

**IN THE  
MISSOURI SUPREME COURT**

<b>STATE OF MISSOURI,</b>	)	
	)	
<b>APPELLANT,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC83485</b>
	)	
<b>ANDRE COLE,</b>	)	
	)	
<b>RESPONDENT.</b>	)	

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
TWENTY-FIRST JUDICIAL CIRCUIT  
THE HONORABLE DAVID LEE VINCENT, JUDGE**

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**APPELLANT'S CORRECTED STATEMENT, BRIEF, AND ARGUMENT**

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**DEBORAH B. WAFER, MO. BAR NO. 29351  
OFFICE OF THE PUBLIC DEFENDER  
1221 LOCUST STREET; SUITE 410  
ST. LOUIS, MISSOURI 63103  
(314) 340-7662 - TELEPHONE  
(314) 340-7666 - FAX**

**ATTORNEY FOR APPELLANT**

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**JURISDICTIONAL STATEMENT**

A St. Louis County jury convicted Andre Cole of one count of first degree murder, §565.020, RSMo 1994, one count of first degree assault (§565.050), two counts of armed

criminal action (§571.105), and one count of first degree burglary (§569.160).<sup>1</sup> In accordance with the verdict, the trial court, the Hon. David Vincent, imposed sentences of death for the murder, life imprisonment for the assault and the two counts of armed criminal action, and thirty (30) years for the burglary. Given the sentence of death, this Court has exclusive appellate jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

### **STATEMENT OF FACTS**

Terri Cole divorced appellant Andre Cole in the spring of 1995 (T846, T911, T1244).<sup>2</sup> The Coles attempted to reconcile during 1997 and 1998 spending weekends together and having frequent contact (T964-65, 1195-98, 1245). Sometime during this period, Terri met Anthony Curtis<sup>3</sup> and stopped seeing Andre (T955, 969-70).

In July of 1998, Andre's sister, Mona, told Terri that Andre was seeing someone new and Terri became jealous and angry (T1198-1203). In August 1998, Mona told Terri that Andre was trying to obtain custody of the children and Terri cried (T1204-08).

Terri changed her phone number at the end of July; she saw Andre a couple of times in August but did not give her new number to him (T1005-06, 1208, 1253-54). Andre's

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<sup>1</sup> All statutory references are to RSMo 1994 unless otherwise noted.

<sup>2</sup> Appellant will cite to the record as follows: T - Trial Transcript; LF - Legal File; SLF - Supplemental Legal File; StEx - State's Exhibit.

<sup>3</sup> To avoid confusion that would otherwise result from similar names, and with no disrespectful purpose, appellant will use "Andre" for Andre Cole, "Terri" for Terri Cole, and "Curtis" for Anthony Curtis.

attempts to obtain her new phone number were unsuccessful (T1248-49, 1208, 1254).

The divorce decree required Andre to pay three hundred twenty (\$320) dollars per month to Terri for child support of their sons (T847, 949). During the summer of 1998, Andre fell behind in his payments (T949). A wage withholding order was mailed to Andre's employer, the St. Louis Zoo, on July 31, 1998, and Andre received notice of the withholding during the first week of August (T849-50, 866, 1026, 1254).

Wage withholding was nothing new for Andre (T1364). Similar directives had previously been sent to his employers in 1995 and 1996 (T857-58). Andre and Terri's divorce decree (StEx-62), property settlement, child support and withholding orders for nonpayment of child support, and Andre's history of child support payments (StEx-118, StEx-119) was elicited by the state in its case in chief (T844-50, T1020-1029).

Evidence of Andre's two prior felony convictions - for unlawful use of a weapon, and his misdemeanor convictions for failure to return to confinement and for violation of an order of protection - was elicited during his direct examination (T1290). The prosecutor's cross examination brought out the dates of these offenses (T1346-48).

The first paycheck subject to the July 1998 withholding was for the pay date Friday, August 21, 1998, and was mailed to Andre the preceding Wednesday (T867-68). Andre had commented to his co-workers at the zoo, Peter Ruffino and Gene Kennedy, about the large amount of child support he had to pay (T872). On Friday, August 21, 1998, or sometime during the preceding week, Andre told Peter and Gene "that if he had to pay any more that he was gonna kill his wife" (T871-73, 881, 885).

After Terri's phone number changed, Andre attempted to contact her numerous times

by going to her house during the day and at night, ringing the doorbell and knocking on the door (T1254). His attempts to contact her and to see his sons continued through August 21st but were unsuccessful (T1254-55).

On the evening of the 21st, Curtis arrived at Terri's house shortly after 8:00 p.m. (T954). At about 8:30, Terri's sons went skating (T912, 954). Curtis and Terri left briefly to rent movies and get some food (T913).

As Terri and Curtis sat in the living room, watching the movies and eating, there was a crash from the dining room (T916). They jumped up and saw Andre who had entered the house through the now shattered sliding glass door separating the dining room to the back patio (T914, 916-17). He was angry, yelling, and cursing - saying "why was [Terri] doin' this to him" and "he knows that [Terri] know[s] that he knows [Terri] love[s] him" (T917-18). Curtis, facing Andre, backed to the front door, opened it, and told Andre to leave (T918-19, 979). Andre attacked Curtis with a knife (T919, 921). Curtis fell on the floor, face down, and Andre stabbed him until he stopped moving (T920-22). Andre then stabbed Terri in her arm, armpit, back, stomach, and breasts (T923-24). Terri fell to the floor on her back; Andre stabbed Terri in the chest and left (T925-26).

Curtis sustained multiple wounds to his chest and back (691-700). A stab wound pierced his head but did not penetrate his skull (T696-97). There were multiple defensive wounds on Curtis's hands (686-89, 701). Three wounds that penetrated his lungs were potentially lethal; death resulted from a stab wound to his left back that penetrated his lung and cut the aorta (T699, 701-02). Curtis's wounds were consistent with having been caused by a knife, StEx-1, found on the back deck of Terri's house after the incident

(T616, 622, 700). Terri was taken to a hospital and had a laparotomy to drain fluid from her ribs and lungs (T931-32). Her wounds were stitched and she remained in the hospital from that Friday until the following Wednesday (T933). As a result of her wounds, she had trouble breathing, and still had pain in her fingers and chest at the time of trial (T924, 926, 934-35).

Andre testified at trial that he and Terri attempted to reconcile from the summer of 1997 to August of 1998 (T1248). He last talked to Terri in late July at which time they had a misunderstanding; she then changed her telephone number and did not give it to him (T1248-49).

Andre took his sons shopping and bought them things, but he was behind on his child support (T1251). He was bothered by the new wage garnishment because he had been giving Terri money and spent time with her and their sons (T1251-52). His understanding was that she was not going to push him on the support since he had just bought a house and was trying to furnish it (T1251-52). In late 1998, Andre began a new relationship with a woman he had met at church (T1253).

After Terri's phone number changed, Andre tried, unsuccessfully, to contact her and to see his sons (T1254). In the week before the incident he repeatedly drove by Terri's house in an attempt to make contact (T1254).

On the evening of August 21st, Andre went to several different stores looking for a satellite dish for his television (T1260-63). En route to K-Mart he drove past Terri's house and noticed a light on in the back of the house (T1263-64). Earlier that day, Andre had stopped at the house and knocked at the front door and nobody had answered

(T1265). This time, Andre took a jack that he had put in his car earlier that day and went to the back of Terri's house (T1266).

Andre was tired of Terri not responding to him; he did not have her number at home or at her new job location (T1266). Andre parked on the street at the side of the house and went across the fence, through the yard and up to the back of the house (T1328). His intention as he went to her back door was to shatter the glass patio door at the rear of Terri's house to get her attention (T1268, 1303-04). He took the jack and hit the glass door throwing the jack through the shattered doorway (T1266-67).

As Andre took a step into the house, an alarm sounded, and Andre noticed a man he had never seen come toward him from the living room area (T1268-69). Andre had never met Curtis and had no inkling that Curtis would be at Terri's house that night (T1265). At that time, Andre did not know that the man coming toward him was Curtis (T1269).

Curtis, who appeared to be saying something, moved toward Andre (T1269). Andre backed out of the house to the railing at the back of the deck (T1269). Curtis had a knife in his hand and also moved to the deck; Andre did not have a knife with him (T1269-70). Andre got hit in the leg by the knife and was bleeding (T1270). Andre, trying to restrain Curtis, got hit a second time (T1270-71).

As Andre and Curtis struggled on the deck, Terri came up behind Curtis (T1272). Andre thought Terri was grabbing or pulling Curtis, and then he saw Curtis had "raised up" (T1272). From the expression on Curtis' face, Andre thought he was in pain (T1272).

It was only after Curtis pulled away from Andre and turned towards Terri that Andre noticed that Terri had a knife (T1272-73). Terri and Curtis moved back into the house:

Curtis pushing Terri, and Terri backing up (T1273-74). Both were "swinging" (T1273).

After a brief time, Terri emerged from the house holding herself and told Andre she had been "cut ... stabbed" (T1278-79). Andre said to her, "Come on, let's go" (T1279). Terri said "No" and told Andre, "just go" (T1279).

Andre left (T1279-80). He was afraid that if he called the police he would get set up and accused (T1367). He drove around the St. Louis area, spent the night at a motel, and left Missouri the next day (T1280-85). For approximately a month, Andre stayed with a relative in Tennessee (T1285-86). He then returned to St. Louis and stayed in a hotel going to his house at night (T1286). Eventually, after contacting an attorney, Andre turned himself in (T1287-89).

In his closing argument at guilt phase, the prosecutor argued that the jury should consider as evidence of Andre's guilt that Terri was afraid Andre would return and did not go home until after he turned himself in to the police (T1434); the prosecutor did not know of a case more important than this case (T1415); as proof of Andre's guilt the jury should consider: Andre - "a convicted felon with priors" - was more likely to be "attacking" than Curtis ("the guy from the museum") or Terri (a mom), Andre had committed prior crimes, Andre's status as a convicted felon was consistent with "the sheer violence of this crime" and Andre was "a convicted killer," (an untrue claim because Andre was not "a convicted killer") (T1421, 1476-78); the jury should consider Andre's failure to pay child support to Terri, his anger towards her, and his stabbing of her as proof Andre deliberated on the matter of killing Curtis (T1417, 1419-20, 1422, 1424, 1435); the defense had "gall" to challenge Terri's credibility, she had to live in the

house where the crime occurred, and the jury should not return a verdict telling Terri, "a dying woman," that they did not believe her (T1465-66, 1480); and people accused of crimes are accused for a reason (T1474).

After approximately five hours of deliberation, the jury returned verdicts finding Andre guilty of all counts as charged (T1481, 1492-93; LF167-71).

At penalty phase, over defense objections, the trial court sustained the state's motion in limine and objections and precluded defense witnesses from testifying that they would visit Andre in prison (LF173-74; T1498-99, 1620-21). The defense included this in the motion for new trial (LF204-05).

Prior to trial, the defense filed various motions and objections to Missouri procedures concerning the death penalty including a motion objecting to MAI-CR3rd Instructions 313.40 to 313.48 (LF81-86). The trial court overruled the objection to the instructions (T8, LF132). At trial, the defense timely renewed its objections to submitting Instructions 313.40 to 313.48 and was again overruled (T1630-31). The trial court's rulings were included in the motion for new trial (LF198, 207).

In its penalty phase case in chief, the state presented detailed evidence of Andre's nonstatutory prior convictions as aggravating evidence (T1511-87). The state also called three victim impact witnesses: Curtis's brother-in-law, sister and mother (T1588-95).

Prior to the start of the penalty phase trial, defense counsel objected to the state admitting evidence of Andre's prior arrests and convictions at penalty phase, and the trial court overruled the objection (T1496-97).

Andre called family members and friends to testify on his behalf (T1596-1628).

Andre's mother, Lillie Cole described how Andre had helped her and had done everything he could do for her before her husband died (T1596). She testified that Andre helped others, was a good father to his children and that he was remorseful about what had happened (T1597). Andre's sister Mona said Andre was a good brother and they had done everything together when they were growing up (T1600). Andre went out of his way to help others, and he listened to her when she had problems (T1601). Andre's cousin, Donna Thomas, had always been able to depend on Andre if she needed anything (T1603). Andre's friend, Christopher Henderson, recalled doing everything with Andre when they were growing up - cub scouts, bowling, shopping, going places together (T1606). Reverend Harold Ellis knew Andre as a warm and compassionate person who attended church regularly (T1610). Will Young, a neighbor, had known Andre since Andre was about twelve (T1612). Andre always helped Mr. Young with house and yard work (T1612-13). Roscoe Johnson remembered meeting Andre at church when Andre was about seven years old (T1615). Jerome Scott had been Andre's father's best friend and remembered Andre from when Andre was a teenager (T1617). He knew Andre as a good and hard worker and a quick learner (T1618, 1620). Henry Moten was another best friend of Andre's father and remembered Andre from the time he was six (T1623). He remembered Andre playing baseball and going to church with his family (T1623-24). When James Dawson and Andre were teenagers, they were both car buffs (T1626). They worked on homework together and Andre taught James to shoot pool (T1626). James called on Andre for help more than once and Andre always insisted that James call him if he needed anything (T1627).

At trial, during voir dire, the defense moved numerous times to strike venireperson Joseph Clark, No. 22, on the grounds that as a St. Louis County police officer he could not be impartial in a case arising in St. Louis County and investigated by St. Louis County police officers and therefore was not qualified to serve on the jury (SLF6, T113, 132, 559). The trial court denied all defense motions (T561).

At the conclusion of voir dire, the trial court entertained a defense motion "based on Batson v. Kentucky" objecting to the state's use of its peremptory strikes to exclude three black panelists including Vernard Chambers (SLF10; T565-70). The trial court denied the Batson challenge to the prosecutor's strike of Mr. Chambers, and defense counsel included this ruling in the motion for new trial (T571; LF198-99).

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

## **POINTS RELIED ON**

### **Point One**

**The trial court erred in overruling Andre's motion for judgment of acquittal at the close of all evidence and entering judgment against him for first degree murder and sentencing him to death. This violated Andre's rights to due process of law, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; §565.035.3(3). The evidence was not sufficient and too unreliable to support a conviction of first degree murder and a sentence of death in that viewed in the light most favorable to the verdict it failed to prove beyond a reasonable doubt that Andre deliberated on killing Curtis.**

**Rather, undisputed evidence showed that Andre had never met Curtis, did not know Curtis was in Terri's house, and had no plan to kill Curtis. The state's evidence showed that Andre's stabbing of Curtis was done knowingly, in anger and rage, but not after cool reflection. Further, numerous errors in the admission and exclusion of evidence at penalty phase undermine confidence in the reliability of the death verdict.**

State v. Snow, 293 Mo. 143, 238 S.W. 1069 (Mo. 1922);

Jackson v. Virginia, 443 U.S. 307 (1979);

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

Cooper Industries, Inc. v. Leatherman Tool Group, Inc. 121 S.Ct. 1678 (2001);

U.S.Const., Amend's VIII and XIV;

RSMo. §565.035.3(3)

RSMo. §565.020.1;

RSMo. §565.021.1;

RSMo. §562.016.3(1).

## **Point Two**

**The trial court plainly erred in allowing the state improperly to inject into the trial, through questions, evidence, comments and argument at guilt phase that: 1) Terri was afraid Andre would return and did not go home until after he turned himself in to the police; 2) the prosecutor did not know of a case more important than this case; 3) as proof of Andre's guilt the jury should consider: Andre - "a**

convicted felon with priors" - was more likely to be "attacking" than Curtis ("the guy from the museum") or Terri (a mom), Andre had committed prior crimes, Andre's status as a convicted felon was consistent with "the sheer violence of this crime" and Andre was "a convicted killer," (untrue); 4) the jury should consider Andre's failure to pay child support to Terri, his anger towards her, and his stabbing of her as proof Andre deliberated on the matter of killing Curtis, 5) the defense had "gall" to challenge Terri's credibility, she had to live in the house where the crime occurred, and the jury should not return a verdict telling Terri, "a dying woman," that they did not believe her; and 6) people accused of crimes are accused for a reason. This violated Andre's rights to due process of law and a fair trial, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's VI, VIII, and XIV; Mo.Const., Art. I, §17. The evidence, comments and argument were improper and prejudiced Andre in that 1) the possibility of a defendant committing future crimes is speculative, not based on fact, and would prejudice the jury against Andre; 2) the prosecutor's statement that this was the most important case he knew of in St. Louis County implied the prosecutor had knowledge of Andre's guilt - unknown to the jury - corroborating his decision to charge and prosecute Andre, 3) using Andre's prior convictions, bad acts and misconduct to prove guilt was contrary to the law prohibiting proving guilt by propensity, 4) Andre's failure to pay child support and his acts toward Terri were not probative of a deliberated killing of Curtis and violated the rule against using uncharged misconduct to show propensity; and 5) it is against the law to criticize a

**defendant for exercising his constitutional rights to defend and to confront and cross examine witnesses, and the argument improperly asked the jury to make their decision based on sympathy for Terri who had to live in the house where the crime occurred and became fatally ill with ALS prior to trial; and 6) the argument went beyond the evidence and violated the law and constitution by stating that people accused of crimes are guilty.**

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

State v. Heinrich, 492 S.W.2d 109 (Mo.App.K.C.D. 1973);

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

State v. Driscoll, No. SC82402 (Mo.banc September 11, 2001);

U.S.Const., Amend's VI, VIII, and XIV;

Mo.Const., Art. I, §17;

Rule 30.20.

### **Point Three**

**The trial court plainly erred and exceeded its jurisdiction in sentencing Andre to death. This violated his rights to due process of law and freedom from cruel and unusual punishment, U.S.Const. Amend's XIV and VIII. Missouri's statutes authorize a sentence of death only upon a finding of at least one of the seventeen statutory aggravating circumstances: alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase the punishment for first degree murder from life imprisonment**

**without probation or parole to death. As the indictment and information in the present case failed to plead any aggravating circumstances, the offense actually charged against Andre was unaggravated first degree murder for which the only authorized sentence is life imprisonment without probation or parole. The trial court therefore lacked jurisdiction to sentence Andre to death, and he was prejudiced because he was subjected to a sentence of death - a sentence not authorized for the offense of which he was convicted. The judgment must be reversed and Andre's sentence vacated.**

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

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

State v. Bolder, 635 S.W.2d 673 (Mo.banc 1982);

State v. Whardo, 859 S.W.2d 138 (Mo.banc 1993);

U.S.Const., Amend's VIII and XIV;

RSMo. §565.030.4(1);

RSMo. §565.032.2;

RSMo. §565.020;

Rule 30.20.

#### **Point Four**

**The trial court erred in overruling defendant's objections, submitting Instruction No. 18 to the jury, and sentencing Andre to death. This violated Andre's rights to due process of law, fair trial by a properly instructed jury, freedom from cruel and**

**unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI and VIII. Instruction 18 included an aggravating circumstance drawn from §565.032.2(7): whether the murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind based on Andre's "repeated and excessive acts of physical abuse upon Anthony Curtis." This language was unconstitutionally vague in that it failed to narrow the class of murderers eligible for the death penalty and provide a means of distinguishing those murders for which the death penalty is appropriate from those in which it is not. At present, and until the Court provides further clarification of the terms "excessive" and "repeated," it is not possible to determine whether the murder in this case involved depravity of mind. Because the state relied heavily on this aggravating circumstance in arguing for the death penalty, it cannot be said that submission of this aggravating circumstance was harmless. The sentence of death must be set aside.**

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

Godfrey v. Georgia, 446 U.S. 420 (1980);

State v. Butler, 951 S.W.2d 600 (Mo.banc 1997);

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

U.S.Const., Amend's VI, VIII, and XIV;

RSMo. §565.032.2(7);

MAI-CR3rd 313.40.

### Point Five

The trial court clearly erred in overruling Mr. Cole's Batson motion, failing to take the required step of evaluating the plausibility of the prosecutor's explanation for peremptorily striking black venireman Vernard Chambers, and upholding this peremptory strike. This violated Mr. Cole's and the excluded jurors' rights to due process and equal protection of law, fair trial by jury, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's XIV, VI and XIV. The trial court failed to evaluate the credibility of the state's reasons for striking Mr. Chambers - that he was divorced, was weak on death and his cousin was "doing life for a murder in Michigan. These reasons were pretexts for removing Mr. Chambers because of his race as shown by the fact that the prosecutor never asked whether any of the "currently married" panelists ever had been divorced, never inquired whether being divorced would affect the panelists' ability to serve on the jury, the record does not support the prosecutor's claim that he struck Mr. Chambers because he wasn't sure about death, and not only did Mr. Chambers say that his cousin doing time in prison for murder "got what he deserved," the prosecutor did not strike similarly situated white juror Parsons whose nephew was in prison in Florida for homicide. The equal protection rights of Mr. Cole and excluded juror Vernard Chambers were violated by the prosecutor's racially motivated strike and by the trial court's failure to correctly discharge its duties under Batson. The cause must be reversed and remanded for an evidentiary hearing at which the trial court will evaluate the plausibility of the prosecutor's

**explanations for striking Mr. Chambers.**

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

Purkett v. Elem, 514 U.S. 765 (1995);

State v. Parker, 836 S.W.2d 930 (Mo.banc 1992);

State v. Lopez, 898 S.W.2d 563 (Mo.App.W.D. 1998);

U.S.Const., Amend's VI, VIII, and XIV.

**Point Six**

**The trial court erred in failing to sustain Mr. Cole's motion to strike for cause St. Louis County police officer Clark. This violated Mr. Cole's rights to due process of law, equal protection of the law, fair trial by jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. The defendant in a criminal trial is entitled to a full panel of qualified jurors before exercising expending peremptory strikes, and Officer Clark was not qualified to serve on the jury in that as a currently active St. Louis County police officer he was an integral part of the prosecution team. By virtue of regular and direct interaction with the criminal justice system, often on a daily basis, and with the prosecuting attorney in all phases of the prosecution - from preparing affidavits for search warrants, writing police reports, investigating witnesses, to testifying for the prosecution at grand jury proceedings and criminal trials - an active police officer is too closely connected to the prosecution to serve fairly and impartially. Although no statute disqualifies police officers from serving on criminal juries, a member of the**

**police force that is assisting the state in investigating and presenting the prosecution's case against the defendant is no less an integral part of the prosecution team than the prosecutor. Failing to strike Officer Clark for cause was an abuse of discretion and prejudiced Andre by requiring him to remove Officer Clark with a peremptory strike. Further, because the failure to strike Officer Clark for cause during the jury selection process was a defect that affected the "entire conduct of the trial from beginning to end" it was a violation of the structural framework of the trial, undermined the trial's integrity and fundamental fairness and requires that the cause be reversed for a new trial regardless of prejudice. Particularly in a case in which the state is seeking the death penalty, the courts must ensure that jury selection leaves no doubt that the defendant has been afforded due process and equal protection of law, and trial by a fairly selected and impartial jury.**

State v. Thompson, 541 S.W.2d 16 (Mo.App.K.C.D. 1976);

State v. Butts, 159 S.W.2d 790 (Mo. 1942);

State v. Vincent, No. ED78518 (Mo.App.E.D. September 11, 2001);

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

U.S.Const., Amend's VI, VIII, and XIV;

RSMo. §494.480.4.

### **Point Seven**

**The trial court erred in admitting at penalty phase detailed evidence of Andre's prior felony and misdemeanor convictions and his failure to pay child support on**

time in penalty phase. This violated Andre's rights to due process of law, fair trial by jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. The evidence of prior convictions involving Terri was improper in that it was in the nature of victim impact evidence but involved other offenses - not those offenses for which Andre was on trial - and its admission was not authorized either by Payne v. Tennessee or state law. The sheer volume of this evidence, and its similarity to the charged offense was prejudicial and the jury, absent instruction, would not have realized that the impact of earlier offenses on Terri was not a matter that they should consider in deciding punishment in this case. The detailed evidence of Andre's prior convictions and his child support payment record was of a nature tending to depict Andre as a person of bad character but of no value in determining whether death or life imprisonment without probation or parole was the appropriate punishment. Although legally irrelevant to the issue of sentencing, the state used the child support evidence to Andre's prejudice by arguing it showed that Andre was a person who did not deserve to live. The prior conviction evidence prejudiced Andre in that the state used it to argue that Andre could not adjust to or succeed in the criminal justice system and therefore only death was appropriate punishment. This was especially prejudicial because the defense was precluded from presenting the only evidence that could defend against this argument and establish that Andre could and would adjust to prison: the testimony of his friends and relatives that they would support and facilitate his adjustment to prison by visiting him in prison.

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

People v. Hope, 702 N.E.2d 1282 (Ill. 1998);

United States v. Peoples, 74 F.Supp.2d 930 (W.D.Mo. 1999);

U.S.Const., Amend's VI, VIII, and XIV;

RSMo. §565.032.2(1)

RSMo. §565.032.3;

RSMo. §565.030.4;

Rule 30.20.

### **Point Eight**

**The trial court erred in sustaining the state's motion in limine and refusing to allow Andre Cole to present evidence that his relatives and friends would visit him in prison. This violated Andre's rights to due process of law, present a defense, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. Andre was prejudiced by the exclusion of this evidence in that evidence that would have a bearing on Andre's adjustment to prison was admissible under Skipper v. South Carolina, and the constitutional guarantees of the right to defend, to be free of arbitrary and capricious and cruel and unusual punishment and to reliable sentencing. Further, the thrust of the state's penalty phase argument was that Andre had repeatedly been afforded chances to succeed in the criminal justice system and had failed, and therefore life imprisonment without probation or parole was not an appropriate sentence. The only evidence that Andre**

**had to defend against this argument was the testimony of his family and friends that they would stick by him and visit him in prison. This testimony - by providing evidence that with the assistance and support of family and friends, Andre would adjust to prison and it was therefore an appropriate punishment - would have allowed Andre to defend against the state's evidence and argument for the death penalty.**

Skipper v. South Carolina, 476 U.S. 1 (1986);

Gardner v. Florida, 430 U.S. 349 (1977);

State v. Barton, 936 S.W.2d 781 (Mo.banc 1996);

United States v. Peoples, 74 F.Supp.2d 930 (W.D.Mo. 1999);

U.S.Const., Amend's VI, VIII, and XIV.

### **Point Nine**

**The trial court erred in overruling defense objections to Instruction No. 21 (MAI-CR3d 313.46A) and submitting this instruction to the jury. This violated Andre's rights to due process of law and fair jury trial, to present a defense, to reliable sentencing and to freedom from cruel and unusual punishment. U.S.Const. Amend's XIV, VI, and VIII. Instruction No. 21 prejudiced Andre by telling the jury that they must consider all the circumstance in deciding whether to assess and declare the punishment at death but failing to advise the jury that they must consider all the circumstances in deciding whether to assess the punishment at life imprisonment without the possibility of probation or parole or death. This**

**prejudiced Andre because it left the jury free to ignore the mitigating evidence presented by the defense in determining whether death - or life - was the appropriate punishment.**

Mills v. Maryland, 486 U.S. 367 (1988);

Lockett v. Ohio, 438 U.S. 586 (1978);

Boyde v. California, 494 U.S. 370 (1990);

Buchanan v. Angelone, 522 U.S. 269 (1998);

U.S.Const. Amend's XIV, VI, and VIII;

MAI-CR3d 313.46A.

### **Point Ten**

**The trial court erred in overruling defense objections to Instruction No. 22 (MAI-CR3d 313.48A), submitting this instruction to the jury, and sentencing Andre to death. This violated his rights to due process of law, trial by a correctly instructed jury, present a defense, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's XIV, VI, and VIII. Instruction No. 22 prejudiced Andre by failing to include all the steps that the jury must follow in the sentencing process. Specifically, it failed to advise the jury of the essential "third step" in the weighing process: that if each juror determined that there were facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then the jury must return a verdict of life imprisonment without the possibility of probation or parole. This error was**

**particularly prejudicial in light of the state's argument telling the jury that Instruction No. 22 gave them the "verdict mechanics" thus leading the jury to believe that the instruction correctly set forth the steps they were to follow.**

State v. Carson, 941 S.W.2d 518 (Mo.banc 1997);

Skipper v. South Carolina, 476 U.S. 1 (1986);

Boyde v. California, 494 U.S. 370 (1990);

Buchanan v. Angelone, 522 U.S. 269 (1998);

U.S.Const. Amend's XIV, VI, and VIII;

§565.030.4(3);

MAI-CR3d 313.48A.

### **ARGUMENT**

**As to Point One: The trial court erred in overruling Andre's motion for judgment of acquittal at the close of all evidence and entering judgment against him for first degree murder and sentencing him to death. This violated his rights to due process of law, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; §565.035.3(3). The evidence was not sufficient and too unreliable to support a conviction of first degree murder and a sentence of death in that viewed in the light most favorable to the verdict it failed to prove beyond a reasonable doubt that Andre deliberated on killing Curtis. Rather, undisputed evidence showed that Andre had never met Curtis, did not know Curtis was in Terri's house, and had no plan to kill Curtis.**

**The state's evidence showed that Andre's stabbing of Curtis was done knowingly, in anger and rage, but not after cool reflection. Further, numerous errors in the admission and exclusion of evidence at penalty phase undermine confidence in the reliability of the death verdict.**

Viewed in the light most favorable to the verdict, State v. Grim, 854 S.W.2d 403, 411 (Mo. banc 1993), the evidence failed to prove that Andre deliberated on the matter of killing Curtis. Rather, the evidence showed that Andre could not have coolly reflected on killing Curtis because prior to the time Andre encountered Curtis at Terri Cole's house, Andre did not know Curtis existed. The state's evidence showed that at the time Andre learned of Curtis's existence - when Andre entered Terri's house - Andre was enraged. Because the evidence failed to prove that Andre coolly reflected, it failed to establish the critical element of deliberation and fell short of proving beyond a reasonable doubt the offense of first degree murder.

Yet, should the Court conclude that the state made a sufficient case to support a verdict of guilt, there remains too much doubt about the strength of the evidence of deliberation, and too much risk that errors at trial, including those at penalty phase, improperly influenced the verdicts, to be confident in the reliability of the verdict at penalty phase and to affirm the sentence of death. Viewed in the light most favorable to the verdict, evidence of an intentional, knowing killing is substantial. Evidence of a coolly reflected, deliberated killing is not.

Numerous errors, mentioned elsewhere in this brief, pervaded the trial. At guilt phase, the prosecutor improperly urged the jury to find the defendant guilty because he

failed to pay child support, he had prior convictions (he was "a convicted killer"), and that people sitting in the defendant's chair were usually there because they were guilty. At penalty phase, the trial court excluded mitigating evidence bearing on Andre's success in adjusting to prison but, conversely, admitted prejudicial evidence of little if any value (see Point Seven and corresponding argument) in determining the appropriate sentence.

Even if this Court should decide that these errors do not rise to the level of reversible error, they are factors that the Court may and should consider in evaluating the reliability and proportionality of the verdict of death. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S.Ct. 1678 (2001). Affirming the sentence of death in this case would violate due process of law, the right to reliable and proportionate sentencing, and the prohibition against cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; §565.035.3(3)<sup>4</sup>; Cooper Industries, Inc. v. Leatherman Tool Group, Inc., *supra*; BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994).

"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. Deliberation "sets first degree murder apart from all other forms of homicide." State v. O'Brien, 857 S.W.2d 212, 217-18 (Mo.banc 1993). "Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." *Id.* at 218. Deliberation may be inferred, State v. Malady, 669 S.W.2d 52, 55 (Mo.App.E.D. 1984), but must still be proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307,

316 (1979).

An intended killing done with knowledge but without "cool reflection" is not first degree murder. State v. Baker, 859 S.W.2d 805, 815 (Mo.App.E.D. 1993). Absent evidence of deliberation, an intentional killing is second degree murder. State v. Snow, 293 Mo. 143, 238 S.W. 1069 (Mo. 1922); §565.021.1 (one who "knowingly causes the death of another person" commits the offense of murder in the second degree). A person who acts "knowingly" acts with the awareness "that his conduct is practically certain to cause that result." §562.016.3(1).

Merely acting with knowledge that an act (stabbing someone more than once) is practically certain to cause a certain result (death) is not the same as acting with knowledge *plus* coolly reflecting (deliberating) before the act. Knowing that death is practically certain to follow from the act of stabbing someone is second degree murder. Knowing that death is practically certain to follow from the act of stabbing someone *plus* acting *only after* coolly reflecting on the matter is first degree murder.

The evidence elicited at trial lacks facts proving cool reflection on the matter of killing Curtis - whom Andre did not know. What the facts did show, in abundance, was Andre's increasing anger - triggered by a recent wage withholding order - toward Terri Cole. The evidence establishing these two circumstances is as follows:

Sometime before the incident on August 21st, Terri Cole had her telephone number changed temporarily because she was getting "hang-up calls" (T1005-06, 1012). She did not give the new number to Andre (T1006, 1208, 1253-54).

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<sup>4</sup> All statutory references are to RSMo. 1994 unless otherwise noted.

In August, 1998, Andre received notice that pursuant to a court order, his employer would begin withholding child support money from his paycheck on August 21, 1998 (T849-50, 865-67, 1026-28; StEx-118). On August 12, 1998, Andre signed a form claiming "a mistake in the support amounts in the withholding order" and requesting a hearing (T1028-29; StEx-119). There were no mistakes (T1028).

Sometime during the week of August 21st, possibly that morning, Andre's co-worker and friend, Peter Ruffino, heard Andre complaining angrily about paying an "exorbitant" amount of child support (T871-74). Peter believed Andre's anger had reached the point that he was going to do something about it (T872). Indeed, Andre told Peter that "if he had to pay any more that he was gonna kill his wife" (T872).

Gene Kennedy, another co-worker and friend, knew from previous discussions with Andre that in the past he had been "frustrated" about paying child support (T881). Andre had discussed trying to keep his payments to a minimum (T881). On the Wednesday before the 21st, Andre told Gene that he had "an issue with his lawyer about the child support" and said, "Before I give her another dime I'll kill the bitch" (T881, 885).

Gene Kennedy was not only friends with Andre, Gene Kennedy was Curtis's best friend (T881, 883). Mr. Kennedy had no idea that Curtis was involved with Terri Cole; Curtis never mentioned her name (T883, 885). And Mr. Kennedy did not think Curtis and Andre Cole knew each other (T850).

Terri Cole agreed that Andre and Curtis had never met (T970). Andre had never seen Curtis's car (T1011).

Terri's testimony showed that Andre was angry at her when he entered her house by

throwing a car jack and shattering her glass patio door (T916-17). After entering the house, Andre yelled and cursed and asked Terri why she was "doin' this to him" and he knew that she loved him (T918). Andre may also have asked Terri, "how can [she] do this to him" and he knew Terri loved him or that she knew he loved her (T961).

As Andre came in the house, Curtis, keeping his eyes on Andre, backed up to the front door, opened it, and said to Andre, "Hey man, you not supposed to be here. Why don't you leave?" (T919, 976, 978-79, 979-80). Andre and Curtis stared at each other (T918-19, 980). Andre lunged at Curtis and stabbed him with a knife (T919, 980). After a few seconds, Curtis, who was saying "stop, man; stop, man; stop" and "ouch," fell to the floor (T919-20, 980-82).

In his opening statement, the prosecutor told the jury that Andre was a "violent angry" person ("Unbeknownst to them his violent angry world was about to collide with theirs") (T584) who came into Terri's house "cursin'" and "yellin'" (T585). In his closing argument, the prosecutor referred to Andre's anger having been roused by the recent child support wage garnishment (T1435).

The prosecutor's argument<sup>5</sup> exhorting the jury to consider Andre's stabbing of Terri as "after the fact" evidence of deliberation reveals the prosecutor's lack of confidence that the state's evidence proved deliberation (T1424). If the prosecutor had been confident that there were facts proving that Andre coolly reflected on killing Curtis, the prosecutor would not have resorted to improper argument asking the jury to consider Andre's acts

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<sup>5</sup> The prejudicial effect of this argument is addressed separately in Point 2 and argument.

toward Terri as proof that Andre killed Curtis after deliberation on that matter. If the jury had been confident that Andre had deliberated, the jury would not have taken from 6:15 p.m. to 11:15 p.m. - some five hours - to return their verdict (T1481, 1493).

The facts cited by the prosecutor as evidence that Andre deliberated on killing Curtis may show, in addition to anger, careful planning and thought as to his actions with regard to Terri Cole, but they do not show that Andre was thinking - or even that he could have thought about killing Curtis - because Andre did not know Curtis. Nor does the fact of Andre's anger driving him into going to Terri's house - an undeniable, unrefuted fact - vanish simply because he found Curtis at Terri's house.

None of Andre's actions cited by the prosecutor - Andre's threats about child support and that he did not want to pay child support (T1417), that he put a jack and a gun and a knife in his car and carefully set down the jack before hopping over Terri's fence (T1419-20), that he called Terri's house before going in (T1419-20), that he carefully chose a parking spot where he wouldn't be seen (T1420), and that he attacked Terri after attacking Curtis - show that Andre coolly reflected on killing Curtis. They show only that he was angry enough at Terri Cole to take actions against her.

The only facts that could conceivably support a finding of deliberation as to the killing of Curtis are: 1 - that Andre attacked Curtis with a knife, 2 - that Curtis and Andre stared at each other when Andre entered Terri's house, and 3 - that Andre inflicted multiple wounds on Curtis during and after a struggle. But these facts do not show beyond a reasonable doubt the cool reflection required for deliberation. Andre was angry, and whatever kind of "reflection" there may have been was not done "coolly."

But neither multiple wounds nor the use of a lethal weapon is conclusive on the question of deliberation. See, e.g., State v. Samuels, 965 S.W.2d 913, 923 (Mo.App.W.D. 1998); State v. Maynard, 954 S.W.2d 624, 629-31 (Mo.App.W.D. 1997); State v. Roberts, 785 S.W.2d 614, 615-16 (Mo.App.E.D. 1990). If killing someone with a knife or gun was conclusive proof of deliberation, then any homicide committed with a knife or gun would be a first degree murder. In this case, the fact that Andre struggled with Curtis for a few seconds or a few minutes and the fact that Andre stabbed Curtis multiple times do not establish deliberation because whatever amount of time there was for reflection, there was no cool reflection.

State statute and the due process clause mandate that the Court must also consider whether the state's evidence is strong enough to support the sentence of death imposed on Andre. §565.035.3(3) ("With regard to the sentence, the supreme court shall determine ... 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"); State v. Chaney, 967 S.W.2d 47, 60 (Mo.banc 1998); Cooper Industries, supra, BMW of North America, Inc. v. Gore, supra; Honda Motor Co., Ltd. v. Oberg, supra; Ford v. Wainwright, 477 U.S. 399, 428 (1986) (O'Connor, J., conc'g and diss'g); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Harris v. Blodgett, 853 F. Supp. 1239 (W.D.Wa. 1994); and Wilkins v. Bowersox, 933 F. Supp. 1496 (W.D.Mo. 1996). If the death penalty is reserved for crimes done after cool reflection, then this crime, committed in manifest anger and rage, should not be punished by death. The Court should reverse Andre's conviction of first degree murder and set aside his sentence of death.

**As to Point Two: The trial court plainly erred in allowing the state improperly to inject into the trial, through questions, evidence, comments and argument at guilt phase that: 1) Terri was afraid Andre would return and did not go home until after he turned himself in to the police; 2) the prosecutor did not know of a case more important than this case; 3) as proof of Andre's guilt the jury should consider: Andre - "a convicted felon with priors" - was more likely to be "attacking" than Curtis ("the guy from the museum") or Terri (a mom), Andre had committed prior crimes, Andre's status as a convicted felon was consistent with "the sheer violence of this crime" and Andre was "a convicted killer," (untrue); 4) the jury should consider Andre's failure to pay child support to Terri, his anger towards her, and his stabbing of her as proof Andre deliberated on the matter of killing Curtis, 5) the defense had "gall" to challenge Terri's credibility, she had to live in the house where the crime occurred, and the jury should not return a verdict telling Terri, "a dying woman," that they did not believe her; and 6) people accused of crimes are accused for a reason. This violated Andre's rights to due process of law and a fair trial, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's VI, VIII, and XIV; Mo.Const., Art. I, §17. The evidence, comments and argument were improper and prejudiced Andre in that 1) the possibility of a defendant committing future crimes is speculative, not based on fact, and would prejudice the jury against Andre; 2) the prosecutor's statement that this was the most important case he knew of in St. Louis County implied the prosecutor had**

**knowledge of Andre's guilt - unknown to the jury - corroborating his decision to charge and prosecute Andre, 3) using Andre's prior convictions, bad acts and misconduct to prove guilt was contrary to the law prohibiting proving guilt by propensity, 4) Andre's failure to pay child support and his acts toward Terri were not probative of a deliberated killing of Curtis and violated the rule against using uncharged misconduct to show propensity; and 5) it is against the law to criticize a defendant for exercising his constitutional rights to defend and to confront and cross examine witnesses, and the argument improperly asked the jury to make their decision based on sympathy for Terri who had to live in the house where the crime occurred and became fatally ill with ALS prior to trial; and 6) the argument went beyond the evidence and violated the law and constitution by stating that people accused of crimes are guilty.**

Each of the matters listed above was improper and prejudicial, but defense counsel did not object to any of these matters at trial or include them in the motion for new trial and thus failed to preserve this point for review. Appellant submits that the comments, evidence and arguments so misdirected the jury, influenced the outcome of the trial, and substantially affected his rights as to constitute a manifest injustice. State v. Barriner, 34 S.W.3d 139, 145 (Mo.banc 2000). Accordingly, appellant respectfully requests that the Court review for plain error. Rule 30.20.

1. Irrelevant evidence and argument that Andre would commit future crimes was prejudicial. On direct examination, Terri Cole testified that when she left the hospital after the incident she stayed with her sister "until Mr. Cole turned himself in" (T935).

Terri added that at that time, Andre was living "[a]bout 7 to 10 minutes" from her house (T935-36). At guilt phase, the prosecutor argued that when Officer Vaughn arrived, Terri was frightened and afraid "because she didn't know if [Andre] was coming back" (T1434).

The longstanding Missouri rule is that a prosecutor may not "speculate about future crimes or possible future conduct of an accused." State v. Rath, 46 S.W.2d 604, 611 (Mo.App.S.D. 2001) *citing* State v. Tiedt, 357 Mo. 115, 106 S.W.2d 524, 527-28 (Mo. 1947). The very notion of "future crimes" is incompetent and prejudicial because it injects opinion and speculation instead of fact. State v. Heinrich, 492 S.W.2d 109, 114 (Mo.App.K.C.D. 1973) (reversing for plain error where prosecutor's argument speculated as to possible future acts of defendant). It evokes the jury's fears and emotions. For these reasons, suggesting to the jury that the defendant will commit future crimes is prejudicial, reversible error. Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991).

In the present case, Terri's testimony that she stayed at her sister's house until Andre "turned himself in" was irrelevant, nonprobative evidence that had nothing to do with proving that Andre was guilty. It had everything to do with suggesting that Andre would commit future crimes and with arousing the jury's passion and prejudice against him.

Likewise, the prosecutor's argument - that Terri was afraid because she feared Andre would come back - implied that Andre would commit future crimes. This was argument based on uncharged, speculative acts, and it was prejudicial because, absent corrective action by the trial court, the jury had no way of knowing that the argument and the testimony on which it was based were matters that should not affect their verdict.

2. Arguing that no case was more important told the jury that the prosecutor had compared this case to other cases and had knowledge of facts outside the knowledge of the jury leading him to charge and prosecute Andre.

At the beginning of his argument, the prosecutor told the jury that he could not "think of a case that could be more important to the people of St. Louis County and to the family of Anthony Curtis and to the family of Terri Cole and Terri Cole herself" (T1415). This statement implied that the prosecutor had evaluated the merits of other cases against this case and had decided this case was more important. It implied the prosecutor was aware of facts beyond the record at trial - not known to the jury - that corroborated his decision to charge and prosecute Andre and to seek the death penalty.

Perhaps most egregious, it invited the jury to speculate about why this case was so important. It suggested that there were more compelling reasons for prosecuting Andre than the jury knew. Indeed, upon later hearing the prosecutor argue that Andre was "a convicted killer," the jury may well have believed that Andre had killed before, and that was why no other case was more important "to the people of St. Louis County" (T1415).

Argument implying that the prosecutor has knowledge of facts outside the record has been repeatedly condemned. State v. Storey, 901 S.W.2d 886, 900 (Mo.banc 1995).

"Assertions of fact not proven amount to unsworn testimony by the prosecutor." Id. at 901. Argument of this nature - especially when the trial court takes no corrective action - is manifestly unjust and prejudicial. See, e.g., Newlon v. Armontrout, 885 F.2d 1328, 1339 (8th Cir. 1989). This Court has "held more than once, that it is improper for a prosecuting attorney to express to the jury in argument his belief in the defendant's guilt

in such way that it implies knowledge on his part of facts not in evidence pointing to the defendant's guilt." State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968).

In Storey, the prosecutor told the jury that the crime in that case was "the most brutal slaying" in the county's history. 901 S.W.2d at 900. Quite properly, the record in that case did not include "evidence about the brutality of other murders in the county" and this Court held that "the prosecutor's argument was improper." Id. at 901.

The argument here is improper for the same reasons that the argument in Storey was improper. Here, too, quite properly, the record did not include evidence about the "merits" of this case as compared to all the other cases in St. Louis County. There was no evidence of what made a case in St. Louis County "important" or why the prosecutor had concluded that no other case was more important.

Instead, the jury had the prosecutor's unsworn, unequivocal testimony that no other case ranked above this case in importance. It was a statement unlike any other at trial, and it would have captured the jury's attention. It was information that the jury would mark and treat as proof of Andre's guilt. It was prejudicial because it was a statement that would influence the jury's verdict against Andre.

As this Court said in Storey, "A prosecutor's assertions of personal knowledge ... are "apt to carry much weight against the accused when they should carry none" because the jury is aware of the prosecutor's duty to serve justice, not just win the case. Id. *citing* Berger v. United States, 295 U.S. 78, 88 (1935); Rule 4.3.8. The prosecutor's argument in this case thwarted justice.

3. It was improper and prejudicial for the prosecutor to use Andre's prior convictions

and misconduct as proof that he was guilty of killing Curtis.

The prosecutor argued:

Anthony Curtis, the guy from the museum, just getting a job at Boeing or McDonnell Douglas, eating Taco Bell and watching movies. You'll see the Blockbuster boxes and Taco Bell boxes. They're so absorbed and an attacker, a convicted felon with priors, is sneaking around at night, smashing windows with a jack. Or is it the mom, who is laying on the couch watching a movie and with the man who is eating Taco Bell.

Who do you think is attacking?

(T1421; emphasis added).

This argument told the jury that "a convicted felon with priors" was more likely to be attacking than a "guy from [a] museum" or "a mom." It was a pure propensity argument urging the jury to use Andre's prior convictions to convict him.

We hear about the going back and forth, nothing has been done about it, something should have been done about it. We also heard he pled guilty to violations of an ex parte order. We know he pled guilty to other crimes as well. You can't tell me nothing was done about it. In the end he made a decision, just as I told you in opening statement, he made a serious, deliberate decision before, during and after this happened and he continued to make them all the way up until the time he turned himself in to jail.

(T1476; emphasis added). Again, this was pure propensity argument. The prosecutor told the jury that Andre's prior convictions and the "back and forth" about his failure to pay child support led up to, and culminated in, his "deliberate decision." In other words -

that Andre's prior convictions and bad acts (nonpayment of child support) were proof that he deliberated on killing Curtis.

Ms. Hirzy was talking about how would she be powerful enough to inflict these injuries on a two hundred and thirty pound man. When you can think about the sheer violence of this crime, we know he's a convicted felon, we know he's destroyed evidence and runs, you think he's not going to lie to you. The Defendant is presumed to be innocent. That does not mean he's presumed to be truthful.

(T1477; emphasis added). This argument used Andre's status as a convicted felon as proof that he committed the charged "crime of violence." Again, this was improper propensity argument.

You can take that picture of Terri Cole. It shows her after the attack. She's Marcus' mom. She's Anthony's mom. She's a mom who worked for a health company doing clerical work and he's a convicted killer.

(T1478; emphasis added). **Andre was not a convicted killer!** Although each of the portions of **guilt phase** argument quoted above were improper and prejudicial propensity arguments, this was the worst of all. The prosecutor was not only arguing that Andre had prior convictions, he was arguing that Andre was a "convicted killer" suggesting that Andre had a prior conviction for killing someone. Any juror wondering why the prosecutor had argued that "no case was more important" could well believe that the answer was in these words: what the prosecutor knew, that the jury did not know, was that Andre had previously been convicted of killing someone.

In each of these instances, the prosecutor used Andre's prior convictions to argue that

he was the guilty party. The fact that in one instance he also used the convictions to argue that Andre was not truthful<sup>6</sup> does not mitigate the prejudice from the repeated, improper propensity arguments: that because Andre had prior convictions, he was likely to be the guilty person in this case.

The prosecutor's use of Andre's prior convictions and misconduct violated the "well-settled" law "that evidence of uncharged misconduct is inadmissible if it is offered for the purpose of showing a defendant's propensity to commit crimes. State v. Driscoll, No. SC82402 (Mo.banc September 11, 2001) slip op. at 8, 2001 WL 1035197 \*4 *citing* State v. Bernard, 849 S.W.2d 10, 13 (Mo.banc 1993).

However, such evidence may be admitted if it is logically and legally relevant to establish the defendant's guilt of the crime charged. *Id.* Evidence is logically relevant if "it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial," but it is legally relevant only if "its probative value outweighs its prejudicial effect." *Id.* Ultimately, however, the admission or exclusion of evidence is a matter within the sound discretion of the trial court. *Id.*

State v. Driscoll, slip op. at 4.

"Evidence of prior uncharged misconduct generally has a legitimate tendency to prove the specific crime charged when it tends to establish motive, intent, the absence of

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<sup>6</sup> "[W]e know he's a convicted felon, we know he's destroyed evidence and runs, you think he's not going to lie to you" (T1477).

mistake or accident, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial." State v. Barriner, *supra*, 34 S.W.3d at 145 *citing* State v. Clover, 924 S.W.2d 853, 855 (Mo.banc 1996). This list is not exhaustive. State v. Barriner, 34 S.W.3d at 145 *citing* State v. Bernard, 849 S.W.2d at 14.

The rule against using uncharged crimes and misconduct to show propensity does not cease to function because the defendant testifies. State v. Carter, 996 S.W.2d 141 (Mo.App.W.D. 1999). State v. Jacobs, 939 S.W.2d 7 (Mo.App.WD. 1997) illustrates that although a prior conviction may be admissible and properly used for a legitimate purpose, it may be erroneous to improperly use it for propensity. In Jacobs, the Western District held that the defendant's prior kidnapping conviction, involving the same victim was admissible to impeach testifying defendant. *Id.* at 11. But the Court also held that it was improper for the prosecutor to use the prior conviction for propensity and condemned the prosecutor's argument that "he did this, and he's been doing it. He has a prior conviction for this." *Id.*

In the present case, the prosecutor repeatedly used Andre's prior convictions and misconduct to support lengthy propensity arguments that because Andre had prior convictions, he was guilty of the charged offense of killing Curtis (T1421, 1476, 1477, 1478). It is inconceivable that these arguments escaped notice and did not influence the jury.

In determining the effect of the erroneous use of prior, uncharged bad acts and convictions, the court considers the following factors: the similarity of the uncharged acts and convictions to the charged offense, whether the trial court took any curative

action, the amount of the evidence involved and the extent to which the state used and referred to it, and whether the prosecutor's references to the uncharged offenses were inadvertent. State v. Barriner, supra, 34 S.W.3d at 150-52. When the prosecutor's use of Andre's prior convictions and bad acts is evaluated according to the foregoing factors, the following emerges:

Andre's prior convictions were similar to the charged offenses. Two were felonies for the unlawful use of a weapon (T1346-47). No details of these felony convictions were admitted, and the jury was free to speculate about the manner in which Andre unlawfully used the weapons. One misdemeanor conviction was for "violation of an adult abuse order" (T1347). Again, the jury was unrestricted in imagining what Andre had done in abusing another adult.

At no time during the trial - neither when evidence of Andre's prior convictions was admitted nor during the prosecutor's closing argument - did the court instruct the jury to restrict or limit their use of the prior convictions. Nor did the trial court admonish the prosecutor when, multiple times in his closing argument, he used Andre's convictions to show propensity to commit the charged offenses (T1421, 1476, 1477, 1478). Needless to say, coming as they did in the prosecutor's argument, the references to Andre's convictions were not inadvertent. The prosecutor questioned Andre about them at trial and deliberately invoked them numerous times during closing argument as proof of his guilt. This was manifest, not harmless, error and it influenced the outcome of the trial.

4. Andre's failure to pay child support to Terri, his anger towards her, and his stabbing of her was not probative evidence that Andre deliberated on the matter of killing Curtis

and the prosecutor's argument that these things showed deliberation was improper.

Throughout his closing argument, the prosecutor told the jury that Andre's anger at Terri over the child support and all of Andre's acts and anger toward Terri proved that his killing of Curtis was deliberated. This argument is extensive, so appellant has attached the closing argument as an appendix to his brief. Representative quotes from the argument are excerpted below:

What he did is, oh, so deliberate before, during and after the fact. His threats that were made before this happened about the child support, combined with the fact that he had forty-five hundred dollars, fifty-five hundred dollars in his bank account, indicate that he did not want to pay child support. He didn't want to pay child support. He even told you it bothered him. He didn't want to pay child support.

Now, you look at him and I look at him sitting there. I want you to think about the deliberation that goes along with that. He didn't want to have to pay his child support. He didn't think he would have to abide by that wage assignment. The fact that Terri Cole was just sending out the wage assignment like she was sitting down at her kitchen table, I think I'll draft a wage assignment, it went through the justice system...

(T1417).

As I said before, if it wasn't enough when he put the jack in the car and probably the gun and his knife, he had been driving by the house, looking at the house before, if that's not enough, he gets -- he makes a call to the house. You

can see he's deliberating. He's making a conscious decision. He's reflecting on what he's going to do. He's reflecting on the fact that he's going to call Terri Cole. He dials her number. After he does that, he takes the jack with him that he's had in the car all day. He's reflecting. As he gets out of his car, he walks to the fence, sets the jack down on the outside of the fence before he hops over. That's cool reflection.

(T1419-20).

[Andre] walked towards Anthony [Curtis] and when the door was open and Anthony [Curtis] told him he could leave, he attacked him and that's deliberation before the fact. If that's not enough for you, him sneaking around, him making threats and not paying what he's supposed to pay when he's got the money, if that's not enough before the fact and those steps towards Anthony Curtis, well then let's see what happens next....

(T1422).

Anthony Curtis' body is the picture of deliberation and that's what that instruction is all about, ladies and gentlemen, he stabbed over and over and over. If that's not enough for you, let's talk about deliberation after the fact.

Deliberation after the fact, after he's done that to [Curtis] and now [Curtis has] got holes in both of his lungs, his aorta is severed and he's just trying to breath. You heard Terri Cole. After he attacks Terri Cole he gets her down on the floor. He doesn't leave her until she's on the floor gasping for air and he's stabbing her in the stomach and then he leaves her.

(T1424).

His exact words were: Anthony looked like he was in pain. Well, he knows that, he knows that for a fact, I guarantee you. It bothered me, he says, it bothered me. He was right about that. It sure did. It bothered him to pay the child support. He had forty-five hundred dollars in his bank account, fifty-five hundred dollars, excuse me, and he wouldn't pay three hundred twenty dollars a month child support. Apparently it did bother him. I'll kill that bitch before I pay another dime. It apparently bothered him. When you think about what Gene Kennedy and Peter Ruffino said -- they said he said he'd kill her....

(T1435).

Arguing that Andre's anger at Terri and at having to pay child support showed that he deliberated on killing Curtis was improper, first, because it misstated the law as to deliberation. "Misstatements of the law are impermissible during closing arguments, and a duty rests upon the court to restrain such arguments." State v. Graham, 916 S.W.2d 434, 436 (Mo.App.W.D. 1996) (citing State v. Blakeburn, 859 S.S.2d 170, 174 (Mo.App.W.D. 1993) ("[A] positive and absolute duty rests upon the trial judge to restrain such arguments").

The argument was contrary to the law because "[d]eliberation" requires cool reflection on taking the life of a specific person.' State v. McDonald, 661 S.W.2d 497, 501 (Mo. 1983) (emphasis added). Here, over and over, the prosecutor used Andre's seething anger at Terri to convince the jury that his killing of Curtis was deliberated.

Second, the argument was improper because it asked the jury to use evidence of bad

character - Andre's failure to pay child support - as proof of guilt. Specifically, it asked the jury to use this evidence as proof that Andre deliberated on killing Curtis. Examples of the prosecutor's improper "bad character" argument are quoted above (T1417, 1422, 1435). "Reputation or character testimony is admissible only when a defendant has put his own reputation in issue." State v. Hernandez, 815 S.W.2d 67, 70 (Mo.App., S.D. 1991) (citations omitted).

In the present case, it was the state, not the defense, that introduced the child support evidence. For the state to then use this evidence to portray Andre as being of bad character and having committed bad acts (nonpayment of child support) and, ultimately, as proof that Andre deliberated, was improper. It was, once again, a violation of the rule against using bad acts for propensity. The repeated hammering of this theme - Andre is a bad character who commits bad acts of not paying child support and this is evidence that he deliberated - could not help but prejudice Andre.

5. Criticizing Andre for exercising his constitutional rights to defend and to confront and cross examine witnesses - by telling the jury that Andre had "gall" for cross examining Terri and by asking the jury to make their decision based on sympathy for Terri who had become fatally ill with ALS prior to trial - was improper and prejudicial.

The prosecutor argued: "Not only was Terri Cole attacked in her house, a friend murdered, she has to raise her boys in that same house where he murdered a friend and tried to kill her and wouldn't talk about that, not only did that happen, she had to go through a laparotomy and everything else you heard about and they have the gall to come in and accuse her." (T1465-66). "Don't tell Terri Cole, a dying woman, by your verdict

that she is a liar" (T1480).

The fundamental rights to due process of law, to trial by jury and to present a defense are meaningless if the state may, in front of the jury, criticize a defendant for exercising those rights. "No prosecutor may employ language which ... limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990); see also, Cunningham v. Zant, supra, 928 F.2d at 1019-20 (although not raised on appeal, the 11th Circuit *sua sponte* denounced the prosecutor's closing argument that the defendant was "not entitled to his Sixth Amendment rights" and that he was "'offended'" by the defendant's exercise of the right to a jury trial); Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995).

In the present case, in denouncing Andre's cross examination and defense of Terri, the prosecutor overstepped the bounds of vigorous advocacy. Fair argument would have gone no further than pointing out whatever weaknesses there may have been in the defense. Accusing Andre of improprieties in presenting a vigorous defense was prejudicial argument.

Sympathy is not a proper factor for the jury to consider in deciding punishment. State v. Clemmons, 753 S.W.2d 901, 910 (Mo.banc 1988). The Eighth Amendment precludes the sentencer in a death penalty case from exercising "unbridled discretion." California v. Brown, 479 U.S. 538, 541 (1987) (citing Gregg v. Georgia, 428 U.S. 153 (1976)). In determining sentence, jurors in death penalty cases should confine their considerations to "record evidence" and not rely "on extraneous emotional factors..." 479 U.S. at 544.

Beyond dispute, Terri's circumstances were somber. But asking the jury to make

their decision based on her fatal diagnosis of ALS - that she was "a dying woman" - was a calculated, unjustifiable ploy for a verdict rendered out of emotion and pity, and it was reversible error.

6. The argument went beyond the evidence and violated the law and constitution by stating that people accused of crimes are guilty. In her closing argument, defense counsel responded to arguments made by the prosecutor that Andre was "a sneak" and a liar and his testimony was lies (see, e.g., T1416, 1421, 1427, 1435):

So we go back now to my client, who is a sneak. He's not stupid. He doesn't have to testify. We went into his priors on voir dire. He could have chosen not to say a word. He didn't have to tell his side of the story. He didn't, and nobody could say anything about that.<sup>7</sup> We talked about that on voir dire too, but he took the stand and he told you his side of the story. Now, the State wants you to think it's ludicrous because he's been charged, he's therefore guilty.

[Prosecutor]: Object to that, your Honor. I have never said that. That misstates the law, misstates what I told the jury during the entire jury selection in the case.

THE COURT: Rephrase it. I'll sustain that.

[Defense counsel]: He's charged because the witnesses come in here and they say this...

(T1450-51).

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<sup>7</sup> Andre did testify; the inference is that counsel meant to convey that "if" Andre had not testified, nobody could have said anything about it.

In rebuttal, the prosecutor argued:

When she says it's ludicrous, maybe it is to you and me. To him it's deliberate. He's not an imbecile but he's not a rocket scientist. People sitting in that chair (indicating), ladies and gentlemen, are usually there for a reason...

(T1474).

Again, the prosecutor went too far. Having already objected, been sustained, and the Court having admonished defense counsel, the prosecutor was not content to limit his argument to the evidence. The prosecutor went beyond the evidence to tell the jury that defendants accused of crimes ("people sitting in that chair...") are charged because they are guilty ("are usually there for a reason...") (T1474).

There are limits as to how far the prosecutor can go in retaliation. It is improper for the prosecutor to express his belief of a defendant's guilt to the jury in such a way that it implies knowledge on his part of facts not in evidence pointing to the Defendant's guilt.

State v. Evans, 820 S.W.2d 545, 547 (Mo.App.E.D. 1991), citation omitted. "The problem with such an argument is that it does not seek a verdict based on proof of guilt of the accused, but instead rests as an expression of confidence in a prosecutorial system which does not bring innocent persons to trial." Id. at 547-48, citation omitted.

Arguments similar to the prosecutor's argument in the present case have consistently been condemned because, as the Court in Evans put it: "This appeal to the jury is a pernicious attack upon fundamental concepts of the criminal justice system and exceeds the bounds of legitimate comment on the evidence." Id. at 548, citation omitted; see e.g.,

State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968); State v. Smith, 626 S.W.2d 669 (Mo.App.E.D. 1981); State v. Bramlett, 647 S.W.2d 820 (Mo.App.W.D. 1983).

In the present case, going beyond the evidence and asking the jury to find Andre guilty by relying on the prosecutor's own knowledge and assurances that Andre was guilty was a misuse of the prosecutor's quasi-judicial position. State v. Storey, *supra*. This argument violated long-standing rules of advocacy and the obligation of the prosecutor to ensure that the defendant gets a fair trial. State v. Allen, 363 Mo. 467, 251 S.W.2d 659, 662 (Mo. 1952).

Given the prosecutor's quasi-judicial position and status in the eyes of the jury, it is doubtful that even a curative instruction would have eliminated the error and prevented prejudice. *Id.* And there was no curative instruction.

As the foregoing portion of this argument demonstrates, the prosecutor's closing argument at guilt phase was replete with improper, prejudicial argument violating fundamental constitutional principles. It is never easy to quantify the prejudicial impact of a prosecutor's argument, but it is certain in this case that the improper comments were not of the "brief" or "passing" variety. They were repeated and deliberate.

In these circumstances, the fairness of appellant's trial is substantially in question, and the reliability of the verdict in doubt. It cannot be said that the improper argument did not influence the outcome of the trial. The constitutional guarantees of due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment demand greater confidence in the verdict - particularly in a death penalty case. U.S.Const., Amend's XIV, VI, and VIII. For these reasons, and for all the foregoing reasons, the cause must be

reversed and remanded for a new trial.

**As to Point Three: The trial court plainly erred and exceeded its jurisdiction in sentencing Andre Cole to death. This violated his rights to due process of law and freedom from cruel and unusual punishment, U.S.Const., Amend's XIV and VIII. Missouri's statutes authorize a sentence of death only upon a finding of at least one of the seventeen statutory aggravating circumstances: alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase the punishment for first degree murder from life imprisonment without probation or parole to death. As the indictment and information in the present case failed to plead any aggravating circumstances, the offense actually charged against Andre was unaggravated first degree murder for which the only authorized sentence is life imprisonment without probation or parole. The trial court therefore lacked jurisdiction to sentence Andre to death, and he was prejudiced because he was subjected to a sentence of death - a sentence not authorized for the offense of which he was convicted. The judgment must be reversed and Andre's sentence vacated.**

Appellant acknowledges that this point has not been preserved for the Court's review, and, as he believes he has been prejudiced by being subjected to an unauthorized sentence of death, he respectfully requests that the Court review for plain error. Rule 30.20; State v. Whardo, 859 S.W.2d 138 (Mo.banc 1993); State v. Parkhurst, 845 S.W.2d 31, 35 (Mo.banc 1992); Drennen v. State, 906 S.W.2d 880, 882 (Mo.App.E.D.

1995) citing State v. Anderson, 844 S.W.2d 40, 41 n.2 (Mo.App.E.D. 1992) ("An unauthorized sentence affects substantial rights and results in manifest injustice, thus justifying plain error review).

Discussion: In Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that "under the Fourteenth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime **must be charged in an indictment**, submitted to a jury, and proven beyond a reasonable doubt." Id. at 476 citing Jones v. United States, 526 U.S. 227, 243, n. 6 (1999) (emphasis added).

Missouri has expressly provided by statute that life imprisonment is the maximum sentence that may be imposed unless the trier finds at least one statutory aggravating circumstance beyond a reasonable doubt. Sec. 565.030.4(1), RSMo. (2000) ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032...."); see, e.g., State v. Taylor, 18 S.W.3d 366, 378 n. 18 (Mo.banc 2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); State v. Shaw, 636 S.W.2d 667, 675 (Mo.banc 1982) quoting State v. Bolder, 635 S.W.2d 673, 683 (Mo.banc 1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence"). Missouri's 17 statutory aggravating circumstances function as facts that increase "the

maximum penalty for a crime" - first degree murder - from life imprisonment without the possibility of probation or parole to the ultimate penalty of death. Id.

Thus, although §565.020, RSMo. ostensibly establishes a single offense of first degree murder for which the punishment is either life without probation or parole or death, the combined effect of §§565.020 and 565.030.4 is to establish two kinds of first degree murders in Missouri. One is "unenanced" first degree murder, established by proving a killing done knowingly and with deliberation, for which the punishment is life without probation or parole. The second is "aggravated" or "capital" first degree murder which requires proof beyond a reasonable doubt of the additional element of at least one aggravating circumstance listed in section 565.032.2<sup>8</sup> and for which the authorized

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<sup>8</sup> Missouri's 17 statutory aggravating circumstances provide 17 alternate (but not mutually exclusive) elements of the offense of aggravated first degree murder. They do not create 17 distinct offenses but different or alternate methods by which a defendant may commit the single offense of aggravated first degree murder.

The use of alternate elements that provide different methods of committing a single offense occurs throughout Missouri's criminal code. See, e.g., State v. Lee, 841 S.W.2d 648 (Mo.banc 1992) (569.020, RSMo 1986, "provides that a person can commit robbery in the first degree by one of several different methods"); State v. Davison, 46 S.W.3d 68, 76 (Mo.App.W.D. 2001) ("This statute creates the single crime of "receiving stolen property," which may be committed in different ways"); State v. Barber, 37 S.W.3d 400, 403-04 (Mo.App.E.D. 2001) (different means of committing offense of unlawful use of a

punishment increases to death.

The indictment initially filed against Andre charged him in count one with murder in the first degree in that he "after deliberation, knowingly caused the death of Anthony Curtis by stabbing him" (LF21). No aggravating circumstances were pled in the initial indictment (LF21-23), the superceding indictment (LF93-95) or the substitute information in lieu of indictment (LF105-107).

The failure to include in the indictment and information any aggravating circumstances means that Andre was charged with and convicted of "simple" first degree murder - an offense punishable only by life imprisonment without probation or parole. As the death penalty is authorized only for the offense of "aggravated first degree murder" - a crime of which Andre was neither charged nor convicted - the judge had no authority or jurisdiction to sentence Andre to death. The sentence of death imposed upon him is thus unauthorized and violates his rights to due process of law and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII. The judgment must be reversed and Andre's sentence vacated.

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weapon); State v. Pride, 1 S.W.3d 494, 501 (Mo.App.W.D. 1999) ("Forgery is a crime which may be committed in several ways"); State v. Jones, 892 S.W.2d 737, 738 (Mo.App.W.D. 1994) ("a person may commit the crime of third-degree assault of a law enforcement officer in five different ways"); State v. Burkemper, 882 S.W.2d 193, 196 (Mo.App.E.D. 1994) (two different ways to commit crime of trespass).

**As to Point Four: The trial court erred in overruling defendant's objections, submitting Instruction No. 18 to the jury, and sentencing Andre to death. This violated Andre's rights to due process of law, fair trial by a properly instructed jury, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI and VIII. Instruction 18 included an aggravating circumstance drawn from §565.032.2(7): whether the murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind based on Andre's "repeated and excessive acts of physical abuse upon Anthony Curtis." This language was unconstitutionally vague in that it failed to narrow the class of murderers eligible for the death penalty and provide a means of distinguishing those murders for which the death penalty is appropriate from those in which it is not. Without clarification or definition of the terms "excessive" and "repeated," it is not possible to determine whether the murder in this case involved depravity of mind; the jury had no guidance and was free to interpret both "repeated" and "excessive" to mean one act or anything more than a single act. As argued by the prosecutor, the jury could have interpreted "repeated and excessive" to be established by a finding of a "deliberated" killing. Because the state relied heavily on this aggravating circumstance in arguing for the death penalty, it cannot be said that submission of this aggravating circumstance was harmless. The sentence of death must be set aside.**

A meaningful basis must exist for distinguishing the few cases where death is appropriately imposed from the many where it is not. Furman v. Georgia, 408 U.S. 238,

313 (1972). A statutory aggravator that fails to provide adequate guidance for making this distinction is unconstitutional. Maynard v. Cartwright, 486 U.S. 356, 365 (1988).

In the present case, overruling defense objections, the trial court submitted Instruction 18, MAI-CR3d 313.40:

In determining the punishment to be assessed under Count I against the defendant for the murder of Anthony Curtis, you must first unanimously determine whether one or more of the following statutory aggravating circumstance[s] exists:

1. Whether the murder of Anthony Curtis was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Terri Cole. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Anthony Curtis 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 Anthony Curtis and the killing was therefore unreasonably brutal.

3. Whether the murder of Anthony Curtis was committed while the defendant was engaged in the perpetration of burglary.

A person commits the crime of burglary when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing assault.

A person commits the crime of assault if he attempts to or knowingly causes or

attempts to cause physical injury to another person.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt.

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 exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(LF179-80).

The "depravity of mind" aggravator comprising paragraph 2 in Instruction 18 has twice before been subject to a "limiting construction" by this Court in an attempt to save it from unconstitutional vagueness. In State v. Preston, 673 S.W.2d 1 (Mo.banc 1984), to steer clear of the "standardless sentencing discretion" invalidating Georgia's "depravity" aggravator in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court declared that it,

while not expressly adopting a precise definition, has noted the following factors to be considered in finding "depravity of mind": mental state of defendant, infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime.

673 S.W.2d at 11.

Four years later, addressing a challenge based on Maynard v. Cartwright that the depravity aggravator had "not been given a sufficiently narrow construction to avoid arbitrary and capricious imposition of death sentences as required by" Godfrey, in State v. Griffin, 756 S.W.2d 475 (Mo.banc 1988), the Court "expressly" held that "at least one of the Preston factors must be present before a finding of depravity of mind will be found to be supported by the evidence." Id at 489-90. The Court then limited "brutality" to murders "involv[ing] serious physical abuse." Id. at 490. "Serious physical abuse" was not defined, but the Court said that "evidence that the murder victim or other victims at the murder scene were beaten or evidence that numerous wounds were inflicted upon a victim will support the aggravating circumstance." Id.

But even after Godfrey v. Georgia and Maynard v. Cartwright, and Preston and Griffin, the depravity aggravating circumstance remains too broad. It could still apply to any murder and is unconstitutionally vague.

MAI-CR3d 313.40 currently instructs that a murder must be "unreasonably brutal" meaning that "repeated and excessive acts of physical abuse" are committed upon the murder victim to find the "depravity" aggravator. But "repeated" and "excessive" are nowhere described, limited or defined. Nothing guides the jury in determining what acts of physical abuse, and how much physical abuse, are sufficient to "find" this aggravating circumstance. The jury is not told what is meant by "excessive" - whether "excessive" acts of physical abuse include or exclude those acts inflicted to commit the murder; whether "repeated" means anything greater than one; whether multiple injuries, alone, is

sufficient to find "excessive" physical abuse; whether "excessive" means something different than "repeated," and if so, what; 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 a troublesome guideline because even "repeated" acts of violence toward the victim, such as multiple gunshot injuries or multiple stab wounds, do not necessarily prove even deliberation. See, e.g., State v. Samuels, 965 S.W.2d 913, 923 (Mo.App.W.D. 1998) ("victim was killed by a semi-automatic pistol which fired rapidly. All seven bullets could have been fired in the span of three seconds. Multiple gunshot wounds do not conclusively establish deliberation and thus guarantee that a jury will convict defendant of first degree murder.").

If an act - or acts - will not necessarily establish an element of the offense of first degree murder, how can such act or acts serve to distinguish an unaggravated murder from an aggravated murder? At penalty phase, the prosecutor made this very argument: that having found a deliberated killing, the jury had already found the depravity aggravator (T1637, 1641).

As noted, "excessive" and "repeated" are not defined or described. These "guidelines" 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 Butler, the Court said that "[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.

As an objective guideline to distinguish the few cases truly deserving of the death penalty from the many that are not, "depravity" covers too broad a spectrum. The "one or two gunshot depravity" in Butler is not comparable to the "depravity" in State v. Goodwin, 43 S.W.3d 805, 816 (Mo.banc 2001) ("defendant pushed a sixty-two year old woman down the stairs to the concrete floor below... followed and watched her ... took a hammer and struck the woman's head three times, fracturing her skull). Nor does a single gunshot - or two gunshots - to the head seem to be "excessive" or "repeated" when compared with such cases as State v. Johns, 34 S.W.2d 93, 100, 115 (Mo.banc 2000) (victim shot in wrist, belly, side, upper right leg, lower right leg, right side of his body, left side of the back of his head), State v. Brown, 998 S.W.2d 531, 552 (Mo.banc 1999) (victim was strangled with an electrical cord and stabbed with a large butcher knife), and State v. Roberts, 948 S.W.2d 577, 606-07 (Mo.banc 1997) (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) (citations omitted).

The depravity aggravator - at least when submitted in its "repeated" and excessive" form as in the present case - fails to give sufficient guidance. The meaning of these terms is uncertain, and unless clarified, could apply to any murder. See, Butler, supra.

For the foregoing reasons, the depravity aggravator must be held unconstitutionally vague. Further, because the jury found only two aggravating circumstances, depravity and burglary (LF190), and because the state's closing argument emphasized the depravity aggravating circumstance (T1637, 1640-41, 1653), it is not possible in this case to conclude that the result would have been the same had the depravity aggravating circumstance not been submitted. Cf., State v. Johnson, 968 S.W.2d 686, 700-02 (Mo.banc 1998). Accordingly, Andre'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.

**As to Point Five: The trial court clearly erred in overruling Andre Cole's Batson motion, failing to take the required step of evaluating the plausibility of the prosecutor's explanation for peremptorily striking black venireman Vernard Chambers, and upholding this peremptory strike. This violated Andre's and the excluded jurors' rights to due process and equal protection of law, fair jury trial, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. The trial court failed to evaluate the credibility of the state's reasons for striking Mr. Chambers - that he was divorced, was weak on death and his cousin was "doing life for a murder in Michigan. These reasons were**

**pretexts for removing Mr. Chambers because of his race as shown by the fact that the prosecutor never asked whether any of the "currently married" panelists ever had been divorced, never inquired whether being divorced would affect the panelists' ability to serve on the jury, the record does not support the prosecutor's claim that he struck Mr. Chambers because he wasn't sure about death, and not only did Mr. Chambers say that his cousin doing time in prison for murder "got what he deserved," the prosecutor did not strike similarly situated white juror Parsons whose nephew was in prison in Florida for homicide. The equal protection rights of Andre and excluded juror Vernard Chambers were violated by the prosecutor's racially motivated strike and by the trial court's failure to correctly discharge its duties under Batson. The cause must be reversed and remanded for an evidentiary hearing at which the trial court will evaluate the plausibility of the prosecutor's explanations for striking Mr. Chambers.**

At the conclusion of strikes for cause, after the state made its peremptory strikes, defense counsel moved "to quash the entire jury panel" because the state had used three of its nine peremptory strikes<sup>9</sup> to remove the three black jurors remaining on the venire (T566).

The prosecutor's use of his peremptory strikes left the defendant, a black man, to be

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<sup>9</sup> Defense counsel initially misspoke saying the state had removed "three out of nine black jurors" (T566). Defense counsel subsequently clarified that as a result of the state's using three of its nine strikes, no black jurors remained (T573-74; LF198).

tried for first degree murder before an all-white jury in county which, according to the 2,000 census,<sup>10</sup> was almost 20% black (T574, LF199). The trial court overruled the motion and defense counsel included this ruling in the motion for new trial (T573-74; LF199).

Before defense strikes, the trial court entertained a "challenge based on Batson v. Kentucky"<sup>11</sup> to the state's removal of three black jurors (T566). Appellant here challenges the prosecutor's removal of Mr. Vernard Chambers. The prosecutor gave reasons for excluding Mr. Chambers:

[T]he State's primary concern with Mr. Chambers is that he is divorced. And because of the facts and the dynamics of [the] case -- the record should reflect the State expects that the evidence that's introduced will show that Mr. Cole was divorced from his wife Terri Cole. There was a great deal of animosity between the two of them. I'm concerned that someone who is similarly situated to Mr. Cole in that he's divorced may be sympathetic to Mr. Cole and may not be sympathetic to Terri Cole, the victim in this case.

My primary concern is I think sometimes when people are divorced there is a great

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<sup>10</sup> According to the "Missouri Demographic Profile #1: 2000 Census, St. Louis County," Missouri Census Data Center, census data showed that black citizens comprised approximately 19% of St. Louis County residents. Appellant respectfully requests that the Court take judicial notice of this census data.

<sup>11</sup> 476 U.S. 79 (1986).

deal of animosity that flows back and forth between the two parties. And I'm afraid Mr. Chambers would sympathize with the Defendant here and maybe give Terri Cole a degree of scrutiny that I'm not sure I want to be given to her in this case.

In addition to that, Your Honor, with regard to the death penalty he stated that he was not opposed to the death penalty, but not sure if he could do it or not. Furthermore, he has a cousin doing life in prison for a murder in Michigan.

I will say this: I would like the record to reflect that Mr. Chambers -- I like Mr. Chambers. He was a juror in a case that I tried in Division 11, State versus Leo McLaughlin.<sup>12</sup> He was a juror where a young man was charged with tampering with a victim in a felony murder prosecution or tampering with a witness, I should say, a Class C felony. And he was part of a jury that returned a verdict sentencing that Defendant, a young man, to 4 years -- or they recommended a sentence of 4 years in the Missouri Department of Corrections and a fine.

I found that to be a good State's oriented jury. But I'm very concerned about the fact that Mr. Chambers is divorced. And that's why I'm striking him.

THE COURT: Any response?

Ms. Hirzy [Defense Counsel]: Well, there were several other. There was Mr. -- what was his name? There was another white gentleman who was paying child support in this case. There was also Mr. Tallent who was never married. He was a white male sitting over here in the jury box. They were not stricken by the State.

The fact that he is divorced and black I challenge it and object to it, and I think

there's a denial of equal protection, due process of law, right to a fair trial, right to an impartial jury, and a right to a cross section of the community. Denial of all.

THE COURT: All your motions and objections are overruled and denied. I find that the State's reasons for striking Mr. Chambers, old No. 40 and new No. 23, are race neutral reasons. Not done for the purpose of biasness (sic) on the part of his race. (T569-71).

The Equal Protection Clause of the Fourteenth Amendment prohibits the prosecutor from using peremptory strikes to eliminate jurors for reasons of race. Batson v. Kentucky, *supra*. Excluding even a single juror for racial reasons violates the Equal Protection Clause. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 142 n.13 (1994).

Acknowledging the diversity of voir dire practices, the Court in Batson left it to the states "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's [peremptory] challenges." 476 U.S. at 99. Missouri's procedure requires the prosecutor to provide explanations for the state's peremptory strikes when timely challenged by the defense. State v. Parker, 836 S.W.2d 930, 940 (Mo.banc 1992). If the prosecutor articulates a facially race-neutral explanation for the challenged strike, the defense, still bearing the burden of proof, must rebut the explanation to show that it is merely a pretext for what is in reality a racially motivated strike. Purkett v. Elem, 514 U.S. 765, 767-68 (1995); Parker, *supra*, 836 S.W.2d at 939.

The Batson hearing does not stop simply because the prosecution proffers a facially race neutral explanation. "If a race-neutral explanation is tendered, the trial court must

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<sup>12</sup> The prosecutor's record does not reflect the race of defendant McLaughlin.

then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." Purkett v. Elem, 514 U.S. at 767. At this point, the trial court must evaluate the explanation, even if superficially race-neutral. Id. at 767-68. In making this determination, "[t]he chief consideration should be the plausibility of the prosecutor's explanations" in the context of the "facts and circumstances surrounding the case." Parker, 836 S.W.2d at 939.

Various considerations enter into the evaluation of proffered explanations. Long before Purkett v. Elem, Missouri employed a three-step procedure requiring prosecutors to provide explanations for their strikes and the trial court to evaluate those explanations. State v. Parker, 836 S.W.2d at 937-38; State v. Antwine, 743 S.W.2d 51, 64 (Mo.banc 1987). Likewise, the Courts of this state have consistently recognized that counsel's failure to inquire about matters later given as reasons for exercising a peremptory strike is a circumstance that should be considered in evaluating the credibility of the proffered explanation. See, e.g., State v. Parker, 836 S.W.2d at 940; State v. Antwine, 743 S.W.2d at 64-65 *citing* State v. Butler, 731 S.W.2d 265, 269 (Mo.App.W.D. 1987); State v. Lopez, 898 S.W.2d 563, 569 (Mo.App.W.D. 1998); State v. Payton, 747 S.W.2d 290, 292 (Mo.App.E.D. 1988). The failure to exclude similarly situated jurors demonstrates that the proffered explanation is pretextual. State v. Price, 763 S.W.2d 286 (Mo.App.E.D. 1989). Courts must take into account that "identical" jurors do not exist, and the term "similarly situated" should not be taken to mean identical. See, Coulter v. Gilmore, 155 F.3d 912 (7th Cir. 1998); Turner v. Marshall, 121 F.3d 1248, 1252 (9th Cir. 1997) (court should consider treatment of jurors of "comparable circumstances").

Explanations not supported by the record will not withstand a Batson challenge. Ford v. Norris, 67 F.3d 162, 168-69 (8th Cir. 1995); State v. Butler, supra. An invalid, racially-motivated explanation for striking a juror casts doubt on the credibility of seemingly race-neutral explanations. United States v. Chinchilla, 874 F.2d 695, 699 (9th Cir. 1989); Moore v. State, 811 S.W.2d 197 (Tex.App. 1991).

In the present case, as to the prosecutor's first explanation, his presumption that because Mr. Chambers and Andre Cole were both divorced they must be similarly situated is telling. First, it is a presumption - not a fact - because the prosecutor never bothered to ask Mr. Chambers about his divorce. Did the prosecutor presume that because he was a black male, Mr. Chambers' circumstances were likely to be similar to those of the black male defendant?

Second, because the prosecutor never bothered to ask, it is entirely possible that Mr. Chambers' circumstances resembled Terri Cole's rather than Andre's: that Mr. Chambers' spouse had been angry and that Mr. Chambers' experiences more closely resembled Terri Cole's than Andre Cole's. The record does not refute the likelihood that Mr. Chambers' divorce had been perfectly amicable, and that neither he nor his spouse had been angry or obtained an order of protection.

Third, because the prosecutor never bothered to ask, it is very likely that jurors who raised their hands when the prosecutor asked people who were married to "just raise your hand" (T445) had once been divorced but at the time of trial had remarried. Particularly because the prosecutor's follow-up question was, "Now, I need to ask the question is there anybody who's currently divorced on the panel now?" (emphasis added) (T446) it

is possible that the "married" panelists included people who previously had been divorced. As to those jurors, the prosecutor's failure to inquire revealed nothing of their circumstances but, at the same time, revealed much about the prosecutor's lack of concern as to that circumstance. State v. Lopez, supra.

With regard to other circumstances that would have tended to cause prospective jurors to sympathize with Terri Cole, per the prosecutor's questions, the record shows only Mr. Alexander as "currently paying child support or who did pay child support at any time" (T447). In fact, the prosecutor's utter failure to inquire as to whether any of the panel members had prior experience with orders of protection reveals that he was content to presume that solely on the basis of a divorce, a black male panel member was likely to be sympathetic to the black male defendant.

The prosecutor's second reason was that Mr. Chambers had to do with the death penalty. Significantly, the prosecutor did not attempt to claim that Mr. Chambers was "weak" on death (T570). The most the prosecutor could say was that Mr. Chambers had said he "was not sure if he could do it or not" (T570).

What is important about this voir dire response was that the prosecutor had asked Mr. Chambers about "both punishments for Murder in the First Degree."

[Prosecutor]: Could you consider -- give realistic consideration to both punishments for Murder in the First Degree? In the event the Defendant is found guilty, could you consider imposing a death sentence and a sentence of life without parole?

[Mr. Chambers]: I honestly don't know.

[Prosecutor]: All right.

[Mr. Chambers]: I'm not philosophically, religiously, or anything else, opposed to the death penalty; but I've never been in a position where I had to make that kind of decision and I don't know whether I could or not.

(T192). Further inquiry by the prosecutor elicited that Mr. Chambers understood, was comfortable with, and would follow the reasonable doubt standard (T193). Significantly, when asked about whether he could sign a death verdict, Mr. Chambers did not hesitate: "If [it's] unanimous, I'm foreperson, I would sign it" (T194).

In response to further questioning, Mr. Chambers stated that "[i]t absolutely would be" a hard decision (T 194). When asked for a second time if he "could give realistic consideration to both [punishments]," Mr. Chambers said:

I think I can. But if you're asking me if I'm absolutely positive or what's gonna happen -- and that's also making an assumption that the individual is found guilty. (T194).

Pressed, yet again, as to whether he could sign a death verdict, Mr. Chambers answered unequivocally: "Yes. Because that says I've also agreed that that's the right thing to do." (T195).

What the voir dire reveals is that although Mr. Chambers recognized that the decision would be difficult, he felt comfortable enough with the death penalty that he twice unhesitatingly affirmed that he could sign a death verdict (T194-95).

Mr. Chambers' voir dire underscores the deficiency of the record for this court resulting by the trial court's failure to evaluate the plausibility of the prosecutor's explanation. The trial court would have had an opportunity to evaluate not only Mr.

Chambers' responses and demeanor, but to evaluate the prosecutor's questions and demeanor. The trial court was in a unique position to have evaluated whether - in light of Mr. Chambers' entire voir dire, the prosecutor's explanation was credible and plausible.

Next, the prosecutor proffered the explanation that Mr. Chambers had a "cousin doing life in prison for a murder in Michigan" (T570). The short answer to this was that venireperson Parsons' nephew - her sister's son - was in the penitentiary in Florida for a homicide, also (T495). Venireperson Parsons was thus a similarly situated white juror who perhaps had more compelling reasons for being struck and yet was not struck by the state. Again, the trial court's failure to consider the plausibility of the prosecutor's explanation - in light of his failure to strike Miss Parsons - forecloses meaningful review by this Court.

Finally, the prosecutor claimed that he "like[d]" Mr. Chambers who had served on a jury in an earlier case (T570). What, then, would be the difference between that case and this? Why, if the prosecutor liked Mr. Chambers, would he strike him? Why would Mr. Chambers have been a favorable juror on one criminal case but not on another? Could it be the difference in defendants?

Unfortunately, as to each of the prosecutor's proffered explanations, the trial court failed to go beyond the second step of Batson. The judge merely said, "I find that the State's reasons for striking Mr. Chambers, old No. 40 and new No. 23, are race neutral reasons. Not done for the purpose of biasness (sic) on the part of his race." (T571). The judge failed to take the required third Batson step and evaluate the plausibility of the prosecutor's explanations. Purkett v. Elem, *supra*.

In the absence of the required Batson third step, the record is incomplete. As it stands, there is good reason to find that the prosecutor's explanation was nothing but a pretext and that he presumed that Mr. Chambers, a black man would sympathize with Andre, a black man. Such discrimination deprived both Andre and Mr. Chambers of their right to equal protection and left them both with an all-white jury. Powers v. Ohio, 499 U.S. 400, 412 (1991).

Given the incomplete record, devoid of evaluation by the trial court, the Court should remand for an evidentiary hearing at which the trial court will consider the credibility of the prosecutor's strike of Mr. Chambers in the context of the entire voir dire. Galarza v. Keane, 252 F.3d 630, 640-41 (2nd Cir. 2001); State v. Nathan, 992 S.W.2d 908 (Mo.App.E.D. 1999). Alternatively, the Court should reverse and remand for a new trial.

**As to Point Six: The trial court erred in failing to sustain Andre's motion to strike for cause St. Louis County police officer Clark. This violated Andre's rights to due process and equal protection of the law, fair trial by jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. The defendant in a criminal trial is entitled to a full panel of qualified jurors before expending peremptory strikes, and Officer Clark was not qualified to serve on the jury in that as a currently active St. Louis County police officer he was an integral part of the prosecution team. By virtue of regular and direct interaction with the criminal justice system, often on a daily basis, and with the prosecuting attorney in all phases of the prosecution - from preparing affidavits for search**

**warrants, writing police reports, investigating witnesses, to testifying for the prosecution at grand jury proceedings and criminal trials - an active police officer is too closely connected to the prosecution to serve fairly and impartially. Although no statute disqualifies police officers from serving on criminal juries, a member of the police force that is assisting the state in investigating and presenting the prosecution's case against the defendant is no less an integral part of the prosecution team than the prosecutor. Failing to strike Officer Clark for cause was an abuse of discretion and prejudiced Andre by requiring him to remove Officer Clark with a peremptory strike. Further, because the failure to strike Officer Clark for cause during the jury selection process was a defect that affected the "entire conduct of the trial from beginning to end" it was a violation of the structural framework of the trial, undermined the trial's integrity and fundamental fairness and requires that the cause be reversed for a new trial regardless of prejudice. Particularly in a case in which the state is seeking the death penalty, the courts must ensure that jury selection leaves no doubt that the defendant has been afforded due process and equal protection of law, and trial by a fairly selected and impartial jury.**

Who can doubt the symbiotic relationship between a prosecuting attorney and the police of that jurisdiction? The prosecutor and "others acting on the government's behalf in the case, including the police" are the prosecution team. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). The prosecutor presents the state's case in court; the police make it possible for the prosecutor to do so. "To be sure, as the state concedes, ordinarily the police are an arm of the prosecution..." Robinson v. State, 730 A.2d 181, 190 (Md.

1999). "Prosecutors are actively involved in trial preparation, production of evidence, examination of witnesses, and evaluating the credibility of prosecution witnesses." Fierro v. Johnson, 197 F.3d 147, 155-56 (5th Cir. 1999). "Thus, prosecutors work hand in hand with the police in presenting the case before the courts." Id.

In the present case, despite numerous objections by defense counsel - that as "an active police officer" of the St. Louis County Police Department, "the police department involved in this case" Officer Clark should be struck for cause - the trial judge refused to strike St. Louis County police officer Clark for cause (T113, 132, 559). The defense preserved this ruling as a point of error for appellate review by including it in the motion for new trial (LF200-01).

"The trial court has broad discretion to determine the qualifications of prospective jurors." State v. Parker, 886 S.W.2d 908, 919 (Mo.banc 1994). "Only clear abuse of discretion and a real probability of prejudice justify reversal." Here, for the reasons that follow and from the record, it is clear that the trial court abused his discretion and Andre was prejudiced.

The prosecutor realized early in the voir dire that he recognized Officer Clark (T99). Officer Clark was not only an active member of the St. Louis County police force, he had personally testified in court in criminal cases, and he knew some of the officers who testified in the case against Andre (T470, 480).

In attempting to pinpoint how he knew Officer Clark, the prosecutor listed two of the ways that St. Louis County prosecutors and St. Louis County police officers work together: St. Louis County police officers are called by St. Louis County prosecutors to

testify before the grand jury and St. Louis County police officers work with St. Louis County prosecutors on St. Louis County cases (T99).

This and other cases reveal that the working relationship between the police and the prosecutors is extensive. Missouri reported cases bearing witness to the interactive nature of the police and the prosecutorial functions include a recent case from this Court: State v. Wolfe, 13 S.W.3d 248 (Mo.banc 2000). In Wolfe, the prosecutor was instrumental in the police investigation by making arrangements for a witness to receive complete immunity from prosecution before the witness ever spoke to the police. Id. at 254-56. See also, State v. Morris, 480 S.W.2d 825, 829 (Mo.1972) (noting that police reports are prepared "for the use of the police department and the prosecutor"); State v. Vinson, 854 S.W.2d 615 (Mo.App.S.D. 1993) (prosecutor consulted and worked with law enforcement officers in devising inducements to convince defendant to confess).

Appellant respectfully requests that in the interests of justice and ensuring that it is made fully aware of relevant facts, the Court take judicial notice of the record in State v. Marschke, No. SD23887 (currently on appeal) and State v. Helm, 14 S.W.3d 642 (Mo.App.E.D. 2000).<sup>13</sup> In Marschke, the prosecutor and various law enforcement officers conducted a gunshot test to prove or disprove a statement given by the defendant

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<sup>13</sup> By separate motion, appellant has requested that the Court take judicial notice of the records in State v. Marschke and State v. Helm. Respondent, the state, will not be prejudiced by granting this motion as the Attorney General is counsel of record in both cases. Appellant has attached the pertinent portions of each transcript to his motion.

to the effect that she had been upstairs at the time of the shooting and "came back and found her husband deceased, and that she had heard nothing" (MarschkeT545, 548, 573-75). In Helm, former police officer Voss stated during voir dire that he would do things at the direction of the prosecutor's office (HelmT133). He indicated that not doing something that the prosecutor had asked him to do was "against department procedures" and that there would be repercussions (HelmT133). Another police officer, Hawkins, had gone to the prosecutor's office "[a] lot" of times and asked for charges to be filed (HelmT147). The prosecutor would read the police report and ask about the case if they didn't understand the report (HelmT147).

Cases from other jurisdictions are consistent with those from Missouri in acknowledging the "team" nature of the relationship between the police and the prosecutors. See, e.g., Massachusetts v. Sheppard, 468 U.S. 981, 985 (1984) (police detective-affiant had his affidavit for checked over by "the district attorney, the district attorney's first assistant, and a sergeant"); United States v. Leon, 468 U.S. 897, 902 (1984) (search warrant application "was reviewed by several district Attorneys"); State v. Miller, 600 N.W.2d 457, 461 (Minn. 1999) (prosecutor directed officers questioning appellant not to allow appellant to speak to his attorney); State v. Barcia, 549 A.2d 491, 492-93 (N.J.Super.L. 1988) (prosecutor advised police on setting up roadblock); Commonwealth v. Simmons, 392 Mass. 45, 466 N.E.2d 85 (Mass 1984) (prosecutor directed police to conduct further investigation based on inconsistencies in victim's statements). See also, Burns v. Reed, 500 U.S. 478, 486 (1991) ("the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the

initiation of a prosecution and actions apart from the courtroom") *quoting Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1991).

"[T]he qualifications of a prospective juror are not determined conclusively by a single response but are made on the basis of the entire examination." *State v. Brown*, 902 S.W.2d 278, 285 (Mo.banc 1995) (citations omitted). Evidence of partiality towards police officers or the testimony of police officers demonstrates that the juror's "ability to serve as an impartial juror [is] questionable..." *State v. Gary*, 822 S.W.2d 448, 452 (Mo.App.E.D. 1992) (citing *State v. Edwards*, 740 S.W.2d 237 241 (Mo.App.E.D. 1987)).

In evaluating whether a juror is qualified to serve, the trial court should consider "facts stated by the juror" rather than the juror's own conclusions about his ability to serve fairly and impartially. *State v. Lovell*, 506 S.W.2d 441, 444 (Mo.banc 1974). **"In no event shall a challenged venireman be allowed to pass upon his own qualifications to serve as a juror..."** *State v. Thompson*, 541 S.W.2d 16, 18 (Mo.App.K.C.D. 1976) (emphasis added).

The appellate courts of this state have wisely put the words of *Thompson* into practice in evaluating the qualifications of active police officers to serve as jurors:

The primary duty of a police officer is to preserve peace. He is an officer of the law whose duties require him to come in daily contact with crime and law enforcement... Would anyone say that a defendant, tried by a jury consisting of police officers, was accorded a jury trial as contemplated by our constitution? ...It seems incompatible with justice that a defendant who has been apprehended by the police, and against whom police officers are going to testify, should be

tried by a jury made up of police officers.

State v. Butts, 159 S.W.2d 790, 793-94 (Mo. 1942).

Also instructive is State v. Petty, 610 S.W.2d 126 (Mo.App.E.D. 1980), in which the Eastern District held that the trial court had abused its discretion in failing to strike for cause two retired police officers. Both retired officers had stated unequivocally on voir dire that they could be fair and impartial jurors and would judge the testimony of a police officer just as they would judge the testimony of any other witness. Id.

Framing the "ultimate question" as whether there was "more than a former affiliation with law enforcement," the Court noted that the two retired officers knew each other, that one was then employed by the police department and had "daily contact with police officers at work." Id. Both knew a police officer, Micciche, who had been endorsed as a state's witness and one had worked with Micciche. Id.

In holding that the two former police officers should have been struck for cause, the Eastern District said:

It is better practice to fill a jury panel with persons who have not spent a lifetime as police officers. It is incompatible with justice that a defendant in a criminal case should be tried by a jury which includes two retired, career police officers still working in some manner with protecting the peace, and acquainted with a police officer endorsed by the state as a witness.

Id.

State v. Petty illustrates that the testimony of the jurors themselves, two former police officers in that case, that they could be fair and impartial should not be

dispositive. Rather, the trial court needs to look at all surrounding circumstances and makes its own determination.

Interestingly enough, in response to defense counsel's final motion to strike, the trial court in the present case expressed concern about Officer Clark's ability to be fair and impartial (T559). Further, the trial court also suggested that Officer Clark himself might have had concerns about whether he should serve on a jury:

THE COURT: In addition to your observations made during voir dire -- and I believe it was also mentioned to some of the attorneys off the record -- not being off the record, but while we were off the record that he approached a clerk and said that he described himself as a detective for the St. Louis County Police Department.

[Defense Counsel]: That's right.

THE COURT: And basically said -- I don't know if he said ["]take him off the case["] or ["]can I get excused,["] which would suggest to the Court that he would probably have a concern about serving on any jury in St. Louis County. I want to make sure that's on the record...

(T559-60; emphasis added).

Appellant acknowledges cases such as State v. Wise, 879 S.W.2d 494 (Mo.banc 1994) in which this Court, citing other cases, noted that "past employment with law enforcement does not, standing alone, constitute grounds for striking a venireperson for cause." Id. at 512. "Cause exists where such employment combines with other factors, such as juror responses to voir dire questioning, to indicate a bias or a lack of

impartiality." *Id.* citing State v. Hopkins, 687 S.W.2d 188, 190 (Mo.banc 1985).

But there are other factors here that demonstrate an abuse of discretion in failing to strike Officer Clark for cause. **Officer Clark was not retired!** He was an active member of the St. Louis County police department. In fact, according to information he gave to the clerk, he was a detective. The trial court had reason to think that Officer Clark, himself, thought he should not sit on a criminal jury in St. Louis County (T559-690). Officer Clark also knew officers who would be testifying (T470, 480).

And, despite Officer Clark's statement that it would not cause him any problems if he "returned a verdict of not guilty," (T551-52) this Court need not ignore reality: that Officer Clark would not likely return a verdict of not guilty and therefore would not have any problems. This Court also need not ignore the reality that it would not reflect well on the St. Louis County Police Department or on Officer Clark to say anything other than he would be fair and impartial and could return a verdict of not guilty without any problems.

"The accused must be afforded a full panel of qualified jurors before expending any peremptory challenges." State v. Vincent, No. ED78518 (Mo.App.E.D. September 11, 2001) slip op. at 4 *citing* State v. Johnson, 722 S.W.2d 62, 65 (Mo.banc 1986). That requirement of the law was not met here, and Andre was prejudiced by being forced to expend a peremptory strike to correct the trial court's error in failing to ensure a qualified panel. In the alternative, because the error involved the structural framework in which the entire trial occurred, it was a "structural defect[] in the constitution of the trial mechanism" and not subject to harmless error analysis. Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992) *citing* Arizona v. Fulminante, 499 U.S. 279, 309 (1991); see

also, United States v. Harris, 192 F.3d 580, 588 (6th Cir. 1999).<sup>14</sup>

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

**As to Point Seven: The trial court erred in admitting at penalty phase detailed evidence of Andre's prior felony and misdemeanor convictions and his failure to pay his child support on time. This violated Andre's rights to due process of law, fair jury trial, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. The evidence of prior convictions involving Terri was improper in that it was in the nature of victim impact evidence but involved other offenses - not those offenses for which Andre was on trial - and its admission was not authorized either by Payne v. Tennessee or state law. The sheer volume of this evidence, and its similarity to the charged offense was prejudicial. The jury, absent instruction, would not have realized that the extensive evidence of the impact of earlier offenses on Terri was not a matter that they should consider in**

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<sup>14</sup> Appellant is cognizant of §494.480.4 which provides, "[t]he qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for a new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant." Appellant submits that this statute should not apply because the error was of a structural nature, and a claim of this fundamental constitutional magnitude may not be defeated by statute.

**deciding punishment in this case. Further, the detailed evidence of Andre's prior convictions and his child support payment record was of a nature tending to depict Andre as a person of bad character but of no value in determining whether death or life imprisonment without probation or parole was the appropriate punishment. Although legally irrelevant to the issue of sentencing, the state used the child support evidence to Andre's prejudice by arguing it showed that Andre was a person who did not deserve to live. The prior conviction evidence prejudiced Andre in that state used it to argue that Andre could not adjust to or succeed in the criminal justice system and therefore only death was appropriate punishment. This was especially prejudicial because the defense was precluded from presenting the only evidence that could defend against this argument and establish that Andre could and would adjust to prison: the testimony of his friends and relatives that they would support and facilitate his adjustment to prison by visiting him in prison.**

Virtually the entire state's case at penalty phase - beginning with opening statement and going through closing argument - revolved around nonstatutory aggravating evidence of Andre's prior convictions and bad acts (T1503-08, 1511-87, 1633-45, 1652-55). The state's message was that Andre was a bad character, he'd victimized Terri on other occasions, he'd failed to pay child support, he could not abide by the rules of the criminal justice system, and for these reasons life imprisonment without probation or parole was not an appropriate punishment and he should be put to death.

Although unpreserved for this Court's review, appellant submits that in permitting the prosecutor to use Andre's prior offenses and bad acts as nonstatutory aggravating

evidence and as victim impact evidence, the trial court committed a miscarriage of justice. The vast amount of prior offense and bad act evidence admitted and argued at penalty phase - this evidence comprised the entire penalty phase - could not have failed to influence the jury's verdict. Appellant therefore respectfully requests review for plain error. Rule 30.20.

The evidence presented by the state at penalty phase included the following:

1. Andre's child support payment record including documents from the court file in Andre and Terri's divorce (T1511-13).
2. The "adult abuse case" that Terri filed against Andre. This included an order dated August 8, 1994, effective until February 6, 1995, that Andre was to pay child support and refrain from abusing, threatening, molesting, talking to and disturbing Terri Cole and from entering her house (T1514-16). The file contained a second order of protection dated February 6, 1995.<sup>15</sup>
3. Testimony of two detectives from the St. Louis County Police Department regarding Andre's commission of traffic offenses and the unlawful use of a weapon (T1518-28; 1530-32). Detective Miller testified that on September 18, 1994, he stopped Andre for driving at 70 mph in a 55 mph zone (T1518-19). Andre "leaned over" as Detective Miller approached arousing the detective's concerns (that Andre was hiding something under the seat) and prompting him to call for assistance (T1520). Officer Kopfensteiner arrived and arrested Andre (T1521). While writing Andre a ticket,

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<sup>15</sup> The transcript does not contain the complete effective dates of the second order.

Detective Miller discovered that Andre had a municipal bench warrant and a Louis County warrant for destruction of property (T1521). Detective Kopfensteiner testified that he looked under the front seat after arresting Andre and found a gun (T1530).

Detective Kopfensteiner identified the gun and ammunition he seized from Andre's car on September 18, 1994 (T1530-31). The state introduced the gun and cartridges into evidence (T1531-32).

4. Terri Cole's testimony about Andre's violations of the August 8, 1994, order of protection. Terri testified that on August 14, 1994, Andre brought their children home and "barg[ed]" into the house (T1539). Terri told him to leave "and he snatched two phones out and then he left" (T1539). Andre ripped the phones from the wall after Terri told him she was going to call the police (T1539).

On November 11, 1994, Terri arrived home to find Andre in the driveway unscrewing her "dusk-to-dawn" lights (T1540). Andre hit and cracked Terri's windshield with his fist (T1540). Terri left and went to the police department (T1540). Andre appeared angry - going straight to her car and hitting it (T1541). Terri paid \$145.58 to replace her windshield (T1541-42).

On January 16, 1995, Andre "came to the house rantin[g] and ravin[g] at the front door and [Terri] didn't let him in the house (T1543). The police came (T1543).

On October 2, 1995, Terri received a letter from Child Services about receiving child support payments that were currently in arrears telling her that Andre would have to start making his payments through the court clerk's office (T1543-44).

On October 5, 1995, Terri and her sons were at home in bed when there was a crash at

the back patio door (T1544). Terri jumped out of bed, ran down the hall and met Andre (T1545). The state introduced photographs showing the glass back door Terri's house after it had been shattered and the inside of the house after Andre was there on October 5, 1995 (T1546-47). Andre had a gun with him and used a tire iron to shatter the door (T1548). He was angry, upset, and frustrated about the child support paperwork he had received and he waved the gun around (T1549). One of the children called the police (T1550). Andre left before the police arrived (T1550). Terri paid \$60 to have the door boarded and an additional amount to replace the glass (T1550-51).

The prosecutor showed Terri a gun which she identified as the gun Andre had that night (T1548).

5. St. Louis County Police Officer Winters testified that he went to Terri's house on January 16, 1995 (T1556). He found Andre and Terri arguing at the front door (T1557). Andre was talking loudly and was angry (T1558). Terri appeared afraid (T1558). Officer Winters arrested Andre (T1558).

Officer Winters also went to the house on October 5, 1995, for another disturbance (T1558-59). Andre was leaving through the shattered glass door as Officer Winters arrived at the front door (T1559). There was glass all over (T1559). Terri told Officer Winters that Andre had pointed a gun at her (T1560). Officer Winters and Officer Clay followed the sound of barking dogs and located Andre (T1560-62). They told Andre to "freeze" and at that time he put his hand in his waistband (T1562, 1564). As Officer Clay "placed" Andre on the police car, Officer Winters spotted a cocked gun in Andre's waistband (T1562).

Later that night, Officer Clay removed a second gun from Andre's right rear pocket (T1565). This gun, also, was cocked and loaded (T1566-67).

The prosecutor showed Officer Winters two guns and ammunition which he identified as the guns and ammunition Andre had that night (T1563-64, 1565-66). Officer Winter testified that a cocked weapon was more easily fired, more deadly (T1566).

The St. Louis County firearms examiner, Officer John Kaltenbronn, testified that the guns seized from Andre were in normal firing condition (T1575-82).

6. The prosecutor read from the criminal court records of Andre Cole.

On March 17, 1995, Andre pled guilty to unlawful use of a weapon {U UW) occurring on September 18, 1994 (T1584). He received a suspended imposition of sentence and was placed on probation, with conditions, for four years (T1584). On March 18, 1996, Andre admitted violating conditions of his probation, and on April 19, 1996, Andre was sentenced to nine months for the U UW and ordered to report for work release on May 26, 1996 (T1585).

On December 15, 1994, Andre pled guilty to violating an order of protection occurring on November 11, 1994 (T1585-86). He was sentenced to six months and placed on probation for two years with the "condition that he not have contact with the victim Terri Cole" (T1586). On August 23, 1996, Andre admitted violating his probation and was sentenced to six months (T1586).

On April 18, 1996, Andre pled guilty to the offense of U UW occurring on October 5, 1995 (T1586). He was sentenced to nine months and given work release (T1587). On July 1, 1997, Andre pled guilty to failing to return to confinement on November 3, 1996,

and was sentenced to six months (T1587)

To ensure the death penalty is not imposed arbitrarily and capriciously, the Supreme Court has construed the Eighth Amendment to preclude the sentencer in a death case from exercising "unbridled discretion." California v. Brown, 479 U.S. 538, 541 (1987) *citing* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). In determining sentence, jurors in death penalty cases should confine their considerations to "record evidence" and not rely "on extraneous emotional factors..." 479 U.S. at 544.

Is failure to pay child support really the kind of evidence that a jury should consider in deciding whether or not to sentence a defendant to death? Should the impact of prior offenses on the victims of those offenses be admitted for the jury's unguided use in deciding whether to sentence a defendant to death?

Appellant acknowledges that this Court has previously rejected similar claims. See, State v. Smith, 32 S.W.3d 532, 556-57 (Mo.banc 2000). Appellant respectfully requests that the Court consider this point and argument because the grounds of the claim here are not identical to claims previously raised and the penalty phase evidence at issue in the present case far exceeded that in other cases.

In Payne v. Tennessee, 501 U.S. 808 (1991), the Supreme Court described the kind of victim impact evidence appropriate to present to the jury at the penalty phase trial.

"Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question..." 501 U.S. at 825.

"[F]or the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific

harm caused by the defendant."

Payne acknowledged limits to the admissibility of such evidence. "In the majority of cases, ... victim impact evidence serves entirely legitimate purposes." Id. at 825. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986).

Recently, the Illinois Supreme Court held that evidence of the impact of prior offenses on the victims of those offenses was inadmissible and violated the defendant's Eighth Amendment rights. "Payne clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried..." People v. Hope, 702 N.E.2d 1282, 1288 (Ill. 1998).

In the present case, the extensive, detailed evidence of the impact on Terri of Andre's prior offenses far exceeded anything authorized by Payne. The evidence, briefly summarized, supra, included a considerable amount of victim impact testimony from Terri relating not to the charged offense of Anthony Curtis' murder, but relating to other, uncharged offenses. There is nothing in Payne, the Missouri Constitution, the Missouri statutes, or the common law of Missouri that authorizes the admission of such an excessive amount of detailed evidence. See, State v. Dunn, 577 S.W.2d 649, 653 (Mo.banc 1979) ("Cross-examining a defendant as to alleged prior acts of misconduct, particularly where details are stated and the acts are somewhat similar to the case on trial, as here, lends itself to the creation of substantial prejudice even though the answers are in

the negative") (emphasis added).

Further support for excluding this evidence lies in the fact that §565.032.2(1) specifically authorizes admission of evidence of prior murder or "serious assaultive" convictions, but does not expressly authorize admission of any other conviction. Section 565.030.4 authorizes admission of "evidence in aggravation" but with an important limitation: "Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of §565.032, may be presented **subject to the rules of evidence at criminal trials**. Appellant is unaware of any Missouri case or evidentiary rule authorizing the admission of the factual details of a defendant's convictions or his character (as in failing to pay child support) - particularly when the defendant does not testify and does not put his character in evidence. State v. Hernandez, 815 S.W.2d 67, 70 (Mo.App., S.D. 1991). Missouri rules of evidence prohibit admission of evidence defendant's character - except as provided by §565.032.

The recent case of United States v. Peoples, 74 F.Supp.2d 930 (W.D.Mo. 1999) provides additional support for holding that evidence of nonstatutory prior convictions should not be admitted. In Peoples, the government tried to use prior burglary convictions, which did not constitute the "serious crimes" that were authorized as aggravators under the federal death penalty statute. Peoples' convictions for stealing, tampering, burglary, receiving stolen property and unlawful possession of a weapon did not fall within the statutory list of "serious crimes" and the Court held they could not be admitted. Id. at 932.

In Peoples, the Court relied on constitutional principles equally applicable here. Heightened reliability is constitutionally required in death penalty sentencing hearings. Id. at 931; see also Woodson v. North Carolina, 428 U.S. 280, 305 (1977). The Court cautioned that ordinary sentencing must be distinguished from capital cases: “Tampering and dealing in stolen goods may well alter judicial views as to the number of months a defendant should serve ... They are pernicious distractions, however, in considering whether a defendant shall live or die.” Peoples, 74 F.Supp.2d at 932. When criminal history is excluded as a statutory aggravator, “[it] cannot, by any fair reading, be given a second and more abundant life as a nonstatutory aggravator.” Id. at 933-34, n. 1.

One aspect of the penalty phase of this trial stands out: it was dominated by evidence and argument concerning Andre's bad acts (child support) and nonstatutory prior convictions. If the finding of an aggravating circumstance is the threshold requirement that must be met before a jury may even consider the death penalty, what can one say about a death sentence imposed after a trial in which the state builds its case of aggravated murder around nonstatutory prior convictions and bad character evidence?

Appellant respectfully suggests it should be said that unauthorized, inadmissible evidence of nonstatutory prior convictions and bad character played a major, disproportionate, and unconstitutional role in sentencing the defendant to death. For these reasons, the sentence of death must be reversed and the cause remanded for a new penalty phase trial.

**As to Point Eight: The trial court erred in sustaining the state's motion in limine**

**and refusing to allow Andre Cole to present evidence that his relatives and friends would visit him in prison. This violated Andre's rights to due process of law, present a defense, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. Andre was prejudiced by the exclusion of this evidence in that evidence that would have a bearing on Andre's adjustment to prison was admissible under Skipper v. South Carolina, and the constitutional guarantees of the right to defend, to be free of arbitrary and capricious and cruel punishment and to reliable sentencing. Further the thrust of the state's penalty phase argument was that Andre had repeatedly been afforded chances to succeed in the criminal justice system and had failed, and therefore life imprisonment without probation or parole was not an appropriate sentence. The only evidence that Andre had to defend against this argument was the testimony of his family and friends that they would stick by him and visit him in prison. This testimony - by providing evidence that with the assistance and support of family and friends, Andre would adjust to prison and it was therefore an appropriate punishment - would have allowed Andre to defend against the state's evidence and argument for the death penalty.**

In 1982 the United States Supreme Court held that 'in capital cases, "the sentencer ... [may] ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death."' Skipper v. South Carolina, 476 U.S. 1, 4 (1986) citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604

(1978)). "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper, 476 U.S. at 5. "Under Eddings, such evidence may not be excluded from the sentencer's consideration." Id.

Of particular interest for the present case, the court held in Skipper, that where the prosecution presents evidence and argument tending to show that the defendant cannot be safely contained in prison, 'it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that the defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain.'" Skipper, 476 U.S. at 5 n.1 *citing* Gardner v. Florida, 430 U.S. 349, 362 (1977).

In the present case, under Skipper, it was error for the trial court to preclude the defense from eliciting evidence that would have provided a basis for a sentence less than death. Had the defense been allowed to elicit the testimony of Andre's friends and relatives that they would visit Andre in prison, this evidence would have provided a factual basis for arguing - by inference if necessary - that with the support and encouragement of his friends and relatives Andre would make a good adjustment to prison and, therefore, that life imprisonment without probation or parole was an appropriate sentence. State v. Barton, 936 S.W.2d 781, 783 (Mo.banc 1996).

This evidence was critical because the thrust of the state's penalty phase case and argument was built on Andre's nonstatutory prior convictions which the state used to establish that Andre had not appropriately controlled and adjusted his behavior in his previous encounters with the criminal justice system (e.g., T1503, 1633-38, 1638, 1644-

45, 1652, 1654). To counter this, the defense had to present evidence showing that if Andre were sentenced to life imprisonment, in prison, he would behave appropriately. The testimony of Andre's friends and relatives would have supported this defense.

It is important to note that Andre's previous experiences with the criminal justice system largely revolved around his volatile relationship with Terri. In contrast, if Andre were sentenced to prison, he would be in a very structured environment and Terri would no longer be part of that environment. See, United States v. Peoples, 74 F.Supp.2d 930, 932 (W.D.Mo. 1999) ("[D]angerousness should not be measured in the same manner as if a defendant were to be "uncaged;" the defendant's "future dangerousness" must be analyzed in the context of the prison setting - in which the defendant's movements, activities and choice are greatly restricted).

As pointed out in Skipper, the right to defend against the state's case, evidence and argument continues throughout the entire penalty phase trial. In the present case, precluding the defense from presenting the only evidence available to defend against the state's penalty phase evidence and argument was an abuse of the trial court's discretion, State v. Ray, 945 S.W.2d 462, 467 (Mo.App.W.D. 1997), and violated Andre's rights to due process of law, to defend, to reliable sentencing, and to freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI, and VIII. The cause must be reversed and remanded for a new penalty phase trial.

**As to Point Nine: The trial court erred in overruling defense objections to Instruction No. 21 (MAI-CR3d 313.46A) and submitting this instruction to the jury.**

**This violated Andre's rights to due process of law and fair jury trial, to present a defense, to reliable sentencing and to freedom from cruel and unusual punishment. U.S.Const. Amend's XIV, VI, and VIII. Instruction No. 21 prejudiced Andre by telling the jury that they must consider all the circumstance in deciding whether to assess and declare the punishment at death but failing to advise the jury that they must consider all the circumstances in deciding whether to assess the punishment at life imprisonment without the possibility of probation or parole or death. This prejudiced Andre because it left the jury free to ignore the mitigating evidence presented by the defense in determining whether death - or life - was the appropriate punishment.**

Instruction 21, MAI-CR3d 313.46A, read:

Instruction No. 21

As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

(LF183).

Appellant acknowledges that in State v. Storey, 40 S.W.2d 898 (Mo.banc 2001), the Court considered and denied this claim holding that the instruction "adequately informs the jury that it must consider all of the circumstances, including the mitigating

circumstances, in determining the appropriate punishment." Id. at 912. Appellant includes this point here in the hope that the Court will reconsider what it said in Storey.

To a certain extent, appellant agrees with the Court's reasoning that "[j]ury instructions are not to be viewed in isolation, but are to be taken as a whole to determine whether error occurred." Id. Appellant suggests this analysis stops short of addressing the problem here: that this is an instruction expressly reminding the jury of the requirement that they must consider all the evidence in deciding that death is appropriate but failing to mention that the same requirement applies to determining if life is appropriate. It is the absence from this instruction of language addressing the requirements as to determining whether life is appropriate that causes the problem. Further, because the federal courts have not yet ruled on this point, and appellant believes it has merit, appellant includes it to preserve it for federal review.

Instruction 21 is deficient in that it omits critical language telling the jury that they must consider all the circumstances in determining whether to impose a sentence of life imprisonment. Because the instruction specifically tells the jury that they must consider all the circumstances in determining whether to impose a sentence of death, the absence of parallel language advising the jury that they must consider all the circumstances in determining whether a sentence of life is appropriate is not only striking, it is manifestly unjust.

This was especially prejudicial in this case because the prosecutor disparaged and ridiculed the defense mitigating evidence suggesting it was not valid evidence and thus encouraging the jury to ignore it:

We've heard a lot about what a great guy [Andre] was. We've heard so much in this phase about what a great dad he was. Was he really? Was he?

I'm showing you evidence. Somebody tell Anthony Curtis he was a great guy.

Somebody tell Anthony Curtis he was a great guy.

(T1632-33). Further, the prosecutor argued that the sole statutory mitigating circumstance - "Whether the defendant has no significant history of prior criminal activity" was actually evidence in aggravation of punishment: "Two felonies and two misdemeanors, four time convicted criminal, he has substantial criminal history" (T1643). With this kind of argument, the absence of language telling the jury that they "must" **also** "consider all the circumstances in deciding whether to assess and declare the punishment at" life imprisonment without probation or parole and not just in deciding whether to sentence the defendant to "death" was, literally, fatal to the defendant.

Further, none of the other instructions given to the jury told them that they "must" consider the mitigating circumstances. This case is therefore unlike Buchanan v. Angelone, 522 U.S. 269 (1998) in which the prosecutor acknowledged the validity and existence of the mitigating circumstances but argued that they were not sufficient to outweigh the aggravating circumstances.

The error in this instruction affected the jury's verdict and thus violated Andre's rights to due process of law, to reliable sentencing and to be free from cruel and unusual punishment. U.S.Const., Amend's XIV, and VIII; McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

The “qualitative difference between death and other penalties” calls for “a greater degree of reliability when the death sentence is imposed.” Lockett v. Ohio, 438 U.S. 586, 602 (1978). Accordingly, the Supreme Court has steadfastly construed the Eighth Amendment as requiring that nothing preclude the sentencer in a capital case “from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Id. at 604; see, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Ambiguity in a jury instruction that creates “a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence,” violates the Eighth Amendment. Boyde v. California, 494 U.S. 370, 380 (1990). Although the Eighth Amendment does not require instructions on mitigating evidence, instructions given may not ‘preclude the jury from being able to give effect to mitigating evidence,’ or create “‘a reasonable likelihood that the jury has applied the challenged instructions in a way that prevents the consideration of constitutionally relevant evidence.’” Buchanan v. Angelone, supra, 522 U.S. at 276 quoting Boyde v. California, supra, 494 U.S. at 380.

In particular, the Eighth Amendment requires that a jury must be allowed to consider, and must consider, all “relevant mitigating evidence.” Eddings v. Oklahoma, supra, Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987). This means that unlike aggravating circumstances, which the jury may not consider unless they unanimously find them to exist, each member of the jury must be

allowed to consider, and must consider, each and every mitigating circumstance. McKoy v. North Carolina and Mills v. Maryland, 486 U.S. at 384 (“Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk”).

Instruction 21 presented a risk, "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments" that the jury would not and did not consider "factors which may call for a less severe penalty" than death. McDowell v. Calderon, 130 F.3d 833, 837 (9th Cir. 1997) rev'd on other grounds, McDowell v. Calderon, 197 F.3d 1253 (9th Cir. 1999).

For the foregoing reasons, the trial court's error in submitting Instruction 21 prejudiced Andre Cole. The Court must vacate his sentence and remand the cause for a new penalty phase trial.

**As to Point Ten: The trial court erred in overruling defense objections to Instruction No. 22 (MAI-CR3d 313.48A), submitting this instruction to the jury, and sentencing Andre Cole to death. This violated Andre's rights to due process of law, trial by a correctly instructed jury, present a defense, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's XIV, VI, and VIII. Instruction No. 22 prejudiced Andre by failing to include all the steps that the jury must follow in the sentencing process. Specifically, it failed to advise the jury of the essential "third step" in the weighing process: that if each juror**

**determined that there were facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then the jury must return a verdict of life imprisonment without the possibility of probation or parole. This error was particularly prejudicial in light of the state's argument telling the jury that Instruction No. 22 gave them the "verdict mechanics" thus leading the jury to believe that the instruction correctly set forth the steps they were to follow.**

Instruction 22, MAI-CR3d 313.48A, read:

INSTRUCTION NO. 22

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Anthony Curtis, your foreperson must write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 18 which you found beyond a reasonable doubt, and sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Anthony Curtis by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict

form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 18, or if you are unable to unanimously find that there are aggravating circumstances which warrant the imposition of a sentence of death, as submitted in Instruction No. 19, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 18 and 19, but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

(LF184-87).

Appellant acknowledges that in State v. Storey, 40 S.W.2d 898 (Mo.banc 2001), the Court considered and denied a similar claim. Id. at 913. Appellant includes this point here in the hope that the Court will reconsider what it said in Storey in light of the fact

that in the present case, during his penalty phase argument, the prosecutor emphasized that this instruction gave the jury the "mechanics" (T1644). Given this argument, the jury may have resolved the differences between this instruction - which omitted the important weighing step - and the other instructions by following the prosecutor's advice and simply following the incomplete steps outlined in Instruction 22. Further, because the federal courts have not yet ruled on this point, and appellant believes it has merit, appellant includes it to preserve it for federal review.

A claim that an MAI instruction fails to comply with the substantive law is reviewed for error. State v. Carson, 941 S.W.2d 518, 520 (Mo.banc 1997). MAI-CR3d 313.48A, which gave the jury directions for reaching a verdict, failed to comply with the substantive law, §565.030.4(3), in that it failed to include what the "third step" of the deliberation process. It failed to tell the jury that if, after finding at least one statutory aggravating circumstance, each juror determined that the mitigating circumstances outweighed the aggravating circumstances, the jury must sentence the defendant to a term of life imprisonment without the possibility of probation or parole. The instruction therefore did not comply with the statutory law. §565.030.4(3).

The omission of this step from Instruction 22 was prejudicial because , as the prosecutor noted, that instruction is or functions as a verdict director: "Instruction 22 has the mechanics for you. And there are three different verdict forms for you." (T1644).

As the prosecutor recognized, this instruction takes the jury, step by step, through the deliberation process. Accordingly, the absence from this instruction of the step requiring the jury to weigh the mitigating evidence against the aggravating evidence rendered the

sentencing process unreliable and violated the Eighth Amendment.

Particularly in the present case, where the prosecutor belittled the mitigating testimony presented by Andre's family and friends, and portrayed the only statutory mitigating circumstance - "no significant history of prior criminal activity" (LF182) - as aggravating evidence of "substantial criminal history," (T1643) it was critical that the jury be provided with an instruction ensuring that the procedure they followed would take into account the mitigating evidence and circumstances in determining sentence.

The "qualitative difference between death and other penalties" calls for "a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 602 (1978). Accordingly, the Supreme Court has steadfastly construed the Eighth Amendment as requiring that nothing preclude the sentencer in a capital case "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604; see, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982).

When ambiguity in an instruction creates "a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence," the instruction violates the Eighth Amendment. Boyde v. California, 494 U.S. 370, 380 (1990). Although the Eighth Amendment does not require a jury to be instructed on mitigating evidence, any instructions given may not 'preclude the jury from being able to give effect to mitigating evidence,' or create "a reasonable likelihood that the jury has applied the challenged instructions in a way that prevents the consideration

of constitutionally relevant evidence.” Buchanan v. Angelone, 118 S.Ct. 757, 761 (1998) quoting Boyd v. California, supra, 494 U.S. at 380 (1990).

The Eighth Amendment requires that a jury must be allowed to consider, and must consider, all “relevant mitigating evidence.” Eddings v. Oklahoma, supra, Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987). MAI-CR3d 313.48A fails to implement this requirement because it omits the "third step" of weighing of mitigating circumstances against aggravating circumstances.

In the present case, the defect in Instruction 22 meant that the jury's sentencing determination was fundamentally flawed. As given, the instruction created a substantial likelihood that the jury failed to consider relevant mitigating facts and circumstances. In this area of the law, where life hangs in the balance, the Court may not approve the failure of the MAI instruction to comply with the constitutionally critical step of full consideration of all mitigating facts and circumstances and weighing of aggravating and mitigating circumstances. Sanctioning such erroneous procedures not only amounts to revising the statute, it incurs the very real risk that the procedures followed in imposing the death sentence in this case were arbitrary and capricious.

The trial judge had the authority and obligation to decline to submit MAI-CR3d 313.48A to the jury. State v. Carson, supra. This Court must not excuse the trial court's failure to do so.

No assurances of reliability exist here. The submission of this defective penalty phase instruction left the jury without an accurate description of the steps they were obligated to follow in making the sentencing decision. Andre's sentence of death was imposed in

violation of his state and federal constitutional rights to due process of law, fair trial by a correctly instructed jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI and VIII. The sentence of death must be vacated and the cause remanded for a new penalty phase proceeding.

### **Conclusion**

Wherefore, for the foregoing reasons, as to Points 1, 2, 5, and 6, appellant respectfully requests that the Court reverse the judgment and sentence and remand for a new trial. As to Point 5, in the alternative, appellant requests that the Court remand for an evidentiary hearing. In the alternative, as to Points 1, 4, 7, 8, 9, and 10, appellant requests that the Court reverse, vacate the sentence and remand for a new penalty phase trial. As to Point 3, appellant requests that the Court vacated his sentence of death and sentence him to life imprisonment without the possibility of probation or parole.

Respectfully submitted,

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Deborah B. Wafer, Mo. Bar No. 29351  
Attorney for Appellant  
Office of the State Public Defender  
Capital Litigation Division  
1221 Locust Street; Suite 410  
St. Louis, Missouri 63103  
(314) 340-7662 - Telephone  
(314) 340-7666 - Facsimile

**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 Special Rule 1(b). The brief, excluding the appendix, comprises 29010 words according to Microsoft word count.

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

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were delivered, this \_\_\_ day of \_\_\_\_\_, 2001, to The Office of the Attorney General, 221 West High Street, Jefferson City, Missouri 65101.

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Attorney for Appellant