

No. SC87859

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In the  
Missouri Supreme Court

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STATE OF MISSOURI,

Respondent,

v.

WALTER BARTON,

Appellant.

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Appeal from the Circuit Court of Cass County  
Seventeenth Judicial Circuit, Division II  
The Honorable Joseph P. Dandurand, Judge

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RESPONDENT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction for murder in the first degree, § 565.020, RSMo 2000, obtained in the Circuit Court of Cass County, for which appellant was sentenced to death. Due to the sentence imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const., Art. V, § 3 (as amended 1982).

## STATEMENT OF FACTS

Appellant, Walter Barton, was charged by information on February 18, 1992, in the Circuit Court of Christian County with murder in the first degree for the October 1991 murder of Gladys Kuehler (SC80531 L.F. 1).<sup>1</sup> On August 10, 1992, the State filed its Notice of Intent to Seek the Death Penalty, listing four statutory aggravating circumstances (SC80531 L.F. 5-6). Following numerous changes of venues, two mistrials, a trial followed by a reversal and remand by this Court, and another trial followed by the vacating of the conviction by a post-conviction motion court, this case went to a trial by jury beginning on March 6, 2006, in the Circuit Court of Cass County, the Honorable Joseph P. Dandurand presiding (SC77147 L.F. 174, 178, 181-182; SC80931 L.F. 183; L.F. 9-10, 12, 15, 124). State v. Barton, 936 S.W.2d 781 (Mo. banc 1996).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: The victim, who was 81 years

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<sup>1</sup>The legal file in this case only contains documents filed after this case was reset for trial after appellant's previous conviction was vacated by the motion court in State of Missouri v. Walter Barton, Benton County Case No. 30V019900453. For the purposes of having a complete record of the lengthy underlying criminal proceedings of this case, respondent requests that this Court take judicial notice of the contents of its files in State of Missouri v. Walter Barton, SC77147, and State of Missouri v. Walter Barton, SC80931. To the extent that respondent refers to matters in the record of an earlier criminal appeal, respondent will include the case number in the record cite, e.g., "(SC80931 L.F. \_\_)."

old, was the manager of the Riverview Mobile Park located at 505 West Church Street in Ozark, Missouri, and lived in a trailer she owned at the park (Tr. 451, 504, 531, 609-610, 618). Between 8:30 and 9:00 on the morning of October 9, 1991, Carol Horton, another resident of the park, went to the victim's trailer to help the victim, who needed a cane to get around because of a deteriorating disc in her back, do some work (Tr. 447, 453-454, 504-505). Horton then went to Wal-Mart to do some shopping for the victim (Tr. 454).

Around 10:00 a.m., the victim called her granddaughter, Debbie Selvidge, to let her know that she was going out (which she customarily did) and later called Selvidge back to tell her that she had returned home (Tr. 509). Around 11:00, Horton returned to the trailer park, getting the victim's mail for her as she returned (Tr. 455). When she saw the victim at that time, the victim was sitting on a daybed she kept in her living room, and she looked like she was "doing okay" (Tr. 455).

Around noon that day, appellant came to Horton's trailer (Tr. 452). Appellant was regularly around the park, but Horton had not seen him in a week, and appellant told her he had been living in his car (Tr. 452, 456). Appellant was in a "happy-go-lucky" mood, talking and dancing around to the music from the radio he asked to have turned on (Tr. 462). He stayed at Horton's until around 2:00 p.m., when he said he was going to the victim's trailer to see if the victim would lend him \$20.00 (Tr. 456). He returned about 10-15 minutes later, still in a good mood (Tr. 456-458).

Between 2:00 and 3:00, several people had contact with the victim at her trailer (Tr. 612, 616, 630). Teddy Bartlett and his wife, Sharon Strahan, who used to live at the trailer

park, went to the park to visit the victim around 2:00 and stayed until sometime around 2:45 visiting with her (Tr. 611, 614-615, 630-630). While they were there, Dorothy Pickering, who co-owned the trailer park with her husband, Bill, and who was at the park with her husband cleaning a trailer, stopped by the victim's trailer to pick up some rent payments (Tr. 610-611, 615). A man named Roy also stopped by to bring a fan and a magazine back to the victim (Tr. 615). They stayed until the victim said she was not feeling well and was going to take a nap (Tr. 615-616). Around that same time, Selvidge called the victim and spoke with her (Tr. 505).

Meanwhile, appellant told Horton that he was going back to the victim's trailer, and left sometime around 3:00 (Tr. 457). As Bartlett and Strahan left, Strahan noticed appellant standing at the driver's side door of a pickup truck parked near the victim's trailer talking to someone inside the truck (Tr. 631-633). Shortly thereafter, around 3:15 p.m., Bill Pickering called the victim's trailer because his wife said the victim wanted to talk to him about someone moving into the park (Tr. 620). A male voice answered the phone, and Pickering asked to speak with the victim (Tr. 620-621). The man hesitated, and then said, "She's in the bathroom" (Tr. 621). Pickering told the man who he was and to have the victim call him back (Tr. 621).

Around 4:00, about an hour after he left Horton's, appellant returned and asked to use her restroom, which she permitted (Tr. 458-459). After a while, Horton noticed he'd been in there for a long time and had never heard the toilet flush (Tr. 459). She went to check on him and saw him at the sink (Tr. 459). He said he had been working on a car and was

washing his hands (Tr. 459). All told, appellant spent about ten minutes or so in the bathroom (Tr. 459-460). Horton noticed that appellant's mood had changed, and now, instead of being jovial as he was before, he was distant and seemed in a hurry (Tr. 459-460). He asked her if she would take him to the "Fast Track" to get his car, but she said she could not, as she was going up to the victim's trailer (Tr. 461). Appellant said, in a "very strong," definite voice, "No, don't...Ms. Gladys is lying down taking a nap" (Tr. 462). Horton went anyway, knocking on the victim's door around 4:15 p.m. (Tr. 461-462). There was no answer (Tr. 462). Horton then left the park to get her car washed (Tr. 464).

Meanwhile, as she did every day, Selvidge called the victim at 4:00, as the two always watched the same television program at that time while talking on the phone (Tr. 503, 505). When there was no answer, Selvidge got scared, and went to the trailer to check on her grandmother (Tr. 505-506). She knocked for some time, but there was no answer (Tr. 506-507). She noticed that there were no lights on, which was unusual, as the victim always left the porch light on when she left (Tr. 509). She then left the part and went to her mother's house to tell her mother that she could not find her grandmother and to try to call the victim again (Tr. 507-508).

Around 4:30, Horton arrived back home and went back to the victim's house to check on her, but again received no answer to her knocking (Tr. 465). Between 6:00 and 6:30, Selvidge arrived at the park and went to Horton's, asking about the victim, telling Horton she had been trying to call since 4:00 (Tr. 466, 510-511). They went back to Selvidge's mother's house to try to call the victim again, and then went back to the park and got

appellant, who had been at a neighbors, to help knock on the door again (Tr. 467-469, 510-511, 513). The three took turns knocking on the door and calling out the victim's name (Tr. 469). Appellant went over to the end of the trailer where the victim's bedroom was and knocked on the side of the trailer (Tr. 469). The three tried to get into the trailer, but could not, so they decided to get a police officer (Tr. 470).

Horton and Selvidge drove to the nearby town square, where they saw Ozark police officer Lyle Hodges on patrol (Tr. 470, 511-512, 530-532). They flagged Hodges down and asked for his help getting in the victim's trailer (Tr. 471, 532). They went back to the park and, after unsuccessfully trying to get into the victim's trailer, Hodges called for a locksmith and then left to take care of another call (Tr. 471-472, 532-533). The locksmith, Cliff Mills, arrived and opened the front door, and Selvidge, Horton, and appellant went into the trailer (Tr. 473, 513-514; St. Exh. 81).

Once inside the trailer, both Horton and Selvidge noticed that the victim's cane, which normally hung on a chair or the rail of the daybed, was lying on the daybed (Tr. 475, 514). They called the victim's name, but received no answer (Tr. 475, 514). Selvidge started to walk down the hallway leading to the victim's bedroom when appellant said, "Ms. Debbie, don't go down the hall. Ms. Debbie, don't go down the hall" (Tr. 477, 516). Selvidge notice that the victim's clothes were in the bathroom by the stool and that the toilet lid was up, which was unusual (Tr. 515-516). Selvidge then turned on the lights in the victim's bedroom and screamed as she found the victim, "practically nude," lying on the floor between her bed and closet (Tr. 477, 480, 517). The victim had been stabbed numerous times, with her throat

cut ear-to-ear and with her intestines eviscerating from some of her wounds (Tr. 517, 536, 559-560). Selvidge started to bend down to touch the victim, but Horton, who had followed Selvidge down the hall to the bedroom, said not to, so she did not (Tr. 478, 518-519). Selvidge then went into the hall, pushed past Horton and appellant, who was following Horton, and went back to the living room (Tr. 481, 518-519). Appellant said to Horton, "Let me see," and looked over her shoulder into the bedroom at the victim (Tr. 481). Appellant did not get upset upon seeing the victim, but remained calm, showing no emotion (Tr. 481-482). Appellant then went back into the living room, having never gotten close to the body or the blood in the bedroom, where he "comforted" Selvidge, telling her that he was "so sorry" (Tr. 482-483, 520).

Officer Hodges returned to the trailer to find Selvidge at the front screaming that her grandmother was dead (Tr. 536). After seeing that the victim had been stabbed, he cleared the scene, telling those who had been in the trailer not to leave, and called for help (Tr. 483-484, 535-536). Paramedics arrived and found that there were no signs of life (Tr. 557-560). Afterwards, while waiting to be released, appellant came up and asked one of the paramedics, Pat Dial, if the victim was dead (Tr. 560-561). When Dial asked if appellant was a family member, appellant said he was not, but was an "acquaintance" who lived in the park (Tr. 562). Appellant seemed "overly concerned" and "out of character" for a mere acquaintance, so Dial told Officer Hodges about his concerns (Tr. 563-564).

Hodges asked appellant if he had seen the victim that day (Tr. 537). Appellant told Hodges that he had seen her between 2:00 and 2:30 that afternoon when he had asked her to

lend him \$20.00 (Tr. 537). He said that the victim told him she would lend him the money, but would have to write a check, which she would do later in the day (Tr. 537-538). Appellant claimed that this was the last time he had been there (Tr. 538). Appellant also spoke with Sergeant Jack Merritt of the Highway Patrol, and told Merritt that he had answered the phone call that Bill Pickering made at 3:15 that afternoon (Tr. 538, 665-666). Because that call occurred between when the victim was last seen alive and when she was found dead, the law enforcement officers decided to take appellant to the Sheriff's Department to speak with him (Tr. 539, 667).

At the Sheriff's Department, Hodges noticed apparent blood on the elbow and shoulder of appellant's shirt (Tr. 539, 667). Appellant said that he had gotten the blood on him when he slipped while pulling Selvidge away from the victim's body (Tr. 555, 672). When Trooper Duane Isringhausen spoke with Selvidge about this, however, she said that she had not gone in the room past the victim's feet, that she got no blood on her clothes, that nobody had fallen in the room, and that appellant and Horton had remained behind her while she was in the room (Tr. 747). Police also noticed that neither Selvidge nor Horton had blood on them, that the victim's blood on the floor was "pretty well dried," as if it had been there for a while, and that there was no wet blood to slip on where the witnesses were standing in the room (Tr. 540, 555, 694).

The investigation of the scene revealed that there was also blood on the sink of the victim's bathroom and on a table in the bathroom (Tr. 674, 692). The victim's checkbook was found, and although the victim regularly entered every check she wrote in her check

register, there was a check not in the checkbook, #6027, which was not listed in the check register (Tr. 638-639, 675). Several knives were seized from the scene, including one that was part of a set which was cleaner than the rest and facing a different direction in the block (Tr. 679-680). The area leading from behind the trailer to a nearby river, as well as the river itself, were searched for a weapon, but none was found (Tr. 640-641). Another knife was later found in a drainage ditch (Tr. 645). None of these knives were positively identified as the murder weapon, although examination did not exclude those knives as the murder weapon (Tr. 976-978).

Three days after the murder, eleven-year-old Krista Torrisi was cleaning up a nearby highway with a group from her church when she found a folded check in a ditch (Tr. 654-656). She showed the check to others in the group, and the pastor recognized the victim's name on the check as being a murder victim, and told her to take it to the police, which she did (Tr. 635-636, 658-659). The check was check #6027, the missing check from the victim's checkbook, written on the day of the murder and made payable to appellant for \$50.00 (Tr. 639, 770). Handwriting analysis on the check confirmed that the victim had written everything on the check (Tr. 770-771).

Tests conducted on appellant's clothing revealed that there was human blood on his shirt, his blue jeans, and his boots (Tr. 783-785). DNA tests conducted on the blood from appellant's shirt showed that the blood was the victim's (Tr. 824-833, 843-853). A blood spatter expert testified that some blood found on appellant's shirt, as well as two spots on appellant's jeans, were consistent with stains created by a medium-to-high-energy impact,

meaning the blood was ejected from the source by a blow or transfer of energy and not by simply rubbing up against already-present blood (Tr. 885-886). He also identified a blood stain on the wall evidencing blood spatter, but noted that the scene was unusual due to the lack of a lot of spatter, showing that there was not a great struggle during the murder (Tr. 889-890).

The autopsy conducted on the victim revealed that she was stabbed well in excess of fifty times, including being stabbed twice through her open right eye and once in the left eyelid, twice in the neck, eleven times in the left side of her chest, three times in the right chest, four times in the abdomen, twice to the back of the left hand (characterized as defensive wounds), twice to the back of the left arms, twenty-three times in the back, and three times in the left flank (Tr. 574-579). There were at least two large slash wounds across her neck, one of which contacted the bone (Tr. 575). There were also two X-shaped slash wounds to the abdomen, through one of which the victim's small intestine protruded (Tr. 577). Internally, the victim's left lung collapsed and one of her ribs fractured from the force of the attack (Tr. 580). The cause of death was exsanguination, due primarily to the wounds to her neck as well as the numerous other stab wounds (Tr. 585). There was also at least one blunt force injury to the victim's head, and some bruising and injury to the victim's genital area led to the conclusion that the victim was sexually assaulted (Tr. 574, 585-586).

At some point after the murders, appellant was incarcerated in the Lawrence County Jail, where inmate Katherine Allen was serving as a trustee, serving meals and doing laundry (Tr. 930-932). During her time there, she and appellant argued more than once because he

got angry that she did not want to talk to him anymore (Tr. 933). On more than one occasion, appellant threatened her, asking her if she knew what he was in jail for and saying that he would kill her “like he killed that old lady” (Tr. 934).

Appellant did not testify, but called four witnesses: a resident of the trailer park to testify that she had dinner with appellant on the night of the murder and did not see blood on him (Tr. 970-974); two Highway Patrol criminalists, one of whom testified that a hair found on the victim and one found in the bedroom did not exhibit the same characteristics as appellant’s hair, and the other who could not positively identify one of the seized knives as the murder weapon (Tr. 963-969, 975-980); and Trooper Duane Isringhausen, who testified to “inconsistencies” in Allen’s testimony regarding her statements to him (Tr. 956-960).

At the close of the evidence, instructions, and arguments of counsel, appellant was found guilty of first-degree murder (L.F. 177). During the penalty phase, the State presented evidence that appellant had committed and been convicted of prior assaultive offenses, including: assault with intent to kill with malice aforethought for robbing a gas station at gunpoint and then assaulting the female clerk by hitting her over the head with a full paint can (Tr. 1084-1107); and assault in the first degree for assaulting another female grocery store clerk during another attempted robbery (Tr. 1107-1118). The State also recalled Debra Selvidge to present victim impact testimony (Tr. 1119-1126). Appellant called two friends, whom he originally came in contact with through a prison ministry, and his wife, whom he met through an inmate “pen friend organization,” to testify about the effect executing appellant would have on their lives (Tr. 1130-1146). Following the penalty-phase

instructions and arguments of counsel, the jury recommended a sentence of death for the murder of Gladys Kuehler, finding all three statutory aggravating circumstances submitted: that the murder was outrageously wanton and vile and that appellant had two prior assaultive criminal convictions (L.F. 189).

On July 6, 2006, in accordance with the jury's verdict, the court sentenced appellant to death for first-degree murder (L.F. 227; Tr. 1185). This appeal follows.

## ARGUMENT

### I.

**The trial court did not err in denying appellant’s motion for judgment of acquittal at the close of all evidence and in convicting appellant of first-degree murder because there was sufficient evidence that appellant was the murderer of Gladys Kuehler.**

Appellant briefly claims that there was insufficient evidence to support his conviction for first-degree murder, arguing that there were no “eyewitnesses, credible physical evidence, or credible evidence of inculpatory statements” connecting him to the murder (App.Br. 33-36).

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc 1998). The appellate court does not act as a “super juror” with veto powers, but gives great deference to the trier of fact. Id. In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id. Further, “an appellate court ‘faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.’” Id. at 53, quoting Jackson v. Virginia, 443 U.S. 307, 326, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979). “[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. at 52, quoting Jackson, 443 U.S. at 318-19.

Here, appellant does not contest that the State met the burden of showing that the murder of Gladys Kuehler met the elements of first-degree murder—that the murderer knowingly caused the death of the victim after deliberation upon the matter. § 565.020.1, RSMo 2000. Instead, appellant only contests that there was sufficient evidence to identify him as the murderer (App.Br. 33-36). In doing so, appellant completely disregards the standard of review, presenting facts in the light most favorable to his innocence, as well as disregarding evidence he claims was not credible. When applying the proper standard of review and deference to the finder of fact on the issue of credibility, it is clear that there was sufficient evidence to identify appellant as the victim’s murderer.

First, appellant claims that there was no direct evidence connecting appellant to the crime, as there were no eyewitnesses, no credible physical evidence, or credible evidence of inculpatory statements. While respondent agrees that there was no eyewitness outside of appellant and the victim to the murder, there was both physical evidence and evidence of inculpatory statements the jury was entitled to rely on to find that appellant was the killer.

As to the physical evidence, appellant was found to have the victim’s blood on his clothing the night of the murder, as the victim’s blood was found on shirt, along with human

blood being found on his boots and jeans (Tr. 539, 667, 783-785, 824-833, 843-853). Criminologist and blood spatter expert William Newhouse testified that some of the blood found on the lower left side of appellant's shirt, as well as two blood spots on appellant's jeans, were consistent with stains created by medium-to-high-energy impact, meaning the blood was ejected from the source by a blow or transfer of energy and not by simply rubbing up against already-present blood (Tr. 885-886). He testified that the stains on appellant's shirt were too small to have been created by such a weak force as a boot or fist landing in a puddle of blood in the room, as that kind of impact would have created "much larger" stains (Tr. 894). While it is clear that appellant does not believe Newhouse's conclusions are credible, that was not his decision to make—the credibility of Newhouse was an issue for the jury to resolve, as the jury was free to believe all, part, or none of any witness' testimony. State v. Crawford, 68 S.W.3d 406, 408 (Mo. banc 2002). Thus, there was physical evidence connecting appellant not only to the victim's blood, but to the forceful ejection of the victim's blood in his presence, supporting the inference that it was he who murdered her.

Likewise, there was evidence that appellant made inculpatory statements about the crime. Katherine Allen testified that appellant asked her if she knew what he was incarcerated for and threatened to kill her "like he killed that old lady" (Tr. 934). Again, appellant claims that this evidence could not be relied on because Allen was not a credible witness due to her lengthy criminal history (App.Br. 34). Again, it was up to the jury to determine whether or not to believe Allen, and, in the light most favorable to the verdict, it

appears the jury did. Therefore, there was evidence that appellant admitted killing the victim.

In addition to this “direct” evidence of appellant’s involvement in the murder, there was plentiful circumstantial evidence that appellant killed the victim. Appellant told the police that he was at the victim’s trailer between 2:00 and 2:30 on the day of the murder, and that was the last time he saw her, although he later admitted that he received the phone call from Bill Pickering in the victim’s trailer, which was made at 3:15, well after appellant originally said he left (Tr. 537-538, 620-621, 665-666). False statements to police show a consciousness of guilt. State v. Farris, 125 S.W.3d 382, 388-89 (Mo.App., W.D. 2004). Appellant’s change in mood from his earlier happy-go-lucky mood to his more somber mood after coming back to Horton’s trailer after he said he was going to the victim’s trailer raises the inference that he was no longer cheerful because of the murder (Tr. 457, 459-460, 462). The presence of blood on the victim’s bathroom sink and table, as well as his long trip to Horton’s bathroom to wash his hands, show an attempt to clean himself off to avoid the detection by others of blood from the murder (Tr. 458-460, 674, 692). His statement to Horton not to go to the victim’s trailer, his knocking on the bedroom portion of the trailer as they tried to gain entrance, and his telling Selvidge not to go to the victim’s bedroom shows that he knew exactly where the body was because he knew where he had murdered her (Tr. 462, 469, 477, 516). His attempt to get Horton to drive him to the “Fast Track” so he could get his car shows an attempt to flee the scene as well as the intent to get out of the area (Tr. 461). Attempted flight is evidence of consciousness of guilt. State v. Johns, 34 S.W.3d 93,

112 (Mo. banc 2000). His odd behavior after the murder, from not showing any emotion upon the discovery of the body to his acting “overly concerned” and “out of character” when talking with paramedic Dial leads to an inference that appellant was trying to hide his involvement in the murder by changing his mood to look as if he was shaken by the murder, even though he had not originally acted that way (Tr. 481-482, 562-564). Finally, the discovery of the disposed-of check, which the victim may have written to appellant under duress as evidenced by her failure to follow her normal custom of entering every check in the check register, shows that appellant tried to get rid of evidence tying him to the murder (Tr. 638-639, 654-655, 658-659, 675). Thus, the record showed plentiful circumstantial evidence which supports numerous inferences connecting appellant to the victim’s murder. Therefore, in light of the considerable direct and circumstantial evidence of appellant’s involvement in the murder, there was sufficient evidence that appellant committed the first-degree murder of Gladys Kuehler.

## II.

**The trial court did not err in denying appellant's motion to dismiss or to preclude the State from seeking the death penalty due to alleged prosecutorial misconduct because appellant's trial, including the imposition of the death penalty, was not prohibited by the federal or state constitutional protections against double jeopardy.**

In his second point, appellant attempts to have this Court either ignore its long held precedent as to the Missouri Constitution's Double Jeopardy Clause or "interpret U.S. Constitutional law" where the "U.S. Supreme Court has not recently spoken" and reinterpret the Double Jeopardy clause of the Fifth Amendment to permit a defendant who challenges his convictions on appeal to use the Double Jeopardy clause as a sword to prevent further relitigation of his claims (App.Br. 54-63). The lynchpin of his proposed overhaul of double jeopardy jurisprudence is the purported findings of a post-conviction court that the prosecuting attorney at appellant's prior trials allegedly engaged in wanton, intentional, and flagrant prosecutorial misconduct, including "intentionally" withholding impeachment evidence and "suborning perjury" (App.Br. 40-54, 64). Appellant tops this off with an novel alternate claim, unsupported by any double jeopardy jurisprudence, that the trial court should have, at the very least, precluded the State from seeking the death penalty in appellant's most recent trial to punish the State for the prosecutor's "egregious conduct" (App.Br. 65-68). But because appellant's claim is not supported by either law or fact, his claim must fail.

## **A. Facts**

### **1. Appellant's Motion**

Prior to trial, appellant filed a motion to dismiss the charges against him based on a violation of his freedom from double jeopardy, or, in the alternative, to preclude the State from seeking the death penalty (L.F. 77-81). Appellant argued that he had been placed on trial four previous times for this crime with the following results: 1) a mistrial granted due to the “State’s failure to endorse any witnesses;” 2) a mistrial due to a hung jury; 3) a conviction and death sentence overturned on appeal because “the Prosecuting Attorney’s closing argument was impermissible”; and 4) a conviction and death sentence overturned by a post-conviction motion court because the “State had knowingly failed to disclose impeachment information about ‘Katherine Allen’ and had knowingly used perjured testimony” (L.F. 78). Appellant argued that “[p]rosecutorial misconduct during the course of trial triggers the prohibition against double jeopardy,” and, while acknowledging that the United States Supreme Court had only applied such a ruling to cases where a mistrial had occurred, cited a federal case, United States v. Catton, 130 F.3d 805 (7<sup>th</sup> Cir. 1997), to speculate that double jeopardy should also apply to the “deliberate and knowing misconduct and use of perjured testimony” (L.F. 78-79).

Alternatively, appellant claimed that the State, at a minimum, should have been precluded from seeking the death penalty due to the “extreme egregiousness of the State’s violations,” arguing that double jeopardy could prevent just the penalty phase as it “is a separate ‘trial’ bringing with the constitutionally guaranteed substantive and procedural

protections common to all criminal jury trials,” and claiming that there could “never be any reliability in a death sentence” for appellant due to the length of time necessary to prosecute him (L.F. 79-81).

## 2. The Motion Court Findings

The only source of support appellant used to prove his claim that a violation warranting the application of the Double Jeopardy clause occurred was the motion court’s findings of facts and conclusions of law from the post-conviction proceeding where the case was remanded for this trial, which he attached to the motion.<sup>2</sup> The motion court granted post-conviction relief based on two claims: 1) that he was denied due process of law when the prosecutor failed to disclose State’s witness Katherine Allen’s full prior criminal history and aliases, and 2) that the state “failed to correct perjured testimony” by Allen that she only had been convicted of passing bad checks (L.F. 96-103). Also included in the first claim was a later added claim that the prosecutor had failed to disclose a letter stating that a prosecutor

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<sup>2</sup>In his brief, appellant mentions a motion he filed to “expand” the record with the transcript from the evidentiary hearing before that motion court (App.Br. 50). Appellant, however, did not present this transcript to the trial court (which was different than the motion court) in support of his claim below. Because appellant failed to provide the transcript to the trial court, the evidentiary hearing transcript was not part of the record below, and this Court should not use that transcript to determine if the trial court erred in denying appellant’s motion.

in another county had dismissed a forgery case against Allen in return for her testimony “in a murder case” (L.F. 100).

In finding for appellant on the first claim of failing to disclose her full criminal history, the court found that there was “no evidence” that Allen’s criminal history had been disclosed to the defense (L.F. 97). It found that, although the prosecutor testified that he had “believed he had disclosed the criminal history,” the record did not support that belief, as the record showed: the prosecutor had disclosed the criminal records for State’s witnesses; the prosecutor could not remember exactly how and when he disclosed the record, nor could he produce any written record of such a disclosure; and defense counsel testified that he never received the criminal history (L.F. 97-98).

As to the additional issue in the first claim regarding the letter to the prosecutor from another prosecutor about dismissing a case against Allen, the motion court found that the prosecutor was aware that the victim “received consideration” for her testimony, despite his testimony that, “despite the letter, no such agreement was reached with Ms. Allen” (L.F. 100-101). The court found that the prosecutor had a “duty to reveal this information to the defense,” even though the prosecutor testified that he did not believe that the letter was either exculpatory or discoverable (L.F. 100-101). Based on these two non-disclosures, the motion court found a reasonable probability of a different result at trial had Allen’s full history been disclosed and the “deal” been disclosed and used to impeach her (L.F. 100-102).

As to the “perjured testimony” claim, the court found that Ms. Allen only testified that she had “six bad check charges and an escape charge,” but her history revealed convictions

for several more offenses, including forgery, theft, conversion, and credit card fraud (L.F. 102). The prosecutor testified that he was “not sure Ms. Allen had intentionally lied, because she might have understood the question about ‘convictions’ to mean the number of cases under which she was charged, rather than the number of offenses of which she was convicted” (L.F. 102-103). Regardless, the motion court found that “it was incumbent upon the prosecutor to correct the false impression created by her testimony” (L.F. 103). The court then found a reasonable probability that this “false and uncorrected testimony” affected the outcome of the trial (L.F. 103).

### 3. The Hearings and Ruling

At a motion hearing on appellant’s motion, appellant started to qualify some of his allegations in the motion (Tr. 3-6). As to his claim that appellant’s first conviction was reversed for the State’s alleged improper closing argument, he stated it was actually reversed because the trial court sustained an objection to a comment in the defendant’s closing argument (Tr. 3-4). When the judge asked appellant “Where is the perjury?” at appellant’s insistence that the motion court had found the prosecution had used perjured testimony, defense counsel said that the State “had failed to correct a misstatement and therefore it had some perjury or something to that effect” (Tr. 5-6). The court ruled that the case would not be dismissed, but that it would take the ruling on the death penalty preclusion claim under advisement, and would need more evidence of what the prosecutor did wrong other than that the motion court found alleged wrongdoing (Tr. 6).

Later, the court revisited the issue, stating that it was “very, very concerned” about issues in the motion (Tr. 44). The court found that the defendant had been “prejudiced” from the multiple trials because the State’s case had been improved each time it had been tried due to “find[ing] more snitches” and getting the benefit of better scientific testing (Tr. 45). The court decided to keep the issue under advisement “until I see how the State conducts itself in this trial” (Tr. 45). The court eventually denied the entire motion (Tr. 1066-1069).

### **B. Standard of Review**

Review of a motion to dismiss based on a double jeopardy violation is reviewed *de novo*. State v. Brumm, 163 S.W.3d 51, 55 (Mo.App., S.D. 2005). The defendant bears the burden of proving that a double jeopardy violation has occurred. State v. Barriner, 210 S.W.3d 285, 310 (Mo.App., W.D. 2006); State v. Flear, 851 S.W.2d 582, 598 (Mo.App., E.D. 1993); State v. Willers, 785 S.W.2d 88, 90 (Mo.App., S.D. 1990). This standard applies to appellant’s claim regarding dismissal and preclusion of the death penalty, as both are raised as double jeopardy claims.

### **C. Appellant’s Conviction Did Not Violate His Freedom from Double Jeopardy**

#### **1. The Federal Double Jeopardy Clause Does Not Apply**

The constitutional prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal. State v. Flenoy, 968 S.W.2d 141, 143 (Mo. banc 1998); U.S. Const., Amend. 5. Further, the United States Constitution generally bars retrial if a judge grants a mistrial without a defendant’s request or consent. State v. Tolliver, 839 S.W.2d 296, 299 (Mo. banc 1992). If the defense requests a mistrial, double jeopardy

does not preclude a retrial except when the government engages in misconduct with the intent of “subvert[ing] the protections afforded” by the Double Jeopardy clause. Oregon v. Kennedy, 456 U.S. 667, 675-76, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Regardless of that protection, the Double Jeopardy clause “imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence. Kennedy, 456 U.S. at 677 n.6, *citing* United States v. DiFranscesco, 449 U.S. 1117, 1130-31, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).

Applying the standards set out by the United States Supreme Court in interpreting the United States Constitution, it is clear that appellant is not entitled to the relief he claims under the federal Double Jeopardy clause. His previous trial did not end in a mistrial, but in a conviction, and he succeeded in convincing the post-conviction motion court in setting aside that conviction. Under the plainest reading of United States Supreme Court precedent, the Double Jeopardy clause simply does not apply to his case.

Appellant recognizes this, and thus asks this Court to engage in judicial lawmaking to broaden the protection of the Double Jeopardy clause beyond the interpretation by the United States Supreme Court to include barring a retrial after a conviction where the prosecutor allegedly engages in misconduct in a previous trial which results in a later reversal after conviction. He cites to a small handful of cases from lower courts to support his prayer for this Court to adopt a sweeping change to federal Double Jeopardy jurisprudence. These cases, however, do not support appellant’s prayer.

In 1992, the Second Circuit Court of Appeals created a “limited extension” for cases of prosecutorial misconduct where the misconduct does not result in a mistrial. In United States v. Wallach, 979 F.2d 912 (2<sup>nd</sup> Cir. 1992), that Court extended the double jeopardy bar to retrial in cases “where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.” Id. at 916. Thus, just as those cases which bar retrial only after a mistrial where the prosecutor intended to “goad” the defendant into the mistrial request, this extended standard would only apply when the prosecutor engaged in purposeful misconduct with the intent to prevent an acquittal in a case that, at the time, the prosecutor believed would result in acquittal. Kennedy, 456 U.S. at 676; State v. Clover, 924 S.W.2d 853, 857 (Mo. banc 1996); State v. Walker, 130 S.W.3d 18, 21 (Mo.App., E.D. 2004). The other federal cases appellant cited supporting his extension of the Double Jeopardy clause would only extend it in this limited circumstance of intentionally-committed misconduct with the intent to prevent an expected acquittal. United States v. Pavloyianis, 996 F.2d 1467, 1474-75 (2<sup>nd</sup> Cir. 1993); United States v. Gary, 74 F.3d 304, 314-15 (1<sup>st</sup> Cir. 1996)(rejecting claim that use of false testimony merited application of Double Jeopardy prohibition).

The only case appellant relied on at the trial level, which appellant also relies on in his brief, United States v. Catton, 130 F.3d 805 (7<sup>th</sup> Cir. 1997), also discusses the potential application of the limited extension of Kennedy found in Wallach, and, like the other courts

speculating on it, found it inapplicable. Id. at 806-08. On the propriety of adopting such a rule, that Court stated:

For it is clear that a defendant who wants the district court (or this court on appeal from an adverse ruling by the district court) to block a retrial on the basis of prosecutorial error must show that the prosecutor committed the error because he thought that otherwise the jury would acquit and he would therefore be barred from retrying the defendant. It is not enough that there was an error; it is not enough that it was committed or procured by the prosecutor; it is not enough that it was deliberate prosecutorial misconduct; it must in addition have been committed for the purpose of preventing an acquittal that, even if there was enough evidence to convict, was likely if the prosecutor refrained from misconduct. United States v. Wallach, supra, 979 F.2d at 916. Any greater extension of Kennedy must be left to the Supreme Court, in view of the danger of adding a double jeopardy tail to every appellate-reversal dog.

Id. at 807-08.

As the above cases cited by appellant reveal, there has been no sweeping groundswell of support from the federal courts for a grand expansion of the Double Jeopardy clause where there is simply an allegation of prosecutorial misconduct. Instead, there was the mere

consideration of a limited extension in cases where the purpose of the intentional misconduct was to prevent a certain acquittal. Respondent does not believe even this standard is proper but for, as Catton acknowledged, a declaration of the United States Supreme Court making it so. Id. at 808. In an opinion from the same year, United States v. Doyle, 121 F.3d 1078 (7<sup>th</sup> Cir. 1997), that same court upheld the rejection by a lower court of the Wallach standard, who stated:

Not only is the subjective Wallach II standard problematic to apply, dismissal of these serious charges is not in the interest of justice. The public would be ill-served by such a drastic remedy for prosecutorial malfeasance.

Id. at 1085, *quoting* United States v. Andrews, 824 F.Supp. 1273, 1291 (N.D.Ill. 1993). This reasoning makes sense, and this Court should reject the drastic reinterpretation of federal law proposed by appellant.

Appellant, possibly recognizing the limited help provided by these federal cases, lifts up three state courts—Arizona, New Mexico, and Pennsylvania—as example for this Court to follow in reinterpreting the Double Jeopardy clause (App.Br. 53-59). State v. Minnit, 55 P.3d 774 (Az. 2002); State v. Breit, 930 P.2d 792 (N.M. 1996); Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992). These state’s examples are inapplicable here because those states all relied on state constitutional double jeopardy provisions instead of forcing a new reading of the federal constitution’s Double Jeopardy clause. Minnit, 55 P.3d at 440; Breit, 930 P.2d

at 803; Smith, 615 A.2d at 325. Thus, they are inapplicable to federal constitutional analysis, and do not support the extension of federal constitutional law appellant seeks.

Further, this Court should not consider the extension of double jeopardy protection to cases similar to the above in this case because this case is markedly different from all of appellant's cited cases in one important respect: despite appellant's repeated pronouncements to the contrary, he did *not* establish that the prosecutor in his prior trial engaged in intentional prosecutorial misconduct. Central to Kennedy and the reasoning of the cases that appellant cites is the concept that the prosecutor had to engage in purposeful or intentional misconduct with the intent to circumvent double jeopardy protections, Kennedy, 456 U.S. at 679, or, at the very least, conduct "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." Smith, 615 A.2d at 325. The only record appellant presented to the trial court, the motion court findings, does not show that the prosecutor purposefully engaged in any bad faith or egregious conduct, but that his conduct was either inadvertent or, at worst, poor judgment.

As to the claim that the prosecutor knowingly failed to disclose the criminal history of Katherine Allen, the record does not show that he did so knowingly. The motion court's findings stated that the prosecutor believed that he had disclosed the criminal history (L.F. 97). While the motion court did reject this testimony as evidence that the record was *actually disclosed* (L.F. 97-98), the findings do not reveal that the motion court disbelieved the prosecutor's testimony that he *believed* he had disclosed it. Thus, all that the record appellant provided to the trial court showed is that the prosecutor inadvertently failed to

disclose that which should have been disclosed. This is not sufficient to establish intentional prosecutorial misconduct.

As to the claim that the prosecutor failed to disclose the letter suggesting that Allen had a charge dismissed in exchange for testimony, the motion court's findings show that the prosecutor made a conscious decision not to disclose it, but did not do so to intentionally keep the defense from receiving information he believed was discoverable. Instead, as he did not believe that this letter referenced a deal that he had made with Allen, it did not need to be disclosed (L.F. 100). While the motion court correctly found that this explanation was wrong, and that the letter should have been disclosed, the court again did not find that the prosecutor lied to hide a more sinister motive to purposely hide exculpatory material. Again, this was insufficient to establish intentional prosecutorial misconduct.

As to appellant's most egregious claim—that the prosecutor “suborned perjury”—the motion court again failed to make findings supporting that claim. The prosecutor explained that he did not believe Allen had intentionally lied and may have simply misunderstood what was being asked of her when asked for her “convictions”—thus, he did not believe she had committed perjury (L.F. 102-103). This is consistent with Missouri's definition of perjury, which occurs when a person, “*with the purpose to deceive, [] knowingly testifies falsely* to any material fact” before any court. § 575.040, RSMo 2000. Nothing in the motion court's findings held that the testimony was perjury—it found that it was false and should have been corrected (L.F. 102-103). Further, Allen's testimony at this trial, where she again repeatedly said she had six convictions to refer to the number of times she had been sentenced, claiming

that several of the offenses she had been convicted of were run together, and therefore she was only counting them as one conviction (Tr. 935-937, 941-942), shows that the prosecutor was correct that she was not intentionally lying with a purpose to deceive, i.e., committing perjury. Thus, the prosecutor was not “suborning perjury” as appellant so adamantly claims. While the prosecutor should have corrected the statements, and again made an error in deciding not to, the record again fails to show an intentional course of prosecutorial misconduct.

Respondent is not mincing words or splitting hairs to excuse the prosecutor’s errors in this case. The motion court found in favor of appellant on these claims, and respondent does not quarrel with that finding. But exaggerating those findings to paint the prosecutor as intentionally malevolent is incorrect and distorts the record. The motion court found that the prosecutor erred and granted appellant the appropriate relief for that error—a new trial. Thus, appellant received exactly that which the law required. Because the record shows no more than that, and appellant failed to establish an intentional course of conduct by the prosecutor to overcome appellant’s double jeopardy rights, appellant has failed to establish that he is entitled to an extension of the federal Double Jeopardy clause, and his claim should fail.

### 3. The Missouri Constitution Also Does Not Apply

Appellant, in apparent recognition that federal authority may not permit this Court to reinterpret the United States Constitution to suit his argument, also urges this Court to reinterpret the Missouri Constitution’s Double Jeopardy clause to authorize relief for his

claim (App.Br. 62-63). That clause, found in Article I, Section 19, of the Missouri Constitution, reads as follows:

That no person shall...be put again in jeopardy of life or liberty for the same offense, *after being once acquitted by a jury*; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.

Mo. Const., Art. I, § 19 (emphasis added). The plain language of this section makes it clear that Missouri’s double jeopardy protection applies only to being tried again after an acquittal, and expressly permits retrial after a mistrial or reversal. *Id.* This truth is attested to by numerous holdings of this Court that the provision only applies to retrial after acquittal by a jury. State ex rel. Kemper v. Vincent, 191 S.W.3d 45, 50 (Mo. banc 2006); State v. Tolliver, 839 S.W.2d 296, 299 (Mo. banc 1992); State v. Urban, 796 S.W.2d 599, 601 (Mo. banc 1990). Appellant’s claim that the final phrase “according to the law” “appears to give this Court the responsibility and latitude to determine what ‘law’ will permit retrial” does no such thing (App.Br. 63). The phrase clearly qualifies the “on a proper indictment or information”

phrase, and merely defines the process for how the new trial is to be commenced. Thus, appellant's Missouri Constitutional claim is meritless.

#### 4. Double Jeopardy Clause Could Not Prevent Dismissal of Just Penalty Phase

Appellant's alternative claim—that the trial court erred in not precluding the penalty phase due to a double jeopardy violation—is also without merit. First, as shown above, there was no double jeopardy violation at all, so there would not be one for just the penalty phase. But, even if this Court looks beyond that, appellant's claim is still meritless. Respondent does not dispute that the Double Jeopardy clause can prohibit a retrial of just the penalty phase of a trial, but this only applies when there has been a prior “acquittal” of the death penalty, such as a life sentence imposed in an earlier trial where that conviction is overturned prohibits a later death sentence for the same murder. See Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). Also, it is well settled that a defendant may receive a new penalty phase where there has been some error during or affecting only the penalty phase. See, e.g., Knese v. State, 85 S.W.3d 628 (Mo. banc 2002). There is, however, absolutely no precedent to merge these two protections into one creation that a trial level error can bar a subsequent penalty phase in retrial. That such reasoning is illogical is especially true in this case, where the claimed injury from the prior trial—not being given information to impeach Allen's guilt phase testimony—would have affected only the guilt phase. Therefore, appellant's novel claim that double jeopardy should have barred just the penalty phase of his trial must fail.

### III.

**The trial court did not abuse its discretion in denying appellant's request for a mistrial due to Sergeant Jack Merritt's statement that, "[a]t that point, [appellant] said he wasn't answering questions" in response to a question whether Merritt asked appellant anything concerning the blood stain on his shirt because a mistrial was not required as there is no record that appellant was under arrest at the time of the his post-Miranda statement that he was not answering questions, the statement was not used to incriminate appellant or to impeach his trial testimony, and the trial court instructed the jury to disregard the comment.**

Appellant claims that the trial court erred in failing to declare a mistrial when Sergeant Jack Merritt, who spoke with appellant after the murder, testified that "appellant said he wasn't answering questions," and argues that this comment was an impermissible and prejudicial comment on his invocation of his right to remain silent (App.Br. 69-76).

Merritt testified that, after taking appellant to the courthouse to speak with him about the events that day, Officer Lyle Hodges pointed out blood on appellant's shirt (Tr. 667). The prosecutor asked, "Did you ask Mr. Barton anything concerning the stain on his shirt" (Tr. 668). Merritt replied, "Well, yes. At that point, he said he wasn't answering questions" (Tr. 668). Appellant objected, which was sustained, and his motions to strike the comment from the record and to instruct the jury to disregard the statement were granted (Tr. 668-669). Appellant also requested a mistrial, which was taken under advisement (Tr. 669-671). The court then instructed the jury to disregard the comment and struck it from the record (Tr.

671). The prosecutor then asked if appellant “ever” told him how he got the blood on his clothes (Tr. 672). Merritt testified that appellant told him that he got the blood on his clothes when he was helping pull either Selvidge or Cole away from the victim’s body (Tr. 672).

The court stated that the request for a mistrial was still pending, but believed that the comment did not arise to the level of a comment on appellant’s invocation of his right to remain silent which would justify a mistrial (Tr. 704-706). The court eventually denied the motion for a mistrial (Tr. 1069).

Mistrial is a drastic remedy. State v. Smith, 32 S.W.3d 532, 552 (Mo. banc 2000). The decision whether to grant a mistrial is left to the discretion of the trial court, which is in the best position to determine whether the complained-of incident had any prejudicial effect on the jury, and that decision is reviewed for an abuse of discretion. State v. Goff, 129 S.W.3d 857, 866 (Mo. banc 2004). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Johnson, 207 S.W.3d 24, 40 (Mo. banc 2006). Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found. Id. The defendant bears the burden of showing that there is a “real probability” that he was prejudiced by the abuse of discretion. Id.

In this case, the trial court did not abuse its discretion in overruling appellant’s motion for a mistrial. If a defendant chooses to remain silent upon arrest and after receiving Miranda warnings, it is a fundamental violation of his constitutional rights for the State to

use that silence against him. Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). However, while it is improper to use a defendant's post-arrest, post-Miranda silence against him either as affirmative proof of his guilt or to impeach his trial testimony, a defendant's silence can be mentioned if for some other purpose. State v. Anderson, 79 S.W.3d 420, 441 (Mo. banc 2002).

Here, appellant was not entitled to a mistrial for several reasons. First, Merritt's statement was not prohibited because the prohibition against commenting on post-arrest, post-Miranda silence obviously applies to silence that occurs post-arrest. Doyle, 426 U.S. at 617; Anderson, 79 S.W.3d at 441. "Doyle is expressly limited to the use of silence '*at the time of arrest and*' after receiving Miranda warnings.'" State v. Mahan, 971 S.W.2d 307, 315 (Mo. banc 1998), *quoting Doyle*, 426 U.S. at 619 (emphasis added). There was no evidence that appellant was actually under arrest at the time that he engaged in this conversation with Merritt and said he was not answering any more questions.<sup>3</sup>

Second, the record fails to show that the statement was used for the purpose of incriminating appellant.<sup>4</sup> The prosecutor did not attempt to elicit the statement at all, as

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<sup>3</sup>The record of a suppression hearing prior to appellant's 1993 trial shows that appellant had voluntarily gone to the Sheriff's Department to give his statement and was not placed under arrest until after he "just said he didn't want to talk about it anymore" (SC77147 Supp.Tr. 32).

<sup>4</sup>It clearly was not used for the purpose of impeaching appellant's testimony, as appellant did not testify.

Merritt volunteered the information, and the prosecutor did not later try to argue any inference from it (Tr. 668). In fact, the prosecutor went back and elicited the information that he was actually seeking—that appellant had made a statement that he had gotten the blood on his shirt pulling Selvidge or Horton away from the victim’s body (Tr. 672). This distinguishes this case from State v. Dexter, 954 S.W.2d 332 (Mo. banc 1997), the primary case appellant relies on, where the prosecutor not only elicited the testimony, but repeatedly referenced it in the State’s case-in-chief, the cross-examination of the defendant, and in rebuttal argument, showing an obvious desire to use the silence to both incriminate and impeach the defendant. Id. at 338-39. Because the State had no intent to use this evidence to incriminate appellant and did not use the evidence to do so, a mistrial was not required.

Finally, a mistrial was not necessary because the trial court struck the statement from the record and instructed the jury to disregard it (Tr. 671). This was sufficient to prevent the jury from fixating on this isolated statement, as the jury is presumed to follow the court’s instructions. State v. Forrest, 183 S.W.3d 218, 229 (Mo. banc 2006). In State v. Stolzman, 799 S.W.2d 927 (Mo.App., E.D. 1990), the Eastern District rejected a claim identical to appellant’s, holding that a mistrial is not the “inevitable remedy” for a claimed Doyle violation. Id. at 934. The Court held that the trial court’s instruction to disregard was sufficient to cure any violation where the prosecutor’s question did not appear to be calculated to elicit a response about the defendant’s silence, where the court acted immediately to have the jury disregard the statement, and where the defendant’s silence went unmentioned throughout the balance of the trial. Id. at 935. As any potential effect on

appellant was the same as that in Stolzman, this Court should follow that reasoning and hold that a mistrial was not necessary to cure any Doyle violation in this case.

That appellant has not overcome the presumption that the jury followed the court's instruction in this case is further shown by the fact that the jury heard that appellant had made a statement about the blood on the shirt, and therefore was not "hiding anything" or "failing to cooperate" regarding the blood on the shirt (Tr. 682). Also, on cross-examination, Merritt testified that appellant did not run, gave consent to search the truck, and gave consent to speak with him initially (Tr. 683). Thus, the minimal chance that appellant could have been affected by the statement by Merritt was sufficiently cured by the trial court's ruling and the subsequent testimony, and appellant cannot show a "real probability" of prejudice from the failure to declare a mistrial.

#### IV.

**The trial court did not abuse its discretion in allegedly preventing appellant from asking the venire panel during penalty-phase qualification *voir dire* whether they would be able to consider mitigating circumstances after finding that evidence in aggravation warranted the death penalty because the record shows that appellant was in fact permitted to ask the venire members if they could consider mitigating evidence after finding the aggravating circumstances warranted death, thus insuring that all of the jurors would not automatically vote for death upon the finding of aggravating circumstances, but would consider mitigating evidence prior to entering their verdict.**

Appellant claims that he was prevented from asking most of the venire panel whether they could consider mitigating circumstances after determining that the aggravating circumstances warranted death, therefore causing at least 10 jurors to be seated without insuring that they could follow the instructions to properly consider mitigating circumstances prior to sentencing appellant to death (App.Br. 77-85).

During each of the penalty-phase qualification *voir dire* examinations, the prosecutor laid out the steps that the jury would have to follow in deciding whether or not to impose the death penalty, including that, after unanimously determining that the aggravating circumstances warranted death, the jury would have to whatever mitigating circumstances it chose to believe however it deemed appropriate (Tr. 91-92, 155-156, 209-211, 250-253, 310-313). The State's questioning revealed that venire members 24, 35, 36, 39, 40, and 53 were automatically disposed to give the death penalty regardless of the mitigating evidence (Tr.

161-172, 221-222). During appellant's questioning of the second group of venire members, defense counsel asked venire member 25:

You get to the point, you know, you have found someone guilty of murder in the first degree. It is a coolly reflected-upon murder. You found the aggravating circumstance. You found that, you know, all the evidence warrants the death penalty. Could you give meaningful consideration to a life without parole verdict?

(Tr. 180). Venire member 25 said he could consider a life sentence (Tr. 180). Counsel then asked venire member 26<sup>5</sup> a similar question, never mentioning mitigating circumstances, and venire member 26 stated that he would automatically vote for death under those circumstances (Tr. 181). Venire member 27 also said that, if "we have found that all the evidence warrants the death penalty," she would automatically vote for death (Tr. 181). He then asked venire member 33 the same type of question, again failing to mention mitigating circumstances (Tr. 182). At that point, the court called counsel to the bench and told counsel that his question was not an accurate statement of the law to simply ask if they would impose

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<sup>5</sup>The transcript from page 180, line 11 to page 181, line 6, refers to "Juror Number 25" answering these questions, but as the first question was directed to venire member 26 and then, after concluding with "Juror Number 25," the next question is directed to venire member 27, it is reasonable to conclude that these answers were from venire member 26 (Tr. 180-181).

death if the evidence warrants it (Tr. 182). Counsel argued that the word “warrants” was in the statute, but the court said using “warrants” after asking if they had already decided everything made the word “warrants” go “too far” (Tr. 183).

When counsel resumed, he continued to use the word “warrants,” but asked if, after finding that the death penalty was warranted, if the venire member “would still be able to consider mitigating circumstances” (Tr. 184). Venire member 33 said he could not consider mitigating circumstances, but venire member 38 said she that he could consider them and give meaningful consideration to a life sentence (Tr. 184). After asking venire member 41 the same question and getting another “no” answer, the prosecutor objected that the questions were confusing the venire members, which was sustained (Tr. 185). Counsel then asked, “After listening to all the evidence, can you give meaningful consideration to a life verdict,” to which 41 answered, “Not if one of the aggravating circumstances was found,” concluding the examination of that group (Tr. 186). The court subsequently struck for cause all of the venire members who said they would automatically vote for death or would not consider mitigating circumstances (Tr. 191-192).

Prior to the next group being seated, the court and counsel discussed how to better ask the question (Tr. 193-199). The defense again pointed out that the statute required a finding that the aggravating circumstances “warrant” death (Tr. 194-195). The court agreed as to the legal meaning as understood by the attorneys, but questioned whether the venire members had the same understanding of the word (Tr. 195-196). The court said that the defense was

essentially asking the jury to decide that the defendant should die, then consider not putting him to death, which did not accurately reflect the law (Tr. 198).

Prior to the defense asking any questions to the third group, the court told the defense that it would not tell the defense how to ask the questions, but said it needed to ask the questions in an manner that did not call for a commitment, i.e., asking about “both sides” of the consideration (Tr. 278). Defense counsel stated that he would ask if anybody would automatically vote for death just because of a guilty verdict, then would ask them if there was “anyone who feels that only after finding an aggravating circumstance that warrants the death penalty need automatically give the death penalty without considering mitigating—” (Tr. 229). The court interrupted, saying, “That’s fine. You are fine. That’s fine” (Tr. 229). Defense counsel then proceed to ask the remaining panels that question: would they automatically vote for death without considering mitigating circumstances, or could they consider both types of circumstances and give meaningful consideration to both punishments (Tr. 235, 271, 274-279, 334-337). From those panels, venire members 55 and 97 stated that they would automatically vote for death without consideration of mitigating circumstances (Tr. 237-238, 341). Neither were on the jury (L.F. 149).

The trial judge is given wide discretion in conducting *voir dire* and determining the appropriateness of specific *voir dire* questions. State v. Johnson, 207 S.W.3d 24, 40 (Mo. banc 2006). The trial court’s *voir dire* ruling will be reversed only where an abuse of discretion is found and the defendant can demonstrate prejudice. Id. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary

and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found. Id. The defendant bears the burden of showing that there is a “real probability” that he was prejudiced by the abuse of discretion. Id.

Here, there was no abuse of discretion, as the trial court’s rulings were correct. Under the law as it existed at the time of appellant’s offense, to impose a death sentence, the jury had to find the existence beyond a reasonable doubt of at least one aggravating circumstance, find beyond a reasonable doubt that the aggravating circumstances as a whole warranted death, and that mitigating circumstances did not outweigh aggravating circumstances before it could impose death or make the discretionary choice not to. § 565.030.4, RSMo 2000. A defendant is entitled to jurors who would not automatically vote for death, but will consider both punishments as well as both mitigating and aggravating circumstances. State v. Nicklasson, 967 S.W.2d 596, 611 (Mo. banc 1998). Here, in his questions to the second group, appellant, although using the word “warrants,” was omitting a step—the consideration of mitigating circumstances—in his question as to whether or not the jurors would automatically vote for death. Thus, the trial court reasoned that the defense questions were not accurately discovering true “automatic death penalty” venire members, and had the defense alter its questions to properly ask about the consideration of aggravating and mitigating circumstances. Therefore, because the trial court’s ruling properly reflected the law regarding “automatic death penalty” *voir dire*, there was not an abuse of discretion.

Further, appellant could not have suffered prejudice, as he was never prevented from asking the venire panel the ultimate question—whether it could consider mitigating circumstances or would automatically vote for death upon finding an aggravating circumstance warranting death. Thus, appellant was permitted to ask proper questions to identify “automatic death” venire members—those who could not consider mitigating circumstances. Therefore, the trial court could not have abused its discretion in “preventing” appellant from asking the panel questions to insure that the jury could fairly consider mitigating evidence.

## V.

**Appellant waived any challenged to the admissibility of the expert testimony of William Newhouse by failing to object to the admissibility of his testimony at trial. The trial court did not plainly err in allowing Newhouse to testify as an expert on blood spatter evidence because the record showed that Newhouse was qualified to provide expert testimony and that his testimony was based on scientific principles generally accepted in the relevant scientific community.**

Appellant claims that the trial court plainly erred in allowing State's witness William Newhouse to testify as an expert witness on blood spatter evidence because he was shown not to possess sufficient expertise in the area of blood spatter evidence and because his methodology was "anecdotal" and not based on generally accepted scientific principles (App.Br. 86-92).

Newhouse testified that he was currently with the Madison crime lab of the Wisconsin Department of Justice after serving fourteen years with the Kansas City Police Department crime lab (Tr. 866). He received a bachelor's degree in physics from Purdue University, an engineering university, in 1970, and then took a couple of years worth of graduate-level courses in physics until he joined the California Department of Justice crime lab in August 1972 (Tr. 867). In his second year at the California lab, he was assigned to the serology section, concerned with the identification of blood, often from stains on clothing (Tr. 867-868). While in that section, he also received training in crime scene processing and reconstruction, which included training in bloodstain recognition—being able to identify

stains necessary for analysis as well as recognizing how those stains were created (Tr. 868-869). While with that lab, he had experience with bloodstain creation and experimentation, but did not receive formal training until moving to the Kansas City lab (Tr. 871-872). In 1994, he studied with two of the preeminent bloodstain pattern interpreters in that field in creating and evaluating blood spatters at a week-long training course (Tr. 872). While Newhouse had not had any articles published in a forensic journal on bloodstain pattern evidence, he had trained other criminalists in blood spatter evidence for 5-6 years (Tr. 875-876, 893). He also mentioned books that he had studied regarding blood spatter evidence as part of his education in the field (Tr. 876-879). He testified that he had been qualified as an expert witness in the field of blood spatter evidence in other court cases (Tr. 879). He testified that he had been working with blood spatter evidence since he first encountered it in 1974 in the California crime lab (Tr. 880-881).

As to the field of blood spatter evidence, Newhouse testified that blood spatter was a type of staining pattern which creates smaller bloodstains due to the application of energy to the source of the blood (Tr. 869-873). He testified that blood spatter recognition is a generally accepted scientific principle, with other blood spatter experts throughout the nation, which relied on experimentation and observation to reach its conclusions (Tr. 880). He testified that the processes for creating blood stain patterns, with peer review for the purpose of recreating the conclusions reached from that process, was done throughout the country and was “very common” (Tr. 897). He described the steps of the scientific method used in the field, which included observing existing bloodstains, using that observation

coupled with an understanding of the principles such as the mechanics of fluids and how they react to pressure and force to create a theory as to how those stains were created, testing that theory with experiments attempting to recreate the stain patterns, interpreting the results of the experiments to draw a conclusion as to whether a certain type of pattern is consistent with a type of blood spatter or eliminated as such (Tr. 917).

The trial court recognized Newhouse as an expert in “blood spatter testimony” without objection (Tr. 881). Because appellant lodged no objection to the introduction of Newhouse being qualified as an expert nor objected to his testimony as unqualified expert testimony, he has waived any claim regarding the admissibility of this testimony. As this Court stated in Washington by Washington v. Barnes Hospital, 897 S.W.2d 611 (Mo. banc 1995):

If a question exists as to whether the proffered opinion testimony of an expert is supported by a sufficient factual or scientific foundation, the question is one of admissibility. It must be raised by a timely objection or motion to strike.

Id. at 616. The failure to object to the foundation for expert testimony thus waives any claim regarding the admissibility of that testimony. Id. Therefore, because he failed to object at trial to the foundation for Newhouse’s testimony, this claim should be deemed waived.

If this Court was to review appellant’s claim, due to the failure to object, appellant’s claim is unpreserved, and review is available only for plain error. Supreme Court Rule 30.20. A finding of plain error requires a finding that manifest injustice or miscarriage of

justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

Expert testimony is admissible if the expert is qualified by “knowledge, skill, experience, training, or education” to render an opinion and if specialized knowledge will assist the trier of fact. § 490.065.1, RSMo 2000; Elliot v. State, 215 S.W.3d 88, 93 (Mo. banc 2007). If qualified, the expert is entitled to base his opinion on facts or data of a type reasonably relied on by experts in the field and which are otherwise reasonably reliable. § 490.065.3, RSMo 2000; Elliot, 215 S.W.3d at 93. A witness may be qualified to testify as an expert although his knowledge may have been gained through practical experience rather than by scientific or formal training. State v. Clark, 136 S.W.3d 582, 585 (Mo.App., S.D. 2004); State v. Seddens, 878 S.W.2d 89, 92 (Mo.App., E.D. 1994).

Here, the trial court did not plainly err in permitting Newhouse to testify as an expert in blood spatter evidence. First, as shown above, Newhouse clearly had sufficient qualifications, based on a combination of scientific training with practical experience dealing with blood spatter evidence: he had a degree plus extra graduate training in physics, a scientific field obviously related to the principles of how particles and substances move; he had worked with blood spatter evidence for over twenty years prior to the examination he made in this case; he had studied with preeminent blood spatter experts as well as their written works; he had conducted numerous experiments relating to blood spatter over the years; and he had trained other criminalists in blood spatter evidence for several years. Clearly, there was enough evidence Newhouse was qualified to testify regarding blood

spatter evidence to, at the very least, show that the trial court did not plainly err in recognizing him as an expert.

Appellant makes no challenge about whether or not blood spatter evidence is “specialized knowledge” that would aid the trier of fact, but the record shows that the difference between impact blood stains and transfer blood stains was important to the case and would not be part of the average person’s scope of knowledge. Thus, this prong also was satisfied. Appellant does contest whether or not Newhouse’s opinions were properly based on scientific methods. The record shows that it was. As explained above, Newhouse testified that blood spatter recognition is generally accepted in the forensic scientific community and outlined the scientific process by which blood spatter evidence is evaluated. He further testified that his findings were peer reviewed by other forensic scientists (Tr. 897). Missouri courts have recognized blood spatter evidence as a valid scientific field and have permitted testimony about it. See State v. Buchli, 152 S.W.3d 289, 297-98 (Mo.App., W.D. 2004); State v. Partridge, 122 S.W.3d 606, 609 (Mo.App., E.D. 2003). Thus, the trial court did not plainly err in concluding that Newhouse’s testimony was properly based on generally accepted scientific principles, and thus permitting Newhouse’s expert testimony.

## VI.

**The trial court did not plainly err in admitting the previous testimony of State's witness Sharon Strahan identifying appellant at the previous trial because the State's prior testimony did not improperly refer to a prior photographic lineup that Strahan had viewed and appellant did not suffer a manifest injustice.**

Appellant claims that the trial court plainly erred in admitting a portion of the prior cross-examination testimony of unavailable witness Sharon Strahan regarding her ability to identify appellant, arguing that the testimony referred to a photographic lineup which appellant claimed at trial was not disclosed (App.Br. 93-98).

At trial, the State sought to introduce the prior testimony of Sharon Strahan, who had died by the time of trial (Tr. 629-634). The defense objected to a portion of that testimony regarding a photo lineup in which she identified appellant on the grounds that the lineup had not been disclosed (Tr. 624-628). Because the State could also not locate anything showing disclosure of the lineup, the court ruled that the portion of her prior testimony regarding the lineup would not be read, and directed the State to eliminate certain portions of the direct examination (Tr. 628). The testimony was then read to the jury, which included a cross-examination question stating, "So when you made your identification, did you make it based on his clothing?" to which Strahan answered, "Yes, ma'am" (Tr. 634). There was no objection to this testimony (Tr. 634).

Because appellant did not object to this evidence, appellant's claim is unpreserved, and review is available only for plain error. Supreme Court Rule 30.20. A finding of plain

error requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

First of all, the introduction of this evidence was not necessarily erroneous. While the trial court ordered the elimination of all references to Strahan's photo lineup identification, her in-court identification was still admissible (and is not challenged on appeal) (Tr. 632-633). Thus, the question about her ability to identification would not have been understood by the jury to be a reference to a prior photographic lineup, but merely her identification of appellant based on observing him. Therefore, the vague question which did not explicitly mention the photographic lineup did not alert the jury that she made a prior lineup identification, as appellant suggests.

Further, appellant could not have suffered a manifest injustice from this testimony. First, the question about her ability to identify appellant benefited appellant: because she testified that she could only identify appellant by his clothes and not by actually observing his face, as she only saw him from behind, the defense was able to cast doubt on her in-court identification (Tr. 634). Second, there was plenty of other evidence establishing that appellant was around the trailer park and, specifically, around the victim's trailer, at the time Strahan identified appellant. Appellant himself admitted that he had been at the trailer between 2:00-2:30, and admitted that he had answered the phone call from Bill Pickering, which was made at 3:15 (Tr. 537-538, 665-666). Additionally, Carol Horton testified that appellant was around the trailer park the entire day of the murder (Tr. 453, 456-458). Thus, Strahan placing appellant near the scene of the murder was merely cumulative to other valid

evidence establishing his presence at or near the scene. A question and answer cumulative to other significant trial testimony does not result in a manifest injustice. State v. Nettles, 216 S.W.3d 162, 165 (Mo.App., S.D. 2006). Therefore, the motion court could not have plainly erred in admitting Strahan's single question and answer relating to the basis of her identification of appellant.

## VII.

**The trial court did not plainly err in refusing to permit appellant to question State's witness Katherine Allen regarding the details of her prior criminal offenses because it is improper to question witnesses regarding the specific details of their criminal convictions and appellant did not suffer manifest injustice.**

Appellant claims that the trial court plainly erred in refusing to allow appellant to cross-examine State's witness Katherine Allen regarding the details of her prior criminal convictions, which he argues he was permitted to do the examine the nature of her crimes, and that he suffered prejudice as he was unable to establish that her convictions were for crimes of dishonesty (App.Br. 98-102).

During his cross-examination of Allen, appellant established that she had numerous convictions for such crimes as forgery, stealing, deceptive bad checks, and auto theft (Tr. 935-937, 941-943). He then asked her, "And the fraud charge, that's when you used somebody's stuff that's not yours but you pretend that you are that person, right?" to which Allen replied, "Yes, it is" (Tr. 945-946). Appellant then asked, "So you lie about who you are in order to get something of value?" An objection to this question was sustained as argumentative (Tr. 946). Appellant then started to ask "Did you lie in that case—" when the prosecutor objected again to "improper impeachment" (Tr. 946). The court sustained the objection, telling defense counsel that he could not ask about the details of the prior convictions (Tr. 946). Appellant argued that Allen's use of an alias would allow him to argue that Allen lacked credibility (Tr. 947). The court told appellant he was free to make

that argument, but that did not permit him to argue it with the witness (Tr. 947). Appellant argued that he believed he was allowed to ask if a fraud, bad check, or forgery conviction was lying with a name or identity, and that such a question did not involve the underlying facts of the case (Tr. 947). The court doubted that argument, but was willing to consider case law on the issue (Tr. 947-948). The court later told counsel he had located two cases stating that it was only proper to allow questioning about the details of the crime if the witness “waffled” on whether she committed the crime or not (Tr. 996). Counsel stated that it would defer to the court’s ruling and that he was simply going to inquire whether those conviction involved lying and move on (Tr. 997-998).

Because appellant did not include this claim in his motion for new trial (L.F. 202-208), this claim is not preserved for appeal, and review is only for plain error. Supreme Court Rules 29.11(d), 30.20. A finding of plain error requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

A witness may be impeached by evidence of her prior convictions. § 491.050, RSMo 2000. It is improper, however, to question a witness about the details of the prior criminal conviction. State v. McClanahan, 954 S.W.2d 476, 479 (Mo.App., W.D. 1997); State v. Light, 871 S.W.2d 59, 63 (Mo.App., E.D. 1994). The witness may be asked about the nature, dates, and places of the convictions. Id. The who, what, when, and where of the prior offenses are admissible, but the how and why are not. Id. Here, appellant wanted to go past the “nature” of the convictions, i.e. the “what” or what the offense was, to a description

of the actions Allen did to commit the crimes (Tr. 945-946). Therefore, the questions were improper, and the trial court did not plainly err in sustaining the objection to that questioning.

Further, appellant suffered no manifest injustice from the court's ruling. First, immediately prior to the objection being sustained, appellant was able to establish that Allen had "used somebody's stuff that's not yours but you pretend that you are that person" (Tr. 945-946). Thus, appellant was able to establish that which he claimed he wanted to establish—that Allen's crimes were crimes of dishonesty involving lying (Tr. 946-947, 997-998). Second, appellant was able to argue in closing that:

[Allen] is a woman who her entire life apparently has portrayed herself as other people, has lied to banks, has lied to merchants, has lied to almost everybody about who she is, what the availability of her funds are, what sort of ability she has making payments, and she gets herself in trouble after trouble after trouble. This is a scheming, conniving sort of person, and the State knows it.

(Tr. 1026). Thus, appellant, relying on the inferences that the nature of her convictions portrayed, was able to achieve everything he claimed he wanted—to be able to argue that Allen could not be believed because of her history of crimes of dishonesty (Tr. 947). Therefore, appellant could not have suffered a manifest injustice from the court's ruling regarding the details of Allen's crimes.

## VIII.

**The trial court did not plainly err in submitting Instructions 14 and 15, the penalty phase instructions on consideration of whether aggravating circumstances warrant death and on consideration of mitigating circumstances on the grounds that they violated appellant’s constitutional rights for failing to give “full consideration” to mitigating evidence because this Court has repeatedly rejected appellant’s claim that the approved penalty-phase instructions fail to properly account for mitigating evidence.**

Appellant claims that the trial court plainly erred in submitting Instructions 14 and 15 as those instructions violated appellant’s constitutional rights to due process and freedom from cruel and unusual punishment because they failed to permit the jury to fully consider mitigating evidence (App.Br. 103-111).

Instructions 14 and 15, patterned after MAI-CR 3d 313.42B and 313.44B, respectively, read as follows:

### Instruction 14

If you find and believe from the evidence beyond a reasonable doubt that one or more of the aggravating circumstances in Instruction No. 13 exist, it will then become your duty to decide whether the aggravating circumstances are sufficient to warrant the imposition of death as punishment of defendant. In deciding that question, you may consider:

1. All of the evidence relating to the murder of Gladys Kuehler.

2. Any of the aggravating circumstances referred to in Instruction No. 13 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that those aggravating circumstances you have found warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for parole.

#### Instruction 15

If you decide that one or more aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 14, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Gladys Kuehler.

You may also consider other circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 182-183). Appellant did not object to these instructions on the grounds raised on appeal, and therefore his claim is not preserved. (Tr. 1071-1077). Review is therefore only for plain error, which requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006); Supreme Court Rule 30.20.

Here, the trial court could not have plainly erred in submitting these instructions because this Court has repeatedly rejected the claim that appellant raises—that the instructional scheme for death penalty cases fails to instruct the jury to fully consider all evidence in mitigation of punishment, including non-statutory mitigating circumstances (App.Br. 103-111). See, e.g., State v. Clayton, 995 S.W.2d 468, 478 (Mo. banc 1999); State v. Kinder, 942 S.W.2d 313, 333 (Mo. banc 1996); State v. Wise, 879 S.W.2d 494, 518 (Mo. banc 1994). Appellant's claim presents no new version of this argument warranting this Court granting the extraordinary remedy of reversal for plain error. Therefore, appellant's claim of error should fail.

## IX.

**The trial court did not plainly err in failing to *sua sponte* instruct the jury to disregard the prosecutor’s statement to penalty phase witness Ralph Franklin that there were irrelevant portions of the statement he was reading from because the admission of this statement did not rise to a plain error resulting in a manifest injustice.**

Appellant claims that the trial court plainly erred in failing to *sua sponte* instruct the jury to disregard the prosecutor’s comment during the direct examination of penalty phase witness Ralph Franklin that he was only to read the non-bracketed portion of appellant’s statement regarding a prior crime because the other portions were not relevant (App.Br. 111-114). Appellant argues that the prosecutor’s statement was “highly prejudicial” and “allowed and encouraged” the jury to speculate “about additional uncharged crimes” (App.Br. 111-114).

While questioning Ralph Franklin, a former Camden County deputy, about his investigation of appellant’s prior offense of assault with intent to kill, the prosecutor had Franklin read portions of appellant’s confession to that crime (Tr. 1094-1102). Immediately prior to this, the attorneys approached the bench, and the prosecutor advised the court that the witness was only going to read the non-bracketed portions of the statement due to prior rulings regarding evidence of an uncharged crime in the remaining portions of the statement (Tr. 1093-1094). Appellant objected to the statement being read at all due to the best evidence rule and hearsay, but made no objection to the redaction (Tr. 1094). The prosecutor then resumed his questioning of Franklin:

Q. Mr. Franklin, I am going to hand to you Exhibit 71 again, and we have talked about before we came in here about the possibility of you reading here.

A. Yes.

Q. And there are certain portions that we are not going to read because they are not relevant to what we are hear about today.

A. Yes.

Q. And do you recall that?

A. I do.

Q. At this point, I am going to ask you to read the portions that are not bracketed?

(Tr. 1094-1095). Franklin then read the non-bracketed portions of the statement (Tr. 1095-1102). Appellant made no objection to the above questions (Tr. 1094-1095).

Because there was no objection to the prosecutor's statement about the statement being redacted, appellant's claim is not preserved, and review is for plain error only. Supreme Court Rule 30.20. A finding of plain error requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

Here, there was no plain error because the statement could not have resulted in a manifest injustice. Plain error can only serve as the basis for granting a new trial where the

error was outcome-determinative. Deck v. State, 68 S.W.3d 418, 427 (Mo. banc 2002). Despite appellant's protestations to the contrary, there was little to no chance that the prosecutor's statement would have had any effect on the jury's deliberation, let alone been the reason the jury sentenced appellant to death. While appellant claims that the statement "begged the jury to speculate on what other horror the bracketed portion might contain[.]" this is simply not true. The prosecutor's statement was made during the penalty phase, at a time the jurors would expect to hear about any and all horrible things the defendant had done. Thus, when the prosecutor indicted that some of the information in the statement was "not relevant," the jury would have believed that the remainder of the statement which was not read contained information *not relevant* to the issues before it in the penalty phase, i.e., that it did *not* contain information about horrible things the defendant had done (Tr. 1094-1095). The prosecutor did not suggest that it contained information the jury should not hear, or information that was improper, but merely that it was not relevant. To suggest that the jury would hear this statement and immediately jump to the conclusion that the unread portion must have contained information of other uncharged crimes is completely unsupported logic as well as by the record. Because this innocuous comment could not have been so outcome-determinative to amount to a manifest injustice, appellant is not entitled to plain error relief on this claim.

**X.**

**The trial court did not plainly err in failing to *sua sponte* grant a mistrial for the prosecutor’s penalty-phase closing argument reference to either the victim’s granddaughter or the victim of one of his prior crimes because the argument was not improper, as victim impact and the defendant’s past criminal actions were relevant to the sentence he received, and any error was cured by the trial court’s sustaining of appellant’s objection and instruction to disregard.**

Appellant claims that the trial court plainly erred in failing to *sua sponte* declare a mistrial when the prosecutor made a statement in closing argument which he claimed improperly sought to have appellant punished for his past offenses instead of the crime charged (App.Br. 115-117).

During the defense penalty-phase closing argument, defense counsel argued that it was “morally repugnant” for the State to ask appellant’s penalty phase witnesses using a “tone” and “suggestion” which “dare[d] to suggest that their feelings about [appellant] are not as important as Debbie Selvidge’s feelings about her own grandmother” (Tr. 1154-1156). During the rebuttal portion of his penalty phase closing argument, the prosecutor said:

Mercy. You are being asked for mercy. Ms. Gladys didn’t have mercy. The family that loved Ms. Gladys receives no mercy.

And I guess when you look at it, respect, I respect those ladies. They came in here and they said what they felt. You

know, I always look at it this way, when someone commits a crime, no matter what happens to that individual, that's not the only one that's punished. Actually, the people that are punished are these three ladies back here who have walked up here and testified and told you their feelings, and I respected them. I only wanted to ask them questions.

You see, I have got to think past the point that defense counsel would. I have got to think about this lady.”

(Tr. 1161-1162). At that point, defense counsel objected that the prosecutor was “suggesting that there is punishment for what has occurred in the past” (Tr. 1162). The prosecutor offered to withdraw the statement, and the court sustained the objection (Tr. 1162). At appellant's request, the court advised the jury to disregard the last statement of the prosecutor” (Tr. 1162-1163).

Because appellant did not request a mistrial, nor include a claim regarding this argument in his motion for new trial, appellant's claim is not preserved for review. Supreme Court Rule 29.11(d). Review is therefore only for plain error, which requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006); Supreme Court Rule 30.20.

Mistrial is a drastic remedy. State v. Smith, 32 S.W.3d 532, 552 (Mo. banc 2000). The decision whether to grant a mistrial is left primarily to the trial court, which is in the best

position to determine whether the complained-of incident had any prejudicial effect on the jury. Smith, 32 S.W.3d at 552. Here, the trial court had no reason to declare a mistrial.

First, appellant's claim misrepresents the prosecutor's argument. He claims that prosecutor's statements about the "three ladies" who testified about their feelings referred to the victim's granddaughter, Debbie Selvidge, as well as the two victims of appellant's prior crimes, although one of those women did not testify (App.Br. 115-116). This claim is incorrect; these statements actually referred to the defendant's three penalty phase witnesses, his wife and two friends. It is clear from the prosecutor's statements about "respecting" the women and "only want[ing] to ask them questions" that he was responding to defense counsel's argument that the prosecutor had disrespected appellant's witnesses (Tr. 1154-1156, 1162). Thus, the only portion of the argument appellant claims referenced appellant's past criminal victims actually did not, and appellant's claim should fail on this basis alone.

Second, to that portion of the argument that appellant does not reference but to which appellant objected at trial, stating that he had to think about "this lady," whether this argument referred to appellant's past assault victim Reba Williams or to Ms. Selvidge, the argument was not improper. As to Ms. Williams, the State may introduce evidence of the details of prior criminal offenses. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003). As to Ms. Selvidge, the State may present victim impact evidence. State v. Forrest, 183 S.W.3d 218, 225 (Mo. banc 2006). Further, a prosecutor may argue appropriate inferences from the factual record. Id. at 228. Thus, any argument based on the admissible evidence of

past crimes, which constituted two of the statutory aggravating circumstances, or the victim impact evidence was permissible.

Further, even if the argument about “this lady” could have been construed to be improper, the court corrected any impropriety by sustaining the objection and instructing the jury to disregard the comment. Jurors are presumed to follow the court’s instructions. Forrest, 183 S.W.3d at 229. As vague as this comment was and as quickly as it was objected to and corrected by the trial court, it is nearly impossible to tell what kind of negative effect the statement “I have got to think about this lady” would have had on the jury. Certainly, there is no reason to doubt the trial court’s decision, from its better vantage point to judge the effect of the statement, to simply strike the statement and instruct to disregard rather than declare a mistrial nobody asked for. Therefore, the trial court did not plainly err in failing to *sua sponte* declare a mistrial.

## XI.

**The trial court did not plainly err in allegedly sentencing appellant to death based on his rejection of a plea bargain because the trial court did not sentence appellant to death based on his rejection of the plea bargain, but based on the jury's recommendation of that sentence.**

Appellant claims that the trial court sentenced him to death instead of life because appellant refused to accept a plea bargain for a life sentence prior to the start of trial, which he claims violated his rights to due process and to be free from cruel and unusual punishment (App.Br. 117-122).

At sentencing, the trial court pointed out that this trial was the third time a jury had recommended a death sentence for this crime, and commented that appellant's counsel had asked the court to sentence to life instead of following the jury's recommendation of death (Tr. 1183). The court stated that it had struggled with the decision "for many reasons" (Tr. 1183). The court then pointed out that appellant had the chance to avoid a death sentence before the trial started by accepting the State's plea offer, which he rejected (Tr. 1183-1184). After again commenting on the difficulty of the decision (Tr. 1184), the Court said:

But to the extent that you made the decision before we picked a jury, it was an opportunity at least that you had to make this go away, and you chose to take your chance with a jury, and the job I have then, as far as I'm concerned, is to see to it that the trial is conducted fairly. I made my rulings pretrial. I have

no concerns about, as far as I am concerned, the conduct of this trial, the way that it went, the way the evidence went, the way the jury selection process went, and the way the jury was permitted to consider the evidence, and then to consider what they believed to be appropriate.

So the Court, after considering the alternatives, sentences the Defendant to death by lethal injection.

(Tr. 1184-1185). There was no objection to this statement or the judge's sentence (Tr. 1184-1185).

Because appellant did not object, his claim is not preserved for appeal, and review is only available for plain error. Supreme Court Rule 30.20. A finding of plain error requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

A judge is charged with the responsibility of imposing a punishment that fits both the offense and the offender. State v. Lindsey, 996 S.W.2d 577, 580 (Mo.App., W.D. 1999). A court cannot, however, use the sentencing process to punish a defendant for exercising his right to a full and fair trial instead of pleading guilty. Id. In this case, the trial court's comments, when placed in context, did not show that it was punishing appellant for going to trial. Instead, the statement merely responded to the defense request that the court disregard the jury's recommended sentence and give him life by pointing out that the defendant wished to have the jury make the decision regarding his fate (Tr. 1174, 1183-1185). The closing

part of the argument makes clear that the court's comment was not about punishing appellant for going to trial, but to show that the court believed the jury, whom appellant had trusted, had reached an appropriate decision regarding appellant's sentence after a fair trial (Tr. 1184-1185).

This conclusion is strengthened by comparison to the cases appellant cites in support of his claim. In Hess v. United States, 496 F.2d 936 (8<sup>th</sup> Cir. 1974), the court, while noting the defendant had a right to go to trial, sentenced the defendant to two consecutive life sentences for kidnapping, noting that there had been "no admission of sins" on which to seek leniency, but instead there had been the decision to "pursue every remedy," even though the defendant had no defense to the charges. Id. at 938. In United States v. Sales, 725 F.2d 458 (8<sup>th</sup> Cir. 1984), the court was "openly critical" of the defendant's decision to go to trial instead of pleading guilty and sentenced the defendant to a year for each count number (one year for count 1, two years for count 2, etc.) for a total of 55 years explicitly in response to the defendant's "abuse of the judicial process." Id. at 460. In Thurston v. State, 791 S.W.2d 893 (Mo.App., E.D. 1990), the court stated that it customarily sentenced prior and persistent offenders who had a jury trial to maximum consecutive sentences, thus establishing a pattern of punishing defendants for going to trial. Id. at 897. While the comments in these cases are far more indicative of an intent to sentence harshly for going to trial than anything the court said in this case, these cases also differ from the case at bar in that the court was fully responsible for the sentencing decision without regard to a jury finding. Finally, in State v. Wright, 998 S.W.2d 78 (Mo.App., W.D. 1999), while the jury did make a sentencing

recommendation of two years for two different counts, the court decided to run those sentences consecutive to each other, largely because the defendant had “victimized” the child victims again by making them come to court to testify—an obvious reference to the defendant’s right to have a trial and confront the witnesses against him. Wright, 998 S.W.2d at 84. Unlike all the above cases, where the court made the decision to increase the defendants’ overall sentences due to their exercise of their right to trial, the trial court in this case did not increase the punishment to appellant, but simply deferred to the jury’s decision, consistent with the defendant’s desire to have the jury try his case. Therefore, the trial court’s comments, which neither evidenced the harshness of the comments from these other cases nor showed an increase in the sentencing due to appellant’s choice to go to trial, did not rise to the level of punishing appellant for deciding to reject the plea bargain and proceed to trial.

## XII.

**This Court’s proportionality review does not violate § 565.035 or appellant’s right to due process as this Court has routinely rejected the myriad claims appellant raises as to why this Court’s proportionality review is insufficient.**

Appellant raises the oft-rejected claim that this Court’s proportionality review is flawed, violating both § 565.035.3(3), RSMo 2000, and appellant’s due process rights, arguing that the pool of cases for comparison is improperly selected, the method by which cases are selected from that pool does not permit a “meaningful ability” to show why the penalty is disproportionate, and that this Court fails to use “adequate methods” in comparing the cases (App.Br. 123-129).

This Court has repeatedly rejected the same claims regarding proportionality review appellant raises here. See, e.g., State v. Edwards, 116 S.W.3d 511, 548 n. 6 (Mo. banc 2003)(rejecting claim that proportionality review is unconstitutional because “it provides inadequate notice and opportunity to be heard”); State v. Barnett, 980 S.W.2d 297, 309 (Mo. banc 1998)(rejecting claim that proportionality review fails to account for cases where life sentences were imposed). In Lyons v. State, 39 S.W.3d 32 (Mo. banc. 2001), this Court listed numerous cases showing not only that this Court had rejected claims that proportionality review is unconstitutional or otherwise invalid, but also that the method used to compare specific cases had been held by the United States Supreme Court not to violate due process and that this Court’s method in particular had been held not to violate due process. See id. at 44-45 and cases cited therein. As appellant’s claim simply rehashes the

past arguments that the method this Court uses to select cases for review is improper and that the method fails to provide appellant adequate notice and opportunity to respond, this Court should reject his claim in light of the overwhelming precedent finding no merit in his claims.

### **XIII.**

**This Court should, in the exercise of its independent statutory review, affirm appellant's death sentences because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's finding of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence, and the defendant.**

Under the mandatory independent review procedure contained in § 565.035, this Court must determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the strength of the evidence and the defendant.

§ 565.035.3, RSMo 2000. This Court’s proportionality review is designed to prevent freakish and wanton application of the death penalty. State v. Ramsey, 864 S.W.2d 320, 328 (Mo. banc 1993).

Instead of actually addressing the issues raised by the statute to be used in proportionality review, appellant instead relies on evidence never presented to the trial court to argue that there was evidence supporting his innocence and mitigating circumstances involving mental illness and a troublesome childhood, all of which he argues supports a finding that the imposition of death in this case was wanton and freakish (App.Br. 134-138). Appellant’s reliance on witness accounts never presented to this trial court or this jury to argue that the jury and court acted wrongly in sentencing appellant to death is obviously improper—this “evidence” was never subjected to the jury’s consideration of its contents, let alone its credibility, and could not have been considered by the trial court upon its consideration of whether the jury’s sentence was appropriate. The appellate court is limited to consideration of the evidence in the record. State v. Pendergrass, 869 S.W.2d 816, 819 n. 1 (Mo.App., S.D. 1994). While appellant refers to past proceedings as part of the “record,” and has moved to make testimony from his prior PCR hearing part of the “record” for this appeal, the purpose appellant seeks to use it for is improper, as this testimony was not ever part of the “evidence in the record” at the trial below, and therefore could have had no effect on the trial court’s ruling. Essentially, appellant seeks to have this Court treat “evidence” that has never been found credible as the truth about the crime at issue in this case. Thus,

this Court should disregard appellant's inappropriate argument that "other evidence" supports a finding that the death penalty is disproportionate in this case.

Appellant does not attempt to make any argument in his point that there was any problem with either of the first two statutory considerations for proportionality review: (1) that the sentence of death was imposed under the influence of passion, prejudice, or other improper factor, or (2) that there was not sufficient evidence to support the aggravating factors found by the jury. § 565.032.3, RSMo 2000. As to the first, record shows that the appellant's death sentence was not imposed under the influence of passion, prejudice or another improper factor. The State's presentation of evidence and guilt phase argument was very straightforward. The State repeatedly declined to object to improper argumentative questioning or factual speculation by the defense; its penalty phase evidence was very fact-based regarding appellant's prior crimes, with only one witness providing victim impact testimony; and the penalty phase argument was very low-key and short, ending with this non-emotional plea:

You remember the evidence, folks. You remember what happened. All I am going to ask is that you look at what we presented in the first part and in the second part. You decide that Gladys, who didn't receive mercy, if the Defendant should receive the death penalty for what he did. That's strictly up to you.

I told you in the beginning, at least as far as the first argument I came up here to talk to you about, that you have the hard job, and this is the hardest part.

Now, I want to thank you for your attendance and thank you for your attention very much.

(Tr. 1163). This argument is simply an example of the tenor of the entire trial presentation by the State, seemingly crafted to prevent any claim that any potentially inflammatory or unduly prejudicial influence in favor of the State was communicated to the jury. As appellant fails to identify any source of improper influence, the first prong of proportionality review should be resolved in favor of the death sentence.

Likewise, the second prong of proportionality review—whether there was sufficient evidence to support the statutory aggravating circumstances—should be resolved in favor of a finding that the death sentence was proper. Through the testimony of the police officers and one victim of appellant’s prior assaultive crimes, the State established that appellant committed, admitted to, and was convicted of assault with the intent to kill with malice aforethought and of assault in the first degree (Tr. 1084-1118). The guilt phase evidence of the autopsy of the victim established that she was stabbed well over fifty times, including being stabbed in both eyes, having her throat slashed, and having two X’s carved into her abdomen, all while only having 2-4 defensive wounds and the scene showing the lack of a serious struggle, was sufficient to show that the victim was “mutilated or grossly disfigured...by acts beyond that necessary to cause her death” (L.F. 181; Tr. 574-577).

Appellant's only remaining argument addresses the third point: that the evidence supporting appellant's conviction was weak, and therefore should not be relied on to support the imposition of death (App.Br. 133-134, 139). As shown in the first point, there was sufficient evidence identifying appellant as the murderer of Gladys Kuehler. Point I, supra. Appellant argues that, even if this Court finds that the evidence was sufficient to convict him of first-degree murder, it is too weak for this court to find that appellant's sentence was proportionate to other cases where the death penalty has been imposed (App.Br. 139). In support, he cites to State v. Chaney, 967 S.W.3d 47 (Mo. banc 1998), where this Court found the death sentence disproportionate, stating, "In this case there is no eyewitness, confession, admission, document, fingerprint or blood evidence directly pointing to the defendant. Neither is there evidence of defendant's involvement in any similar or related crimes from which one might infer his involvement here." Id. at 60.

The above list shows that appellant's case is very different from Chaney. First, while appellant disputes the veracity of the evidence, there *was* evidence of that appellant admitted to Katherine Allen having "killed that old lady" (Tr. 934). The jury, fully exposed to Allen's prior record and the defense's opinion of her credibility, clearly believed this evidence (Tr. 935-946, 1025-1026, 1043). Second, there was blood evidence connecting appellant to the murder: the victim's blood was found on appellant's clothing, some of which was blood spatter caused by force acting on the source of blood (Tr. 783-785, 824-833, 843-853, 885-886). While appellant suggested an alternative explanation for how the blood got on his shirt and again attacked the credibility of the testimony about blood spatter (Tr. 897, 899, 919,

1033, 1043, this again is a difference between a lack of evidence, as found in Chaney, and the credibility of evidence, which the jury clearly resolved in favor of believing the evidence. Finally, as opposed to Chaney, there was evidence of appellant's participation in similar crimes, having twice before seriously assaulted women, once with a dangerous instrument, while attempting to obtain money from them—similar crimes to appellant's murder of the victim connected to his effort to get money from her (Tr. 770-771, 1107-1126). Thus, this case is very unlike Chaney, and that case cannot provide appellant relief from his death sentence.

Because this case differs from Chaney in more than one respect, appellant's argument is limited to a claim that this Court should overturn the death sentence because appellant deems the State's direct evidence unbelievable and the circumstantial evidence insufficient. Such a ruling would amount to a declaration that a case based essentially on circumstantial evidence could not support a death sentence, which is contrary to this Court's precedent. See State v. Jones, 749 S.W.2d 356, 365 (Mo. banc 1987)(upholding death sentence where evidence was "essentially circumstantial"). Thus, because there was sufficient evidence that appellant indeed was the murderer, and because there is no question that the evidence showed deliberation and the satisfaction of the aggravating circumstances, the evidence was strong enough to support appellant's death sentence.

Finally, a comparison to other cases for which the death sentence was imposed shows that appellant's death sentence was not "freakish or wanton." First, and most telling, this Court has previously held that the imposition of the death penalty on appellant for this

murder was proportionate. State v. Barton, 998 S.W.2d 19, 29-30 (Mo. banc 1999). In addition, this Court has repeatedly upheld death sentences where the depravity of mind was shown by the mutilation of the victims beyond that necessary to cause death. See, e.g., State v. Strong, 142 S.W.3d 702 (Mo. banc 2006); State v. Reuscher, 827 S.W.2d 610 (Mo. banc 1992); State v. Feltrop, 801 S.W.2d 1 (Mo. banc 1991). This Court has repeatedly upheld the death penalty where the defendant had an assaultive criminal history. See, e.g., State v. Brooks, 960 S.W.2d 749 (Mo. banc 1997); State v. Chambers, 891 S.W.2d 93 (Mo. banc 1994); Reuscher, 827 S.W.2d 610. This Court has also upheld the death penalty for murders of victims who were elderly, disabled, or helpless. See, e.g., State v. Gilbert 103 S.W.3d 743 (Mo. banc 2003); State v. Barnett, 980 S.W.2d 297 (Mo. banc 1998); State v. Ramsey, 864 S.W.2d 320 (Mo. banc 1993). Therefore, appellant's death sentence is not disproportionate to other death sentences upheld by this Court.

#### XIV.

**The trial court did not plainly err in failing to dismiss appellant's case based on an alleged double jeopardy violation when the first trial ended in a mistrial due to the State's inadvertent failure to endorse witnesses because appellant's claim is barred by collateral estoppel, the State's inadvertent failure to endorse witnesses was not intended to goad the defense into seeking a mistrial, and the defendant's claim constitutes the improper use of the Double Jeopardy clause as a sword to thwart the prosecution against him.**

Appellant claims that the trial court erred in not dismissing his case after the very first mistrial was declared in 1993 after the panel was sworn due to the State's failure to endorse witnesses, claiming that the prosecutor's failure to endorse was designed to goad the defense into seeking the mistrial (App.Br. 140-143).

Appellant's claim was not included in his motion for new trial, and thus is reviewable only for plain error. Supreme Court Rules 29.11(d), 30.20. A finding of plain error requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

This Court should not reach the merits of appellant's claim, as the claim is barred by the doctrine of collateral estoppel. In deciding whether collateral estoppel applies, the following four factors are considered: (1) is the issue in the present case identical to the issue decided in the prior adjudication; (2) was there a judgment on the merits in the prior adjudication; (3) is the party against whom collateral estoppel asserted the same party or in

privity with a party in the prior adjudication; and (4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue in the prior suit. State ex rel. Johns v. Kays, 181 S.W.3d 565, 566 (Mo. banc 2006). As appellant notes, this precise issue was raised in his brief in his 1996 appeal, which featured the same parties, and this Court, remanding for a new trial based on a different trial court error, by definition must have concluded that the Double Jeopardy clause must not have precluded a new trial, or it would not have ordered one. State v. Barton, 936 S.W.2d 781 (Mo. banc 1996). Further, appellant raised at least two claims of ineffective counsel for failing to object that the new trial was barred by the Double Jeopardy clause based on the first mistrial in his latest post-conviction proceeding (L.F. 31, 39). Those claims were denied, and appellant did not appeal that ruling (L.F. 31-39). Thus, appellant has had several opportunities to litigate this issue, and all have been unsuccessful. This Court should not grant him another opportunity.

As to the merits of appellant's claim, when a defendant requests a mistrial, the retrial of his case is not generally prohibited by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. State v. Tolliver, 839 S.W.2d 296,298-99 (Mo.banc 1992). "A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact.'" Oregon v. Kennedy, 456 U.S. 667, 676 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). See also United States v. Dinitz, 424 U.S. 600, 608, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) (mistrials granted "at the defendant's request" do not bar retrial even when request triggered by "judicial or prosecutorial error"). "Only where the government conduct in question is

intended to ‘goad’ the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.” Id.; Tolliver, 839 S.W.2d at 299; State v. Fitzpatrick, 676 S.W.2d 831, 835 (Mo. banc 1984). “Prosecutorial misconduct” alone is insufficient to bar a retrial on double jeopardy grounds. Kennedy, 456 U.S. at 676. Moreover, appellant has the burden of proving that the defense request for a mistrial was the result of prosecutorial misconduct and that the misconduct was intended to coerce such a request. Id.

There is nothing in the record to indicate that there was any prosecutorial misconduct or that the prosecutor’s actions were intended to cause appellant to request a mistrial. To the contrary, the record makes abundantly clear that the prosecutor believed that he had, in fact, endorsed his witnesses by sending the relevant documents to the court clerk and to opposing counsel. The prosecutor produced his own file copy of the documents at issue, complete with a certificate of service indicating that they had been sent, and said he was “flabbergasted” to learn that they had not been received by counsel or the clerk (SC77147 Supp.Tr. 96-99, 103-04). Appellant, while arguing that the “failure to endorse was intended to compel the defendant to request a mistrial,” has identified nothing in the record to indicate that the prosecutor intentionally failed to endorse any witnesses, let alone failing to do so for the purpose of prompting a request for mistrial. As the record clearly shows that the failure to endorse was accidental, and thus not calculated to lead to a mistrial, appellant failed to establish a double jeopardy violation.

Finally, to grant appellant's claim would allow him to improperly use the Double Jeopardy clause as a "sword" to prevent prosecution. In Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984), the United States Supreme Court held that a defendant could not use the Double Jeopardy clause to prevent being prosecuted for a serious offense by pleading guilty, over the prosecutor's objection, to a lesser offense, describing this conduct as using the clause "as a sword to prevent the State from completing its prosecution[.]" Johnson, 467 U.S. at 493. Missouri courts have recognized this reasoning. State v. Bally, 869 S.W.2d 777, 780 (Mo.App., W.D. 1994).

While not the same circumstances, to find that appellant's prosecution was barred by the Double Jeopardy clause due to the first mistrial would be to permit him to use the clause as a sword. Appellant concedes in his brief that defense counsel was well aware that the prosecution had not endorsed witnesses prior to trial (App.Br. 140). Instead of taking action to seek the identities of the witnesses (most of which had already been learned through discovery and depositions and were part of the defense endorsement), counsel waited until after the jury had been impaneled to move for a mistrial, and then sought discharge immediately following the mistrial being granted (SC77174 Supp.Tr. 103-107). Thus, the defense sandbagged the State in an effort to seek an unfair discharge as opposed to pointing out the error when it was first noticed. In short, allowing appellant to seek a benefit from his improper use of the Double Jeopardy clause clearly violates the spirit of that clause as described in Johnson. Therefore, this Court should not permit such an offensive use of the Double Jeopardy clause, and should deny this claim.

## XV.

**The trial court did not plainly err in imposing a sentence of death based on his claim that Missouri’s method of execution constitutes cruel and unusual punishment because appellant’s claim is not properly raised for the first time on direct appeal from his conviction and Missouri’s method of execution is not cruel and unusual.**

Appellant claims that the method of execution in Missouri constitutes cruel and unusual punishment because it may cause conscious suffering (App.Br. 144-146). He relies solely on the federal district court’s decision in Taylor v. Crawford, 05-CV-4173-FJG (W.D. Mo. June 26, 2006), which found that the State’s proposed protocol for conducting executions was insufficient to prevent an “unreasonable risk of pain and suffering” (App.Br. 144-146).

While review of a claim that an action by the State is unconstitutional is typically reviewed *de novo*, Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 737 (Mo. banc 2007), here, appellant is presenting his constitutional claim for the first time on appeal. Thus, his claim is not preserved, and can be reviewed only for plain error. Supreme Court Rule 30.20. A finding of plain error requires a finding that manifest injustice or miscarriage of justice has resulted from a trial court error. State v. Johnson, 207 S.W.3d 24, 34 (Mo. banc 2006).

Plain error review is inappropriate in this case. First, it is inappropriate for this Court to address this issue on direct appeal because there is no way for this Court to determine what protocol will be in place for executions at the time appellant would actually be subject

to execution—until that point, the supposed injury appellant would be subject to is speculative at best. As this Court has recently stated:

As it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington's right to seek relief in state and federal courts is concluded and his execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment because it causes lingering, conscious infliction of unnecessary pain.

Worthington v. State, 166 S.W.3d 566, 583 n. 3 (Mo. banc 2005). Thus, until appellant is actually ready to be subjected to a certain protocol to carry out his execution, his claim is premature, and not appropriate for review.

Appellant's arguments on the merits must also fail. First, this Court has repeatedly rejected the claim appellant now raises, most recently just last year. Goodwin v. State, 191 S.W.3d 20, 40 (Mo. banc 2006); Worthington, 166 S.W.3d at 582-83; Morrow v. State, 21 S.W.3d 819, 828 (Mo. banc 2000). Further, while, as appellant cites, a federal district court issued an injunction, finding that the State's protocol presented an unreasonable risk of pain and suffering, the Eighth Circuit Court of Appeals reversed that finding, holding that Missouri's protocol for executions does not violate the Eighth Amendment. Taylor v. Crawford, No. 06-3651 (8<sup>th</sup> Cir. June 4, 2007). It specifically found that Missouri's method

of execution presents “virtually no risk that an inmate will suffer pain” during the execution, and that the protocol for executions sufficiently provided for proper execution of that protocol. Id. Thus, the Court held, the protocol “does not present any substantial foreseeable risk that the inmate will suffer the unnecessary or wanton infliction of pain” and “any risk of pain far too remote to be constitutionally significant.” Id. Therefore, appellant’s claim that Missouri’s execution protocol causes an unnecessary risk of pain and suffering must fail.

## CONCLUSION

In view of the foregoing, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 21,988 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 29th day of June, 2007, to:

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**APPENDIX**

State's Exhibit 81..... A-1