NO. SC87859

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

WALTER E. BARTON

Appellant.

Appeal from the Circuit Court of Cass County

Honorable Joseph Dandurand

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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Appellant.

In this reply brief, appellant addresses only those issues and contentions of the appellee which require response. The failure to re-urge any issue or argument presented in the opening brief is not intended as a waiver of that issue. The points in this reply brief are numbered to correspond to the points in the opening brief.

STATEMENT OF FACTS

The portion of the Statement of Facts in the opening brief entitled "Trial evidence and issues" was incomplete. Counsel for Mr. Barton apologizes for her failure to correct this before the brief was submitted. For the convenience of the court, the entire section is repeated below with the necessary corrections and additions.

Trial evidence and issues.

At trial, the state presented evidence that on October 9, 1991, the body of Gladys Kuehler was discovered in her trailer at Riverview Trailer Park, in Ozark, Missouri. She had been repeatedly stabbed. Debbie Selvidge (Ms. Kuehler's granddaughter), Carol Horton (a neighbor) and Walter Barton were present when the body was discovered. Tr. Vol. III, pp. 477-479.

Carol Horton testified that Mr. Barton had been at her trailer in the park from noon to 2:00 p.m. that day, when he left to go to Ms. Kuehler's to borrow some money. Tr. Vol. III, p. 456. He returned about 10-15 minutes later saying that she had told him to come back later to get a check. Tr. Vol. III, p. 457. He left again about 3:00 and was gone about an hour. Tr. Vol. III, pp. 458-459. When he returned, he said he had been working on his car, asked to use the bathroom, and washed

his hands there. Tr. Vol. III, p. 459. Ms. Horton testified that his mood seemed different when he returned after leaving the second time. Tr. Vol. III, p. 460. She was confronted with her prior testimony in which she had said that he seemed about the same as he had been before. Ms. Horton did not notice any blood on Mr. Barton. Tr. Vol. III, p. 497. No blood was found on the soap, in the sink, or in the drain trap at Ms. Horton's trailer. Tr. Vol. IV, p. 687.

Mr. Barton told Ms. Horton that Ms. Kuehler was taking a nap and not to go to her trailer. Tr. Vol. III, pp. 462-463. Ms. Kuehler, who was old and rather infirm, often napped in the afternoons, so Ms. Horton did not find this unusual. Tr. Vol. III, p. 464. Mr. Barton and Ms. Horton both left Ms. Horton's home. She returned to her trailer at about 4:30. At that point, Mr. Barton was at her neighbor's trailer. He came over and fixed a board on her porch. Tr. Vol. III, p. 464. He then left, and Ms. Horton went to Ms. Kuehler's trailer and knocked on the door. She received no response. Tr. Vol. III, p. 465.

Dorothy Pickering, then an owner with her husband of the trailer park, testified that she visited with Ms. Kuehler around 2:00 p.m., when she went to Ms. Kuehler's trailer to pick up some rent that Ms. Kuehler, who managed the park, and collected from tenants. Tr. Vol.

IV, pp 611-612. Ms. Kuehler had guests, a man and woman who used to live at the trailer park. Tr. Vol. IV, p. 611. Teddy Bartlett, one of the guests, testified that he visited Ms. Kuehler that day with his then wife Sharon. They left the trailer around 2:45 to 3:00 p.m. Tr. Vol. IV, p. 615.

Testimony from Sharon Strahan, Mr. Bartlett's former wife, was read into evidence because she is deceased. Tr. Vol. IV, p. 623. The testimony was partially redacted to remove references to a lineup to which an objection was sustained. Tr. Vol. IV, p. 628. As read, the testimony included the statement that she saw Mr. Barton talking to someone outside the trailer when she and her husband left. Tr. Vol. IV, p. 632. On cross-examination, Ms. Strahan said that she identified Mr. Barton only by his clothing because she did not see his face. No objection was made to the reading of this statement. Tr. Vol. IV, pp. 633-634.

Mrs. Pickering's husband, Bill Pickering, testified that around 3:15, he had called Ms. Kuehler at her trailer. A man answered, and said that Ms. Kuehler was in the bathroom and could not come to the telephone. Tr. Vol. IV, pp. 620-621. After his arrest, Mr. Barton told Officer Jack Merritt that it was he who had answered. Tr. Vol. IV, p. 665.

The testimony of defense witness Brenda Montiel, who had died, was read into the record. Ms. Montiel testified that Mr. Barton came to her trailer at around 5:30 and asked about Ms. Kuehler's whereabouts. He stayed for supper with her. She noticed no blood on him. He went to the door when someone honked a horn outside, and left with that person. Tr. Vol. V, pp. 971-973.

Around 6:00-6:30 p.m., Debbie Selvidge came to Ms. Horton's trailer. She asked Ms. Horton if she knew where Ms. Kuehler was, since Ms. Selvidge had not been able to reach her by phone since 4:00 p.m. Tr. Vol. III, pp. 466, 510.

The two went to Ms. Selvidge's mother's home to make telephone calls to try to locate Ms. Kuehler. They were unsuccessful. Tr. Vol. III, p. 511. They then returned to the trailer park. Ms. Selvidge honked near Ms. Montiel's trailer, Mr. Barton came out, and Ms. Selvidge asked him to go with them to Ms. Kuehler's trailer. Tr. Vol. III, p. 467.

Ms. Selvidge testified that she wanted Mr. Barton and Ms. Horton there when she tried to get into Ms. Kuehler's trailer so that Ms. Kuehler would not think she was breaking in. Tr. Vol. III, p. 513. Ms. Selvidge had previously had a key to Ms. Kuehler's trailer, but Ms. Kuehler took it back the day before her death. Tr. Vol. III, p. 512. Ms.

Selvidge did not know why Ms. Kuehler had asked for the key back. Tr. Vol. III, p. 525. Ms. Selvidge's key was not found in Ms. Kuehler's trailer after her death, and was never located. Tr. Vol. IV, p. 542.

When the three went to Ms. Kuehler's trailer, Ms. Horton and Ms. Selvidge knocked at the door. Mr. Barton went around to the side of the trailer and knocked under Ms. Kuehler's bedroom window, calling, "Ms. Gladys, are you okay?" Tr. Vol. III, p. 469. They got no response and the trailer was locked. Tr. Vol. III, p. 470. Ms. Horton and Ms. Selvidge started into town and found Officer Lyle Hodges, who attempted to open the door. Tr. Vol. III, p. 471. Since Ms. Selvidge did not want him to break the door down, Officer Hodges had his dispatcher call a locksmith. Tr. Vol. IV, p. 533. Officer Hodges then left for another call. The locksmith arrived and unlocked the door. Tr. Vol. III, p. 467.

Ms. Selvidge, Ms. Horton and Mr. Barton entered the trailer. As they went down the hall, Ms. Selvidge noticed Ms. Kuehler's clothing in the bathroom. Tr. Vol. IV, p. 516. When Ms. Selvidge entered the bedroom, she saw Ms. Kuehler's mutilated body and began to scream. Tr. Vol. IV, p. 519. They left the bedroom. Mr. Barton tried to comfort Ms. Selvidge and said, "I'm sorry, Ms. Gladys." Tr. Vol. IV, p. 520.

Officer Hodges arrived and cleared the trailer. Tr. Vol. IV, p. 536. Outside, he noticed bloodspots on Mr. Barton's shirt and took him into custody. Tr. Vol. IV, pp. 539-540. Mr. Barton explained to Officer Merritt that he must have gotten the stains on his shirt when he pulled Ms. Selvidge away from the body. He said he slipped as he did so, and probably came into contact with the blood at that point.[1] Tr. Vol. IV, p. 672. Describing this testimony, Officer Jack Merritt stated that at one point after he had been given his *Miranda* warnings, Mr. Barton had refused to answer further questions. Tr. Vol. IV, p. 668. An objection to this statement was sustained, and an instruction to disregard was given. Tr. Vol. IV, p. 671. However, Mr. Barton's motion for mistrial was denied. Tr. Vol. V, p. 1068.

On the night of the incident, Ms. Selvidge confirmed to Officer Hodges that Mr. Barton had pulled her away from Ms. Kuehler's body. Tr. Vol. IV, p. 552. She repeated this statement the next day to Missouri Highway Patrol Lt. Duane Isringhausen. Tr. Vol. V, p. 747. However, at trial, both she and Ms. Horton testified that Mr. Barton never entered

[1] Mr. Barton never said he had slipped *in blood*; he simply said he had slipped. Tr. Vol. IV, p. 556.

the bedroom; he followed them down the hall but never got past the doorway. Tr. Vol. IV, p. 518 (Selvidge); pp. 482-483 (Horton).

Blood on Mr. Barton's shirt was found to be that of Ms. Kuehler. William Newhouse, a criminalist, testified that the stains on the shirt could have been caused by a high speed impact similar that which would occur if Mr. Barton had stabbed Ms. Kuehler. Tr. Vol. V, pp. 885-886, 891.

Ms. Kuehler had been stabbed numerous times. Blood was pooled on the floor of the bedroom and on the bed. She had lost so much blood that it was difficult to obtain a blood sample. Tr. Vol. V, p. 756. The blood exhibits submitted to the crime lab were still wet when they were opened for analysis. Tr. Vol. V, p. 755. Crime scene photos confirmed the existence of wet, liquid blood when the body was discovered. Tr. Vol. IV, p. 694, 817. At autopsy, a hair was discovered on Ms. Kuehler's body which was not consistent with the hair of Mr. Barton or Ms. Kuehler. Tr. Vol. V, pp. 593, 966, 968.

Several days after Ms. Kuehler's death, a young girl named Krista Torrisi was picking up trash in the area with a church group. She found a check for $20.00 made out to Mr. Barton and signed by Ms. Kuehler

lying in a ditch. Tr. Vol. IV, p. 656. No usable fingerprints were recovered from the check. Tr. Vol. IV, p. 689.

The state also presented testimony that in 1993, when Mr. Barton was being housed in the Lawrence County jail, he threatened a fellow prisoner "Katharine Allen," saying that he would "kill her like I killed the old lady." Ms. "Allen" testified on direct examination that she had seven prior convictions. Tr. Vol. VI, p. 930. On cross-examination, Ms. "Allen" was shown to have used numerous aliases and to have at least 13 criminal convictions for forgery, bad checks, theft and credit card fraud. Tr. Vol. VI, pp. 934-943. Lt. Isringhausen testified that when Ms. "Allen" provided this information to him, she claimed to have threatening letters from Mr. Barton, but never produced them. Tr. Vol. VI, pp. 956-957. Ms. "Allen" denied telling Lt. Isringhausen she had such letters. Tr. Vol. VI, p. 950.

In a hearing outside the presence of the jury, Larry Arnold, another jailhouse snitch who testified at a previous trial that Mr. Barton had admitted the crime, testified that he had lied and that Mr. Barton had never talked about the crime to him. Tr. Vol. VI, p. 719. Also outside the presence of the jury, Craig Dorser, a third jailhouse snitch who previously testified to admissions by Mr. Barton (SC80931

Tr. p. 777-778), testified out of the jury's presence that he had suffered a head injury and no longer remembered the incident.[2] Tr. Vol. IV, p. 712. The state elected not to present the testimony of these witnesses before the jury. Ricky Ellis, who had previously testified that he heard Mr. Barton threaten Mr. Arnold, also testified out of the jury's presence. SC80931 Tr. p. 766. He said that he lived in the trailer park, and thinks that Mr. Barton came to his trailer that day to use the bathroom. SC80931 Tr. p. 733. The state did not present his testimony to the jury, either.

The jury was instructed on the offenses of first and second degree murder. L.F. Vol. II, pp. 170-171. The defense objected that these instructions were not supported by the evidence. Tr. Vol. VI 1006. The jury found Mr. Barton guilty of first degree murder. L.F. Vol. II, p. 177.

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[2] In its consideration of the proportionality of Mr. Barton's sentence in its 1999 opinion, this Court cited Mr. Dorser's testimony that Mr. Barton had told him that he had licked Ms. Kuehler's blood off his face and liked it as a reason why the death sentence was appropriate. *State v. Barton*, 998 S.W.2d 19, 31 (Mo. banc 1999).

During the penalty phase of the trial, the state presented documentary and testimonial evidence concerning Mr. Barton's two prior convictions for assault. Tr. Vol. VI, pp. 1085-1118. They also presented victim impact evidence from Ms. Selvidge. Tr. Vol. VI, pp. 1119-1129. The defense presented three brief witnesses. Two of them, Lucy Engelbrecht and Donna Potts, testified that they had been visiting Mr. Barton in prison for many years. Tr. Vol. VII, pp. 1130-1142. The third, Mr. Barton's wife, testified that she had met him through a "pen friend" program and had married him 3½ years before trial. Tr. Vol. VII, pp. 1143-1144.

ARGUMENT AND AUTHORITIES

REPLY POINT I

THERE WAS LEGALLY INSUFFICIENT EVIDENCE OF MR. BARTON'S GUILT.

The state accuses Mr. Barton of disregarding the standard of review which requires the court to consider the evidence in the light most favorable to the verdict. Mr. Barton denies this allegation. The state, however, seems in its statement of facts to ignore the fact that

this Court must consider ALL the evidence, not just that favorable to the verdict, in ruling on Mr. Barton's assertion of insufficient evidence.

For example, the State says that Lt. Isringhausen testified that Ms. Selvidge told him that she never got closer to Mr. Barton than Ms. Kuehler's feet, but neglects to mention that she confirmed her earlier statement that Mr. Barton pulled her away from Ms. Kuehler. Respondent's Brief, p. 15. Nor does the State mention that Ms. Selvidge made the same statement about Mr. Barton's pulling her away to Officer Lyle Hodges, or that she changed her story at trial and said she was under "duress" when she made these statements after the body was found. Tr. Vol. III, p. 524.

The state further concedes that the murder weapon was never found, but mis-characterizes the testimony of criminalist Tom Buell, who testified that Mr. Barton's pocketknife (the only knife connected with him) was inconsistent with the wounds. Tr. Vol. V, p. 978. According to the state, Mr. Buell testified that he "could not positively identify one of the seized knives as the murder weapon." Respondent's Brief, p. 18. Nor does the state mention that no trace of blood was found on the pocketknife or any of the other seized knives, for that matter. Tr. Vol. IV, p. 689. Finally, the state indicates that Sharon Strahan, whose

testimony was read into evidence because she had died "identified" Mr. Barton as standing near Ms. Kuehler's house when she left around 3:00 p.m. Respondent's Brief, p. 11. In fact, Ms. Strahan admitted she never saw the face of the person she identified, and relied entirely on clothing for her identification. Tr. Vol. IV, p. 634.

While it is true that the *Jackson v. Virginia*, 433 U.S. 307 (1979), standard permits the court to draw reasonable inferences favorable to the verdict from the evidence presented, the state attempts to draw an attenuated series of inferences not supported by the evidence. The state suggests that Mr. Barton made "false statements to the police" because he changed the time he had been to the trailer when asked about the call from Bill Pickering, and told the officers he had answered the telephone at Ms. Kuehler's. Respondent's Brief. p. 23. But in fact, Mr. Barton would have been far better served by denying he received the call; the fact that he was forthcoming about it when asked is evidence of innocence rather than consciousness of guilt.

As to Mr. Barton's change of mood after his second visit to Ms. Kuehler, the jury heard that Ms. Horton's testimony on that issue directly contradicted her testimony at an earlier trial. Tr. Vol. III, pp. 460, 499-500. The blood in the bathroom of Ms. Kuehler's trailer may

suggest that the murderer attempted to clean him or herself, but it was never connected to Mr. Barton. That Ms. Horton's bathroom, where Mr. Barton washed, yielded no trace of blood strongly supports Mr. Barton's explanation that he had been working on a car and needed to wash his hands.

Mr. Barton's statement to Ms. Horton that Ms. Kuehler was taking a nap was seen by Ms. Horton as normal, because Ms. Kuehler frequently napped in the afternoon. Tr. Vol. III, p. 464. His knocking on the bedroom wall and telling Ms. Selvidge not to enter the bedroom certainly indicate that he knew where the bedroom was and was worried about what Ms. Selvidge might find there (since Ms. Kuehler was not in the living room), but indicate nothing more. Finally, the request for a ride to his car shows, in itself, nothing more than his desire to get to his car. After Ms. Horton refused to give him a ride, Mr. Barton instead went to the home of Brenda Montiel and had dinner. Tr. Vol. V, p. 971. There was no evidence that he asked *her* for a ride anywhere. If there was an impulse to flee, it certainly evaporated quickly.

Finally, the state relies on the testimony of "Katherine Allen"[3], the only jailhouse snitch witness whose testimony survives the long series of trials in this case.[4] Ms. "Allen", whom the post-conviction court found had previously committed perjury with the assistance of the prosecutor, testified to a threat by Mr. Barton that included a possible admission to murdering an old lady. In the course of her direct examination, she once again falsified her prior criminal history. Tr. Vol. VI, p. 930. She also told Trooper Isringhausen that she had threatening letters from Mr. Barton, but failed to produce them. Tr. Vol. VI, pp. 956-957. In *State v. Barton*, 998 S.W.2d 19, 30 (Mo. banc 1999), Judge Wolff, dissenting from the denial of a new trial, noted that the first jury which heard Mr. Barton's case was unable to reach a verdict, and commented, "Much of

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[3] It is unclear what this witness's true name is.

[4] Two other witnesses who testified about Mr. Barton's alleged inculpatory statements at previous trials. One, Larry Arnold, testified at a pretrial hearing that he had committed perjury at the previous trial. Tr. Vol. IV, p. 719. The second, Craig Dorser, testified at the pretrial hearing that he no longer remembered his conversation with Mr. Barton. Tr. Vol. IV, p. 712.

the certainty that his most recent trial is afforded. . . came from ever-helpful fellow prisoners," and suggested that Mr. Barton's guilt was still in question. Ms. "Allen's" testimony is vague and has been thoroughly discredited.

The absence of blood on Mr. Barton prior to the discovery of the body is uncontradicted. Neither Ms. Montiel, Ms. Horton, nor Ms. Selvidge saw it. Tr. Vol. III, p. 459; Vol. VI, p. 973. No blood was found in Ms. Horton's bathroom, where Mr. Barton washed his hands. Tr. Vol. IV, p. 689. Even viewed in the light most favorable to the verdict, the state's theory founders on the proposition that Mr. Barton, who supposedly stabbed Ms. Kuehler over 50 times between 3:00 and 4:00 p.m., when he was absent from Ms. Horton's trailer, had managed to clean himself well enough to eliminate all traces of blood without showering or changing his clothes. Tr. Vol. III, p. 497. Nor does the state explain why, if Mr. Barton did not get blood on him when the body was discovered but rather when he committed the murder, the blood which was immediately apparent to Officer Lyle Hodges in the dark outside Ms. Kuehler's trailer was not seen by anyone else who interacted with Mr. Barton between 4:00 p.m. and the time the body was discovered.

Mr. Barton is entitled to discharge.

REPLY POINT II

MR. BARTON IS ENTITLED TO DISMISSAL OR A LIFE SENTENCE AS A RESULT OF PROSECUTORIAL MISCONDUCT.

A. Mr. Barton is entitled to discharge under the Double Jeopardy provisions of the United States and Missouri Constitutions.

At the outset, the State contends that this Court should not consider the transcript of the hearing conducted in response to its order remanding Mr. Barton's last post-conviction proceeding, because there is no evidence that the trial court considered the transcript in making its ruling on his pretrial motion. This attempt to hide the ball should not be countenanced by this Court which, as noted in Mr. Barton's motion to expand the record, may take judicial notice of the files and records of previous appeals involving the same parties. *State v. Booker,* 540 S.W.2d 90, 93 & n.3 (Mo. App. 1976) (the court procured record to decide case fairly). See also *State v. Gilmore*, 681 S.W.2d 934, 940 & n.3 (Mo.1984) (en banc) (referring to transcripts in prior murder appeals of same appellant); *Knorp v. Thompson*, 352 Mo. 44, 175 S.W.2d 889,

894 (1943) (reason for not taking judicial notice of court records—that a party should not be bound by findings on evidence which it did not have an opportunity to refute or explain—has no application where, as here, the parties are the same); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474-75 & n.4 (Mo. App. 1998) (citing numerous cases); *State v. Johnson*, 714 S.W.2d 752, 764 (Mo. App. 1986).

Contrary to the state's assertion, Mr. Barton certainly does not concede that the Double Jeopardy Clause of the United States Constitution is inapplicable. Rather, based on *Oregon v. Kennedy*, 456 U.S. 667 (1982), he asserts that the Double Jeopardy Clause of U. S. Const. Amend. V, made applicable to the states by U.S. Const. Amend. XIV, requires relief here. The State concedes that a number of courts have found that, where the prosecutor commits misconduct with intent to prevent an acquittal, retrial is precluded. That is exactly what happened here. Faced with a witness whose testimony strongly supported Mr. Barton's guilt in what was largely a circumstantial evidence case, the prosecutor failed to disclose to the defense that he had offered consideration for her testimony, failed to disclose to the defense the extent of her criminal record, and failed to correct her false testimony.

The state argues that there was no finding that this was "intentional" prosecutorial misconduct. Of course, such a finding was not required for the motion court to grant relief. While there was no specific finding that the prosecutor intentionally failed to disclose Ms. "Allen's" criminal history, as to the failure to disclose a letter which clearly recited consideration for a guilty plea, the state cannot take shelter in the prosecutor's expressed "belief" that the letter did not have to be disclosed because he did not believe he had made such an agreement. The post-conviction motion court indicated that Mr. Barton, in the post-conviction proceedings, had presented the deposition testimony of Robert Craven, Ms. "Allen's" Indiana counsel, that he had been told by the prosecutor's investigator, Mr. Dresselhaus, that the Missouri charge would be dismissed if Ms. "Allen" agreed to come to Missouri to testify against Mr. Barton. The motion court found, "The court infers from the fact that the state did not call Mr. Dresselhaus, an employee of the Attorney General, to testify at the evidentiary hearing, that Mr. Dresselhaus would have testified in conformance with the testimony of Mr. Craven." L.F. Vol. I, p. 100. That is, Mr. Dresselhaus would have testified, and the court found, that an agreement *had* been

made. It is clear, then, that the failure to disclose the agreement was intentional.

Moreover, as to the failure to correct Ms. Allen's perjury, the court found that it was "incumbent upon the prosecutor to correct the false impression created by her testimony." The prosecutor never denied that he knew about the additional convictions; he simply said that he did not think the witness had intentionally lied. This amounts to an admission of misconduct. L.F. Vol. I, pp. 102-103.

The state makes the novel argument that the fact that Ms. "Allen" repeated her perjury at this trial (again without intervention by the prosecutor! Tr. Vol. VI, p. 930) shows that her prior perjury was not intentional. What the most recent testimony shows, instead, is that Ms. Allen is a brazen liar who has gotten away with perjury in the past and expected to do it again—with the help of the state.

Mr. Barton's present trial was occasioned by intentional prosecutorial misconduct, and he is entitled to discharge under the federal Double Jeopardy Clause. In the alternative, he relies on the Missouri Constitution, as discussed in the opening brief.

B. In the alternative, this Court should vacate the death sentence.

The trial court found that Mr. Barton had suffered prejudice from being repeatedly retried:

> I find clearly, clearly, that the Defendant has been prejudiced by having to come back over and over again because clearly the State's case has been improved time after time because they find more snitches. They find two things I think most important. They find more snitches, and they get the benefit of technological advantages and DNA, none of which they had. The only time the jury got to hear a fair crack and then the jury was hung. So it is almost unarguably [sic] that the Defendant has been prejudiced. The defendant has been prejudiced.
>
> Tr. Vol. I, p. 45.

The sentence of death is irreversible, and as a result, proceedings in cases involving the death penalty are subject to heightened standards of reliability. As the United States Supreme Court put it in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), "[T]he imposition of death by

public authority is. . .profoundly different from all other penalties. . ." (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). For that reason,

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 456, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340 (1984). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. See *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-2992, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Ford v. Wainwright, 477 U.S. 399, 411 (1986). Where, as here, Mr. Barton's ability to defend himself in both the guilt and penalty phases has been inhibited by prosecutorial misconduct, it is appropriate for this Court, if it is unwilling to dismiss that charges against Mr. Barton, at least to preclude the death penalty. See Mo. Rev. Stat. §565.035.5.

REPLY POINT III

THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTION FOR MISTRIAL WHEN A LAW ENFORCEMENT WITNESS TESTIFIED THAT MR. BARTON HAD REFUSED TO ANSWER QUESTIONS AFTER BEING GIVEN HIS *MIRANDA* WARNINGS.

Arguing that a mistrial was not required, the state attempts to distinguish *State v. Dexter*, 954 S.W.2d 332 (Mo. banc 1997), by contending that Mr. Barton was not under arrest when he made the statement. It is undisputed that the statement was made after Mr. Barton had been given *Miranda* warnings. This is the action that triggers the rule of *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Whether or not the Mr. Barton was formally under arrest is irrelevant; *Doyle* holds that the warnings create an implicit "assurance that silence will carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

The state next argues that in this case, Mr. Barton's silence was not "used for the purpose of incrimating appellant." Respondent's brief, p. 42. It is true that in *State v. Dexter*, 954 S.W.2d 332 (Mo. banc 1997), the prosecutor emphasized the testimony, while the prosecutor here did not do so. This is relevant to the analysis of the *Chapman v. California,*

386 U.S. 18, 24 (1967) factors, and Mr. Barton concedes that there were not repeated *Doyle* violations in *this* trial. However, the same officer made a similar statement in Mr. Barton's 1994 (3rd) trial without objection. SC77147 Tr., p. 657. Prior to Mr. Barton's 1998 (4th) trial, the defense made a motion in limine to prevent this testimony. SC80931, Tr., p. 331. Thereafter, the state did not elicit it. Thus, the State was certainly on notice of the potential problem in this officer's testimony, and should have taken steps to prevent it. Its repitition of the error is rather flagrant. Moreover, the repitition of the violation is only one factor to be considered.

Finally, the state urges this Court to find that the curative instruction was sufficient to eliminate prejudice. As noted in the opening brief, the court's instruction to disregard unnecessarily served to emphasize the testimony to the jury. In formulating an instruction to disregard, there was no need to quote verbatim the objectionable testimony. And, as this Court noted in *Dexter*, despite the instruction to disregard, "The prosecutor's mere asking of the questions. . . had already created an inference of guilt. . ." *State v. Dexter*, 954 S.W.2d 341 (Mo. banc 1997).

Reversal is required.

REPLY POINT VI

THE TRIAL COURT PLAINLY ERRED IN ADMITTING THE FORMER TESTIMONY OF SHARON STRAHAN IN WHICH SHE IDENTIFIED MR. BARTON AND REFERRED TO A LINEUP AS TO WHICH AN OBJECTION HAD BEEN SUSTAINED.

One error in the state's response needs to be corrected. The state asserts, on p. 57 of its brief, that the in-court identification testimony of Ms. Strahan "is not challenged on appeal." On the contrary, on pp. 93-95 of the opening brief, Mr. Barton argues that Ms. Strahan's in-court identification should also have been suppressed. Mr. Barton relies on the arguments presented there in support of that contention, which was not addressed by the state's brief, as well as for his contention that the redaction by the court did not protect his rights.

The state further argues that there was no prejudice to Mr. Barton, because other persons placed him in the trailer park during the afternoon of the murder. However, no one other than Ms. Strahan placed him near Ms. Kuehler's trailer at that time, and the state argues

that this evidence supports Mr. Barton's guilt. The state cannot have it both ways. Reversal is therefore required.

REPLY POINT VII

THE TRIAL COURT PLAINLY ERRED IN PREVENTING TRIAL COUNSEL FROM CROSS-EXAMINING "KATHERINE ALLEN" CONCERNING THE NATURE OF THE CRIMES OF WHICH SHE HAD BEEN CONVICTED.

In response to Mr. Barton's contention that his right to cross-examine a prosecution witness was unduly limited, the state cites *State v. McClanahan*, 954 S.W.2d 476, 479 (Mo. App. 1997); and *State v. Light*, 871 S.W.2d 59, 63 (Mo. App. 1994). Both of those cases concerned the right of the prosecutor to cross-examine *the defendant* about details of prior crimes. Both held that the cross-examination was either proper or was not prejudicial *to the defendant.* As explained in the opening brief, the defendant has a right to be tried only for the offense charged. This right is protected by restrictions on questions regarding *his* prior convictions. Mere witnesses, whether for the defense or the prosecution, have no such right. The state cites no cases holding that a defendant

may not cross-examine state's witnesses about the dishonesty inherent in their prior convictions.

The state then suggests that Mr. Barton was not prejudiced because defense counsel was able to argue that Ms. Allen was dishonest. This is simply not enough to eliminate prejudice. Ms. Allen was the only witness who testified to an admission by Mr. Barton. Mr. Barton was entitled to do much more than simply ask the jury to infer that she was dishonest. He was entitled to demonstrate that dishonesty to the jury by showing the jury exactly what she had done in the past. In light of the fact that a former judge had written to Ms. Allen's Indiana judge about her importance as a witness[5], prejudice is shown and reversal is required.

REPLY POINT VIII

THE TRIAL COURT PLAINLY ERRED IN GIVING INSTRUCTIONS 14 AND 15. THESE INSTRUCTIONS IMPROPERLY PREVENTED THE JURY FROM GIVING FULL CONSIDERATION TO MITIGATING EVIDENCE.

The state's brief cites the cases of *State v. Clayton*, 995 S.W.2d 468, 478 (Mo. banc 1999); *State v. Kinder*, 942 S.W.2d 313, 333 (Mo.

banc 1996); and *State v. Wise*, 879 S.W.2d 494, 518 (Mo. banc 1994), for the proposition that this Court has repeatedly rejected Mr. Barton's challenge to the mitigating circumstances instruction. All of those cases, however, were decided before *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*).

Moreover, since the filing of the opening brief, the U.S. Supreme Court has again recognized the importance of proper instructions in implementing the constitutional requirement that the jury be able to consider mitigating evidence fully. In *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007), the Court held that the jury instructions which required the jury only to answer two special issues, one regarding whether the offense conduct was deliberate and done with a reasonable expectation that death would result, and one regarding whether there was a probability that Mr. Abdul-Kabir "would commit criminal acts of violence that would constitute a continuing threat to society" *Id.* at 1660. Mr. Abdul-Kabir presented evidence that he had been scarred by a terrible childhood. Two psychologists who presented testimony about the consequences of his upbringing testified that, in fact, his

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[5] SC83615 Supp. L.F. p. 2.

psychological condition increased the probability of future dangerousness.

The Supreme Court found that the evidence presented by Mr. Abdul-Kabir was mitigating in that it showed that his "violent propensities were caused by factors beyond his control. . ." *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1661 (2007). The prosecutor argued that the jury must answer the special issues on the facts, and, therefore, could not consider the fact that Mr. Abdul-Kabir's tendency to violence was caused by his poor upbringing.

Remanding for a new penalty phase hearing, the Court held that *even before Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*),

> [O]ur cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.
>
> *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1664 (2007).

The Court went on to re-emphasize that the Constitution requires not only that the defendant be able to *present* mitigating evidence, but

that the jury be able to give "meaningful consideration" to such evidence. The Court then held that the absence of an instruction which expressly permitted the jury to consider mitigating evidence and impose a life sentence as a result, along with the prosecutor's argument that mitigating evidence should *not* be considered, violated Mr. Abdul-Kabir's rights under the Eighth Amendment to the United States Constitution.

The Missouri instructions present a different problem than the Texas special issues, but the consequences for the defendant are the same. As the judge here noted, once a jury has found that the aggravating circumstances "warrant" the death penalty, it is highly unlikely that they will give full consideration to the mitigating evidence. Tr. Vol. I, p. 183. Under *Penry II* and *Abdul-Kabir*, remand for a new penalty phase is required if Mr. Barton is not discharged or granted a new trial.

REPLY POINT XI

THE TRIAL COURT ERRED IN SENTENCING MR. BARTON TO DEATH BASED ON HIS REJECTION OF A PLEA BARGAIN AGREEMENT.

The state suggests that the trial judge's sentence was not improper because the judge "simply deferred to the jury's decision." In sentencing a defendant, the trial judge is not supposed "simply" to "defer" to the jury's decision, but to exercise independent review of the proper sentence. Under Missouri law, jury sentencing merely caps the sentence; it does not remove from the judge the power to enter a lesser sentence. Sup. Ct. R. 29.05. Moreover, that rule requires the judge to determine whether the punishment is "excessive," not whether the defendant exercised his right to trial. Because the trial judge's comments here indicate that he did not base his determination on proper factors, remand for resentencing is required.

REPLY POINT XIII

THE DEATH SENTENCE MUST BE VACATED BECAUSE IT IS EXCESSIVE AND DISPROPORTIONATE TO THOSE IMPOSED IN OTHER SIMILAR CASES, IN VIOLATION OF MO. REV. STAT. §565.035 AND THE UNITED STATES CONSTITUTION, IN THAT THE EVIDENCE OF GUILT IS NOT SUFFICIENT TO SUPPORT A DEATH SENTENCE, AND MR. BARTON HAS BEEN PREJUDICED BY PROSECUTORIAL MISCONDUCT.

The state suggests that this Court, in exercising its statutory review under Mo. Rev. Stat. §565.035, may only consider evidence presented at trial. The statute nowhere indicates that this is true. To the contrary, it seems clear that the statutes allow this Court discretion to consider anything relevant to the sentence. The statutes not require this Court simply to review the action of the trial court, but, on the contrary, give this Court authority to change the sentence as the Court deems fit and just:

> In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. . .

Mo. Rev. Stat. §565.035.5

This Court has not previously had the opportunity to review the evidence presented at the post-conviction rehearing conducted pursuant to its decision in *Barton v. State*, 76 S.W.3d 280 (Mo. banc 2002), because the state did not appeal from the motion court's determination that a new trial was required. However, that testimony is certainly pertinent to the case, and the transcript, as previously discussed, is properly before this Court. Nor is this Court limited, as the state suggests, to determining that the sentence in this case is disproportionate; its authority to reduce Mr. Barton's sentence is "in addition to its authority to correct errors." The statute places no limits on the information this Court may consider in making that determination.

The evidence cited in the opening brief was presented at a post-conviction hearing in which the state had the full opportunity to, and did, participate. There is no unfairness to the state in this Court's consideration of that evidence despite the state's attempts to keep it from this Court's attention.

For the arguments in support of sentence reduction, Mr. Barton relies on his opening brief.

REPLY POINT XV

THE TRIAL COURT PLAINLY ERRED IN IMPOSING A SENTENCE OF DEATH BECAUSE THE METHOD OF EXECUTION PRESCRIBED BY MISSOURI LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Since the filing of the opening brief in this matter, the Eighth Circuit Court of Appeals has reversed the decision of the federal district court for the Northern District of Missouri, and has found the protocol produced by the State of Missouri in connection with the case of *Taylor v. Crawford* to comport with the United States Constitution. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). The mandate in that case has not yet issued, but rehearing has been denied. More recently, in *Nooner*

v. Norris, 2007 WL 1964649 (8th Cir. July 9, 2007), the Eighth Circuit vacated a stay of execution granted to petitioner Nooner on the ground that he had not litigated the issue of whether the state's execution method as soon as such a challenge was available to him. In light of this decision, Mr. Barton now makes his particular challenge to the most recent method of execution promulgated by the Missouri Department of Corrections.

There is a grave risk that Mr. Barton will experience severe pain if the lethal injection process is not performed properly. This is because the two drugs give to cause death are highly painful if the person to whom they are given is not anesthetized at the time they are administered. Therefore, the Constitution requires that executions by lethal injection be overseen by personnel with qualifications and training sufficient to ensure that the condemned inmate is, and remains, fully anesthetized during injection of the second and third drugs in the protocol.

The Missouri Department of Corrections has a well-documented history of employing incompetent and unqualified personnel to oversee this crucial element of executions by lethal injection. Accordingly, under the current lethal injection protocol, there exists a substantial

likelihood that the personnel charged with carrying out executions are unqualified or otherwise unfit to do so.

Since Missouri law currently prevents Mr. Barton or his attorneys from determining the identity of the persons who will carry out the execution, the Cruel and Unusual Punishment Clause of U.S. Const. Amend. VIII requires that this Court remand Mr. Barton's case to the trial court for a prompt determination as to the qualifications and training of the persons who will execute him. Alternatively, this Court could fix a time at which a condemned inmate must raise any challenge to the method of execution.

CONCLUSION

For the foregoing reasons, Mr. Barton prays the court:

a) For the reasons discussed in Points I, II and XIV of the opening brief and corresponding reply points, to vacate his conviction and sentenced and order that he be discharged; or, in the alternative,

b) For the reasons discussed in Points III, V, VI, and VII of the opening brief and corresponding reply points, to vacate his conviction and sentence and remand for a new trial as to both guilt and penalty; or, in the alternative,

c) For the reasons discussed in Points II XII, and XIII of the opening brief and corresponding reply points, to vacate his sentence of death and enter a sentence of life imprisonment without eligibility for probation or parole; or, in the alternative;

d) For the reasons discussed in Points IV, VIII, IX, and X of the opening brief and corresponding reply points, to vacate his sentence of death and remand for a new penalty phase; or, in the alternative,

e) For the reason discussed in Point XI of the opening brief and the corresponding reply point, to vacate his sentence of death and remand for resentencing before a different judge; or, in the alternative;

f) For the reasons discussed in Point XV of the opening brief and the corresponding reply point, either to remand for a hearing on

Missouri's execution method or to fix a time when a death-sentenced person must raise the issue of cruel and unusual methods of execution.

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CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 7.714 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

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I hereby certify that a copy of the foregoing brief was served upon Richard Starnes, Asst. Atty. Gen., Attorney for Respondent, at P.O. Box 899, Jefferson City, MO 65102, by U.S. Mail on August 15, 2007.

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