

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC82743</b>
	)	
<b>BOBBY JOE MAYES,</b>	)	
	)	
<b>Appellant.</b>	)	

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**Appeal to the MISSOURI SUPREME COURT**

**From the Circuit Court of PULASKI, COUNTY**

**Twenty-Fifth Judicial Circuit, The Honorable Douglas E. Long, Jr., JUDGE**

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**APPELLANT’S OPENING BRIEF**

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## *Jurisdiction*

The State charged Bobby Joe Mayes, appellant, with two counts each of first degree murder and armed criminal action. §§565.020,571.015.<sup>1</sup> Assistant Attorney General Rachel Smith told the Marion County jury sitting in Pulaski County that four days before the murders Bobby asked where he could buy a gun, arguing “That’s premeditation. That’s deliberation.” The jury found Bobby guilty. Moving to penalty phase, AAG Smith “accused [Bobby] of stabbing a fellow inmate [in Kentucky],” and the jury recommended that Bobby receive two death sentences. The Honorable Douglas E. Long, Jr., sentenced Bobby to death without granting him allocution, although Bobby needed a chance to explain that the State had lied—that the question about buying a gun pertained to a hypothetical robbery, reference to which the court excluded; and that the Kentucky prison’s investigation of the stabbing “Cleared” Bobby. Because Judge Long sentenced Bobby to death, this Court has exclusive appellate jurisdiction. Mo.Const., Art.V, §3 (amended 1982).

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<sup>1</sup> Unless noted, all statutory citations are to RSMo 1994.

## *Facts*

On August 10, 1998, Charles Noakes sat in his driveway “trying to oil some scratches out of [his saddle]” (Tr.960). He could see the Mayes’ home, but he wasn’t focused on it (Tr.960-961). After a brief errand, Noakes returned home about 12:15 p.m., and he saw Bobby’s and Sondra’s cars at the Mayes’ home (Tr.961-962). At 1:15 p.m., while inside fixing a sandwich, he heard a car with a bad muffler like Bobby’s and glanced outside to see Bobby’s car leaving (Tr.964,971-972).

## *The Arrest*

Around 4:00 p.m., Bobby returned home from an afternoon of fishing (Tr.964, 1134,1159-1162,1324,1423-1426). When he went in the house, he found his wife, Sondra, lying on their bedroom floor (Tr.964-965,1021,1395;Ex.3). Blood was on the wall, dresser, carpet, pillow, bed and nearby clothes (Tr.1109,1148). Sondra wasn’t breathing (Ex.3; Tr.1122,1148). Bobby grabbed the phone from the dresser and went outside to call 911 (Tr.1018-1021,1241,1253,1257;Ex.3). He paced in front of the house awaiting the ambulance and police (Tr.1104,1138-1139,1144-1145). As police arrived, they asked “what was going on,” but Bobby didn’t know (Tr.1104). Rubbing cut hands with a cloth, Bobby added that he’d been fishing all afternoon (Tr.1138,1167-1168,1375-1376,1396-1397,1529,1537).

Officers entered the house, went through the living room, down the hall, past a closed door and into the master bedroom where Sondra lay dead (Tr.1104-1105,1125-1126,1135-1136, 1156-1157,1392-1393). A shirt on Sondra’s floor was stained with her

blood and the DNA of someone other than Bobby, Sondra or Amanda (Tr.1467,1548-1549,1734-1736). Police found Amanda lying dead on her bedroom floor with a “pronounced linear mark” around her neck (Tr.1111-1113,1396-1399). As Chief Kirkman told EMTs about Amanda, he learned that Prosecutor Garrabrant was on the phone for him (Tr.1400).

Garrabrant had been preparing to take Bobby to trial the next day for “sex charges,” and two of the witnesses he thought Bobby’s attorney, Fred Martin, might call at that trial were Sondra and Amanda (Tr.1333-1334,1788). After talking to Garrabrant, Kirkman arrested Bobby and advised him of his rights (Tr. 1400,1423). Hearing about Bobby’s arrest, Martin went to the jail to meet briefly with Bobby (Tr.1789).

As night fell on August 10<sup>th</sup>, police decided to investigate the cuts on Bobby’s hands and summoned Dr. Hausenstein to the jail (Tr.1307,1522). At 10:15 p.m., Hausenstein met Garrabrant and Trooper Johnson at the Texas County Sheriff’s office (Tr.1307-1308). They took Hausenstein “to a room where Bobby was.” *Id.* Martin was not present. *Id.* Hausenstein diagramed the injuries on Bobby’s hands that night, but he arranged to have a second look two days later because Bobby had not offered an explanation “as to how” he was injured, thus Hausenstein could not be sure that the injuries were not birthmarks (Tr.1321). After his second examination, Hausenstein opined that the marks were consistent with a constrictive force (Tr.1324-1325).

### *The Scene*

Trooper Watson, Noakes’ son-in-law, processed the Mayes’ home, taking about 200 pictures (Tr.1025-1074,1234-1303,1339-1374,1383). For the pictures outside the

house and those in the front rooms, the State used a bailiff for what it called “Vanna dut[y]” to hold up the pictures for the jury (*See* Tr.1044,1047,1050,1053). Among the former group of pictures, Watson described:

- ❑ a picture of a laundry basket containing a pair of men’s gray underwear with a blood stain, noting that the washing machine was stopped with 10 minutes left in its cycle (Tr.1046-1050);
- ❑ a yellow legal pad with “BJM” on the binding and “2:15, 2:40, 3:15” written on the top page, which Watson seized because his father-in-law said that Bobby was gone between 1:15 p.m. and 4:00 p.m (Tr.1059-1063);
- ❑ a “waiver of interest” form in Sondra’s purse that Bobby had signed before a notary on August 7, thereby surrendering his rights to any property that Sondra owned before their marriage (Tr.983,1051-1056); and
- ❑ three faint fingerprints on the bathroom sink, one of which was Bobby’s left ring finger (Tr.1066-1068,1080,1086-1088).

As Watson’s testimony turned to the bedrooms and bodies, the State began displaying the pictures on a 60” TV (Tr.1053,2043). On a picture of Amanda’s comforter (Ex.21g), Watson pointed to what he described as an “almost white” stain, which the State did not have tested (Tr.1353-1354,1558-1559). Watson then guessed that Amanda’s clothes had been “pulled-up” after she was killed (Tr.1355-1356).

### *The Snitch*

In August 1998, while released on bail, David Cook had resumed his life of crime (Tr.1186). Rearrested, he returned to the Phelps County Jail, facing up to twenty-eight

years in prison for burglaries and stealings (Tr.1186,1191-1193). But he also faced a life sentence for using a hacksaw to escape (Tr.1193-1194). Bobby was then transferred from Texas County to the Phelps County Jail (Tr.1185).

A few nights later, Cook and his attorney had a midnight meeting with Garrabrant, Watson and two others (Tr.1182-1184,1194-1195). Cook said very little at this meeting, but he was immediately transferred to Texas County (Tr.1380). Watson took few, if any, notes, and he later destroyed any he did take—despite the court having just three days earlier ordered all such investigatory notes be preserved (Tr.1380,1385; L.F.1,16-17). Watson and Garrabrant did not document this meeting with a formal report (L.F.1,16-17; Tr.1381).

A few weeks later, Cook pleaded guilty to one burglary, and the State dismissed another burglary and two stealings (Tr.1196-1197). The State also reduced Cook's class A felony escape to a class D felony escape, and he pleaded guilty to it (Tr.1196-1197). He got two, concurrent five-year sentences, and he was paroled after about six months (Tr. 1196-1197,1206). Within a few months, Cook violated his parole and returned to jail (Tr. 1206).

Now, nearly a year to the day after their first meeting, Cook and the police revisited Bobby's case (Tr.1206). Cook claimed that Bobby said he killed Sondra during an argument about Sondra's decision not to testify for him in "some kind of sex case" and that he killed Amanda when she saw him killing Sondra (Tr.1181-1183,1185,1214) (This conflicted with the State's theory that Bobby killed Amanda in the morning then waited for Sondra to come home for lunch and killed her (Tr. 1811-1816)). Cook hoped to

benefit from providing this testimony (Tr.1185). The court refused to let Bobby confront Cook with his having burglarized his uncle's business, or his legal problems having begun a year earlier, or his having recently become a new father (Tr.1196-1197,1207-1208).<sup>2</sup>

### *The Autopsies*

During the August 11 autopsies, Dr. Anderson concluded that Sondra received a few defensive wounds before the fatal injury to the left side of her back (Tr.1641-1654). The latter injury resulted in rapid blood loss, causing shock within a minute and death soon thereafter (Tr.1652-1657,1718-1719). Amanda was choked with some type of cord, and, with her airway blocked, she aspirated her stomach contents—putting her very near death (Tr.1671,1701). Indeed, none of her twenty-one stab wounds were defensive (Tr.1682-1694; Ex.43h). Anderson took 11 pictures during Amanda's autopsy, including one of her emptied chest cavity and one of her refracted scalp (Tr.1660-1702; Exs.43g,i). She died in 5-20 minutes from the combined effect of aspirating her gastric contents and losing 2 ½ quarts of blood (Tr.1699-1700).

Beginning Amanda's autopsy, Anderson noted that her "underwear appeared to be rolled," which is not how he wears his, and that feces were on her calves, but not her thighs (Tr.1664,1668). From this, he pondered whether Amanda "may have been redressed by another individual" postmortem (Tr.1664-1668). Suspicious, Anderson

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<sup>2</sup> The court refused Bobby's request for a cautionary instruction on the special situation of jailhouse snitches (Tr.1804-1805).

“went the extra mile” looking for evidence of sexual assault (Tr.1620-1621,1666). As he continued his examination, Anderson noted that Amanda’s “rectum appeared to be larger” than normal (Tr.1674-1675). He photographed Amanda’s rectum being spread by two sets of gloved-hands, and the State displayed this on the 60” TV (Tr.1053, 1674,2043; Ex.43f). With sexual assault being one of several possible etiologies, Anderson took the extraordinary step of excising a 6-8” section of Amanda’s rectum for a closer look (Tr. 1675-1676). He found no tearing, bruising or laceration (Tr.1676,1704-1705). The Rape Kit samples contained no semen, sperm or foreign hairs (Tr.1580-1582,1779-1780).

### The Trial

Texas County Prosecutor Garrabrant charged Bobby with two counts each of first degree murder and armed criminal action (L.F.10-11,81-86), seeking death for both murders (L.F.10-13). On Bobby’s motion, the court changed venue to Pulaski County, selecting a jury from Marion County (L.F.18; Tr.5,99,135).

The court itself examined the venire regarding hardships, crime victims, law enforcement and criminal convictions (Tr.146,448). It implored venirepersons to “pay attention” and to line-up at the bench if they had any response (Tr.146,448). On crime victims, the court asked "whether you or any of your loved ones or close friends have ever been the victim of a crime." (Tr.146). The court again directed every venireperson with any response to line-up at the bench. *Id.* Approximately 50 members on the first venire marched forward to answer one or more of the court’s questions, but Alice Rouse, Juror 55, did not, despite herself or a relative having been victimized by crime (Tr.146-

259; L.F.445). Rouse made it onto the final jury, serving as its foreperson (L.F.377-380,414-415).

As the parties began death qualifying the venire, the State immediately focused on venirepersons' willingness to serve as foreperson (*E.g.*, Tr.267-271,273-275). The court ruled that "if they haven't equivocated but they still cannot fulfill that obligation as the foreperson, the Court is going to allow them to sit" (Tr.294). Juror Morgan testified unequivocally that she could "realistically consider" the death penalty (Tr.273). But the State moved to disqualify Morgan since she said she could not be foreperson (Tr. 272-273,299). Over Bobby's objection, the court struck Juror Morgan for cause (Tr.299; L.F.419).

In guilt phase, the State portrayed Bobby as a sexual pervert, a bad husband and a lazy employee. Over repeated objections, the State described Bobby's pending case as involving "sexual allegations," "sexual misconduct" or "sex charges" (Tr.86-88,129-133,879-881,906-919,933-934,1332-1333; L.F.423-425; Supp.L.F.1-4). It got this admitted as showing Bobby's motive, but also used it to rebuke Bobby's explanation that he went fishing (Tr.1816). Over repeated and continuing objections, the State presented "indices of suspicions" and "possibilities" of sex before the jury (Tr.868-875,1353-1356,1457-1459,1475-1477,1485-1486,1506-1507,1624-1625,1664-1666,1675-1677; L.F.340-344,420-422). According to the State, the complete absence of physical evidence showing a sexual assault did not mean that none occurred (Tr.872,1677). It pointed to the presence of Bobby's semen on Amanda's bed sheet, draping it in front of the jurors (Tr.1273-1274,1457,1564-1566,1739-1744). Over objection, the State used

Edna Yarnell to paint Bobby as a man who argued violently with his wife (Tr.996-999). After hearing 4-5 arguments between Bobby and Sondra, Yarnell began keeping her patio door closed (Tr.999-1000). And, also, over objection, the State used Chief Kirkman to imply that Bobby was lazy, noting that, “unknown to [Sondra],” Bobby’s employer had let him go (Tr.1429-1430).

Although Sondra and Amanda both died from multiple stab wounds, Assistant Attorney General Rachel Smith—over continuing objection—told the jury that four days before the murders Bobby asked Michael James “where he could buy a gun” (Tr. 1217-1218,1232). Bobby had asked James about buying a gun so he could rob Donnie Storm (Tr.1217-1218; L.F. 430), but Smith argued that Bobby was "complaining [to James] about problems with his wife and looking for a gun. That's premeditation. That's deliberation." (Tr.1815). She then told the jury that any verdict other than first degree murder would insult Sondra and Amanda (Tr.1817,1824).

Bobby did not testify in guilt, and the court cautioned the jury that this did not raise a presumption of guilt or inference of any kind (L.F.353). While deliberating, the jury had several questions about Noakes’ testimony and Bobby’s fishing trip (Tr.1837-1838). An hour after being told to recall the evidence, the jury found Bobby guilty of each count of first degree murder and armed criminal action (Tr.1839-1840; L.F.377-380).

The State alleged that Bobby killed Sondra and Amanda due to their status as witnesses in a pending prosecution (L.F.384,391). To prove this aggravator, the State had Snitch Cook’s guilt phase testimony (Tr.1182) and the Texas County Court file

listing Sondra and Amanda as witnesses (Tr.1333-1334). But the State wanted Cora Wade, too, arguing that her conversation with Sondra showed Sondra's state-of-mind and that Bobby had opened the door by calling Fred Martin in guilt phase to testify that, as of August 10, he still expected that Sondra and Amanda to be testifying for Bobby the next day (Tr.1788,1987-1988). Over objection, the court let Wade testify that, approximately four days before her death, Sondra said "she wasn't intending to testify for [Bobby] and she had told him so." (Tr.1991). Wade added that Sondra said she told Bobby that "she might testify after—if he signed the waiver." (Tr.1991). Wade then testified that she and Sondra spoke again on August 10 (Tr.1992). Sondra then said that Bobby had signed the waiver of marital assets, "but she had not been able to work up the courage to tell him that she still wasn't going to testify for him." *Id.* Wade described Sondra as "[d]etermined—upset." *Id.*

Alleging the "one or more serious assaultive criminal convictions" aggravator (L.F.12,14), the State offered Exhibits 49,50, two prior convictions for first degree sexual abuse and one for second degree robbery. Over objection, the court found that these were "serious assaultive," leaving only the fact of the prior conviction for the jury (L.F.384-385,391-392; Tr.1863-1864,1879).

Overruling Bobby's objections, the court let the State present evidence of prior convictions that do not fit within the statutory aggravator (Tr.1879-1880,1944-1953; L.F.288-297,440-441; Exs.45,48,51).

While using the collage of Amanda's injuries (Ex.43h), AAG Smith told the jury "emotion is fair," and, later, she cried (Tr.2001,2003-3004). Smith also told the jurors,

over immediate objection, that Bobby's execution would be "a thousand times more humane" than the deaths of Sondra and Amanda (Tr.2001-2002). Later, she told the jurors that they were not deciding Bobby's "ultimate fate" and that they were not the "ultimate say" (Tr.2021-2022).

Bobby did not testify in penalty either, but the court refused to give the no-adverse-inference instruction (Tr.XI-XII,1851-1859,1882-1883; L.F.401,413). AAG Smith's final words to the jury were, "The Defendant already had his say on August 10th, 1998, when he took both their lives" (Tr.2024).

The jury found the three prior convictions constituting the "serious assaultive criminal convictions" and the multiple murder aggravators as to both murders and that Amanda's death involved depravity of mind and torture (L.F.414-415). It recommended death sentences on each count. *Id.*

On May 30, 2000, Bobby appeared with counsel for sentencing (Tr.2037). Counsel argued various issues in the motion for new trial, which the court denied (Tr. 2037-2071). The court asked counsel if any legal reason existed not to impose judgment and sentence, and counsel replied, "Not that I'm aware of." (Tr.2071,2074). When the State mentioned that Bobby had not been afforded allocution, the court disagreed (Tr. 2075). The court never gave Bobby a chance to make his personal plea in mitigation (Tr. 2071-2075).

The defense had called Dr. Ferguson as Bobby's only mitigation witness (*See* Tr. XI-XII). Dr. Ferguson testified that Bobby has impulse control and intermittent

explosive disorders, but concluded that his impulses could be controlled if he were in “a very structured environment” and on medication (Tr.1911,1918,1921).

Noting that prison is “[a] very structured environment,” Smith asked if Dr. Ferguson had considered the “sixty-seven disciplinary and incident reports documented in [Bobby’s Kentucky] prison records.” (Tr.1921). Dr. Ferguson agreed that she had considered those reports, but explained that Bobby had only been on medication “[p]art of the time” he was in prison (Tr.1922). Later, Dr. Ferguson added that the sixty-seven incident reports were not “overwhelming considerations” because mentally ill people “may be disruptive in a prison setting without medication.” (Tr.1924-1925). Smith then asked whether Dr. Ferguson had considered the “nature of any of those incident reports” (Tr. 1926). When Dr. Ferguson said that she had, Smith got the court’s permission to elicit that Dr. Ferguson had “consider[ed] the factor that he’d been accused of stabbing a fellow inmate” (Tr.1927-1928).

The court was misinformed, and had it addressed Bobby personally, Bobby could have told the court that the “Incident Report” to which Smith had referred during penalty phase clearly shows that Kentucky’s investigation “Cleared” him of the stabbing (App.A-18). Indeed, Bobby could have told the court that he saved the lives of two Kentucky prison guards (App.A-19-21). Without this information, the court sentenced Bobby to death for each murder and to life imprisonment for each armed criminal action (Tr.2071-2074; L.F.455-458). Bobby appealed to this Court on June 5, 2000 (L.F. 459).

## *Points*

### I.

The trial court plainly erred in entering judgment and sentence because the State won Bobby's convictions and death sentences through gross misconduct that deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Ignoring her duty to serve justice and to elicit the truth, AAG Smith redacted material facts to hide the truth. She lied about Bobby being "accused" of stabbing a Kentucky inmate, knowing that the investigators "Cleared" Bobby of any involvement. She lied that Bobby's question about buying a gun established deliberation, knowing the question related to a hypothetical robbery, references to which the court had excluded. Unless corrected, this gross misconduct will cause manifest injustice.

*Napue v. Illinois*, 360 U.S. 264 (1959);

*Giglio v. U. S.*, 405 U.S. 150 (1972);

*Skipper v. S.C.*, 476 U.S. 2 (1986);

*State v. Carter*, 641 S.W.2d 54 (Mo.banc1982);

*Berger v. U.S.*, 295 U.S. 78 (1935);

*Elmer v. State*, 724 A.2d 625 (Md.1999);

*State v. Dunn*, 577 S.W.2d 649 (Mo.banc1979);

*State v. Storey*, 901 S.W.2d 886 (Mo.banc1995);

*Woodson v. N.C.*, 428 U.S. 280 (1977);  
*Davis v. Zant*, 36 F.3d 1538 (11<sup>th</sup> Cir.1994);  
U.S.Const., Amends.V,VI,VIII,XIV;  
Mo.Const., Art.I, §§10,18(a),21;  
Rules 4.3.3(a)(1), 4-3.8,30.20, and  
*National Prosecution Standards*, §77.2(2dEd-1991).

## II.

**The trial court erred in sentencing Bobby to death without personally addressing him because this violated Bobby’s rights to allocution, due process and freedom from cruel and unusual punishment. Rule 29.07(b)(1); U.S.Const., Amends. V,VIII,XIV; Mo.Const., Art. I, §10,21. Although the court gave counsel a chance to state “any legal reason why sentence should not now be imposed,” it did not give Bobby a chance personally “to present to the court his plea in mitigation.” Had the court addressed Bobby personally, there is a reasonable probability that it would not have sentenced Bobby to death as Bobby could have informed the court that AAG Smith won his death sentences by lying.**

*U.S. v. Moree*, 928 F.2d 654 (5<sup>th</sup> Cir.1991);

*Green v. U.S.*, 365 U.S. 301 (1961);

*State v. Wise*, 879 S.W.2d 494 (Mo.banc1994);

*State v. Whitfield*, 837 S.W.2d 503 (Mo.banc1992);

*Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439 (Mo.banc1998);

*Hill v. U.S.*, 368 U.S. 424 (1962);

*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979);

*U.S. v. Jackson*, 923 F.2d 1494 (11<sup>th</sup> Cir.1991);

*Ashe v. N.C.*, 586 F.2d 334 (4<sup>th</sup> Cir.1978);

*Boardman v. Estelle*, 957 F.2d 1523 (9<sup>th</sup> Cir.1992);

*Woodson v. North Carolina*, 428 U.S. 280 (1977);

*U.S. v. Myers*, 150 F.3d 459 (5<sup>th</sup> Cir.1998);

*U.S. v. De Alba Pagan*, 33 F.3d 125 (1<sup>st</sup> Cir.1994);

*U.S. v. Patterson*, 128 F.3d 1259 (8<sup>th</sup> Cir.1997);

U.S.Const., Amends. V,VIII,XIV;

Mo.Const., Art. I, §§10,21;

§565.035; and

Rules 29.07,30.20.

### III.

**The trial court abused its discretion in overruling Bobby's objection and letting the State present evidence that Bobby asked Michael James about buying a gun because such ruling deprived Bobby of due process, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. This evidence did not tend to prove any matter in issue; indeed, the question about buying a gun related to a hypothetical robbery, references to which the court properly excluded as an uncharged crime. This question about buying a gun was irrelevant to the charged murders so AAG Smith edited reality, falsely asserting that the gun proved deliberation.**

*State v. Bernard*, 849 S.W.2d 10 (Mo.banc1993);

*Old Chief v. U.S.*, 519 U.S. 172 (1997);

*Napue v. Illinois*, 360 U.S. 264 (1959);

*State v. Rousan*, 961 S.W.2d 831 (Mo.banc1998);

U.S.Const., Amends. V,VI,VII,XIV; and

Mo.Const., Art. I, §§10,18(a),21.

#### IV.

**The trial court erred in refusing Bobby’s request to give a “no-adverse-inference” instruction in penalty phase because such ruling deprived Bobby of due process, silence, a fair trial and freedom from cruel and unusual punishment and his privilege against self-incrimination. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Bobby did not testify in penalty phase, and he asked the court to give the “no-adverse-inference” instruction. The court sustained AAG Smith’s objection to that instruction and refused to give it. Smith then referred the jury to Bobby’s silence.**

*State v. Storey*, 986 S.W.2d 462 (Mo.banc1999);

*Carter v. Kentucky*, 450 U.S. 288 (1981);

*Estelle v. Smith*, 451 U.S. 454 (1981);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),19,21; and

MAI-CR3d 308.14 and 313.30A .

V.

**The trial court (a) abused its discretion in sustaining the State's objections and limiting Bobby's cross-examination of Snitch Cook and (b) erred/plainly erred in failing to instruct the jury regarding the special situation of snitches because such rulings deprived Bobby of due process, a fair trial, confrontation and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII, XIV; Mo.Const., Art. I, §§ 10,18(a),21. The State had no evidence connecting Bobby to these murders, until Cook came along hoping for leniency on his pending crimes. Cook made that connection for the State, and the court prevented Bobby from showing Cook's full motive to lie. Bobby was entitled to show that Cook burgled his own uncle's bar, that Cook's criminal problems had lingered for a year-old and that he was about to become a father when he snitched. Cook was not an ordinary witness, and Instruction No.1 did not guide the jury on the credibility concerns unique to Jailhouse Snitches. Without a special cautionary instruction, Bobby will suffer manifest injustice.**

*Davis v. Alaska*, 415 U.S. 308 (1974);

*State v. Carson*, 941 S.W.2d 518 (Mo.banc1997);

*Dodd v. State*, 993 P.2d 778 (Okla.Crim.App. 2000);

*Carriger v. Stewart*, 132 F.3d 463 (9<sup>th</sup> Cir.1997)(en banc);

*State v. Lockhart*, 507 S.W.2d 395 (Mo.1974);

*State v. Dexter*, 954 S.W.2d 332 (Mo.banc1997);

*State v. Hedrick*, 797 S.W.2d 823 (Mo.App.,W.D.1990);

*State v. Grimes*, 982 P.2d 1037 (Mont.1999);

*State v. Silvey*, 894 S.W.2d 662 (Mo.banc1995);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§ 10,18(a),21;

§569.170,570.030, 575.210.3(1);

§1127a, Calif.Pen.Code (1989);

MAI-CR3d 302.01;

*The Jailhouse Informant*, Chicago Tribune, 11/16/1999; and

Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp.

Probs.125(1998).

## VI.

**The trial court erred in sentencing Bobby to death because such sentences are disproportionate under §565.035.3 and thus violate Bobby's rights to due process and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VIII,XIV; Mo.Const., Art. I, §§10,21. The State won these death sentences not with an "evenhanded, rational and consistent" case, but with an underhanded, irrational and erratic one. Bobby's death sentences are the freakish result of the State's reliance on lies and emotion. It intentionally lied in accusing Bobby of stabbing a fellow inmate; it willfully incited the jury with its plea that "emotion is fair;" and it desperately clung to the erratic testimony of an inherently unreliable snitch to connect Bobby to the murders.**

*State v. Chaney*, 967 S.W.2d 47 (Mo.banc1998);

*Dodd v. State*, 993 P.2d 778 (Okla.Crim.App.2000);

*Napue v. Illinois*, 360 U.S. 264 (1959);

*Woodson v. N.C.*, 428 U.S. 280 (1977);

*Skipper v. S.C.*, 476 U.S. 2 (1986);

*Giglio v. U. S.*, 405 U.S. 150 (1972);

*State v. Taylor*, 944 S.W.2d 925 (Mo.banc1997);

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

*Carriger v. Stewart*, 132 F.3d 463 (9<sup>th</sup> Cir. 1997)(en banc);

U.S.Const., Amends. V,VIII,XIV;

Mo.Const., Art. I, §§10,21

§565.035.3 (1);

National Student Research Center, E-Journal of Student Research, Vol.5, No.3

3/1997 (<http://youth.net/nrsc/ejournals.ejou028.html>);

*The Jailhouse Informant*, Chicago Tribune, 11/16/1999; and

Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 61 Law & Contemp.

Probs. 125 (1998).

## VII.

**The trial court abused its discretion in (1) letting the State elicit the sexual nature of Bobby's pending trial and (2) refusing to reopen voir dire so that Bobby could measure the impact of such evidence because these rulings deprived Bobby of due process, a fair trial, freedom from cruel and unusual punishment and to be tried only for the charged offenses. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,17,18(a),21. To show a motive, the State was entitled to elicit that Bobby had a criminal trial set for the day after the charged murders, but the sexual nature of that trial was not strictly necessary to show motive. Indeed, the State did not just use the sex trial to show motive but used it simply to inflame the jurors who Bobby could not voir dire for possible bias from the sexual “allegations” and “charges.”**

*State v. Collins*, 669 S.W.2d 933 (Mo.banc1984);

*State v. Barriner*, No.SC81666 (Mo.banc12/27/2000);

*State v. Holbert*, 416 S.W.2d 129 (Mo.1967);

*State v. Alexander*, 875 S.W.2d 924 (Mo.App.,S.D.1994);

*State v. Sloan*, 786 S.W.2d 919 (Mo.App.,W.D.1990);

*State v. Bernard*, 849 S.W.2d 10 (Mo.banc1993);

*State v. Rousan*, 961 S.W.2d 831 (Mo.banc1998);

*State v. Hedrick*, 797 S.W.2d 823 (Mo.App.,W.D.1990)

*State v. Clark*, No. ED77197 (Mo.App.,E.D.)(pending);

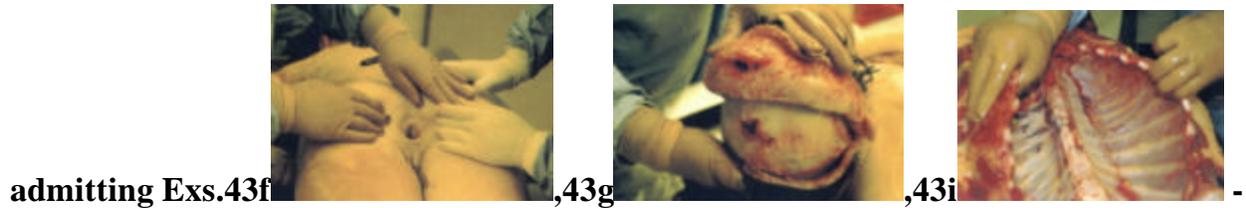
U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,17,18(a),21; and

MAI-CR3d 310.12.

## VIII.

**The trial court abused its discretion in overruling Bobby's objections and**



**three autopsy photographs of Amanda because these rulings deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§ 10,18(a),21. The crime did not produce these shockingly gruesome photographs, the State's single-minded effort to inflame the passions and prejudices of the jury did; after all, the State's pathologist negated any arguable evidentiary purpose of showing the jury these vulgar, horrid and repulsive pictures on a 60"TV. Basing Bobby's conviction and death sentences on emotional pleas to "look at the pictures" cannot be tolerated.**

*State v. Floyd*, 360 S.W.2d 630 (Mo.1962);

*State v. Stevenson*, 852 S.W.2d 858 (Mo.App.,S.D.1993);

*State v. Robinson*, 328 S.W.2d 667 (Mo.1959);

*State v. McMillin*, 783 S.W.2d 82 (Mo.banc1990);

*State v. Rousan*, 961 S.W.2d 831 (Mo.banc1998);

*State v. Middleton*, 339 S.E.2d 692 (S.C.1986);

*State v. Roberson*, 1995 WL 765009 (Tenn.Crim.App.1995);

*State v. Alexander*, 875 S.W.2d 924 (Mo.App.,S.D.1994);

*Woodson v. North Carolina*, 428 U.S. 280 (1977);

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

*Thompson v. Oklahoma*, 487 U.S. 815 (1988);

*Zant v. Stephens*, 462 U.S. 862 (1983)

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art.I, §§ 10,18(a),21.

## IX.

**The trial court abused its discretion in overruling Bobby’s repeated objections and letting the State present its bare suspicion that Bobby sodomized Amanda because those rulings deprived Bobby of due process, a fair trial before a fair, impartial jury, freedom from cruel and unusual punishment and to be tried only for the charged offense. U.S.Const., Amends., V,VI,VIII,XIV; Mo.Const., Art. I, §§10,17,18(a),21. Supposition abounded; evidence did not. Neither the dissection of Amanda’s rectum nor her Rape Kit showed signs of sodomy, but, clinging to its titillating theory, the State wove sexual innuendo throughout the trial, using**

- a. a picture of two gloved hands spreading Amanda’s anus (Ex.43f);**
- b. speculation from Watson and Anderson that Amanda was “redressed” postmortem;**
- c. Watson’s description of an “almost white” stain Amanda’s comforter;**
- d. Amanda’s fitted-sheet (Ex.27) with Bobby’s sperm (Ex.20o); and**
- e. the Rape Kits for Amanda (Ex.25) and Bobby (Ex.12b);**

**to knit a case out of whole cloth.**

*State v. Barriner*, No.SC81666 (Mo.banc12/27/2000);

*State v. Bernard*, 849 S.W.2d 10 (Mo.banc1993);

*State v. Huff*, 296 S.W. 121 (Mo.1927);

*State v. Burns*, 978 S.W.2d 759 (Mo.banc1998);

*Boyington v. State*, 748 So.2d 897 (Ala.Crim.App.1999);

*Old Chief v. U.S.*, 519 U.S. 172 (1997);

*Draper v. Louisville & N.R.Co.*, 156 S.W.2d 626 (Mo.1941);

*White v. American Republic Ins. Co.*, 799 S.W.2d 183 (Mo.App.,S.D.1990);

*Craddock v. Greenberg Mercantile, Inc.*, 297 S.W.2d 541 (Mo.1957);

*Catchings v. State*, 684 So.2d 591 (Miss.1996);

*State v. Dexter*, 954 S.W.2d 332 (Mo.banc1997);

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

U.S.Const., Amends., V,VI,VIII,XIV; and

Mo.Const., Art. I, §§10,17,18(a),21.

**X.**

**The trial court plainly erred in entering judgment and sentence, depriving Bobby of due process, a fair trial before a fair and impartial jury and to freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV and Mo.Const., Art.I, §§ 10,18(a),21. When the court asked the venire “whether you or any of your loved ones or close friends have ever been the victim of a crime,” Foreperson Rouse held her tongue, willfully evading her duty to explain her “yes” response on her Qualification Form. “Through neglect,” Bobby’s attorneys did not bring this to the court’s attention until the motion for new trial. If left uncorrected, Foreperson Rouse’s lie will cause a manifest injustice since Bobby was convicted and sentenced to die “not by a jury of twelve, but by eleven jurors and one intermeddler.”**

*Clark v. U.S.*, 289 U.S. 1 (1933);

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

*Dyer v. Calderon*, 151 F.3d 970 (9<sup>th</sup> Cir.1998);

*State v. Hermann*, 283 S.W.2d 617 (Mo.1965);

*State v. Pointer*, 887 S.W.2d 652 (Mo.App.,W.D.1994);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§ 10,18(a),21; and

MAI-CR3d 300.02.

## XI.

**The trial court abused its discretion in overruling Bobby’s objection and striking Juror Morgan for cause because this deprived Bobby of due process, a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Juror Morgan unequivocally stated that she could “realistically consider” the death penalty, but simply could not sign a death verdict. This difficulty did not prevent or substantially impair Morgan from abiding by her oath and the court’s instructions.**

*Gray v. Mississippi*, 481 U.S. 648 (1987);

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

*Adams v. Texas*, 448 U.S. 38 (1980);

*State v. Kreutzer*, 928 S.W.2d 854 (Mo.banc1996);

*State v. Smith*, No. 82000 (Mo.banc12/5/2000);

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

*Lockhart v. McCree*, 476 U.S. 162 (1986);

*Alderman v. Austin*, 663 F.2d 558 (5thCir.1981);

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art. I, §§ 10,18(a),21.

## XII.

The trial court abused its discretion in letting AAG Smith divert the jurors with wholly inappropriate matters during her guilt and penalty arguments and plainly erred in not declaring a mistrial, *sua sponte*, to correct the grossly improper arguments because such rulings caused a manifest injustice and deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21; Rule 30.20.

### Guilt Phase

(a) Smith warned jurors that they would have to explain any verdict less than first degree murder because that verdict would insult Sondra and Amanda;

### Penalty Phase

(b) Smith invited the jury to base its decision on passion and prejudice rather than reason, crying and telling the jury, “[E]motion is fair;”

(c) Smith gave unsworn testimony that Bobby’s death “would be a thousand times more humane ... than the death[s] of Sondra...[and] Amanda;” and

(d) Smith diminished the jurors’ sense of responsibility, telling them that they were not deciding Bobby’s “ultimate fate” and they were not the “ultimate say.”

*State v. Storey*, 901 S.W.2d 886 (Mo.banc1995);  
*State v. Taylor*, 944 S.W.2d 925 (Mo.banc1997);  
*Caldwell v. Mississippi*, 472 U.S. 320 (1985);  
*Woodson v. North Carolina*, 428 U.S. 280 (1977);  
*Booth v. Maryland*, 482 U.S. 496 (1987);  
*State v. Tiedt*, 206 S.W.2d 524 (Mo.banc1947);  
*State v. Salitros*, 499 N.W.2d 815 (Minn.1993);  
*State v. Horton*, 153 S.W. 1051 (Mo.1913);  
*State v. Roberts*, 838 S.W.2d 126 (Mo.App.,E.D.1993);  
*Berger v. United States*, 295 U.S. 78 (1935);  
*State v. Thomas*, 780 S.W.2d 128 (Mo.App.,E.D.1989);  
*State v. Rhodes*, 988 S.W.2d 521 (Mo.banc1999);  
*Antwine v. Delo*, 54 F.3d 1357, 1361 (8<sup>th</sup> Cir. 1995);  
*State v. Smith*, No.SC82000 (Mo.banc12/5/2000);  
*Fleming v. State*, 240 S.E.2d 37 (Ga.1977);  
*State v. Schneider*, 736 S.W.2d 392 (Mo.banc1987);  
U.S.Const., Amends. V,VI,VIII,XIV;  
Mo.Const., Art. I, §§10,18(a),21;  
§565.035.3(1);  
Rules 4-3.8, 30.20;

I ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.1

(2 ed.1979); and

Borg & Radelt, *Botched Lethal Injections*, NLADA (1998)

(<http://www.nlada.org/caprep/ma98/botch.htm>)

### XIII.

**The trial court abused its discretion in overruling Bobby’s objection and letting Cora Wade testify about Sondra’s hearsay statements because such ruling deprived Bobby of due process, confrontation, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§ 10,18(a),21. Wade’s testimony that Sondra said she had told Bobby she “wasn’t intending to testify for [him],” but that she might testify if he signed the waiver of marital assets merely recounted past events; and her testimony that Sondra said Bobby had signed the waiver, but she had not worked up the courage to tell him that she still was not testifying for him did not prove Sondra’s state-of-mind. Indeed, Bobby did not claim accident, suicide or self-defense, thus he did not put Sondra’s state-of-mind in issue. Furthermore, the State used Wade’s testimony to prove the truth of the matters asserted.**

*State v. Bell*, 950 S.W.2d 482 (Mo.banc1997);

*State v. Debler*, 856 S.W.2d 641 (Mo.banc1993);

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

*State v. Shurn*, 866 S.W.2d 447 (Mo.banc1993);

*Ohio v. Roberts*, 448 U.S. 56 (1980);

*State v. Robinson*, 484 S.W.2d 186 (Mo.1972);

*Simmons v. S.C.*, 512 U.S. 154 (1994);

*Kipp v. State*, 876 S.W.2d 330 (Tex.Crim.App.1994);

*Schneider v. Delo*, 85 F.3d 335 (8<sup>th</sup>Cir.1996);

*State v. Martinelli*, 972 S.W.2d 424 (Mo.App.,E.D.1998);

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art.I, §§ 10,18(a),21.

#### XIV.

**The trial court abused its discretion in overruling Bobby’s objections and letting the State impugn Bobby’s character with irrelevant evidence and speculation because those ruling deprived Bobby of due process, a fair trial before a fair and impartial jury, freedom from cruel and unusual punishment and to defend himself against the charged offenses. U.S.Const., Amends. V,VI,VIII, XIV; Mo.Const., Art.I, §§10,17,18(a),21. Although Bobby did not testify—and thus did not put his character in issue, the State elicited from (a) Edna Yarnell, who lived next door, that she heard Bobby and Sondra argue 4-5 times so she started keeping her patio door closed and (b) Chief Kirkman that Bobby said his employer had “let him go.” If left uncorrected, this error will cause manifest injustice since character evidence weighs so heavily with jurors as to overpersuade them.**

*Old Chief v. United States*, 519 U.S. 172 (1997);

*State v. Bernard*, 849 S.W.2d 10 (Mo.banc1993);

*State v. Milligan*, 654 S.W.2d 304 (Mo.App.,W.D.1983);

*State v. Tiedt*, 206 S.W.2d 524 (Mo.banc1947);

*State v. Taylor*, 944 S.W.2d 925 (Mo.banc1997);

U.S.Const., Amends. V,VI,VIII,XIV; and

Mo.Const., Art.I, §§10,17,18(a),21.

## XV.

**The trial court plainly erred in letting Dr. Hausenstein testify that Bobby offered no exculpatory explanation for the marks on his hands because such action deprived Bobby of due process, silence, counsel and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Police used Dr. Hausenstein as their agent to investigate marks on Bobby's hands, and did so without Bobby's attorney, Fred Martin, being present. Martin was defending Bobby on pending "sex charges," which were set for trial the day after these murders. That sex case gave the State "one possible" motive and two potential aggravators for these murders, thus making Bobby's right to counsel in the sex and murder cases so inextricably intertwined that it could not be severed. If left uncorrected, this error will cause manifest injustice.**

*U.S. v. Arnold*, 106 F.3d 37 (3<sup>rd</sup> Cir.1997);

*U.S. v. Melgar*, 139 F.3d 1005 (4<sup>th</sup> Cir.1998);

*Maine v. Moulton*, 474 U.S. 159 (1985);

*McNeil v. Wisconsin*, 501 U.S. 171 (1991);

*U.S. v. Doherty*, 126 F.3d 769 (6<sup>th</sup> Cir.1997);

*U.S. v. Kidd*, 12 F.3d 30 (4<sup>th</sup> Cir.1993);

*U.S. v. Cooper*, 949 F.2d 737 (5<sup>th</sup> Cir.1991);

*U.S. v. Mitcheltree*, 940 F.2d 1329 (10<sup>th</sup> Cir.1991);

*U.S. v. Rodriguez*, 931 F.Supp. 907 (D.Mass.1996);

*People v. Clankie*, 540 N.E.2d 448 (Ill.1988);

*Whittlesey v. State*, 665 A.2d 223 (1995);

*State v. Tucker*, 645 A.2d 111 (N.J.1994);

*Texas v. Cobb*, No. US99-1702 (pending);

*State v. Stuart*, 456 S.W.2d 19 (Mo.banc1970);

*State v. Dexter*, 954 S.W.2d 332 (Mo.banc1997);

*Lovett v. State*, 516 A.2d 455 (Del.1986);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§ 10,18(a),19,21; and

Rule 30.20.

## XVI.

**The trial court erred in overruling Bobby’s objections, finding that the convictions reflected in Exs.49,50 were “serious assaultive,” and refusing to submit that fact to the jury because these actions deprived Bobby of due process, a jury trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI, VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. First degree murder is punishable by life without parole *unless* an aggravating fact is proved beyond a reasonable doubt, then it is punishable by death. Whether Bobby had two prior convictions for first degree sexual abuse and one for second degree robbery was a fact for the trial court. But whether those convictions were “*serious assaultive*” was a fact for the jury.**

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

*Apprendi v. N.J.*, 530 U.S. 466 (2000);

*State v. Storey*, 986 S.W.2d 462 (Mo.banc1999);

*State v. Johns*, No. SC81479 (Mo.banc12/5/2000);

*State v. Kinder*, 942 S.W.2d 313 (Mo.banc1996);

*Johnson v. Armontrout*, 961 F.2d 748 (8<sup>th</sup>Cir.1992);

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

*Antwine v. Delo*, 54 F.3d 1357 (8<sup>th</sup>Cir.1995);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),21;

§§ 565.030,565.032,565.050; and

MAI-CR3d 313.46A.

## XVII.

**The trial court erred in overruling Bobby's objections and admitting his convictions for Indecent/Immoral Practices with Another (Ex.45) and Second Degree Escape (Exs.48,51) because this evidence violated §§ 565.030,565.032 and deprived Bobby of due process, a fair trial and freedom from cruel and unusual punishment. U.S. Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Generally, §565.032.1(3) excluded all criminal convictions, while §565.032 includes only Serious Assaultive Convictions and Murders as statutory aggravators. Exs. 45,48,51 did not support this aggravator and should have been excluded. Admitting them without guiding the jury on how to consider them, prejudiced Bobby.**

*U.S. v. Peoples*, 74 F.Supp.2d 930 (W.D.Mo.1999);

*State v. Treadway*, 558 S.W.2d 646 (Mo.banc1977);

*State ex rel. Edu-Dyne Systems v. Trout*, 781 S.W.2d 84 (Mo.banc1989);

*State v. Smith*, No. 82000 (Mo.banc12/5/2000);

*O'Flaherty v. State Tax Com'n of Missouri*, 680 S.W.2d 153 (Mo.banc1984);

*Ford v. Lockhart*, 861 F.Supp. 1447 (E.D.Ark.1994);

*Hill v. Lockhart*, 824 F.Supp. 1327 (E.D.Ark.1993);

*Woodson v. N.C.*, 428 U.S. 280 (1977);

U.S. Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),21;

§565.032; and

MAI-CR3d 313.41A.

## XVIII.

**The trial court erred and plainly erred in submitting the depravity of mind and multiple murder aggravators because doing so deprived Bobby of due process, a properly instructed jury and freedom from cruel and unusual punishment. U.S. Const., Amends. V, VIII, XIV; Mo. Const., Art. I, §§10, 21. (A) The State did not prove beyond a reasonable doubt that Amanda's death involved torture in that the State's evidence showed the twenty-one stab wounds occurred after Amanda had been rendered unconscious and aspirated her gastric contents from being choked. (B) Both aggravators are unconstitutionally vague since they do not distinguish this case from those where the death penalty is not imposed and do not channel or limit the jury's discretion, thus resulting in arbitrary and capricious sentencing. If left uncorrected, these errors will cause manifest injustice.**

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

*Engberg v. Meyer*, 820 P.2d 70 (Wyo.1991);

*U.S. v. Farrow*, 198 F.3d 179 (6<sup>th</sup> Cir.1999);

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

*Apprendi v. N.J.*, 530 U.S. 466 (2000);

*State v. Smith*, 756 S.W.2d 493 (Mo.banc1988);

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

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

*Newlon v. Armontrout*, 885 F.2d 1328 (8<sup>th</sup> Cir.1989);

*State v. Griffin*, 756 S.W.2d 475 (Mo.banc1988);

*State v. Powell*, 798 S.W.2d 709 (Mo.banc1990);

*Willie v. State*, 585 So.2d 660 (Miss.1991);

*State v. Storey*, 986 S.W.2d 462 (Mo.banc1999);

*Antwine v. Delo*, 54 F.3d 1357 (8<sup>th</sup> Cir.1995);

U.S.Const., Amends. V,VIII,XIV;

Mo.Const., Art. I, §§10,21;

§565.030.4(1);

MAI-CR3d 313.40.

## *Argument*

### I.

**The trial court plainly erred in entering judgment and sentence because the State won Bobby's convictions and death sentences through gross misconduct that deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Ignoring her duty to serve justice and to elicit the truth, AAG Smith redacted material facts to hide the truth. She lied about Bobby being "accused" of stabbing a Kentucky inmate, knowing that the investigators "Cleared" Bobby of any involvement. She lied that Bobby's question about buying a gun established deliberation, knowing the question related to an hypothetical robbery, references to which the court had excluded. Unless corrected, this gross misconduct will cause manifest injustice.**

"The fundamental purpose of a criminal trial is the *fair* ascertainment of the *truth*." *State v. Carter*, 641 S.W.2d 54,58 (Mo.banc1982)(added). To arrive at the truth, our system imposes on prosecutors the "duty to serve justice, not just win the case." *Berger v. U.S.*, 295 U.S. 78,88 (1935); Rule 4-3.8.

AAG Smith was obliged to elicit the truth. *Giglio v. U. S.*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). She did not. Seeking convictions and death verdicts rather than the truth, Smith carefully redacted material facts. She told Bobby's jury that Bobby's question about buying a gun was deliberation, knowing that it related to

a hypothetical robbery, reference to which the court had excluded. She stressed that Bobby had been “accused” of stabbing a Kentucky inmate, knowing that the investigation of that stabbing completely “*Cleared*” Bobby. “[Such] deliberate deception of...jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” *Giglio*, 405 U.S.at153. This error violated Bobby’s state and federal rights to due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishments. This Court must reverse Bobby’s convictions and death sentences because a “reasonable likelihood” exists that Smith’s lies “could have affected” the jury’s verdicts. *Id.*; *Napue, supra* at271.

***AAG Smith Knowingly Created the False Impression that Bobby***

***Stabbed an Inmate in the Kentucky Bureau of Corrections***

In deciding whether to spare or condemn a capital defendant, juries necessarily try to predict his probable future conduct. *Skipper v. S.C.*, 476 U.S. 2,5 (1986). Evidence, then, that Bobby would *not* pose a danger in prison “must be considered potentially mitigating.” *Id.* Realizing this, the defense called Dr. Ferguson as its only mitigation witness (*See* Tr.XI-XII). Dr. Ferguson testified that Bobby has impulse control and intermittent explosive disorders (Tr.1911). She concluded, however, that Bobby’s impulses could be controlled if he were in “a very structured environment” and on medication (Tr.1918,1921).

Smith pursued Dr. Ferguson’s conclusion—seeking to turn Bobby’s mitigation evidence into aggravating evidence. *Skipper, supra*. Noting that prison is “[a] very structured environment,” Smith asked if Dr. Ferguson had considered the “sixty-seven

disciplinary and incident reports documented in [Bobby’s Kentucky] prison records.” (Tr.1921). Dr. Ferguson agreed that she had considered them, but explained that Bobby had only been on medication “[p]art of the time” he was in prison (Tr.1922). On redirect-examination, Dr. Ferguson added that the sixty-seven incident reports were not “overwhelming considerations” because mentally ill people “may be disruptive in a prison setting without medication.” (Tr.1924-1925).

Desperate to refute this mitigating circumstance, Smith upped the ante. She immediately asked whether Dr. Ferguson had considered the “*nature* of any of those incident reports” (Tr.1926)(added). Intent on death verdicts, Smith sought the court’s unwitting permission to lie. Knowing she could never prove the predicate fact, Smith told the court, “I intend to now ask...whether she considered whether or not he’d been *accused* of stabbing a fellow inmate in prison.” *Id.* (added). Conveniently omitting that the investigation of that stabbing “*Cleared*” Bobby, Smith got permission to elicit her lie (Tr.1926-1927):

Q. (AAG Smith) Did you consider the factor that he’d been *accused* of stabbing a fellow inmate in making your analysis?

A. (Dr. Ferguson) I tried to consider everything—yes.

Q. Did you consider *that* factor?

A. Yes—yes.

(Tr.1927-1928)(added).

The “Incident Report” to which Smith unambiguously referred shows that Kentucky’s investigation “*Cleared*” Bobby of the stabbing (App.A-18)(added). Smith’s

coy phraseology shows that she knew Bobby had been cleared. Questions are powerful tools. “Apart from their mere wording, through voice inflection and other mannerisms of the examiner—things that cannot be discerned from the printed record—they can insinuate; they can suggest; they can accuse....” *Elmer v. State*, 724 A.2d 625,632 (Md.1999). She knew that the poison lay in her question. (Tr. 1926-1927); *State v. Dunn*, 577 S.W.2d 649,651 (Mo.banc1979). Smith chose to ignore her duty of candor. Rule 4-3.3(a)(1).

By “accus[ing]” Bobby of being violent in prison, Smith presented the jury a wholly fabricated aggravator. Her false assertions were apt to carry much weight when they should have carried *none*. *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc 1995); *Berger, supra*; Rule 4-3.8. Smith did not seek justice; she sought a win—at all costs. Her lie eliminated any reasonable possibility that the jury would predict that Bobby would not pose a danger if it spared his life. This cannot be condoned. Smith cannot “ask a question which *implies the existence of a factual predicate* which [s]he knows to be untrue.” *Elmer*, 724 A.2d at631 *quoting National Prosecution Standards*, §77.2, at 211 (2dEd-1991)(added). “A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, *the district attorney has the responsibility and duty to correct what [s]he knows to be false and elicit the truth.*” *Napue*, 360 U.S. at269-270 (added). Smith cannot hide behind semantics.

Death is different from any other sentence. *Woodson v. N.C.*, 428 U.S. 280,305 (1977). Its imposition is the most solemn decision jurors must make. Yet, Smith won Bobby’s death sentences by intentionally deceiving the jurors. She wanted them to

believe that he would pose a danger in prison. But the opposite is true. Not only did Bobby *not* stab a Kentucky inmate, he *saved* the lives of two Kentucky prison guards (App.A19-21).

***Smith Knowingly Lied that Bobby was “complaining about problems with his wife and looking for a gun. That’s premeditation. That’s deliberation.”***

Smith lied in guilt phase as well. Immediately before Michael James took the stand, Smith approached the bench and announced her intent to elicit that, about a week before the murders, Bobby asked Michael where he could buy a gun (Tr.1217). She asserted that this question was posed during a conversation about trouble between Bobby and his wife. *Id.* The trial court ruled that Smith could “ask about the gun, but not the robbery.” (Tr.1217).

What robbery? Well, on August 13, 1998—three days after the charged murders, Sergeant K.L. Johnson filed a report detailing an interview of Michael James (App.A-49-50). Michael spoke with Bobby on August 6, 1998—four days before the charged murders. *Id.* During that conversation, “Mayes...claimed he had money troubles and joked about *needing a small pocket pistol* which Mayes would use to rob Donnie Storm of Licking.” *Id.* (added). Since Michael runs a small grocery, talk of a robbery made him nervous, and he changed the subject (App.A-35). *Then*, Bobby asked “what time it was” and commented that “he didn’t want to go back home until [his wife] left.” *Id.* Bobby left about five minutes later. *Id.*

Using the trial court’s ruling as a license to lie, Smith contorted the truth beyond recognition. Directing Michael to his August 6 conversation with Bobby, Smith carefully

walked him through her new and improved sequence of events. She asked if Bobby talked about his wife (Tr.1231). Michael replied, “When he was about to leave the store, he asked what time it was.” *Id.* When Michael told Bobby the time, Bobby said, “he didn’t want to get home while his wife was there.” *Id.* Removing the question about a gun from its the would-be robbery, Smith suddenly attached it to the comment about Sondra (Tr.1232). Smith completed her contortion in closing argument: “Michael James told us on the 6<sup>th</sup> or 7<sup>th</sup> [Bobby] was at his father’s store *complaining about problems with his wife and looking for a gun. That’s premeditation. That’s deliberation.*” (Tr.1815)(added). ***That’s a lie!*** And “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Napue*, 360 U.S. at269.

**A “reasonable likelihood” exists that Smith’s intentionally false evidence “could have affected” the jury’s verdicts.** *Giglio, supra.; Napue, supra.*

In *Elmer, supra* at626, codefendants—Elmer and Brown—went to trial together. Brown testified that he, not Elmer, “pulled the trigger.” On cross-examination, the prosecutor asked if Brown “ever ma[d]e the statement” that Elmer pulled the trigger. *Id.* at627. Brown denied making that statement, and, indeed, he hadn’t. *Id.* Nonetheless, “exhibit[ing] temerity,” the prosecutor repeated the question, knowing that he could not prove it to be true. *Id.* at630. He used the power of his question to imply the predicate fact. *Id.* at631. Elmer’s convictions were reversed. *Id.* at632-633.

In *Davis v. Zant*, 36 F.3d 1538,1549 (11<sup>th</sup> Cir.1994), the defendant testified that his codefendant had “stepped forward and confessed to this crime about three months

ago....” *Id.* at1546. The prosecutor immediately objected, “That’s not true and it’s not evidence.” *Id.* But the codefendant *had* confessed, and the prosecutor *knew* it six months before trial. *Id.* at1547. Nonetheless, the prosecutor argued that the defense was a “last minute fabrication” “‘thought up’ during trial.” *Id.* at1547-1548. “[T]he prosecutor intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction [and death sentence].” *Id.* at1549. The Eleventh Circuit reversed Davis’ conviction and death sentence because the prosecutor’s “patently dishonest” tactics rendered Davis’ trial fundamentally unfair. *Id.* at1551.

Bobby’s convictions and death sentences must also be reversed. Smith deliberately distorted the facts to mislead and prejudice Bobby’s jury. She rearranged facts to win Bobby’s convictions, and she redacted facts to win his death sentences. Her gross misconduct degraded the fundamental purpose of a criminal trial—“the fair ascertainment of the truth.” *Carter*, 641 S.W.2d at58. If left uncorrected, her lies will cause a grave miscarriage of justice. Rule 30.20. Thus, this Court must reverse Bobby’s convictions and sentences and remand for a new trial.