker, 543 U.S. 220,230 (2005); citations omitted.

As in Missouri, crimes under federal law “are made up of factual elements, which are ordinarily listed in the statute that defines the crime.” *Richardson v. United States*, 526 U.S. 813,817 (1999). “[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.” *Id.*

This question was an underlying issue in *State v. Johnston*, 957 S.W.2d 734 (Mo.banc 1997). In *Johnston*, the deliberating jury sent the court a note asking: “Is the jury required by law to be unanimous on each element contained in the count in order to be unanimous on that count?” 957 S.W.2d 734,752 (Mo.banc 1997). The trial court responded: “The jury is to be guided by the instructions as given.” *Id.* The jury instructions told the jurors they “could not find Johnston guilty ‘unless you find and believe from the evidence beyond a reasonable doubt each and all’ of the elements,” they must “decide the case for yourself,” and the verdict “must be agreed to by each juror” and “be unanimous.” *Id.*

On appeal, Johnston argued that the trial court should have given a further explanation of the instructions to the jury. The Court said it was not improper to “simply refer the jury to “proper instructions already given” and the trial court’s response “merely suggested to the jury that they had their answer if they would

consider the correct, clear and unambiguous instructions already given.” *Id.*

In *Johnston* the trial court, not this Court, was directly faced with the question presented here: must jurors unanimously find each element of an offense to return a verdict of guilty. Still, this Court’s specific references to instructions directing 1) that the jurors must find each and all of the elements beyond a reasonable doubt, 2) each juror was to decide the case himself or herself, and 3) that “each juror” must agree to the verdict and “the verdict must be unanimous” suggests that the Court did not reject, as a matter of law, Johnston’s underlying claim that jurors must be unanimous as to each element of the offense.

Although appellant’s research on this question is not exhaustive, it shows that a number of jurisdictions follow the federal rule that to convict a defendant in a criminal case, a jury must unanimously find “that the Government has proved each element.” *Richardson*, 526 U.S. at 817. See, e.g., *State v. Gardner*, 889 N.E.2d 995, 1004 (Ohio2008); *State v. Pendleton*, 725 N.W.2d 717,730-31 (Minn.2007); *State v. Erskine*, 889 A.2d 312, 316 (Me.2006); *People v. Jenkins*, 997 P.2d 1044, 1130 (Cal.2000); *Martinez v. State*, 190 S.W.3d 254, 258 (Tex.App.2006); *Capano v. State*, 889 A.2d 968,980 (Del.2006); *People v. Palmer*, 87 P.3d 137,141 (Colo.App.2003); *State v. Doucette*, 776 A.2d 744,751 (N.H. 2001).

Failing to instruct the jury that to convict Kevin of first degree murder it must

unanimously find each element of the offense violated his rights to jury trial and due process. U.S.Const., Amend's VI and XIV. Instruction 5 told the jurors that its finding as to each element must be "beyond a reasonable doubt" ("unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the first degree") (LF471). Instruction 7, MAI-CR3d 302.05, told the jury that its "verdict, whether guilty or not guilty, must be agreed to by each juror" meaning the decision as to guilty or not guilty must be unanimous (LF473). But no instruction required the jury to unanimously find and agree upon the elements of the offense of first degree murder. No instruction told the jurors what to do if they were not unanimous as to any of the elements.

Taylor v. Kentucky, 436 U.S. 478 (1978) is instructive. In *Taylor*, the question before the Supreme Court was whether Taylor's jury should have been instructed on the presumption of innocence.

Arguing against the need for such an instruction, the state of Kentucky claimed an instruction on reasonable doubt, which Taylor's jury received, was sufficient. *Id.* at 488. But the Court said the reasonable doubt instruction was unclear and even if it had been clearer, a "presumption-of-innocence" instruction serves a "special purpose." *Id.* Further, rejecting Kentucky's contention that

because defense counsel discussed the presumption of innocence in his opening and closing statements, an instruction on presumption of innocence was unnecessary, *Id.*, the Court said, “arguments of counsel cannot substitute for instructions by the court.” *Id.* at 488-89.

The Supreme Court recognized, “[w]hile the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof [beyond a reasonable doubt] are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence.” *Id.* at 484. “[T]he rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i. e.,* no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases.” *Id.* at 485; emphasis in original; citation omitted.

The same is true here. The instruction on the state's burden of proof beyond a reasonable doubt, although related to the requirement of jury unanimity on the elements of an offense, does not tell the jury it must be unanimous as to the elements of the offense charged to convict.

An analogy may be made concerning proof of the elements of the state's case for death at the penalty phase. Penalty phase instructions MAI-CR3d 314.40 and 314.44, concerning death-eligibility requirements - or elements - in §§565.030.4(2) and (3), both expressly inform the jury that the finding of a statutory aggravating circumstance must be agreed to by all twelve jurors - unanimously:

On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life....

MAI-CR3d 314.40.

If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. ___ exists, you must then determine whether there are facts or circumstances in mitigation of punishment....

MAI-CR3d 314.44. The Sixth and Fourteenth Amendments' requirement of unanimity is as important and constitutionally required for conviction of a crime as it is for proving the state's case for death.

Throughout the case—in voir dire, in opening statement, and at argument—Prosecutor McCulloch repeated that the instructions were the law and if it wasn't in the instructions it wasn't required.⁶ Especially in light of that argument, telling the jurors that a conscious decision was deliberation, defining deliberation in contradictory terms, and failing to instruct the jurors that they must unanimously agree on the element of deliberation to convict Kevin of first-degree murder violated his rights to a fair jury trial and due process of law. This prejudicial, reversible error was a manifest injustice.

The state's evidence of first-degree murder was far from overwhelming and does not preclude relief for the errors that occurred here. At the first trial, when Prosecutor McCulloch did not make these arguments, the jury did not convict Kevin of first-degree murder: it hung, ten to two, in favor of second-degree murder (Tr.2388).

That the shooting inflicted multiple wounds is not overwhelming evidence. Multiple wounds, even multiple gunshot wounds, are not conclusive of deliberation. *See e.g., State v. Stidman*, 259 S.W.3d 96 (Mo.App.S.D.2008) (Defendant appeared at victim's house and shot victim seven times in the head: defendant's first shot missed the victim; the second shot was fired while

⁶ *E.g.*, Tr.87-88,160,271,353,627-28,1892,1897,1898,1973,1974,1977.

defendant was on top of the victim on the floor; two more shots were fired into the victim's head after the defendant stood up and the victim remained on the floor; defendant's gun jammed, and after clearing it, he fired several additional shots into the victim's head); *State v. Samuels*, 965 S.W.2d 913, 923 (Mo.App.W.D.1998) (fact that victim was killed by a rapid-firing semi-automatic which could have fired seven bullets "in the span of three seconds" "do[es] not conclusively establish deliberation" and conviction of first degree murder) citing *State v. Coats*, 936 S.W.2d 852,853 (Mo.App.E.D.1996) (Defendant shoots five times, kills two and an unborn baby and convicted of three counts of second degree murder) and *State v. Ralls*, 918 S.W.2d 936, 937 (Mo.App.W.D.1996) (Defendant kills victim with three shots to the head and convicted of second degree murder).

Evidence presented at trial concerning what led up to the shooting, including BamBam's death and its effect on Kevin, supports a lesser verdict and also demonstrates that the errors here were not harmless and had a decisive effect on the verdict. Jermaine Johnson testified Kevin was "shocked" and "devastated" by BamBam's death (Tr.1467). Eric Long saw Kevin, on the porch of his house, upset and crying (Tr.1335-37). Kevin testified that the first time he shot McEntee, he just "flipped out" when McEntee smiled at him (StEx-80). Kevin testified he

didn't know why he shot McEntee the second time; he "just shot him." (StEx-80).

A jury not misled by the prosecutor's argument and correctly instructed might well have rejected the state's case for first degree murder and found Kevin guilty of second degree murder. But for these prejudicial and manifestly unjust errors, the result in this case would have been different. The cause must be reversed and remanded for a new trial.

4

The trial court erred in refusing Instructions B and C: murder second-degree without sudden passion and voluntary manslaughter. This violated his right to a defense, jury trial, and due process, U.S.Const., Amend's VI and XIV; Mo.Const., Art.1, §§10and18(a), and MAI-CR3d-314.04, Notes on Use, Note 4. Viewed most favorably to the instructions, the evidence, including events within several hours of the shooting—BamBam's collapse; the police not helping BamBam because they were looking for Kevin; the police "smiling" when they saw Kevin before BamBam collapsed; McEntee "smiling" when he spotted Kevin after BamBam went to the hospital—showed that in shooting McEntee when he "smiled," Kevin acted in sudden passion arising from

adequate cause. This evidence supported acquittal of first-degree murder and, depending on whether the state proved the absence of sudden passion arising from adequate cause, conviction of second-degree murder or manslaughter. Refusing these instructions deprived Kevin of a viable defense.

The events of the several hours preceding the shooting on July 5th comprise part of the evidence supporting the refused instructions. *State v. Battle*, 32 S.W.3d 193,197 (Mo.App.E.D.2000). Viewed most favorably to giving the requested instructions,⁷ the evidence showed the following:

Even before July 5th, the police were looking for Kevin to arrest him on a probation violation (Tr.1219-21,1272-73). Kevin testified Kirkwood officers Brand and Nelson were looking into his truck on the 5th when his Grandma Pat asked them for help because BamBam had passed out inside 413 Saratoga (Tr.I.774-78;StEx-80). Kevin, inside 411 Saratoga, saw the police walk slowly to the porch and go inside(Tr.I.778-79;StEx-80). Nelson went through the rooms on the main floor while Brand made Kevin's Grandma Pat and his aunt and uncle stand in the driveway (Tr.I.780;StEx-80). Sgt. McEntee arrived and went into the house(Tr.I.782;StEx-80). Kevin's mother, Jada, came and tried to get in the house; McEntee stood at the door and wouldn't let Jada in, so she tried looking through

⁷ *State v. Avery*, 120 S.W.3d 196,200 (Mo.banc 2003).

the living room window then climbing through (Tr.I.784-85;StEx-80). McEntee pushed her from the window to keep her from the house and almost pushed her off the porch (Tr.I.785;StEx-80).

An ambulance took BamBam to the hospital; (Tr.I.786;StEx-80). McEntee and Nelson went to 411 and told Kevin's great-grandmother where BamBam was being taken; McEntee asked if Kevin was in the house (Tr.I.787;StEx-80). McEntee saw Kevin at a window and tapped Nelson's shoulder; the officers "just started smiling" (Tr.I.787;StEx-80).

When Kevin later learned of BamBam's death, he was shocked, mad, and upset (Tr.I.788;StEx-80). Jermaine Johnson and Kevin walked through Meacham Park after BamBam's death; Kevin spoke of BamBam's death saying the police "act[ed] like they didn't want to save him" (Tr.1426-27). Kevin told Jermaine the police weren't trying to help BamBam, "they were too busy looking for me" (Tr.I.790;StEx-80).

BamBam's death "was a shocker" to Jermaine and Kevin was more shocked than Jermaine - "more devastated" (Tr.1467). Kevin appeared confused to Jermaine but not angry; he didn't mention taking revenge or harming anyone (Tr.1468-71). Norman Madison, who saw Kevin right after the shooting, described him as "highly upset" (Tr.1656).

Kevin first noticed the police car on Alsobrook when it was about 15 feet away from him (Tr.I.798;StEx-80). Not wanting to draw the officer's attention, he decided not to run; instead, hoping the officer wouldn't see him, he and Jermaine began walking past the car (Tr.I.798;StEx80).

Reaching the passenger window, Kevin saw the officer was McEntee and stopped (Tr.I.798;StEx-80). McEntee saw Kevin "and he just started smiling" (Tr.I.798;StEx-80). Kevin said "you killed my brother" and shot McEntee (Tr.1299,1384,1386;StEx-68).

Kevin testified: "I flipped out, and I pulled out my gun, and I started shooting" (Tr.I.798;StEx-80). He shot McEntee seven times (Tr.I.799;StEx-80). Afterward, walking away toward Orleans, Kevin heard McEntee's car "taking off" and turned to see it hit a white car up the street (Tr.I.800;StEx-80). Kevin kept walking away(Tr.I.800;StEx-80).

At the corner of Saratoga and Orleans, his mother saw him and asked what was wrong (Tr.I.800;StEx-80). Kevin said, "he killed BamBam" meaning "[t]he police, McEntee" killed BamBam (Tr.I.801;StEx-80). Jada said, "son, BamBam died, nobody killed him"(Tr.I.801;StEx-80). Kevin insisted the police killed BamBam; that was how he felt (Tr.I.801;StEx-80).

Jada cried and asked about his daughter, Cori; Kevin ran up Saratoga toward

Cori's house (Tr.I.801-02;StEx-80). He cut through several back yards to get to Cori's house at 319 Alsobrook (Tr.I.802;StEx-1A;StEx-80).

Reaching Alsobrook, Kevin went around the white car and the police car to get to Cori's house (Tr.I.803;StEx-80). On the side of the police car, Kevin saw Officer McEntee moving (Tr.I.804;StEx-80). Kevin "flipped out again," "shot one more time," and "hit [McEntee] in the back of the head" (Tr.I.804;StEx-80). Kevin walked toward McEntee, stumbled, and the gun went off again hitting the concrete (Tr.I.805;StEx-80). Kevin had gotten his gun, which was loaded, out of his truck after BamBam went to the hospital and the police left and put it in his pocket because he was worried about the police finding it if they towed his truck (Tr.I.819,821,858;StEx-80).

McEntee smiling put Kevin in an emotional state and he started shooting; Kevin called this "flipping out" and the prosecutor called it a "trance" (Tr.I.798,804,824,816,835,857;StEx-80). The shooting "just happened" and Kevin didn't have any control over it (Tr.I.827;StEx-80). He knew he was shooting but didn't think about it (Tr.I.860-62;StEx-80). He fired the final shot at McEntee without knowing why he was shooting (Tr.I.863;StEx-80).

The state submitted a lesser included offense instruction for conventional second-degree murder (Tr.1869). Kevin proffered a second-degree murder

instruction requiring the state to prove he did not shoot McEntee “under the influence of sudden passion arising from adequate cause” and a voluntary manslaughter instruction (Tr.1870-72). Counsel argued a voluntary manslaughter instruction was “appropriate.... [T]he jury could infer from the evidence that a reasonable person may have been upset by the apparent lack of any effort on the part of the police to do anything in terms of helping [BamBam] as he was dying on the floor”(Tr.1872).

The trial court agreed “the evidence would indicate that the Defendant was upset... over the death of Joseph, and I don’t believe that there was anything that was done by Sergeant McEntee that would have created a - produced a reasonable degree of passion in a person of ordinary temperament sufficient to substantially impair his capacity for self-control” (Tr.1874). The trial court gave the state’s second-degree murder instruction as Instruction 6 and refused the defense instructions marking them “B” and “C” (Tr.1869-75;LF472,475-76;A10,A27-A28). Kevin preserved these rulings in his motion for new trial (LF561-62).

The Court’s rulings are error requiring reversal. The evidence, viewed in the light most favorable to the requested instructions, showed sudden passion arising from adequate cause. Therefore, the trial court should have given the jury

a second-degree murder instruction with language requiring the state to prove an absence of sudden passion and a manslaughter instruction.

This evidence provided a basis for the jury to acquit Kevin of first degree murder and convict him of second degree murder or, alternatively, manslaughter. Failing to give Instructions B and C to the jury prejudiced Kevin and violated his constitutional rights to due process, a defense, and jury trial by depriving him of a defense and instructions that fully covered the case. The cause must be reversed and remanded for a new trial.

An appellate court reviewing a claim that refusing to submit an instruction was error must view the evidence “in the light most favorable to the defendant.” *State v. Avery, supra*, 120 S.W.3d at 200. “If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it.” *Id.*

An instruction on a lesser included offense is required if, by fact or inference, the evidence supports acquittal of the greater offense and conviction of the lesser offense. *State v. Redmond*, 937 S.W.2d 205, 208 (Mo.banc 1996). Failure to give an instruction required by MAI is error and “*presumed* to prejudice the defendant unless it is clearly established by the state that the error did not result in prejudice.” *State v. Hahn*, 37 S.W.3d 344,348 (Mo.App.W.D.2000); emphasis in

original.

“A person commits the crime of murder in the second degree if he: (1) Knowingly causes the death of another person....” §565.021.1(1). “A person commits the crime of voluntary manslaughter if he: (1) Causes the death of another person under circumstances that would constitute murder in the second degree under [§565.021.1(1)], except that he caused the death under the influence of sudden passion arising from adequate cause....” §565.023.1(1). “‘Adequate cause’ means cause that would reasonably produce a degree of passion a person of ordinary temperament sufficient to substantially impair an ordinary person’s capacity for self-control...,” §565.002(1). “‘Sudden passion’ means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation....” §565.002(7).

“Passion may be rage, anger, or terror, but it must be so extreme that, for the moment, the action is being directed by passion rather than reason....” *State v. Battle, supra*, 32 S.W.3d at 197. There is not “sudden passion” if enough time has passed that the passion has cooled. *Id.* Adequate provocation is such as “to inflame the passions of the ordinary, reasonable, temperate person and must result from a sudden, unexpected encounter or provocation tending to excite the

passion beyond control....” *Id.*

Sudden passion arising from adequate cause is a special negative defense to conventional second-degree murder.... It is an element of the crime and when properly introduced, it requires a finding by the jury that the defendant did not commit the murder under the influence of sudden passion to find the defendant guilty of second degree murder.... Once a defendant has properly injected the issue of sudden passion, the state bears the burden of disproving it beyond a reasonable doubt.... The defendant is entitled to have the jury consider voluntary manslaughter instead of second degree murder when the defense introduces adequate evidence of the special negative defense

State v. Price, 928 S.W.2d 429,431 (Mo.App.W.D.1996); *State v. Robertson*, 182 S.W.3d 747,758 (Mo.App.W.D.2006) (Second-degree murder instruction with “sudden passion” language correctly submitted although manslaughter instruction not given).

MAI-CR3d 314.04 requires language submitting the absence of “sudden passion” as an element to be disproved by the state when the evidence injects this issue: the state must prove beyond a reasonable doubt:

Third, that defendant did not [cause the victim’s death] under the influence of

sudden passion arising from adequate cause....

Note 4 of the Notes on Use, MAI-CR3d 314.04, provides:

A homicide which would be murder in the second degree - conventional is voluntary manslaughter if committed under the influence of sudden passion arising from adequate cause. Section 565.023.1(1), RSMo 2000. The burden of injecting this issue is on the defendant. If there is evidence supporting sudden passion from adequate cause, paragraph (Third) must be given. Further, an instruction on voluntary manslaughter, MAI-CR 3d 314.08, may be given upon request of a party or on the Court's own motion.

“If there is some evidence that defendant caused the death under the influence of sudden passion arising from adequate cause it is reversible error to fail to give a [voluntary] manslaughter instruction.” *Hahn, supra*, 37 S.W.3d at 349.

Here, in refusing Kevin’s proffered instructions, the trial court erred. First, the trial court applied an incorrect standard in denying the instruction because he thought McEntee did nothing that “produced a *reasonable degree of passion* in a person of ordinary temperament sufficient to substantially impair his capacity for self-control”(Tr.1874;emphasis added). The law does not restrict or limit the kind or degree of passion that may arise. The degree of passion need not be

“reasonable”; the “reasonable” requirement goes to whether it was reasonable for the provocation to cause passion: “‘Adequate cause’ means cause that would reasonably produce a degree of passion a person of ordinary temperament sufficient to substantially impair an ordinary person’s capacity for self-control....” §565.002(1).

The person’s reaction need not be reasonable. “[T]here is no requirement that the defendant act reasonably to have his intentional killing reduced from murder to voluntary manslaughter.” *Redmond*, 937 S.W.2d at 209.

The law does not require the defendant to ignore prior events bearing on the provocation and the passion. *See, e.g., State v. Battle, supra*, 32 S.W.3d at 197; (events occurring “[i]n the hours preceding the shooting... and could have caused a reasonable person to lose control and act out of passion rather than reason.”). It follows that the “reasonable” person must be a reasonable person in the same or similar circumstances. Here, the reasonable person would be someone who had seen his brother collapse, seen what he perceived as police failure to respond because they were busy searching for him, police “smiling” when they thought they had found Kevin.

Missouri recognizes that an injury done to a relative may be provocation providing adequate cause for sudden passion and mitigate second-degree

murder to voluntary manslaughter. In *State v. Turner*, 152 S.W. 313 (Mo. 1912), in which the defendant responded to injuries to his brother, this Court cited with approval Wharton on Homicide [3d Ed.] §183:

“To mitigate a homicide, an assault upon a near relative may serve as an adequate provocation to reduce killing the assailant to manslaughter, as well as an assault upon the slayer. *** Nor would the shooting of a person be anything more than manslaughter where it was done in a moment of passion aroused by an assault upon, and wrongful treatment of, the brother of the slayer.”

Id. at 316.

Other jurisdictions recognize “injury to one of the defendant's relatives or to a third party, and death resulting from resistance of an illegal arrest as adequate provocation for mitigation to manslaughter.” *Girouard v. State*, 583 A.2d 718,721 (Md.1991) quoting 40 C.J.S. *Homicide* §48 at 913 (1944) and 40 C.J.S. *Homicide* §50 at 915-16 (1944). *Girouard* explained, “[t]hose acts mitigate homicide to manslaughter because they create passion in the defendant and are not considered the product of free will.” *Id.*; see also In *State v. Coyle*, 574 A.2d 951,967 (1990), the New Jersey Supreme Court noted “the ‘modern tendency to leave questions of the reasonableness of a provocation to the jury’” and

“accept[ed] as reality that a third person can be provoked when a close friend suffers injury or abuse under circumstances that would constitute adequate provocation had the third person been the object of the abuse”).

Beyond question, Kevin reacted with sudden passion when he shot McEntee. The only question is whether McEntee “smiling” was adequate cause. In the context of earlier events that day, which may be considered under Missouri law, the evidence showed that McEntee’s smiling would not have been viewed by Kevin – or a reasonable person in Kevin’s circumstances – as a friendly gesture. The evidence, which includes Kevin’s testimony, shows that McEntee smiling would have brought back to Kevin that when his brother was dying on the floor, the police, looking to arrest Kevin, were slow to stop looking at his truck and go to the house. McEntee’s smile would have reminded Kevin that when the police went into the house, they were more interested in going through the house and looking for him than helping BamBam. McEntee’s smile would have caused Kevin to recall McEntee’s smile when he asked Kevin’s great-grandmother where he was and then saw Kevin in the window. McEntee’s smiling in this case likely would have been perceived by a reasonable person in Kevin’s circumstances as a smirk.

Cases in which a “smile” provides adequate cause for sudden passion may be

rare. But “[t]he law cannot justly assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation...” *State v. Grugin*, 47 S.W. 1058,1061 (Mo.1898).

A smile that brings to mind painful history could be as devastating and painful as a physical injury. In this case, McEntee’s smile no doubt brought to Kevin’s mind BamBam’s death and what Kevin perceived as the police failure to respond. Whether McEntee’s smile was adequate cause giving rise to sudden passion was a question for the jury.

It is ironic that in a case in which sudden passion was of such significance, the jury was not instructed to consider whether it mitigated the charged offense. The trial court’s failure to give the jury Kevin’s requested instructions, B and C, prejudiced Kevin by eliminating his only means of presenting a sudden passion defense to the jury. It violated his federal and state rights to present a defense, to jury trial, and to due process.

The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as

might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder.

Stevenson v. United States, 162 U.S. 313,314 (1896).

The trial court's error in failing to submit Instructions B and C was prejudicial error. The cause must be reversed and remanded for a new trial.

5

The trial court erred in sentencing Kevin to death violating due process, fundamental fairness, and reliable, proportionate sentencing. U.S.Const., Amend's XIV,VI, and VIII; Mo.Const., Art.1, §§10, 18(a), and 21; RSMo.§565.035.3(3). Numerous trial errors, strong mitigating evidence, and a previous jury not finding Kevin guilty of first degree murder show this is an inappropriate case for death. Missouri's lack of standards afford prosecutors unguided discretion in seeking death sentences resulting in inconsistent application of the death penalty. To safeguard against the arbitrariness of unguided prosecutorial discretion, when the state seeks death, it should be required to afford the accused an opportunity to avoid a death sentence by pleading guilty to first degree murder or a lesser offense.

This brief argues elsewhere that Kevin's conviction of first degree murder must be reversed because of numerous trial errors. Errors contributing to the conviction's unreliability include: the prosecutor repeatedly misleading the jury about "deliberation"; lack of instructions on murder second-degree without "sudden passion" and manslaughter; the police unconstitutionally obtaining Kevin's statement and its improper use at trial. Additional unreliability arises because Kevin was convicted and sentenced to death by a jury from whom one juror was unconstitutionally removed for race and another for opposing the death penalty but included a juror who failed to disclose that she knew a police detective who was a state's witness .

The unreliability of Kevin's conviction of first-degree murder violates the Eighth Amendment's 'heightened "need for reliability in the determination that death is the appropriate punishment."' *Caldwell v. Mississippi*, 472 U.S. 320,340 (1985). The unreliable first-degree murder verdict undermines confidence in the death verdict and violates the Fourteenth and Eighth Amendments. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,441-43 (2001) (proportionality review required by due process clause must consider effect of trial errors on jury's determination of punitive damages). Kevin's conviction, founded on serious and prejudicial trial errors, makes his death sentence

unreliable and disproportionate in violation of the Eighth and Fourteenth Amendments.

Even if the Court finds all errors harmless as to the first-degree murder conviction, the Court must still determine whether Kevin's death sentence violates his rights to due process, and reliable and proportionate sentencing.⁸ Regarding 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." §565.035.3.

Although the evidence may support Kevin's conviction of first degree murder, sufficiency alone cannot support a death sentence. As discussed in this

⁸ U.S.Const., Amend's V,XIV,&VIII, *Cooper Industries*, 532 U.S. at 441-43; *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (to determine whether monetary punitive damage award is excessive, Due Process Clause requires reviewing court to consider penalties imposed for comparable misconduct..." *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"); *State v. Chaney*, 967 S.W.2d 47,60 (Mo.banc 1998).

section and elsewhere in the brief, *supra*, “the strength of the evidence” is constitutionally inadequate to support Kevin’s sentence of death. Significantly, at Kevin’s first trial, the jury never reached sentencing because it was unable to convict him of first degree murder. In this retrial, the prosecutor improperly made sure the jury would convict by the manifestly unjust argument that a conscious decision was deliberation essentially arguing that second-degree murder was first-degree murder. *See, supra*, Point 3 and corresponding portion of argument.

Further, there was substantial mitigating evidence documenting the abysmal neglect Kevin suffered as a child. Kevin’s father went to prison for murder shortly after his birth (Tr.2081-82). His mother, Jada, ostensibly lived with Kevin and his older brother Marcus in a garage behind Kevin’s grandmother’s house but Jada was involved in drugs and often left Kevin, a toddler, and his older brother Marcus to fend for themselves (Tr.2082,2085). Kevin’s grandmother, Pat Ward, gave Kevin food and called the hotline which, eventually, resulted in the Family Court placing Kevin, then about 4, with his Aunt Edythe (Tr.2085,2088). When Kevin had problems with bedwetting Edythe punished him (Tr.2105).

Kevin began having problems when his dad was paroled (Tr.2110). He skipped classes and wouldn’t do homework (Tr.2111). When he introduced girls,

alcohol, and sex to Edythe's house while she was at work, she asked DFS to remove Kevin from her house (Tr.2111-12).

DFS sent Kevin to a series of children's homes: Father Dunne's St. Joseph's, Annie Malone, and a home in Rolla (Tr.2112). Edythe twice let Kevin return to her home; each time it lasted less than a year (Tr.2113-14).

Although his mother abandoned him for drugs and his father abandoned him for prison, Kevin loved his daughter Coriansa; he kept her and cared for her most of the time and spent a lot of time with her (Tr.1312,2116). He bathed her, fed her, and combed her hair; "he was a great father" (Tr.2116).

He had a good relationship with his younger brother BamBam and bought things for him and spent a lot of time with him (Tr.1311-12,2116). After BamBam's death, Eric Long saw Kevin sitting on the porch of his house upset and crying (Tr.1335-37). People who witnessed the shooting said Kevin accused McEntee of "kill[ing] BamBam (Tr.1299,1320,1347,1384). Norman Madison saw Kevin shortly after the shooting and described him as "highly upset" (Tr.1656).

Several of Kevin's former teachers and his elementary school principal testified on his behalf at trial; they remembered Kevin as smart and not causing problems (Tr.2134-63).

Kevin's high school English literature and writing teacher remembered that

giving her students a creative writing assignment about a moment in their life; Kevin wrote about giving his daughter a bath (Tr.2146). His former elementary school teacher visited him in jail after his arrest and he showed her a picture of Cori saying he was proud of her(Tr.2135). He wrote a letter to her saying, “he wished he could go back and start over” (Tr.2136). The assistant principal of Kevin’s high school sometimes saw him with Cori in the park; he would smile and speak and she knew him as a “very doting father” (Tr.2151). Kevin’s former football coach remembered Kevin listened to what he was told given during games and responded well to advice (Tr.2159). Kevin was always respectful, interacted well with teammates and coaches, and the coach never had problems with him (Tr.2160-61). The coach, too, saw Kevin with his daughter in the park; Kevin played with her and was concerned and interested in her (Tr.2161).

Kevin was no angel; the evidence also showed that the abuse and neglect took its toll: he had some problems and could be aggressive (Tr.2165-2271). Yet the same evidence and history also shows that Kevin’s shooting of McEntee is drastically out of character for him.

The Court may not uphold the sentences of death without considering whether the less severe punishment of life imprisonment would be adequate for this defendant. *BMW, supra*; §565.035.3(3). The evidence shows that for Kevin, a

sentence of death is an excessive and disproportionate punishment.

Systemic problems with Missouri's death penalty scheme, giving rise to inconsistent and arbitrary use of prosecutor's option to seek the death penalty and its inconsistent and arbitrary imposition, also require Kevin's death sentence to be set aside. §565.035.3(1). Unlimited, unguided prosecutorial discretion in seeking death, discrepancies across the state, and the absence of a mandatory opportunity for a defendant to obtain the alternative, statutorily-authorized sentence of life imprisonment have created an arbitrary and capricious death penalty system in Missouri.

Missouri's capital sentencing scheme currently provides no assurance of consistency across jurisdictions such that whether a defendant convicted of first degree murder is sentenced to death depends on the prosecutor and the subdivision of the state in which the offense is committed. Two recent articles underscore the problem of arbitrariness in Missouri.

In an internet article published by the on-line journal THE BEACON, St. Louis University Law School professor David Sloss discussed the findings of a recently completed empirical study of capital punishment in Missouri:

Discretionary choices by individual prosecutors account for the difference between the 76 percent of cases that are death-eligible and the 5

percent that are presented to juries as capital cases....

If prosecutors in different counties exercised their discretion in similar ways, the system would not produce arbitrary results. In fact, though, substantial variations exist across counties.

Prosecutors in St. Louis County pursued capital trials in more than 7 percent of their intentional homicide cases. In contrast, prosecutors in Jackson County (Kansas City) pursued capital trials in fewer than one-half of 1 percent of their cases. These disparities raise the disturbing possibility that decisions about who lives and who dies may be guided more by the philosophical predilections of individual prosecutors than the culpability of individual defendants.

Not surprisingly, there are substantial variations across counties in the rate at which prosecutors pursue M1 [murder first degree] charges. For example, prosecutors in St. Louis City charged M1 in 85 percent of their intentional homicide cases, whereas prosecutors in Jackson County charged M1 in only 29 percent of their cases. This striking contrast provides compelling evidence that, in practice, the distinction between M1 and M2 is left almost entirely to prosecutorial choice.

In theory, the aggravating factors should narrow the class of murder cases that are eligible for the death penalty. In practice, though, the factors are so numerous and broad that 90 percent of M1-eligible cases are death-eligible.

David Sloss, *"Death penalty: In Missouri, where you live may matter,"* THE BEACON, last updated 23 May 2008, available at http://www.stlbeacon.org/voices/in_the_news/death_penalty_in_missouri_w_here_you_live_may_matter.

A second article, Heather Ratcliffe, *Prosecutors use discretion differently in death sentencing*, ST. LOUIS POST-DISPATCH, July 6, 2008, at A1, discussed the practices of adjacent jurisdictions St. Louis City and County. The article noted that in the City, the Circuit Attorney's office will "waive" the death sentence "in exchange for a guilty plea." *Id.* In the County, however, once the prosecutor decides to seek death, "the bargaining is over." *Id.* Whether the death penalty will be sought in a case depends on whether "you commit a murder on this side of the county line or the other." *Id.*

The article gave the example of two similar cases in St. Louis City and St. Louis County: "the line-of-duty killings of Officer Robert Stanze of the St. Louis [City] police, shot by Harold Richardson in 2000, and Sgt. William McEntee of

the Kirkwood police, shot by Kevin Johnson in 2005 in the county court's jurisdiction." *Id.* In the City case, the circuit attorney gave notice she would seek death; the case ended with the parties agreeing to a plea to first-degree murder and a sentence of life imprisonment without parole. *Id.* In the County case, no deal was struck; "McCulloch filed notice, got a hung jury in the first trial of Johnson and won a death sentence in the second." *Id.*

Kevin's case was the County case. Had it occurred in St. Louis City, he would very likely, based on the consistent practice in that jurisdiction, have had a chance to avoid the death penalty by pleading guilty to first degree murder or a lesser offense.

Until the state legislature enacts guidelines to provide consistency to the state's selection of cases in which it will seek death, temporary measures are necessary to ensure some measure of consistency and reduce the degree of arbitrariness in the use and application of the death penalty. To that end, this Court should require that in cases in which it seeks death, the state should be required to afford the accused an opportunity to avoid a sentence of death by pleading guilty to first degree murder or a lesser offense.

For the foregoing reasons, the Court should find that Kevin's sentences of death are excessive and disproportionate, and re-sentence him to life

imprisonment without probation or parole.

6

The trial court erred in granting the state's motion to strike juror Tompkins for cause. This violated Kevin's rights to fair jury trial, freedom from cruel, unusual punishment, reliable sentencing and due process. U.S.Const., Amend's V,VI,VIII, and XIV; Mo.Const.,Art I, §§10,18(a) and 21. Tompkins' opposition to the death penalty did not disqualify her. Her opinion was that the death penalty was inappropriate except in extraordinary cases - not that she would never impose a death sentence or automatically exclude it - and never said her views would keep her from following the court's instructions. Tompkins could "be convinced otherwise" about the death penalty depending on the evidence. She was not "closed off" to giving death "in this case."

[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *Witherspoon v. Illinois*, 391 U.S. 510,522-23(1968).

Before his death-qualification questioning of the group of jurors that included

Tompkins, the prosecutor said: "Kevin Johnson is charged with Murder in the First Degree and that it involves the shooting death of Sergeant Bill McEntee of the Kirkwood Police Department" (Tr.262). He asked Tompkins if she thought "the death penalty is the appropriate punishment in some cases" (Tr.262). Tompkins said she "really could not see any case where [the death penalty] would be appropriate" and added: "I do feel I am somewhat impartial.⁹ I can be convinced otherwise, but I really do not see any case where the death penalty is appropriate" (Tr.288). Asked to "imagine... circumstances where... "death is the appropriate punishment," Tompkins said, "maybe genocide" or something involving mass murder (Tr.288-89). Asked if "the evidence in aggravation outweighs the evidence in mitigation" she would "exclude the death penalty as a possible punishment" Tompkins answered: "Unless something, you know, tremendously - you know, something within the evidence that is given can convince me otherwise, I really don't think that—I think there would be only one option unless something real extraordinary happened that I saw"(Tr.289). During questioning, she could not think of something that extraordinary (Tr.290). She said the death penalty was "somewhat possible" if the evidence presented something she "never thought about" (Tr.290).

⁹ Tompkins may have said, or meant to say, "partial."

During defense questioning, Tompkins said it was possible the evidence at Kevin's trial would convince her that the death penalty was appropriate(Tr.322). She might be open to giving the death penalty to a psychopath (Tr.322).

She had not "ruled out" the death penalty in her own mind: "Most of me says it's not a possibility, but I'm open" (Tr.322). She was not "closed off" to death being the appropriate punishment in this case (Tr.322-23). She would not reject any evidence (Tr.323).

The prosecutor moved to strike Tompkins for cause stating she "made it initially very clear she didn't think death was ever appropriate" (Tr.337). Acknowledging Tompkins said the death penalty might be appropriate for genocide and psychopath cases, the prosecutor said, "It's real clear she will reject... death automatically as a possible punishment in the case"(Tr.337).

Defense counsel disagreed: "Ms. Tompkins did say it was possible that something could be presented in this courtroom that would convince her that death would be an appropriate punishment in this case"(Tr.338).

The trial court ruled Tompkins "could not consider the death penalty" and sustained the state's motion to strike her for cause(Tr.338). Kevin preserved this ruling for review in his motion for new trial(LF559).

Tompkins was a classic "*Witherspoon*" juror. In its entirety, her voir dire

shows she could consider the death penalty and impose it in an appropriate case. She unequivocally said if presented evidence that made her think the death penalty was appropriate, she was open to imposing it. That this would be an extraordinary or rare case, possibly not the instant case, does not disqualify her. The state is not entitled to a commitment that a juror would impose death in a given case. *State v. Pinkston*, 79 S.W.2d 1046, 1048-49 (Mo.1935). A juror who *could* impose a death sentence in the case being tried is qualified. Tompkins was qualified and improperly struck for cause.

A criminal defendant's rights include "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment..." *Uttecht v. Brown*, 127 S.Ct. 2218,2224 (2007) citing *Witherspoon*, 391 U.S. at 521. The state's "interest" is "having jurors who are able to apply capital punishment within the framework state law provides." *Id.* Only "a juror... substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause"; otherwise, "removal for cause is impermissible." *Id.* A trial court's decision should "vindicate the State's interest without violating the defendant's [constitutional] right" and is "owed deference by reviewing courts." *Id.*

"[T]he proper standard for determining when a prospective juror may be

excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Morgan v. Illinois*, 504 U.S. 719,728 (1992). "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." *Id.* at 728. "The burden of proving bias rests on the party seeking to excuse the venire member for cause." *Wainwright v. Witt*, 469 U.S. 412,423(1985).

A prospective juror's qualifications "are determined on the basis of the voir dire as a whole" *Rousan, supra*, 961 S.W.2d at 839. "The question is not whether a prospective juror holds opinions about the case, but whether these opinions will yield and the juror will determine the issues under the law." *Id.* (citation omitted).

Section 494.470.2 provides specific guidance for determining whether a juror's opinions will disqualify her: "Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case." This statute disqualifies "potential jurors who are unable to follow the court's instructions due to their 'opinions or beliefs.'" *Joy v. Morrison, supra*, 254 S.W.3d at 889.

Joy, a medical malpractice case, is illustrative. In that case, although venireman Shirkey admitted strong opinions and biases against plaintiffs and favoring doctors, he was not disqualified. His voir dire revealed he thought “things are way out of hand in the country as far as lawsuits against doctors” and jury awards of “millions of dollars for this or that...” *Id.* at 890.

Shirkey acknowledged “a strong bias’ against ‘lawsuits in general’” related to the monetary awards: “[H]e would have a problem awarding a ‘substantial amount of money...’” *Id.* He “probably would be biased” in favor of doctors but “could be ‘persuaded’” otherwise. *Id.* He admitted being “substantially’ troubled by lawsuits and his opinions ‘could’ affect his ‘ability to listen to’” expert witnesses “and give them fair credence.” *Id.* Shirkey said, however, he could award damages if he found the doctor negligent and “could be [a] ‘fair and unbiased’” juror. *Id.* The trial court ruled “Shirkey could evaluate the evidence fairly and impartially” and was qualified. *Id.* at 891.

On appeal, this Court noted, “The critical question ... is always whether the challenged venireperson indicated unequivocally his or her ability to fairly and impartially evaluate the evidence.” *Id.* “Shirkey's opinions and beliefs” would not have “precluded him from following the directions of the trial court” and did not disqualify him under §494.470.2. *Id.* at 890. This Court held, “although

Shirkey gave some answers during voir dire that raised the possibility that he was prejudiced, the trial court did not abuse its discretion in finding that the tenor of his testimony overall was that he would be fair and impartial." *Id.* at 891.

If Shirkey's voir dire in *Joy* showed he was qualified under §494.470.2 and could be fair and impartial, Tompkins' entire voir dire here shows she was a qualified juror under §494.470.2 who could be fair and impartial.

In *Szuchon v. Lehman*, 273 F.3d 299 (3dCir.2001), the prosecutor asked potential juror Rexford whether he would "have any conscientious scruple or any hesitation to find [defendant] guilty of first degree murder?" 273 F.3d at 329. Rexford responded, "I do not believe in capital punishment." *Id.* The trial court struck Mr. Rexford for cause. *Id.* On appeal, the Sixth Circuit reversed finding "no evidence that Rexford's lack of belief in capital punishment would have prevented or substantially impaired his ability to apply the law." *Id.*

The state's burden is to show Tompkins' beliefs about the death penalty meant she could not follow the court's instructions, *Morgan, supra; Witt, supra.* As in *Joy* and *Szuchon*, nothing shows Tompkins could not set aside her beliefs and follow the court's instructions. Her belief that the case would have to be extraordinary for her to impose death does not disqualify her.

Tompkins was not “irrevocably committed, before the trial ha[d] begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge” during trial. *Witherspoon, supra*, 391 U.S. at 522, n. 21. The record demonstrates she could consider and vote for death and was improperly excluded because she was opposed to the death penalty. The cause must be remanded for a new penalty phase trial.

7

The trial court plainly erred in admitting evidence of Kevin’s statement.¹⁰

¹⁰ Kevin’s interrogation, recorded, lasted approximately 6 hours; he made numerous “statements” responding to questions(StEx-70). In appellant’s brief, “Statement,” although singular, refers to everything Kevin said during interrogation. The state prepared a transcript of the interrogation and provided it to defense counsel; it was not used or admitted at trial. Appellant cites the tape-transcript in this brief as “Interr.Tr.,” has provided a copy to opposing counsel,

This violated his rights to silence, non-incrimination, due process, and reliable sentencing. U.S.Const., Amend's V,VIII,XIV; Mo. Const., Art. 1,§§10,19,and21. Kevin was advised of, but never waived, his rights; questioning continued after Kevin said he didn't want to talk. Admitting Kevin's statement was a manifest injustice: the prosecutor used it extensively in cross-examining Kevin and arguing he was a liar and his trial testimony unbelievable.

Before giving Kevin his rights, Detective Neske said they would talk:

Neske: Okay. We're going to talk about some things, all right? Before you make any answers, say anything, I want you to listen to what I have to say, all right? I'm going to read you your rights, okay? Just advise you of all of that stuff. I'm going to talk to you for a minute before you make any decisions, okay? Can you do that for me?

Johnson: Yeah.

Neske: All right I want you to speak loud and clear, okay? I have trouble hearing sometimes, all right?

Johnson: Yeah.

Neske: You know you have the right to remain silent. You know anything you say can be used against you in a court of law. You're entitled to talk to an

and has filed a motion asking leave to provide it to the Court.

attorney, have an attorney present. If you cannot afford an attorney, one will be appointed to you. Do you understand all of that?

Johnson: (Inaudible)

Neske: Okay. We all know why we're here?

Johnson: Yeah.

Neske: This isn't about a who done it or anything like that, okay? We can sit here and play silly games and talk all night long about bullshit, okay? It's going to get us absolutely nowhere....

Neske: You just - if you want to give me your side of the story, tell me what happened up there....

Johnson: Yeah.

Neske: Okay. So, let's talk about what happened...

Johnson: Yeah.

Neske: All right. You can begin wherever you want.

Johnson: (Inaudible)

Neske: Why don't we - you want to start with what happened with BamBam?

Johnson: BamBam, I was in the house....

(StEx-70;Interr.Tr.6-8).

Neske: Why is your hand bloody?

Johnson: *Do I have to keep telling you this?*

Neske: Yes...

((StEx-70;Interr.Tr.42);emphasis added.

Neske: That's the problem. I'm telling you what the witnesses see. they see you, not only your gun that you used to kill that policeman, but the gun you took from the policeman. Okay.

Johnson: Yeah.

Neske: Yes.

Johnson: (Inaudible) *I don't want to talk to you now. You want --*

(StEx-70;Interr.Tr.47);emphasis added.

Neske: So you don't know how those bullets would get in your car?

Johnson: *I don't want to answer no more questions.*

Neske: Well, one more thing, the bullets that were in your car.

Johnson: Yeah.

Neske: You want me to tell you what kind of bullets they were? ... Any reason why your fingerprints were on the box? Can you answer that?

Johnson: No.

Neske: You don't know how they got in your vehicle that you told me you drive away in?

Johnson: *I told you I don't want to answer no more questions.*

Neske: But you can't explain why they're there and then the same casings are there?

Johnson: *I don't want to answer no more questions.*

Det. Mike B: Can I ask you why?

Johnson: Huh-hun.

Mike B: Why you don't want to answer any more questions?

Neske: And again, this whole conversation isn't about whether or not Kevin did this or not... Could you live with that?

Johnson: I wouldn't have no choice.

Neske: You wouldn't have no choice to live with it. Would it bother you the rest of your life that you could have made a difference?

Johnson: *I don't want to talk about it.*

(StEx-70;Interr.Tr.177-79);emphasis added.

Neske: But you know as well as I do that you're not going to stand around when the police are running around the neighborhood...

Johnson: I mean, they might see me, I mean, they might not see me, but I

might have my head down or something.

Neske: Then explain to me why if –

Johnson: *I don't want to answer your questions, man.*

Neske: Somebody tells you that he's down the street...

(StEx-70;Interr.Tr.215);emphasis added.

After advising Kevin of his constitutional rights, instead of asking if he wished to waive his rights, talk with the officers, or make a statement, Neske started the interrogation: “we all know why we're here...” (StEx-70,Interr.Tr.6). Kevin never waived his rights or said he wanted to talk; at some point, he began responding to Neske's questions. Subsequently, Kevin several times told the officers he did not want to talk or answer further questions (StEx-70;Interr.Tr.42,47,177-79,25). The officers ignored this and continued interrogating Kevin.

Kevin did not object or preserve this point for review and therefore asks the Court to review for plain error. Rule 30.20. “To be manifest injustice, the error and the injustice resulting therefrom must be apparent.” *State v. Fuente*, 871 S.W.2d 438,443 (Mo.banc 1994). “An error is only an injustice if it is prejudicial.”

The error here is apparent and prejudicial. It is apparent Kevin never waived his rights to counsel and to remain silent, and when he said he didn't want to

talk further, the officers ignored him and continued the interrogation.

It is also apparent that the admission of Kevin's statement prejudiced him. The prosecutor himself conceded that the only issue was whether Kevin deliberated, Tr.1903, and the prosecutor's closing argument repeatedly used Kevin's statement-often comparing it to his trial testimony-to argue that Kevin lied because the truth would show deliberation (e.g.,Tr.1904-08,1910-12,1922,1984-90). Admitting Kevin's statement was a manifest injustice and requires reversal.

"Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings *and obtain a waiver of rights before custodial questioning* generally requires exclusion of any statements obtained." *Missouri v. Seibert*, 542 U.S. 600,608 (2004); emphasis added. "The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver, and the voluntariness of the confession." *Id.*

[A]n individual ... taken into custody or otherwise deprived of his freedom by the authorities in any significant way... must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the

presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. *After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.*

Miranda v. Arizona, 384 U.S. 436,476-79 (1966).

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Id. at 473-74.

“[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”

Id. at 475.

“[C]ourts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and ... ‘do not presume acquiescence in the loss of fundamental rights.’” *Johnson v. Zerbst*, 304 U.S. 458,464 (1938). Waiver of a constitutional right requires that it be “intentional[ly] relinquish[ed] or abandon[ed].” *Id.* “An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver....” *North Carolina v. Butler*, 441 U.S. 369,373 (1979). “[A] court may find an intelligent and understanding rejection of counsel in situations where the defendant did not expressly state as much.” *Id.* at 373,n.4.

A written waiver of a defendant’s *Miranda* rights is not required: an oral waiver is sufficient. *State v. Barriner*, 210 S.W.3d 285,302 (Mo.App.W.D. 2006). But “[u]nless the prosecution can demonstrate the warnings and waiver as threshold matters... it may not overcome an objection to the use at trial of statements obtained from the person in any ensuing custodial interrogation.” *Withrow v. Williams*, 507 U.S. 680,690 (1993).

In *United States v. Christian*, 571 F.2d 64 (1stCir.1978), Christian was arrested, given *Miranda* warnings, then given a “waiver of rights form” listing “the rights” followed by a “waiver” agreement and a line for the defendant’s

signature below the waiver. *Id.* at 66-67. Christian “signed the form below the statement of rights, but above the waiver.” *Id.* at 67. Asked if he wanted to say anything about the arrest or charges, Christian made an incriminating statement. *Id.*

At the suppression hearing, Christian testified he signed the form to indicate he understood his rights; the officer testified that Christian signed the waiver form, and the trial court ruled the statement admissible. *Id.* At trial, the form itself, showing Christian’s signature above the waiver, was introduced. *Id.* Christian testified he had not signed “the waiver” and “thought” by signing “he was effecting his right to remain silent.” *Id.*

The Court ruled the statement inadmissible because Christian never waived his rights:

[A]ppellant was read his rights and ... understood them... The only question is whether he waived those rights. These are distinct questions.... [B]oth warnings and waiver are prerequisites. One cannot substitute for the other. The privilege against self-incrimination must be voluntarily relinquished ... and “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”

Id. at 68 citing *Miranda*, 384 U.S. at 476,475. These circumstances showed no “voluntary, knowing, intelligent waiver.” *Id.* at 69.

In *State v. Baker*, 580 P.2d 90 (Kan.App.1978), the suppression hearing evidence showed Baker received *Miranda* warnings but wasn’t asked if he wished to waive his rights; he responded to questions. *Id.* at 91-93. The trial court suppressed Baker’s statement finding that under *Miranda*, before “asking questions,” an officer should “find out if he is willing to waive that right.” *Id.* at 93. “Otherwise, there is no point in giving him that advice in the first place.” *Id.* “And the Supreme Court has held many times there must be a voluntary waiver.” *Id.*

On appeal, the Court held that when a defendant “advised of his rights” indicates “his understanding of those rights [and] proceeds to voluntarily answer questions, such waiver *may* be implied under the facts of a particular case.” *Id.*; emphasis added. The Court expressly noted that *Miranda* warnings followed by the defendant acknowledging he understood his rights would not always “validate[] a subsequent confession.” *Id.* The Court found the record inadequate to determine if the defendant waived his *Miranda* rights and remanded for a new hearing. *Id.*

From the record here it is apparent Kevin did not waive his rights. Kevin was

never asked if he wished to waive his rights, he never said he wished to waive his right or talk with the officers or make a statement. Unlike the defendant in *Christian*, Kevin was not even given a form to sign.

In *Michigan v. Mosley*, 423 U.S. 96 (1975) the question was: “when the person in custody indicates he wishes to remain silent ... under what circumstances, if any,” may the police resume questioning. *Id.* at 101. The Court held that a “momentary cessation” of questioning, “would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned....” *Id.* at 102; *Miranda*, 384 U.S. 473-74.

Here, the officers’ failure to stop questioning Kevin, when he said he didn’t want to talk and didn’t want to answer any more questions, violated *Mosley* and *Miranda*. There was not even a “momentary cessation” of questioning. This is an additional violation of Kevin’s right to remain silent under the Fifth and Fourteenth Amendments.

The officers’ roughshod, unconstitutional treatment of Kevin’s right to terminate questioning is significant for an additional reason. The conduct of these showed they were determined to interrogate Kevin and had no intention of letting him exercise his constitutional rights. It is strong evidence that the failure to obtain a waiver of rights from Kevin before beginning the interrogation was

deliberate.

For all the foregoing reasons, admitting Kevin's statement was plain error: apparent, prejudicial, and manifestly unjust. The cause must be reversed and remanded for a new trial.

The trial court erred in overruling Kevin's objections to: StEx-91-a letter written by Mary and Sgt. McEntee's son, Mary McEntee reading the letter, Instruction 12-MAI-CR3d 314.40, and also erred in refusing Instruction E requiring the jury to find non-statutory aggravating and victim impact evidence beyond a reasonable doubt. These errors violated Kevin's rights to jury trial, confrontation, reliable sentencing, and due process. U.S.Const., Amend's VI, VIII, XIV; Mo.Const., Art.1, §§10, 18(a), & 21. Kevin was prejudiced: admitting StEx-91 and allowing Mary McEntee's to read it violated the rule against hearsay and invited the jury to sentence Kevin to death based on passion and emotion instead of guided discretion. No given instruction told the jury how to consider non-statutory aggravating evidence, including victim impact evidence, or that it must find the existence of non-statutory aggravating evidence beyond a reasonable doubt to use it in sentencing Kevin.

At the penalty phase instruction conference, defense counsel objected to Instruction 12 because 1) the statutory aggravators not being included in the indictment, it violated *Apprendi v. New Jersey*, 2) it included the unconstitutionally vague "depravity of mind" statutory aggravating circumstance, and 3) it provided no direction or guidance concerning non-

statutory aggravating evidence and the burden of proof as to that evidence (Tr.2291-92). As the MAI's failed to address the burden of proof regarding nonstatutory aggravation, the defense submitted Instruction E, MAI-CR3d 314.40-modified, to fill that void (Tr.2292-93; LF508). The trial court refused Instruction E and submitted unmodified MAI-CR3d 314.40 as Instruction 12 (Tr.2294;LF499-500). Kevin preserved these rulings for review in the motion for new trial (LF569-70).

The Eighth Amendment does not preclude admission of all victim impact evidence. *Payne v. Tennessee*, 501 U.S. 808,827 (1991). Missouri conditions admission of non-statutory aggravating evidence, including victim impact evidence, on observance of "the rules of evidence at criminal trials." §565.030.4. The trial court's decision to evidence at penalty phase will not be reversed absent an abuse of discretion. *State v. Storey*, 40 S.W.3d 898,403 (Mo.banc 2001).

Here, the trial court's penalty phase decision to allow Mary McEntee to read her son's letter to the jury violated the rule against hearsay. This unauthorized admission of non-statutory aggravating evidence was an abuse of discretion. Adding to this error, no instruction told the jury how to consider and use this evidence and other non-statutory evidence including Kevin's conviction of misdemeanor assault.

Instruction E told the jury the state had the burden of proving non-statutory aggravating evidence beyond a reasonable doubt (LF508;A29). In overruling Kevin's objections to Instruction 12 and refusing Instruction E, the trial court abused its discretion and violated Kevin's federal and state constitutional rights to confrontation, jury trial, reliable sentencing, freedom from cruel, unusual punishment, and due process.

Trial court discretion regarding non-statutory aggravating evidence is limited by statute and the constitution. Under §565.030.4, penalty phase evidence, including victim impact, must comply with evidentiary rules. Consistent with the Eighth Amendment and due process, *Payne*, 501 U.S. at 836 (Souter, J., concurring), when admission of error violates the constitution, the reviewing court must reverse unless the State proves beyond a reasonable doubt the error was harmless. *State v. Driscoll*, 55 S.W.3d 350,356 (Mo.banc 2001).

Over defense objections, and the prosecutor's speaking response, "Judge, it's victim impact evidence from a twelve year old," the trial court allowed Mary McEntee to read her then-nine-year-old son's letter:

Day one. The next day. I was all shook up about what happened. I did not go outside until five o'clock.

Day two. Coming out. I was still sad but I came out and went to my

friend's house, Michael. I had a good time, but I miss him.

Day three. Lay out. It was hard to get past. I was about to burst, but I didn't I sat in a room for seven hours wondering why I still didn't know, nobody does know except the guy who did it.

Day four. Funeral. I was sad day for me and everyone else. then it was the end. Everyone said their goodbyes, and they left. Then I wondered why.

Those are the four most saddest days of my life. I am still sad today, and I wonder why. It has been three to four months from then, and we are doing better.

I am sad because he was the best coach ever and no one who could take my dad's spot, nobody. He was also my baseball coach, and I am sad about him not being there when I need him and I am lonely, when I kick a soccer ball. He was the greatest dad ever. He was ready for soccer season, and someone took his life away. I was so mad. I was in shock that night. I thought he would be okay, but I was wrong. He had passed away.

Dad, if you hear me right now, I love you.

(Tr.2074-76;StEx-91).

This letter, and Mary McEntee's reading of it, constituted hearsay. Admitting this evidence violated Kevin's constitutional rights to confrontation, reliable

sentencing, and due process.

The Confrontation Clause mandates that, in criminal prosecutions, the accused have the right to confront the witnesses against him. U.S.Const., Amend's VI and XIV; *Crawford v. Washington*, 541 U.S. 36,62 (2004). *Pointer v. Texas*, 380 U.S. 400,406(1965). Admitting hearsay evidence violates §565.030.4's requirement that penalty phase evidence is "subject to the rules of evidence at criminal trials." Admission of the letter written by 9-year-old Brendan McEntee and allowing his mother to read that letter were especially prejudicial. Without the letter's author in court-available for cross-examination and questioning about the letter-the jury was free to give free rein to its unguided ideas, emotions and prejudices concerning the impact of this crime on McEntee's son.

Additionally, instructional error aggravated the erroneous admission of this evidence rendering the death verdict unreliable. The jury instructions provided no guidance regarding victim impact evidence: what could be considered, how to consider it, and what standard of proof applied.

Instructions 12, 14, and 16 required *statutory* aggravating evidence to be found "beyond a reasonable doubt" (LF499-500,502-03,505-06;A16-17,A19-20,A22-23). No instruction gave the jury any guidance regarding non-statutory aggravating evidence. To correct this omission, the defense submitted Instruction

E which told the jury, “the burden rests upon the state to prove, beyond a reasonable doubt, evidence of non-statutory aggravating circumstances” (LF508;A29).

If you have, unanimously and beyond a reasonable doubt, found that one or more of the statutory aggravating circumstances submitted... exists, you must next consider whether any other aggravating evidence exists....

You are further instructed that the burden rests upon the state to prove, beyond a reasonable doubt, evidence of non-statutory aggravating circumstances. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

You must list at the bottom of this instruction each non-statutory aggravating circumstance, if any, that you have unanimously found to exist beyond a reasonable doubt.

(LF508;A29).

Capital defendants are entitled, under the Fourteenth Amendment’s Due Process Clause and the Sixth Amendment’s notice and jury trial rights, to have a jury find beyond a reasonable doubt all facts upon which an increase in punishment is contingent. *Ring v. Arizona*, 536 U.S. 584,600 (2002). Section

565.030.4(3) specifies facts that must be found to increase a sentence for first degree murder from life to death. *State v. Whitfield*, 107 S.W.3d 253,258-61 (Mo.banc 2003); *State v. Whitfield*, 837 S.W.2d 503,515 (Mo.banc 1992). But due process and jury trial constitutional guarantees are not satisfied merely with a jury's factual finding. As *Whitfield* affirmed, that finding must be "beyond a reasonable doubt." *Id.* at 257; citing *Ring*, 536 U.S. at 602; *Apprendi*, *supra*, 530 U.S. at 494; see *State v. Debler*, 856 S.W.2d 641,657 (Mo.banc 1993).

The Sixth, Eighth, and Fourteenth Amendments, and *Whitfield*, *Ring* and *Apprendi*, require that a jury make factual findings beyond a reasonable doubt on non-statutory aggravators. They also require that a jury be given guidance for making findings as to victim impact evidence.

Under *Ring*, the *Whitfield* opinions, and *Debler*, Instruction 14, (MAI-CR3d314.44), required the jury to weigh aggravating evidence against mitigating evidence; in this case, the non-statutory aggravating evidence included victim impact evidence. Kevin's jury should have been instructed that before it could consider and use any of the non-statutory evidence in the "weighing step, it had to find that evidence as fact beyond a reasonable doubt.

Without an instruction providing a standard for consideration of non-statutory aggravating evidence, the jury had neither knowledge nor direction

regarding the need to make factual findings beyond a reasonable doubt as to non-statutory aggravating evidence. Instruction E, refused by the trial court, would have provided the necessary guidance. Lacking such an instruction, Kevin's jury may well have considered and used this kind of evidence without finding it beyond a reasonable doubt.

Here, the victim impact evidence exceeded *Payne's* limits and violated the rules of evidence. Kevin's jury received no guidance on how to treat, consider, and use this evidence.

For the foregoing reasons, Kevin's death sentence is unreliable under the Eighth Amendment. This Court must reverse and remand for a new penalty phase or reverse and order Kevin re-sentenced to life without parole.

9

The trial court erred in overruling Kevin's objections, giving the jury Instruction 12, and sentencing Kevin to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's XIV,VIandVIII. Instruction 12 included §565.032.2(7)'s unconstitutionally vague statutory aggravator: the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." Kevin

was prejudiced: absent this unconstitutional aggravator, it cannot be said that the outcome at penalty phase would have been the same.

Kevin objected to Instruction 12 because it included the unconstitutionally vague “depravity of mind” statutory aggravating circumstance (Tr.2291-92). The trial court overruled his objections; Kevin preserved this ruling in the motion for new trial (LF569-70).

During penalty deliberations, the jury sent the judge several questions concerning the “depravity” aggravator. First, the jury asked, “In the matter of law, regarding #2, what is the definition of “Depravity of Mind”?” (Tr.2343;LF511). After consulting with counsel, the judge answered, “You will be bound by the instruction as submitted. I cannot give you further clarification of that instruction” (Tr.2343;LF512). The jury wrote back, “Give us a dictionary... !” (LF513). The judge responded, “Your request for a dictionary is denied. You will be bound by the instruction as submitted” (LF514). This last exchange does not appear in the transcript and does not reflect counsel’s participation.

A meaningful basis must exist for distinguishing the few cases where death is appropriate from the many where it is not. *Furman v. Georgia*, 408 U.S. 238,313 (1972). A statutory aggravator failing to provide adequate guidance for this distinction is unconstitutional. *Maynard v. Cartwright*, 486 U.S. 356,365 (1988).

As written, without further definition, Missouri's depravity of mind statutory aggravator is too vague to provide adequate guidance. *Godfrey v. Georgia*, 446 U.S. 420,428 (1980); *State v. Feltrop*, 803 S.W.2d 1,14 (Mo.banc 1991). To provide the additional, constitutionally required guidance, this Court has at least twice adopted "limiting constructions." See *State v. Griffin*, 756 S.W.2d 475,490 (Mo.banc 1998) and *State v. Preston*, 673 S.W.2d 1,11 (Mo.banc 1984). As appropriate, based on the evidence, appropriate limiting language is included in the instructions submitting §565.032.2(7) to the jury.

Here, Instruction 12 submitted §565.032.2(7) as follows:

"Whether the murder of Sgt. William McEntee involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find: That the defendant committed repeated and excessive acts of physical abuse upon Sgt. William McEntee and the killing was therefore unreasonably brutal.

(LF499;A16).

Even after *Godfrey*, *Maynard*, *Preston* and *Griffin*, this aggravator remains too broad: it could still apply to any murder. It is unconstitutionally vague. "Repeated" and "excessive" are nowhere described, limited or defined. The jury

is not told what acts of physical abuse, and how much physical abuse, are sufficient to “find” this aggravator. The jury is not told whether “excessive” acts of physical abuse include or exclude those acts inflicted to commit the murder and whether “repeated” means anything greater than one. Noting explains whether multiple injuries, alone, are sufficient to find “excessive” physical abuse, whether “excessive” means something different than “repeated” and if so, what it means, and whether the defendant must have an intent, separate from the intent to commit murder, to commit “repeated” and “excessive” acts of physical abuse.

“Repeated” is also unclear. Not even “repeated” acts of violence toward the victim, such as multiple gunshot injuries or multiple stab wounds, necessarily prove deliberation. See, e.g., *State v. Samuels*, *supra*, 965 S.W.2d at 923. “Excessive” and “repeated” cannot mean the same thing, because then both would not be necessary, and a finding of one would satisfy the other. But the jury is not so instructed.

The vagueness of the depravity aggravator and in particular the terms “repeated” and “excessive” is illustrated by *State v. Butler*, 951 S.W.2d 600 (Mo.banc 1997), in which the Court said “[a] gunshot wound to the head is an excessive act of physical abuse.” *Id.* at 606. Because the victim had been shot

twice, the Court found both “repeated and excessive acts of physical abuse.” *Id.* If the Court meant what it said in *Butler*, then a single gunshot wound to the head is excessive.

“If the sentence fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.” *Arave v. Creech*, 507 U.S. 463,474 (1993); emphasis in original; citing *Cartwright, supra*, 486 U.S. at 364 (“invalidating aggravating circumstance that ‘an ordinary person could honestly believe’ described every murder”); *Godfrey, supra*, 446 U.S. at 428-29 (“A person of ordinary sensibility could fairly characterize almost every murder as “outrageously or wantonly vile, horrible and inhuman”).

Under *Arave*, *Cartwright*, and *Godfrey*, Missouri’s depravity aggravator, even with its limiting constructions, is too vague to provide meaningful, constitutional, guidance. The cases finding “depravity” cover a spectrum so broad that the aggravator could truly be said to apply to any case. They include the “one or two gunshot depravity” in *Butler* as well as *State v. Johns*, 34 S.W.2d 93, 100, 115 (Mo.banc 2000), in which the victim was shot in the wrist, belly, side, upper right leg, lower right leg, right side of his body, and left side of the back of his head, and *State v. Roberts*, 948 S.W.2d 577, 606-07 (Mo.banc 1997) in which

the defendant “struck the victim numerous times with a hammer, kicked her, choked her, stabbed her, slashed her, and finally tried to drown her.” “[I]f an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.” *Newlon v. Armontrout*, 885 F.2d 1328,1334 (8th Cir. 1989).

The depravity aggravator – at least in its “repeated and excessive” form as submitted here – fails to give constitutional guidance.

Nothing shows more clearly than the jury’s notes that this aggravator is unconstitutionally vague. If it were not vague, the jury would not have needed to send the notes asking first for a definition of depravity of mind and then asking for a dictionary.

The mitigating evidence in this case, including the events leading up to the shooting, was powerful. It is not possible to conclude with confidence that the result would have been the same had the depravity aggravating circumstance not been submitted. *State v. Johnson*, 968 S.W.2d 686, 700-02 (Mo.banc 1998). For these reasons, Kevin’s sentence of death must be reversed and a sentence of life imprisonment without probation or parole imposed or the cause remanded

for a new penalty phase trial.

10

The trial court erred in overruling Kevin's objections to Instruction 14, MAI-CR3d-314.44, and refusing Instruction F, MAI-CR3d-314.44-modified. This violated his jury trial, due process, and reliable sentencing rights, U.S.Const., Amend's V,VI,VIII, and XIV; and §565.030.4(3). A defendant convicted of first-degree murder must be sentenced to life imprisonment unless the state proves sentence-enhancing aggravators, but MAI-CR3d-314.44, given here as Instruction 14, which instructs on §565.030.4(3)'s death-eligibility "weighing" step, requires a defendant to establish entitlement to a life sentence by proving mitigation outweighs aggravation. As the state bears the burden of proving death-eligibility, the jury should be instructed the state must prove aggravation outweighs mitigation or mitigation weighs less than aggravation; Instruction F so instructed. MAI-CR3d-314.44 unconstitutionally requires defendant to establish eligibility for a life sentence, and relieves the state of its burden, by instructing defendant must prove to a unanimous jury that mitigation outweighs aggravation.

Kevin objected to Instruction 14 on the grounds "it shifts the burden of

proof... to the defense to prove that the mitigating circumstances outweigh the aggravating circumstances” and offered Instruction F as an alternative (Tr.2296;LF509-10;A30-31). The trial court overruled this objection and refused Instruction F (Tr.2296-97). Kevin preserved this ruling for review in his motion for new trial (LF570-72).¹¹

The jury can impose the death penalty only under certain conditions....
[T]he jury must unanimously find that *mitigating circumstances weigh less than aggravating circumstances*.... Therefore, the current system in Missouri fully complies with the dictates of the Eighth Amendment.

Whitfield, supra, 837 S.W.2d at 515, “ *Whitfield I*”; emphasis added.

Life imprisonment is the default punishment for a defendant convicted of first-degree murder: a defendant’s “right” to a sentence of life imprisonment is established by the jury’s verdict of first degree murder. A defendant convicted of first-degree murder can *only* be sentenced to life imprisonment *unless* the

¹¹ Kevin acknowledges this Court has denied similar claims, *e.g.*, *State v. Zink*, 181 S.W.3d 66,74 (Mo.banc 2005). Kevin’s point is preserved; he requests full review because he presents arguments he believes have not previously been presented in a brief filed in this Court and also because it raises a federal constitutional issue not yet ruled on by the United States Supreme Court.

state proves the defendant death-eligible through the proof of additional, aggravating circumstances. *Whitfield, supra*, 107 S.W.3d at 258, “*Whitfield II*”; (“Section 565.030.4 on its face requires that steps 1, 2, 3, and 4 be determined against defendant before a death sentence can be imposed”) citing *Whitfield I, supra*.

In other words: at the point that penalty phase proceedings begin for a defendant convicted of first-degree murder, the defendant, by law, is already “eligible” for a sentence of life imprisonment. If no penalty phase proceeding were held, the defendant would be, could only be, sentenced to life imprisonment.

If Missouri’s instructional scheme followed the burden of proof scenario described in *Whitfield I*, Missouri would be in compliance with the federal constitution and with §565.030.4(3). An instruction requiring the jury to “unanimously find that *mitigating circumstances weigh less than aggravating circumstances*” at the weighing step would be consistent with the state bearing the burden of proving death-eligibility. It would also be consistent with §565.030.4(3)’s requirement that the defendant receive the unenhanced (default) sentence for first-degree murder – life imprisonment without eligibility for probation or parole – if the jury “concludes” that the mitigating evidence is

sufficient to outweigh the aggravating evidence. Alternatively, an equally valid way to instruct the jury on the weighing step would be as in Instruction F: “[i]f all the jurors do not agree that the state has proved beyond a reasonable doubt that *the evidence in aggravation of punishment outweighs the evidence in mitigation of punishment,*” the jury must return a verdict of life imprisonment” (LF509-10;A30-A31).

But giving a jury penalty phase instructions imposing on the defendant the burden of proving he is not death-eligible and is entitled to a sentence of life imprisonment pretty much flips *Ring v. Arizona, supra*, and the Sixth, Eighth, and Fourteenth Amendments upside down. It eliminates the defendant’s existing sentence of life imprisonment – established by the jury having convicted him of first-degree murder – and, instead, imposes on him the burden of proving he is eligible for a life sentence.

MAI-CR3d-314.44, the current MAI instruction on the weighing step of §565.030.4(3), does not assign the burden of proof consistently with *Whitfield I* or the constitutional requirement that the state bear the burden of proving death-eligibility.¹² MAI-CR3d 314.44, given here as Instruction 14, posited a very

¹² See, e.g., *Sattazahn v. Pennsylvania*, 537 U.S. 101,117 (2003), O’Connor, J., concurring in part and concurring in judgment citing *Poland v. Arizona*, 476 U.S.

different, unconstitutional burden. It required Kevin to establish his eligibility for a sentence of life imprisonment by proving to all the jurors that the mitigating evidence outweighed the aggravating evidence. Instruction 14 told the jury:

“[D]etermine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment....

“If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant’s punishment at imprisonment for life...”

147,155 (1986) (“A defendant is ‘acquitted’ of the death penalty for purposes of double jeopardy when the sentencer ‘decide[s] that the prosecution has not proved its case that the death penalty is appropriate’”); *Poland*, 476 U.S. at 154 (“the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has ‘decid[ed] that the prosecution has not proved its case’ for the death penalty and hence has ‘acquitted’ petitioners”); *Bullington v. Missouri*, 451 U.S. 430,432 (1981) (“the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed...”).

(LF502-03;A19-A20).

The somewhat confusing statutory phrasing of the death-eligibility step of §565.030.4(3), stating that the defendant should be sentenced to life if the mitigation outweighs the aggravation, may have created this problem. The factual determination required by §565.030.4(3) to *increase* the punishment” from life imprisonment to a sentence of death is *not* affirmatively stated in the statutory language “that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment...” MAI-CR3d- 314.44. Oddly, the fact that must be proved under §565.030.4(3) to increase the punishment to death is the converse of what §565.030.4(3) says mandates a life sentence: that there are “[*not*] facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment.” Or as *Whitfield I* put it: that the mitigation weighs less than the aggravation. Or as Instruction F put it: that aggravation outweigh mitigation.

For the foregoing reasons, overruling defendant’s objections to Instruction 12 and refusing Instruction F was error. Kevin was prejudiced because had his jury been correctly instructed, the result might very well have been different at penalty phase. Kevin’s sentence of death must be reversed and the cause

remanded for a new penalty trial.

11

The trial court erred in overruling Kevin’s motion to quash the information or preclude the death penalty, and sentencing him to death. This violated his rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const., Amend's V,VI,&XIV; Mo.Const., Art.1, §§10,17,18(a) & 21. At least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Statutory aggravators are alternate elements of a greater, aggravated form of first-degree murder and must be pled in the charging document to increase punishment to death. Kevin’s unauthorized death sentence must be reduced to life imprisonment.

Pretrial, Kevin moved¹³ to quash the information or preclude the death penalty

¹³ Kevin acknowledges this Court’s denial of similar claims, *e.g.*, *State v. Glass*, 136 S.W.3d 184,193-94 (Mo.banc 2005). He requests review because it raises a federal constitutional issue not yet ruled on by the United States Supreme Court.

relying, *e.g.*, on *Ring v. Arizona, supra*, and *Apprendi v. New Jersey, supra* (LF90-114). The trial court overruled the motion; Kevin's new trial motion preserved this ruling (Tr.17-18;LF575-76).

In *Apprendi, supra*, the Supreme Court held that a factual determination authorizing an increase in the maximum prison sentence must be made by a jury based on proof beyond a reasonable doubt." 530 U.S. at 469. Subsequently, in *Ring, supra*, the Court applied *Apprendi* to a capital case and held the factual finding that a statutory aggravator exists must be made by a jury: the Sixth Amendment requires jury fact finding beyond a reasonable doubt "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense...,'" *Id.* at 609 citing *Apprendi*, 530 U.S. at 494, n.19; emphasis added.

In Missouri, a defendant convicted of first-degree murder may not be death-sentenced unless a jury additionally finds, beyond a reasonable doubt, at least one statutory aggravator. Section 565.030.4(2), RSMo. (Supp. 2006); *see e.g., Whitfield I and II, supra*. Missouri's statutory aggravators, like Arizona's, are facts required to increase the punishment for a defendant convicted of first-degree murder from life imprisonment to death. Missouri's statutory aggravators have precisely the same effect as Arizona's: they serve as "the functional equivalent of an element of a greater offense..." *Ring*, 536 U.S. at 609 citing

Apprendi, 530 U.S. at 494,n.19.

“An indictment must set forth each element of the crime that it charges.” *Almendarez-Torres v. United States*, 523 U.S. 224,228 (1998); *State v. Barnes*, 942 S.W.2d 362, 367 (Mo. banc 1997). A person may not be convicted of a crime not charged unless it is a lesser included offense. *State v. Parkhurst*, 845 S.W.2d 31,35 (Mo.banc 1992). Although §565.020 ostensibly establishes a single offense of first-degree murder punishable by either life imprisonment or death under *Ring*, *Apprendi*, *Jones v. United States*, 526 U.S. 227 (1999), and *Whitfield I* and *II*, the combined effect of §§565.020, 565.030.4, and 565.032.2 is to create two kinds of first-degree murder: *unaggravated* first-degree murder which does not require proof of a statutory aggravating circumstance, and the greater offense of *aggravated* first-degree murder which requires the additional finding of fact, and includes as an additional element, at least one statutory aggravator.

To charge aggravated first-degree murder, the state must plead in the charging document the statutory aggravators on which it will rely at trial to obtain a death sentence. Because statutory aggravators authorize an increase in punishment and serve as elements of the greater offense of aggravated first-degree murder, the state must plead in the charging document the statutory aggravators it will rely on at trial to establish the offense as death-eligible. This is

true whether the offense is charged by indictment or information. U.S.Const., Amend's V, VI, and XIV; Mo.Const., Art.1, §§10,17, and 18(a).

It is often argued that the Fifth Amendment's Indictment Clause does not apply to the States, *see, Apprendi*, 530 U.S. at 477, n.3, and that the only federal constitutional limitation on state charging documents derives from the Sixth Amendment's notice requirement. *Blair v. Armontrout*, 916 F.2d 1310,1329 (8thCir.1990). These arguments represent a flawed and materially incomplete reading of *Hurtado v. California*, 110 U.S. 516(1884).

That the Fourteenth Amendment's Due Process Clause has been held not to incorporate the Fifth Amendment's right to be charged by indictment, *Id.*, 110 U.S. at 534-35, does not resolve the question. Missouri may choose how to charge a criminal defendant but may not deny its citizens federal constitutional protections or eliminate the "safeguard against oppressive and arbitrary proceedings" afforded by some check on prosecutorial authority. Only with that check and the notice the Sixth Amendment mandates can a defendant be afforded the full panoply of rights the federal constitution guarantees. *Hurtado* did not discount the States' constitutional obligations. "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information—**after examination and commitment by a**

magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.”*Id.* at 538, n.6(emphasis added).

Whether a defendant is prosecuted by indictment or information, key to ensuring his rights is that an independent third party—a magistrate or a grand jury—review the charges against him. And, in a capital case, in which aggravators are death-eligibility elements of the offense, they, too, must be presented to that third party. Missouri law proves this argument.

In *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), the defendant was charged with first-degree robbery. The robbery statute authorized an enhanced punishment of ten years imprisonment ‘for the aggravating fact for such robbery being committed “by means of a dangerous and deadly weapon,”’ but the information failed to charge this aggravator. *Id.* at 52. The jury found the defendant guilty of “[r]obbery first degree, by means of a dangerous and deadly weapon” and enhanced his punishment based on this aggravator *Id.*

The question on appeal was identical to the issue here: whether the aggravating facts authorizing additional punishment must be pled in the charging document. *Id.* at 53. The state claimed the defendant had adequate

notice from other sources “of the cause and the nature of the offense for which he was convicted,” and, in fact, knew of the aggravator, so it was unnecessary to charge the aggravator in the information. *Id.* at 53-54.

This Court rejected these arguments: “The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal” and “[t]he trial court was without power or jurisdiction to impose that sentence.” *Id.* at 54.

Here, as in *Nolan*, the state did not plead any statutory aggravators in the Indictment (LF28-30), and under *Nolan*, failed to charge Kevin with an offense punishable by death. The state charged only an unaggravated first-degree murder for which the maximum sentence is life imprisonment.

For the foregoing reasons, the Court should find the state charged an offense with a maximum sentence of life imprisonment, and the trial court exceeded its jurisdiction in sentencing Kevin to death. Kevin’s sentence must be vacated and he must be resentenced to life imprisonment without probation or parole.

Conclusion

Wherefore, for the foregoing reasons, as to Points 1, 2, 3, 4, and 6, Kevin Johnson 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,

Deborah B. Wafer, Mo. Bar No. 29351
Office of the Public Defender
1000 St. Louis Union Station
Suite 300
St. Louis, Missouri 63103
(314) 340-7662; Ext. 236 - Phone
(314) 340-7666 - Fax
Attorney for Appellant

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 Rules 84.05 and 84.06. The brief comprises 30,553 words according to Microsoft word count.

The CD Rom 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.

This 14 day of October, 2008, a true and correct copy of the attached brief, the separately bound appendix, and a CD Rom containing a copy of this brief were mailed, first class postage pre-paid, to the Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102, and an email with this brief attached was sent to Shaun.Mackelprang@ago.mo.gov.

Attorney for Appellant