Sup. Ct. # 85235

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MICHAEL TAYLOR,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Charles County, Missouri,
11th Judicial Circuit, Division 3
The Honorable Lucy D. Rauch, Judge

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Michael Taylor incorporates the Jurisdictional Statement from page 12 of his Opening Brief.

STATEMENT OF FACTS

Michael incorporates the Statement of Facts from pages 12-42 of his Opening Brief.

ARGUMENT I[1]

The state's argument fails because it refuses to consider this Court's language in State v. Thompson that acknowledges that MAI-Cr3d 306.04 restricts a jury's ability to consider certain expert testimony regarding a defendant's *mens rea*. The state implicitly acknowledges that Instruction No. 5 served no purpose in the case, yet the state insists the court must abdicate its discretion and blindly obey the MAI's "requirement" that the instruction be given regardless of whether it is appropriate or will trample the defendant's right to have the jury consider his evidence.

By its silence, the state implicitly acknowledges that Instruction 5 served no purpose in this case. The state agrees that MAI-Cr3d 306.04 is intended to help defendants by protecting their rights against self-incrimination and to confrontation (Resp., 22). But here, the defense candidly admitted that Michael killed Shackrein, so the only issue at trial was Michael's mental state at the time of the crime. The instruction served absolutely no purpose yet confused the jury by instructing it on a non-issue while using daunting language that "under no

[1] Michael maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

circumstances should you consider this evidence…" (L.F.309). Instead of protecting the defendant's rights, Instruction 5 trampled them.

The state fails to acknowledge the difficulties even the judge and lawyers had with the instruction. The parties did not request the corollary, "required" instruction, MAI-Cr3d 300.20 (Tr.1392). The judge initially agreed with defense counsel's objection to 306.04 and stated "I don't think it's an appropriate instruction" (Tr. 1390). Even the prosecutor acknowledged, "I do think Instruction No. 5 does considerable damage to Instruction No. 7" (Tr.1398). Only because the instruction was "required" did the court give it. This blind obedience to the MAI, without consideration of whether the instruction was truly appropriate, violated the court's duty to instruct the jury precisely on the law of the case.

The state fails to acknowledge how lay jurors would view the instruction. Instruction No. 5 stated that "under no circumstances should you consider [the doctors' testimony regarding statements that were made to them and information that they received regarding their inquiry into the defendant's mental condition] as evidence that the defendant did or did not commit the acts charged against him" (L.F. 309). Lay jurors are not versed in *actus reus* and *mens rea*. They would not be expected to know about and differentiate between these legal propositions. Instead, they would believe that Instruction 5 must serve some purpose and would look to restrict their consideration of the testimony of the expert witnesses.

The problem with 306.04 is evident through this Court's discussion in State v. Thompson, 985 S.W.2d 779 (Mo.banc 1999), which the state futilely attempts

to distinguish (Resp.,28). Although this Court was not resolving in Thompson the same question raised here, its discussion of the role of MAI-CR3d 300.20 and 306.04 is directly on point.[2] This Court explained that the instruction "diminishes the jury's ability to consider out-of-court statements made [during a 552.030 examination] favorable to [the defendant]" regarding his *mens rea*. *Id*., at 788, fn2. Although an expert related important facts about the defendant's *mens rea* – the defendant's statement that he did not remember parts of the crime and that he felt deep emotional stress at the time of the crime – the jury would not have been allowed to consider that testimony if 306.04 had been given. *Id*. This is precisely the problem here.

Because 306.04 was given, the jury was precluded from considering crucial evidence that Michael could not understand the wrongfulness of his actions and was not malingering. For example, Dr. Rabun testified that Michael told him that the voice told him that "it's time" rather than "go kill" (Tr.1036-37,1071). This was highly significant in the psychiatric analysis of Michael's mental state. It refuted the state's argument that Michael was malingering, since a malingerer would have stated that the voice told him he must kill (Tr.1037,1071). Dr. Rabun

[2] Although the state tries to differentiate between 300.20 and 306.04, the gist of the two instructions is the same. The difference is that 300.20 is supposed to be read before the experts testify, whereas 306.04 is provided to the jury at deliberations.

also testified that Michael told him that he heard the voices twice immediately before the crime, but did not hear them as he was strangling Shackrein (Tr.1072). This too was significant, because a malingerer would have stated that the voices were ever-present and overpowering during the crime (Tr.1072). Michael candidly told Dr. Rabun that he killed Shackrein, and he had immediately and consistently confessed to the crime. This too was significant to show that Michael did not understand the wrongfulness of his actions; a sane man would have tried to conceal or deny his act, and would not have killed in his own cell in the first place (Tr.1033).

State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996), is distinguishable from the current case. In Kreutzer, this Court held that the instructions surrounding the 306.04 instruction clarified the situation. *Id*., at 871. Here, that is not the case. Even the prosecutor stated, "I do think Instruction No. 5 does considerable damage to Instruction No. 7" (Tr.1398). Instruction 7 defined the term "mental disease or defect" (L.F. 311). It instructed that even if the jury found that Michael engaged in the conduct alleged, it must find him not guilty by reason of a mental disease or defect excluding responsibility if it found that (1) at the time of the conduct, Michael had a mental disease or defect; and (2) as a result, he was incapable of knowing and appreciating the nature, quality or wrongfulness of his conduct (L.F. 311).

The state argues that because the instruction was not given at penalty phase, it could not have affected penalty phase deliberations (Resp., 29). The problem is

that the bulk of mitigating evidence was presented through guilt phase. If the jurors believed in guilt phase that they could not consider certain statements made to the psychiatrists, or information learned by the psychiatrists, that belief would carry over into penalty phase. Thus, the jury would be precluded from considering key mitigating evidence such as the physical and sexual abuse Michael suffered in childhood or his extensive psychiatric treatment from early childhood onward.

Given the unique circumstances of the case, Michael should have been allowed to waive Instruction No. 5. The instruction served no purpose, since Michael had admitted that he killed Shackrein, and yet it exposed Michael to the great risk that the jury would fail to consider vital defense evidence. As a result, Michael must receive a new trial.

ARGUMENT II

The state argues that because the prosecutor has broad scope in cross-examining psychiatric experts, it can reveal highly prejudicial information that has absolutely no relevance. The fact that Michael killed the victim in his prior case by drowning her in a toilet had absolutely no relevance to the charged crime and had no bearing on the dispute between the prosecutor and Dr. Rabun as to whether Michael had a sexual motivation to kill the victim in the charged crime. The state argues that the jury already knew that Michael had a previous conviction for rape and murder, so he was not harmed by the jury knowing the details of the first murder. But the jury did not know that Michael had killed the first victim by drowning her in a toilet, and the state was desperate for the jury to know this highly prejudicial fact in guilt phase.

The state alleges that the prosecutor's questions properly tested the basis for Dr. Rabun's opinion (Resp., 37). It is true that prosecutors have wide latitude in cross-examining psychological experts and that these witnesses may be cross-examined about facts not in evidence to test the validity of their opinions. State v. Parker, 886 S.W.2d 908, 927 (Mo.banc 1994). The problem is that the details of the first crime did not challenge the factual basis for Dr. Rabun's opinion. The fact that Michael killed the first victim by drowning her in a toilet had as much relevance as what he had eaten for breakfast that day. Nor should those specific details have been part of Dr. Rabun's analysis, since the state's experts themselves

felt no need to discuss those facts. Those facts had no relevance to the charged crime.

Dr. Rabun based his opinion on meeting with Michael, reading the police reports from the charged crime, and reviewing the wealth of mental health records reaching back to early childhood (Tr.1013-14). His diagnosis that Michael was suffering from a mental disease at the time of the crime stemmed from Michael's long history of psychiatric problems, his actions at the time of the crime, and the lengthy and aggressive psychiatric treatment he received at Fulton State Hospital (Tr.1071-76). He candidly admitted that he did not read the police reports from the first crime, but instead relied on the summarization by state witness Dr. Scott, who had evaluated Michael after that first crime (Tr.1102). Dr. Scott himself apparently believed the specific means of death had no relevance to the issue of insanity, since he did not mention the facts of the drowning in his summary of those police reports (Tr.1102).

The gory facts also did not further the state's argument that sex motivated the crime. The prosecutor challenged Dr. Rabun's conclusion that Michael had no motivation for committing the charged crime (Tr.1100). The prosecutor argued that since sex was involved in both cases, Michael must have been motivated by sex to kill Shackrein (Tr.1100). But the fact that Michael killed the first victim by "thrusting" her head into a toilet had no bearing on whether sex motivated Michael to kill Shackrein. In considering whether sex was the motive, the jury did not need to know that "Christine Smetzer died of asphyxiation from having her throat

forced up against the side of the toilet and her face into the water" (Tr.1099) or that "the defendant in murdering Christine Smetzer caused her death by asphyxiation, by thrusting her throat up against the toilet and her head into the water of that toilet" (Tr.1101-1102). How does that gory fact – that Michael "thrust" Ms. Smetzer's head into a toilet – show that Michael's motivation in the charged crime was sexual? It doesn't.

Revealing this highly prejudicial information also failed to further the state's purported purpose of exposing the similarities between the first crime and the charged crime (Tr.1100). The fact that Michael killed Ms. Smetzer by drowning her in a toilet was not at all similar to the charged crime. In fact, although a toilet was one of the few fixtures in the cell, it played no role in Shackrein's death. Mentioning that Ms. Smetzer was killed when Michael "thrust[ed] her throat up against the toilet and her head into the water" served no purpose other than prejudicing Michael before the jury. Even if there were some similarities in the two crimes, the mode of asphyxiation was not one of them.

State v. Goodwin, 43 S.W.3d 805 (Mo.banc 2001), is distinguishable. There, the defense expert testified that she based her opinion on the defendant's claim that he had no prior significant episodes of violence. *Id*., at 817. It was permissible for the prosecutor to follow-up by questioning the expert if she had known of several other violent crimes committed by the defendant. *Id*. Because the expert's opinion was based in part upon a lack of significant history of crimes

or violence, the state was entitled to test the depth of her knowledge about that history. *Id*.

Here, in contrast, Dr. Rabun did not base his opinion on the form of asphyxiation in the first crime, and that detail did not have any bearing on this case. Revealing that Michael "thrusted" Ms. Smetzer's head into a toilet during a prior crime served no purpose except to "gross out" the jury and prejudice it against Michael.

The state attempts to distinguish State v. Burnfin, 771 S.W.2d 908 (Mo.App. 1989), on the ground that it allegedly does not involve the cross-examination of a psychological expert (Resp., 38-39). Reversal was warranted in Burnfin due to the state's manipulation of its cross-examination of the defense psychiatrist to elicit the defendant's uncharged bad acts. *Id*., at 912. The defense "objected that the questioning was being pursued for an improper purpose and not to test the diagnosis of mental disease or defect." *Id*., at 911. That is precisely what happened here. The state used its cross-examination of Dr. Rabun as a pretext to reveal highly prejudicial details of Michael's first crime, even though those details had no bearing on the issue of whether Michael was not guilty by reason of mental disease or defect in this crime.

Despite the state's assertion to the contrary (Resp., 40), Michael suffered manifest injustice. There was no issue as to whether Michael committed the charged crime. The sole, crucial issue was whether Michael was not guilty by reason of a mental disease or defect. This is where the prejudicial facts of the first

crime were so damaging. If the jury hated Michael because he drowned a fifteen-year old girl in a toilet of a bathroom stall at her school, it would be more likely to reject his affirmative defense of insanity. The prejudice extended beyond the jury's consideration of whether Michael committed the crime – that fact was uncontested. The prejudice extended to, and thwarted, the jury's willingness to consider and accept Michael's insanity defense. The state recognized this and made every effort to get those prejudicial facts before the jury in guilt phase, where the state's case was most at risk. Michael Taylor must receive a new trial.

ARGUMENT III[3]

The state incorrectly asserts that Michael did not set forth sufficient facts in support of his request for state witness Scott Perschbacher's psychiatric records. Defense counsel obtained court documents vouching that Perschbacher "escaped" from one psychiatric ward and was hospitalized at another just four months before Michael's trial; and learned through deposition that Perschbacher engaged in bizarre behavior in prison such as throwing excrement at other inmates. These facts were sufficient to warrant an *in camera* review of Perschbacher's records to ascertain whether he could perceive, recall and relate events accurately and if he had lied in his deposition or was lying at trial.

The state erroneously contends that Scott Perschbacher was not a crucial witness. But in the same breath, the state stresses that Perschbacher testified that (1) Michael admitted that he killed Shackrein to prevent him from moving to another cell (rather than blaming his actions on voices he heard); and (2) Michael admitted to receiving notes from another inmate instructing him to pretend he was crazy to beat the case. Perschbacher was

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[3] Undersigned counsel mistakenly stated in the Point from the Appellant's initial Brief that the trial took place in March, 2003 (App., 81). The trial actually took place in January, 2003. Thus, the known time period when Scott Perschbacher was hospitalized at two psychiatric centers was only four months prior to this trial.

the sole witness to these facts. In a case where the testimony of the psychiatric experts conflicted so radically, Perschbacher's testimony about Michael's own alleged admissions was crucial to break the tie.

The state argues that Michael's claim is too speculative, citing State v. Parker, 886 S.W.2d 908, 917 (Mo.banc 1994), and State v. Goodwin, 65 S.W.3d 17, 21 (Mo.App. 2001) (Resp., 43-44). In Parker, the defendant requested that the court conduct an *in camera* review of a police officer's personnel file. *Id*. The court agreed to review the file in chambers on the basis that (1) the victim had told her roommate that the officer had been disciplined for failing properly to report the victim's several complaints about the defendant, and (2) two or three months before her murder, the victim had read aloud a newspaper article stating that the officer was on probation. *Id*. But the court did not review the file to see if the officer had been disciplined after the murder for summarizing the victim's complaints. *Id*. This Court held that the lower court did not err, because the latter request expanded the inspection period beyond the materiality showing. *Id*. The defendant presented no facts, but merely a theory, that the officer was disciplined after the victim's death. *Id*.

Michael's basis for an *in camera* review of Perschbacher's records was like the first two grounds in Parker – Michael presented facts, not just theory, and he demonstrated the materiality of his request. Michael presented facts – court records showing that just four months prior to trial, Perschbacher was hospitalized

for psychiatric treatment and a deposition revealed that he engaged in bizarre behavior such as throwing excrement (Tr.19-20;L.F.265,268). Records from a psychiatric hospital inherently contain information about the patient's psychiatric difficulties, many of which relate to the patient's ability to perceive, recall or relate events accurately. Since Perschbacher was in a psychiatric hospital so close to the time of trial, and he had been acting bizarrely in prison, his mental illness must have been longstanding and affected the time period about which he was testifying. Additionally, since the court records indicated that Perschbacher had "escaped" from one of the institutions (Tr.19-20;L.F.265,268), it is likely he was hospitalized under court order; this would contradict Perschbacher's testimony that he had never underwent a psychiatric evaluation for any of his numerous criminal cases (L.F.265).

In Goodwin, the court actually granted the defendant's request for an order for discovery of the victim's medical records. 65 S.W.3d at 20. For some reason, however, defense counsel did not follow through. *Id*., at 20. Then, on appeal, the defendant challenged the fact that he had not received the records. *Id*., at 20. The only basis for the records was defense counsel's statement that he believed they would show that the victim was using alcohol and marijuana during the time period of the alleged crimes, and that her drug use may have affected her ability to remember and relate the events. *Id*., at 21.

Reviewing the issue for plain error, the Court of Appeals found none. *Id*., at 21-23. It stressed that defense counsel was able to pursue the issue of the

victim's drug and alcohol use adequately through cross-examination. *Id*., at 21. It further recognized that the defendant had not even requested an *in camera* review at the trial level. *Id*., at 22.

In contrast, the issue here is fully preserved for appeal (Tr.20; L.F. 265, 364-65). Furthermore, the defense had no other means to impeach Perschbacher on his ability to perceive, recall, and relate the events accurately, or to challenge the truthfulness of his deposition. When cross-examined on other issues, such as his racial bigotry, Perschbacher denied any problems until confronted with his own words in writing (Tr.1289-94). The defense should have been given the opportunity to confront Perschbacher with his psychiatric records; without the actual records, any impeachment regarding his psychiatric history would have been fruitless given Perschbacher's habit of denying any problems offhand. The court should have conducted an *in camera* review to protect Michael's constitutional right to full and effective cross-examination of such a crucial witness.

The state attempts to limit the relevance of the psychiatric records to Perschbacher's competency to testify (Resp., 44). True, the psychiatric records related directly to Perschbacher's basic ability to perceive, recall or describe the events in question. Knowledge of Perschbacher's limitations in this regard was crucial for the jury's assessment of his credibility. The records also related to the truthfulness of the information Perschbacher gave in his deposition, where he stated he had never had a psychiatric evaluation in any of his cases (L.F. 265).

The state contends that Scott Perschbacher was not a crucial witness and that his testimony was "simply cumulative" to that of other state witnesses (Resp., 48). But no other witness at the trial testified that Michael admitted that he really killed Shackrein out of his desire to keep his "bitch" from moving to another cell (rather than because he responded to voices in his head) and that Michael admitted to receiving notes instructing him to fake mental illness to beat the case (Tr.1262-67,1269-70). Since Michael's mental state was such a pivotal issue, and the parties had presented such conflicting testimony on that issue, Perschbacher's testimony was crucial.

The state argues that a strong public policy discourages even *in camera* review of a witness' psychiatric records (Resp., 49-50). The state, however, ignores an even stronger public policy – the search for the truth. The purpose of a criminal trial, after all, is to seek the truth. State v. Carter, 641 S.W.2d 54, 58 (Mo.banc 1982). In deciding whether Perschbacher's testimony shooting down Michael's affirmative defense should be believed, the jury was entitled to know all the facts relating to Perschbacher's credibility.

The state argues that, if courts allow *in camera* review of confidential materials, witnesses will be reluctant to testify (Resp,. at 49-50). This public policy concern has been fully litigated in the United States Supreme Court, which held that that concern must yield to the search for truth. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 711-14 (1974); Davis v. Alaska, 415 U.S. 308, 319 (1974).

Furthermore, this witness would not have been swayed against testifying. Perschbacher was motivated by the unbelievably lenient sentence he expected to receive on his five pending felony charges (Tr.1274-77) and the favors he asked of the prosecutor's office (Tr.1285-89), even though he denied they had anything to do with his testimony in Michael's case (Tr.1286).[4] Michael must receive a new trial.

[4] Despite his nine prior felony convictions, Perschbacher expected to be sentenced to drug treatment on five new felony charges (Tr.1271-76). He would attend drug treatment for up to eighteen months and then be released (Tr.1276-77).

ARGUMENT IV

The state erroneously attempts to excuse the state's speaking objection which urged the jury to consider that there were reasons outside the record for the state to continue to medicate Michael. The state's current argument – that the reason for medicating Michael was that he was malingering – conflicts with the state's speaking objection and makes no sense.

The state attempts to justify the prosecutor's comments encouraging the jury to speculate that there was in fact some reason outside the record for the Department of Corrections to continue giving Michael psychotropic medications (Resp., 58). The argument was as follows:

> Defense Counsel: We do not need to execute the mentally ill. I can't overstate the importance of this. Dr. Vlach, the psychiatrist told you that to this day the State, Michael Taylor is being treated by the State with medications for schizophrenia to this day. If he does not have significant mental health problems, why? Why?
>
> The Prosecutor: Object to this, Your Honor, that calls for speculation beyond the record. There may be very good reasons that are not in evidence.
>
> The Court: The objection will be sustained.

(Tr.1546-47).

The state now argues:

> Even if defense counsel's argument was a fair inference from the record, an equally fair inference from the record, which the prosecutor would have been entitled to make during his rebuttal argument, was that Appellant was being treated for a mental illness because he was feigning a mental illness to avoid responsibility for this crime.

(Resp., 58). There are two problems with the state's justification.

First, this is not what the state argued in its speaking objection; in fact, the state now directly contradicts the prosecutor's objection. The prosecutor admitted that any reasons Michael would be given psychotropic medication – other than that he was truly mentally ill – were not part of the record (Tr.1546-47). It argued that the other reasons "are not in evidence" (Tr.1546-47). True, the state had presented some testimony that Michael was malingering (Tr.1361-62). But the prosecutor's speaking objection clearly did not refer to any malingering theory; it directly urged the jury to believe that there were unspoken yet valid reasons outside the record.

Second, if there really was a reason on the record that justified the state giving Michael medication for schizophrenia – other than him truly being schizophrenic – then the state would have provided that reason in rebuttal. The state failed to do so. There were no other valid reasons.

Through its speaking objection, the state managed to improperly urge the jury to reach outside the evidence to believe that the state had valid reasons to medicate Michael, other than him being truly mentally ill. As the state concedes,

"the entire trial centered on whether [Michael] suffered from paranoid schizophrenia or was simply malingering" (Resp., 58-59). Since this was the crucial issue at trial, the state urged the jury to believe that there were valid reasons outside the evidence supporting the state's case on this crucial issue, and the court actually sustained the state's objection, Michael must receive a new trial.

ARGUMENT VIII

Under the trilogy of cases handed down by the United States Supreme Court – Ring v. Arizona, Apprendi v. New Jersey, and Jones v. United States – and this Court's resulting Whitfield opinion, the state has the burden of proving the first three steps of Section 565.030.4 beyond a reasonable doubt.[5] The state's argument is nothing more than a thinly veiled and meritless attack on Whitfield.

The state argues that to accept Michael's argument, "this Court must accept a premise which is untrue–that the jury must find the existence of the non-statutory aggravating circumstances beyond a reasonable doubt to find that the defendant is eligible for a death sentence" (Resp., 80).

First, it is true that the jury must find the existence of non-statutory aggravators beyond a reasonable doubt. In State v. Debler, 856 S.W.2d 641, 657 (Mo.banc 1993), this Court held that evidence of unconvicted bad acts, presented by the state as non-statutory aggravating circumstances, is significantly less reliable than evidence relating to prior convictions. This Court held that before considering evidence of the non-statutory aggravators, the jury "must unanimously

[5]Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999); State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003).

find beyond a reasonable doubt" that the defendant had in fact committed those bad acts. *Id*.

Second, the state must prove beyond a reasonable doubt that the evidence in aggravation warrants death. The findings required by Section 565.030.4 (1), (2), and (3) are death-eligibility factual findings that must be made by a jury. State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it must be found by a jury beyond a reasonable doubt." *Id.*, 107 S.W.3d at 257, *citing* Ring v. Arizona, 536 U.S. 584, 602 (2002).

The state argues that Michael's argument is faulty because this Court has held, even after Whitfield, that the existence of one statutory aggravator is enough to support a death sentence (Resp,. at 80). Under the state's argument, however, even if the jury completely failed to consider steps two, three, and four, a resulting death sentence would be proper. This clearly is not the law.

The state cites Taylor v. State, 2004 WL 117932 (Mo.banc, 1/27/04) and State v. Smith, 32 S.W.3d 532, 556 (Mo.banc 2000) for the proposition that all the state needs to do to make the defendant death eligible is to prove one aggravator beyond a reasonable doubt (Resp., 80-81). Those cases did not address the argument here. Taylor dealt with the strength of the several aggravating circumstances found by the jury and held that if the state proves one aggravating circumstance beyond a reasonable doubt, it has met the burden of that first step.

2004 WL 117932, at 6. The Court did not hold that the state was absolved of its duty to prove steps two and three beyond a reasonable doubt.

The text of Smith cited by the state refers not to the burden of proof regarding steps one, two and three, but rather to whether an aggravator was worded properly. 32 S.W.3d at 556. Smith, moreover, is a pre-Whitfield opinion. Neither of these cases supports the state's argument. The other cases relied on by the state date back to 1982 and 1983 and thus are inapplicable (Resp., 81-82).

The state suggests that the Missouri Legislature's action in amending the death penalty statute in 1993 proves that the state need not prove step two beyond a reasonable doubt (Resp., 81). United States constitutional law is constantly evolving. The 1993 amendment pre-dates any of the recent Supreme Court trilogy of Ring, Apprendi and Jones, which mandated changes in Missouri's procedures. The 1993 amendment, additionally, shows that in the not-too-distant past, the state believed it was indeed constitutionally required to prove at least steps one and two beyond a reasonable doubt.

The state unsuccessfully attempts to distinguish Ring (Resp., 84). It argues that Ring held only that the existence of a statutory aggravator need be found by the jury beyond a reasonable doubt (Resp., 84). But the state's argument ignores the plain language of Ring: "Capital defendants … are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 588 (emphasis added). "Any fact" includes the first three steps of Section 565.030.4.

The state argues that Justice Scalia's concurrence clarifies that Ring cannot be extended further than requiring that step one be found by a jury beyond a reasonable doubt (Resp., 84, fn13). But Justice Scalia plainly stated his belief that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt." *Id*., at 610. Again, those facts that must be found beyond a reasonable doubt are the first three steps of Section 565.030.4.

The state agrees that Whitfield mandates that steps one, two and three must be found by a jury, but argues that it does not require that the state prove steps two and three beyond a reasonable doubt (Resp., 85-86). Whitfield held that the first three steps of Section 565.030.4 require factual findings by the jury before the defendant is eligible for the death penalty. *Id*., at 256. This Court further explained:

> The Supreme Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury. And, in determining which factors fall within this rule, Ring cautioned that, "the dispositive question ... 'is one not of form, but of effect.'" If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it must be found by a jury beyond a reasonable doubt.

Whitfield, 107 S.W.3d at 257 (internal citations omitted). Whitfield clearly mandates that steps one, two and three be found by a jury beyond a reasonable doubt. Michael must receive a new trial before a properly instructed jury.

PROPORTIONALITY REVIEW

(Responding to State's Argument XI)

The state's argument that Michael's sentence is proportionate is misguided. This Court cannot run the risk that the state execute a man who is not guilty, either because of actual innocence or by reason of mental disease or defect. Pursuant to its independent duty to review death sentences under Section 565.035, this Court must reduce Michael's death sentence to life imprisonment without parole, based on the wealth of evidence presented that Michael suffers from a mental disease or defect that excludes responsibility (or in the least, was incapable of the rational thought required for deliberation); the state's use of a jailhouse informant to defeat the defense of mental illness; and events at trial that resulted in a conviction and death verdict based on misunderstanding, speculation, prejudice, and half-information. Upholding the death sentence would violate Michael's rights to due process of law, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3.

> [Proportionality] review is not just for the defendant, it is for ourselves. The honorable reputation of our legal system is tarnished by ordering the execution of those who may not be guilty.

State v. Wolfe, 13 S.W.3d 248, 277-78 (Mo. banc 2000) (Judges Wolff and White, dissenting). This Court cannot run the risk that the state execute someone who is not guilty, either because of actual innocence or because he is not guilty by reason of mental disease or defect. In State v. Chaney, 967 S.W.2d 47, 60 (Mo. banc 1998), this Court recognized that although evidence may be sufficient to support the verdict, it might not be strong enough to warrant a death sentence. That is the case here. Although Michael admittedly killed Shackrein, he was incapable of knowing and appreciating the nature, quality or wrongfulness of his actions due to his extreme paranoid schizophrenia. This Court must grant proportionality relief, because there remains too great a danger that Michael is not guilty by reason of mental disease or defect.

Michael was severely mentally ill at the time of the crime and, at the least, could not have rationally deliberated. The defense at trial was that Michael was not responsible for his acts because of his mental illness. If this Court finds that Michael did not meet that burden, it still should consider whether Michael was truly able to deliberate upon killing Shackrein. The "cool reflection" required for deliberation, after all, must necessarily connote an element of rational thought. Michael's well-documented history of mental illness and his actions surrounding the crime show that he was in no frame of mind for rational thought.

Michael is Mentally Ill

To the date he was sentenced to death, Michael was on medication for schizophrenia, prescribed by state doctors (Tr.1108-1109).

Michael's mental illness is not a fabrication, as the state argues. Mental illness runs rampant in Michael's family (Tr.1016; Ex.F, at 8), and Michael was no exception. Michael underwent psychiatric evaluations as early as age seven (Tr.1021). Although further treatment was recommended, any treatment he actually received was very sporadic (Tr.1022,1024). Residential treatment was recommended but rejected by Michael's mother (Tr.1023-24).

As early as age twelve, Michael reported hearing voices telling him to kill himself, and he finally was hospitalized (Tr.1023). Michael stayed for two months and showed improvement (Tr.1024, 1226). He was diagnosed with a conduct disorder and post traumatic stress disorder (Tr.1025)[6]. The doctors recommended that Michael be put on medication, but his mother refused (Tr.1022).

Awaiting his first trial (age 15), a psychiatrist diagnosed Michael with major depression with psychotic features (Tr.1079-80). In April, 1998 (age 19), after being convicted, Michael was sent to Fulton Reception and Diagnostic Center, where he was examined by a psychiatrist and received psychiatric treatment (Tr.1029-30). He then was sent to Potosi Correctional Center, where he was diagnosed with major depression with psychotic features (Tr.1030). He

[6] By this young age, Michael had already been subjected to severe and repeated physical abuse at home by both his father and mother (Tr.1018-19, 1022, 1027). He had been sexually assaulted on a school bus, when other boys forced him to perform oral sex and then they urinated in his mouth (Tr.1020).

reported auditory hallucinations from the Father of Darkness, continuing as late as August, 1999 (Tr.1030-31). The charged crime took place less than two months later (Tr.974).

In November, 1999, at the request of Potosi's psychiatrist, Michael was transferred to Fulton State Hospital, because he was engaging in "para-suicidal behavior" by banging his head on the wall (Tr.1045). Although the average time a mentally disturbed prisoner spent at the hospital was one to two-and-a-half weeks, Michael was there eight months (Tr.1046,1131, 1156). Four psychiatrists at Fulton State Hospital diagnosed Michael with paranoid schizophrenia in partial remission (Tr.1050,1159).

Michael's illness was so severe that he was given an expensive and potentially life-threatening drug, Clozaril, after nothing else worked (Tr.1052, 1127). The drug would not be given to a patient simply to calm him down (Tr.1052). If the patient was not schizophrenic, Clozaril would sedate him beyond belief; Michael responded well to the Clozaril and was not overly sedated with it (Tr.1128-29). When Michael left the hospital, the main psychiatrist wrote a nine-page discharge summary, the longest he has ever written, because he was so concerned about Michael (Tr.1133).

Michael has made over twenty suicide attempts (Ex.F, at 11). At times, he had to be restrained because of his auditory hallucinations (Tr.1158). He repeatedly mutilated himself, once even requiring restraints (Tr.1050,1160). He heard voices telling him he should kill himself (Tr.1160-61). He also had

paranoid thoughts about staff members doing things to him and conspiring against him (Tr.1050,1160-61).

Michael was evaluated for this case by Dr. John Rabun, who typically testifies for the state, since he seldom finds that a defendant has a mental disease or defect (Tr.1008,1010). Dr. Rabun concluded, however, within a reasonable degree of medical certainty that Michael was suffering from a mental disease – schizophrenia – at the time of the crime and that as a result, he lacked the capacity to know and appreciate the nature, quality, or wrongfulness of his conduct (Tr.1075-76).

The Facts of the Crime

The guards responding to Michael's call for help noted how strange Michael was acting. Michael was "looking pretty much straight ahead, rocking his head slightly back and forth a little bit, you know, it was just bouncing a little bit just slightly" (Tr.879). He stared "straight ahead, rocking his head … kind of back and forth, moving it around in such a way, it was just odd" (Tr.890). His body, too, swayed back and forth (Tr.844,862). He finally leaned over and whispered something unintelligible (Tr.845). The guards eventually realized that Michael said, "my father told me to do it" (Tr.811,822,845,862). Michael was moved from the cell to a steel cage, where he slammed his head into the bars as punishment for not fully obeying "his father" (Ex.22).

That very night, Michael cooperated by confessing to killing Shackrein (Ex.22,24). He explained that he heard a voice from "his father" – the Father of

the Dark Side, or of Darkness – that told him to send Shackrein to him (Ex.22). He explained that his father talks to him often, which is why he sees the psychiatrist (Ex.22). Michael knew death was the only way to travel to "the dark side" (Ex.22). He told Shackrein that he was going to send him to his father, and then he strangled Shackrein (Ex.22). Michael rolled Shackrein onto his back and put a pillow under his head (Ex.22).

Michael spoke to Shackrein's lifeless body: "man, I don't know what you did … I don't know what you did to make my father tell me… what ya did, that was stupid … you know stupid… stupid" (Ex.24). Michael couldn't sleep (Ex.24). "I just hopped down off the bunk and I said, move out my way. That was stupid of you to do some shit like that. Then I sit down on the toilet. I just got to lookin' at him, rocking back and forth, shaking my head. And you know … my father looking at me, he was like, you're not done… you're not done. I said what you mean I'm not done? I done did what you told me to do. He was like, you're not done…you're not done. And I just sit there and I said I don't know what you're talking about" (Ex.24).

The Use of Jailhouse Informant to Defeat Michael's Insanity Defense

To defeat Michael's insanity defense, the state relied upon the testimony of jailhouse informant Scott Perschbacher. Perschbacher provided testimony that no other witness could – that Michael admitted that he really killed Shackrein out of his desire to keep his "bitch" from moving to another cell (Tr.1265); and that

Michael admitted to receiving notes instructing him to fake mental illness to beat the case (Tr.1265-67,1269-70).

Jailhouse snitches are inherently untrustworthy. Dodd v. State, 993 P.2d 778,784 (Okla.Crim.App.2000); Carriger v. Stewart, 132 F.3d 463,479 (9th Cir. 1997). They constitute the leading cause of wrongful capital convictions. Mills and Armstrong, The Jailhouse Informant, *Chicago Tribune*, 11/16/1999; *also* Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 61 *Law & Contemp. Probs*. 125, 139 (1998) (35% of erroneous capital murder convictions due to perjury). "Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that [he] received some sort of benefit…." Dodd, 993 P.2d at 783. The use of jailhouse informants "carries considerable costs, especially in death-penalty cases," and the court must protect itself and society from "unreliable professional jailhouse…snitch[es], who routinely trade dubious information for favors." *Id*.

As well as being a career criminal, Perschbacher was a career informant, having given information to the authorities on four or five homicide cases in the past (Tr.1277). Although he denied that he was receiving anything in exchange for his testimony (Tr.1257,1274-75,1294), he hoped his "information" would help him, and he expected an extremely favorable resolution of his then-pending five new felony charges, especially for someone who had nine prior felony convictions and had behaved so abysmally in prison previously (Tr.1257-58, 1272-73, 1276-77, 1283).

In addition to relying on a jailhouse informant to break the back of the insanity defense, the state refused to cooperate with the defense's request for an *in camera* review of Perschbacher's psychiatric records (Tr.20-21). The state intentionally and repeatedly informed the jury, for no valid purpose, that Michael had killed his first victim by drowning her in a toilet (Tr.1099-1102). The state engaged in guilt phase closing argument that urged the jury to think that there was a reason outside the record for Michael to be receiving psychotropic medication, other than his being truly mentally ill (Tr.1546-47). Furthermore, the jury was read an instruction that confused and misled them about the manner in which to consider Michael's statements to the psychiatrists (Tr.1389-96; L.F.309). Although evidence was presented that Michael is mentally retarded, the jury was not instructed how to consider it (Ex. F, at 7, 12-13).

The Eighth Amendment exacts a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. Caldwell v. Mississippi, 472 U.S. 320, 340 (1985); Woodson v. North Carolina, 420 U.S. 280, 305 (1976). That reliability is absent here. Upholding the death sentence under these circumstances would violate Michael's rights to due process, fundamental fairness, reliable, proportionate sentencing and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3.

This Court must apply *de novo* review. *See* State v. Black, 50 S.W.3d 778, 793-99 (Mo.banc 2001)(Wolfe, J., dissenting); *see also* Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424, 436 (2001); *see also* BMW of North America, Inc. v. Gore, 517 U.S. 559, 584 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994). If it does, it surely will conclude that Michael cannot be executed given the substantial evidence of his mental illness and the unfair tactics employed by the state in obtaining the guilty verdict and death sentence. This Court must not let its honorable reputation be tarnished by condoning the execution of a man who truly was not guilty by reason of mental illness or in the least was not capable of the rational thought required for deliberation.

CONCLUSION

For the foregoing reasons and those set forth in his initial brief, Michael Taylor affirms the Conclusion set forth on page 137 of his initial brief.

Respectfully submitted,

_____
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CERTIFICATE OF MAILING

I certify that on March 16th, 2004, two copies of the foregoing and a disk containing the foregoing were delivered to the Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 7,745 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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