IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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| STATE OF MISSOURI, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| v. | ) | No. ED97498 |
| | ) | |
| LARON HART, | ) | |
| | ) | |
| Appellant. | ) | |

APPEAL TO THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION SEVEN
THE HONORABLE JOHN RILEY, JUDGE

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# APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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## JURISDICTIONAL STATEMENT

In St. Louis City Circuit No. 1022-CR00406, the State charged Appellant Laron Hart with Count I of the class A felony of murder in the first degree in violation of § 565.020, Counts II and IV of the unclassified felony of armed criminal action in violation of § 571.015, and Count III of the class A felony of robbery in the first degree in violation of § 569.020.[1] The State tried Mr. Hart from July 25, 2011 through July 28, 2011. On July 28, 2011, the jury found Mr. Hart guilty of all charges.

On September 9, 2011, the Honorable John Riley sentenced Mr. Hart to concurrent terms of imprisonment in the Missouri Department of Corrections of life without parole on Count I, and thirty years each on Counts II, III, and IV. On November 7, 2011, Mr. Hart filed his notice of appeal with leave from this Court.

As this appeal does not involve any of the categories reserved for the exclusive jurisdiction of the Missouri Supreme Court, the Missouri Court of Appeals of the Eastern District has jurisdiction. Mo. Const., Art. V, § 3 (as amended 1982); § 477.050.

[1] Appellant Laron Hart (Mr. Hart) will cite to the appellate record as follows: Trial and Sentencing Transcript, "(Tr.)"; and Legal File, "(L.F.)." All statutory references are to RSMo 2000 unless otherwise stated.

## STATEMENT OF FACTS

*The Hellrich Robbery*

At approximately 8:50 to 8:55 p.m., on January 14, 2010, Rebecca Hellrich left her apartment at 1911 Allen Avenue in St. Louis, Missouri and walked to her Honda Civic across the street (Tr. 281-282). She was going to meet friends at 9:00 to 9:15 p.m. at Ruth's Chris Steakhouse downtown (Tr. 282). She was closing the driver's door to her Civic and turning her key in the ignition when a four-door, older model, silver-blue Cutlass came down the opposite side of the street and stopped abruptly (Tr. 283, 285). Its tires screeched (Tr. 311).

A man with dreadlocks got of the rear passenger's side of the Cutlass and sprinted over to where Ms. Hellrich was sitting in her Civic (Tr. 284-285). Ms. Hellrich, who had one foot in her Civic and one foot out, thought the man needed help or directions (Tr. 285, 312). The man pulled on her driver's door and she opened the already ajar door further (Tr. 284, 312). The man stepped just inside her driver's door, and told her to give him her things (Tr. 284, 286, 309).

Ms. Hellrich grabbed the purse on her left shoulder and put her hand inside it (Tr. 285, 309-310, 312). Inside her purse, Ms. Hellrich had her Blackberry, a Sony camera, a blue iPod, her valet key to her Civic, debit cards, credit cards, probably a social security card, and her wallet (Tr. 287). She had the dome light on in her Civic and was attempting to retrieve the wallet out of her purse when she saw the man had a gun (Tr. 284-286, 309, 312).

The gun was in the man's left hand (Tr. 312). It was small, silver, boxy, and pointed at her (Tr. 286, 312-313). She threw her purse at the man (Tr. 287, 309).

The man caught the purse, returned to the rear passenger's seat of the Cutlass, and sped away (Tr. 287-288). As he did, Ms. Hellrich yelled to the man to throw her cell phone, i.e., the Blackberry, out, but the man didn't (Tr. 288).

The incident was over (Tr. 308-309). It had taken three to five minutes, and the man had been face-to-face with her for a minute (Tr. 308-309). Ms. Hellrich was shaken up (Tr. 313, 322).

She made a U-turn and tried to follow the Cutlass to possibly obtain its license plate (Tr. 289). But she traveled only five feet before driving to the nearest gas station (Tr. 289).

The gas station was closed and locked (Tr. 289, 320). Ms. Hellrich pounded on the door until the security officer at the gas station let her inside (Tr. 289, 320-321). She told the security officer what had happened, and the security officer had a clerk call the police (Tr. 289, 321-322).

Police took her statement and a description of the man with the gun (Tr. 290). She described him as 5'8", 20 years of age, with medium-length dreadlocks, and "darker" skin (Tr. 290). She said he was wearing a ball cap or hat, but she could not say what style or color of cap or hat (Tr. 290, 310). She also said he was wearing dark-colored jeans and a tan or brown jacket (Tr. 290, 311).

*The Sindelar Shooting*

At approximately 9:15 to 9:20 p.m. on January 14, 2010, Michael McKinley was going to Shop 'N Save at the corner of Kinghighway and Chippewa Streets (Tr. 330). As he traveled down Morganford Street in his truck, he looked out his driver's side window and saw a white man, around 40 years of age, walking the same direction he was traveling (Tr. 331-332, 337). The man had a backpack on his back (Tr. 331).

As Mr. McKinley came to the four-way stop at Morganford Street and Oleatha Avenue, a car passed him, going in the opposite direction, and abruptly pulled to the curb (Tr. 331, 333, 337, 520). Mr. McKinley, who was almost at a complete stop but still rolling, saw a man exit the passenger's side of the car, run up behind the white man, and reach for his backpack (Tr. 333, 334, 349). The white man pulled away and turned to face the man who had reached for his backpack (Tr. 334-336, 349). "They just kind of stood there [at a distance], kind of facing one another . . ." (Tr. 336).

Mr. McKinley could hear voices, but he couldn't hear what they were saying (Tr. 335). It sounded like the white man screamed (Tr. 335).

The man, who had reached for the backpack, drew a small gun and fired one shot (Tr. 335, 351). Mr. McKinley heard the shot, and saw the shooter's face (Tr. 337-338, 348, 352, 354).

Mr. McKinley believed the shooter to be a young black male, 6' tall with medium-length dreadlocks or braids (Tr. 338, 349-350, 354, 520). He couldn't see what the shooter was wearing, and couldn't describe the gun (Tr. 351).

It was dark (Tr. 352). The nearest light pole was eight to 10 feet from where the men were (Tr. 354). The shooter was 18 yards or 15 feet away (Tr. 352).

Mr. McKinley saw the flash of the gun and drove off (Tr. 338, 351, 355). He saw the white man take a few steps out into the street, and the shooter run back to the car from which he had come (Tr. 337, 348). As Mr. McKinley turned the corner, the white man stepped back onto the sidewalk and collapsed to the ground (Tr. 337).

Neil Bardon, who was driving south on Morganford Street toward Oleatha Avenue, also saw the white man stagger, and not one but two black men run to an older model powder-blue Cutlass (Tr. 359, 361, 365, 521). Mr. Bardon did not see the men's faces (Tr. 361, 366). He saw only that one of the men had dreadlocks that fell below his ears, and the other had shorter hair that was close to his head (Tr. 360-361, 364-365, 521).

The men got into the Cutlass (Tr. 337, 339). The Cutlass jolted back, and sped north on Morganford Street (Tr. 339, 362).

Mr. Bardon "pulled a diagonal," made a left, parked, and told his girlfriend with whom he was riding to call police or an ambulance (Tr. 360-361). Then, he jumped out of his car and ran over to assist the man on the ground, Alan Sindelar (Tr. 325, 361, 419).

Though Mr. Sindelar had some abrasions on the back of his left hand, Mr. Bardon could see no injury or blood on Mr. Sindelar through his coat (Tr. 362, 577). Mr. Sindelar was looking at Mr. Bardon, had a pulse, and was trying to speak (Tr. 361-362).

On the ground near Mr. Sindelar were his white bike helmet and backpack (Tr. 361, 375). His backpack was under his upper left back and shoulder (Tr. 377-378). The left strap of the backpack had detached in the struggle (Tr. 370).

A couple of minutes later, Mr. Sindelar passed away from a thoracic abdominal gunshot wound (Tr. 362, 577). A bullet had entered his chest, passed through a major

artery and internal organs, and exited the left side of his torso (Tr. 573, 575). The bullet and the shell casing later located on the street next to the curb near Mr. Sindelar's body were .380 caliber (Tr. 374, 377, 565, 567-568, 576).

*The Pursuit and Apprehension*

At approximately 7:00 a.m. on January 15, 2010, officers in a marked patrol car saw a Cutlass pull over at a bus stop at Cass Avenue and 18th Street (Tr. 381-382, 412). There were two people in the Cutlass (Tr. 387, 395, 418). When the passenger exited the Cutlass, the officers activated their lights and siren (Tr. 382, 412). The passenger jumped back into the Cutlass and the Cutlass fled east on Cass Avenue (Tr. 382, 412).

The officers chased the Cutlass down 10 to 12 different city streets and onto I-70 West (Tr. 383-386, 413). The Cutlass was traveling 40 to 50 mph in rush hour traffic, and zigzagging in between cars on the highway (Tr. 384). The Cutlass got ahead of the officers and the officers got stuck in traffic (Tr. 386).

When the officers reached the North Florissant exit, they discovered the Cutlass had hit a guardrail and traveled 50 feet before hitting one of the light poles next to the exit ramp and coming to a stop (Tr. 386, 392-394, 413). The passenger door of the Cutlass was open and its passengers had abandoned it (Tr. 386-387). Ms. Hellrich's purse, two black gloves, and a screwdriver were in its front seat (Tr. 291, 296-298, 415-418).

One of the officers, Officer Travis Vuichard, stayed with the Cutlass while the other, Officer Timothy Bockskopf, chased after two men he saw running from the area

(Tr. 387-388, 414). Officers David Kalu and Matthew Burle joined the chase (Tr. 398-400).

They chased the men over fences, and alongside and across I-70 before finally catching them (Tr. 387-388, 400). Fifteen minutes and five miles after spotting the Cutlass at the bus stop, Officer Bockskopf arrested Kenneth Ivy, Jr., the driver of the Cutlass and Officer Kalu arrested Reginald Green (Tr. 389, 400, 500).

At the time of their arrests, Mr. Green was 15 or 16 years old and Mr. Ivy was 19 (Tr. 524). Neither Mr. Ivy nor Mr. Green was armed or had a gun (Tr. 389). Mr. Green had a blue iPod in the right pocket of his brown coat (Tr. 401, 403-404).

*The Identifications*

On January 15, 2010, police placed Mr. Ivy in a physical lineup for Ms. Hellrich to view, but she identified no one from the lineup (Tr. 291, 299-300, 461). Ms. Hellrich noted that all of the men in the lineup had short hair (Tr. 299, 316). Mr. Ivy did not have dreadlocks (Tr. 523).

On January 16, 2010, police placed Mr. Green in a physical lineup for Ms. Hellrich to view, but she again identified no one from the lineup (Tr. 300, 466, 469). All of the men in the lineup had short hair, just like the men in the lineup she had seen the day before (Tr. 300).

Also, when shown a photo of Mr. Green, Ms. Hellrich said she had never seen him before (Tr. 301, 466). Mr. Green did not have dreadlocks (Tr. 523, 542).

From photos, Ms. Hellrich, Mr. McKinley, and Mr. Bardon did identify the Cutlass as the car seen during the commission of the offenses (Tr. 296, 341, 363, 464, 523-

524). Ms. Hellrich also identified the purse taken from the Cutlass, and the iPod taken from Mr. Green, as belonging to her (Tr. 291, 297-298, 464). She said the brown coat looked similar to the one worn by the man with the gun (Tr. 299, 465).

*Accusation, Arrest, and Identification of Laron Hart*

On January 20, 2010, detectives interviewed Mr. Ivy's father, Kenneth Ivy, Sr. (Tr. 524-525, 556). After detectives described the man with the gun from the robbery and shooting as having dreadlocks, Kenneth Ivy, Sr. told detectives that his son, Kenneth Ivy, Jr., wasn't the one, but that Mr. Hart, Kenneth Ivy, Jr.'s cousin, matched the description of the man with the gun (Tr. 525-526, 546).

Minutes after Kenneth Ivy, Sr. pointed an accusing finger at Mr. Hart, Mr. Green's mother, Shantella Scroggins, telephoned detectives and in her subsequent interview with them, told them the same thing (Tr. 526-527, 546, 560).

On January 22, 2010, detectives showed Ms. Hellrich a six-man photo lineup, containing Mr. Hart's photo (Tr. 302, 470-471). It was the only photo spread shown to her, as she viewed no photo lineups containing Mr. Green or Mr. Ivy (Tr. 501).

She identified Mr. Hart, who was in the first photo in the top, left-hand corner, as the man with the gun from her robbery (Tr. 301-303, 313-314, 317, 472-473, 496-497). Mr. Hart had dreadlocks (Tr. 615). Ms. Hellrich was only 70% certain of her identification though and stated she would have to see Mr. Hart in person to be 100% certain (Tr. 303-304, 314, 317).

At approximately 9:30 to 10:00 a.m. on January 25, 2010, officers went to Mr. Hart's home on Coleman Avenue where they arrested him (Tr. 405-406). Mr. Hart cooperated with police and gave them no trouble (Tr. 408).

Detectives spoke to Mr. Hart at 3:00 p.m. and another set of detectives spoke to him again before 7:00 p.m. (Tr. 476, 504, 530-531, 547-548). They advised him that he was a suspect in a robbery, had been identified from a photo lineup, and would be placed in a physical lineup (Tr.477-479, 530-531). They also advised Mr. Hart of his rights, which he acknowledged he understood (Tr. 478-479, 532). Mr. Hart told them that he wasn't involved in any robbery (Tr. 479, 532).

Hours later, at 9:15 p.m., detectives placed Mr. Hart in a physical lineup with two men for Ms. Hellrich and Mr. McKinley to view (Tr. 314, 341-343, 479-481, 533-535, 549). From the lineup, Ms. Hellrich positively identified Mr. Hart, who was in position one (Tr. 304, 306-307, 314, 482). She recognized him from the photo lineup (Tr. 315-316).

Mr. McKinley also identified Mr. Hart from the physical lineup as Mr. Sindelar's shooter, but he was only 65% to 75% certain of his identification of him (Tr. 343-344, 352-353, 557). He could not provide a positive identification, only a "tentative" one (Tr. 353, 486).

*No Physical Evidence Connecting Laron Hart to the Offenses*

Laron Hart was 17 years old at the time the Hellrich robbery and Sindelar shooting occurred (Tr. 620-621; L.F. 10, 15). Police had found no property belonging to Ms. Hellrich on his person, and had not found the gun used in the offenses (Tr. 389, 503,

506). Mr. Hart had not been in the Cutlass when police apprehended it, Mr. Ivy, or Mr. Green (Tr. 395, 418).

Also, DNA evidence linked Mr. Green, and not Mr. Hart, to the offenses (Tr. 441, 443-444, 445). Police swabbed anywhere they thought they might find DNA (Tr. 449), including the straps on the backpack, the shell casing, and the exterior of the bike helmet (Tr. 424-425, 427, 438-439). The swab from the left shoulder strap of the backpack yielded a partial DNA profile consistent with Mr. Sindelar and a swab from the exterior of the bike helmet yielded a DNA profile consistent with Mr. Green (Tr. 439-441, 443, 445). No DNA found was consistent with Mr. Hart, and he was excluded as a contributor of the DNA found on the bike helmet (Tr. 441, 445).

*Laron Hart's Statement*

After learning a witness had identified him from the lineup, Mr. Hart began to cry and asked detectives for an opportunity to explain what had happened (Tr. 537). Detective Scott Sailor told Mr. Hart that they would come back to interview him "the right way" (Tr. 538, 549-550).

Detectives Leonard Blansitt and Michael Dohr placed Mr. Hart in an interview room to interrogate him (Tr. 485-486; *see* State's Ex. 21). They read Mr. Hart his rights and he executed a written warning and waiver form at approximately 9:52 p.m. (Tr. 488-490; State's Ex. 20).

Then, while the VHS recorder was playing, detectives advised Mr. Hart of his rights on camera again and Mr. Hart indicated he understood them (State's Ex. 21). They told Mr. Hart that they wanted to interview him about a robbery that occurred on

January 14th at 1911 Allen, involving a female victim, and that he had been positively identified twice, once in a photo spread and again in a physical lineup (State's Ex. 21). They asked Mr. Hart to tell them what he knew about the robbery (State's Ex. 21).

Mr. Hart said he had been told about it (State's Ex. 21). He said Mr. Green had the gun and Mr. Ivy was driving (State's Ex. 21). He said they told him that Mr. Green had just run up on her by himself, tried to get her to give up what she had, and robbed her of a white purse (State's Ex. 21).

He said that night they came to his home after the robbery in an older model, blue car (State's Ex. 21). He got into the car with them and smoked outside his home (State's Ex. 21). They had a black, rusty, semi-automatic handgun with them, and said they were going over to Mr. Ivy's father's home (State's Ex. 21). Mr. Hart said that was all he knew (State's Ex. 21).

He said after another robbery in which they had done the same thing, they came over to his house and showed him the money (State's Ex. 21). They told him they had run up on a man with a gun and robbed him, but did not tell him where the robbery had occurred (State's Ex. 21). They told him not to tell his mom and to not let news of it get out (State's Ex. 21). They gave him $5.00 of the proceeds and they smoked some marijuana (State's Ex. 21).

One of the detectives told Mr. Hart that he wasn't being fully cooperative (State's Ex. 21). The detective told Mr. Hart that Ms. Hellrich was shaking she was so scared when she identified him (State's Ex. 21). The detective asked Mr. Hart to find it in his

heart to give her some relief and to just be honest (State's Ex. 21). The detective said he knew Mr. Hart was there (State's Ex. 21).

The other detective told Mr. Hart that he knew what the problem was – if Mr. Hart admitted the robbery, he would implicate himself in the shooting (State's Ex. 21). The detective told Mr. Hart they were not talking about the shooting then (State's Ex. 21).

The detective further indicated that Mr. Green didn't match Ms. Hellrich's description, but that Mr. Hart did and Ms. Hellrich had identified Mr. Hart (State's Ex. 21). He asked Mr. Hart to give her some peace and be honest (State's Ex. 21).

Mr. Hart indicated he was there, but didn't have the gun and didn't take the purse (State's Ex. 21). He said Mr. Green ran up to her with the gun first (State's Ex. 21). He said afterwards, he got out of the car and ran to where Mr. Green was just in time to see Mr. Green take the purse (State's Ex. 21). Once Mr. Green had the purse, Mr. Hart ran back to the car and they dropped Mr. Hart off at home (State's Ex. 21). Mr. Hart said he did not go to the next place Mr. Green went (State's Ex. 21).

One of the detectives confronted Mr. Hart with the fact that the next robbery occurred fifteen minutes later (State's Ex. 21). The detective said that if the same thing happened in the next robbery as with the first, i.e., if Mr. Green ran up with the gun, Mr. Hart got out of the car, and Mr. Green shot him, that's a completely different story (State's Ex. 21). The detective said, "But if you're there, you're there," and asked if Mr. Hart had been there for the robbery where the man was shot (State's Ex. 21).

Mr. Hart said he was not there (State's Ex. 21). He said he had only just heard about the robbery where the man was shot (State's Ex. 21). He said a relative of the others phoned him with the information after their arrests (State's Ex. 21)

Detectives told Mr. Hart it was virtually impossible to drive to Mr. Hart's home and back to the location of robbery and shooting in fifteen minutes (State's Ex. 21). The detective told Mr. Hart he was probably there, and Mr. Green might have shot the man (State's Ex. 21). Mr. Hart denied being present for the robbery and shooting, and said that the robbery and shooting couldn't have happened fifteen minutes later (State's Ex. 21).

Detectives confronted Mr. Hart with records showing the 911 call for the robbery involving the woman came in at 8:55 p.m. and the call for the shooting came in at 9:18 p.m. (State's Ex. 21). The detective again stated it was virtually impossible to drive from the location of the first robbery, to Mr. Hart's home, and back to the location of the robbery and shooting in that time (State's Ex. 21). He told Mr. Hart he was present, and if he didn't have the gun, he needed to say so (State's Ex. 21).

Mr. Hart acknowledged he was present, but said he did not have the gun, and had not even gotten out of the car (State's Ex. 21). He said Mr. Green did the robbery all by himself (State's Ex. 21). He said Mr. Green tried to rob the man and when the man hit him with the helmet, he shot him (State's Ex. 21). He said afterwards, they dropped him off at home (State's Ex. 21). He didn't know what they did with the gun (State's Ex. 21).

Detectives thanked him for his honesty, told him homicide detectives would interview him, and told him he would be booked for first-degree robbery and armed

criminal action, the same as Mr. Ivy and Mr. Green (State's Ex. 21). The detective explained that if he acted along with another, even if he didn't have the gun, he gets charged like everybody else (State's Ex. 21). Mr. Hart said he understood (State's Ex. 21).

Mr. Hart said that he wasn't the type of person to do this, and that he was sorry for what had happened (State's Ex. 21). He said he looked up to Mr. Ivy, and was intimidated into doing things through peer pressure (State's Ex. 21).

Mr. Hart asked if he would spend the rest of his life in jail, and the detective said, "I don't believe you will be, I really don't, if what you're saying is true and you didn't . . . you didn't have that gun, you never had that gun" (State's Ex. 21). The detective said, "If what you're saying is true, . . . then no, you're not going to spend the rest of your life in jail, okay?" (State's Ex. 21). Mr. Hart said he has a daughter that he really loves and he would be so hurt if he would not be able to see her again (State's Ex. 21).

Seconds later, detectives, Scott Sailor and Lon Ray, entered the room and interrogated Mr. Hart next (State's Ex. 21). They told him the rights read to him by Detective Dohr still applied and Mr. Hart indicated he understood them (State's Ex. 21). They told Mr. Hart they wanted to talk to him about the robbery and shooting (State's Ex. 21).

Mr. Hart stated that on that date, he was wearing a blue jacket, blue jeans, and a white t-shirt and Mr. Green was wearing a brown coat and hoodie (State's Ex. 21). Mr. Green was in the front passenger's seat of an older model light-blue car that Mr. Ivy was driving (State's Ex. 21). Mr. Ivy had on brown gloves for driving and Mr. Hart was seated in the car behind him (State's Ex. 21).

Mr. Hart stated that he knew Mr. Green was going to rob a man, but did not know he was going to shoot him (State's Ex. 21). He said Mr. Green exited the car, and ran up to the man (State's Ex. 21). Mr. Hart said he heard "pow," and Mr. Green got back into the car (State's Ex. 21). He said Mr. Ivy asked Mr. Green in the car if he had shot the man, but Mr. Green denied shooting him (State's Ex. 21). He said afterwards, they drove to his home where Mr. Green told him he had shot the man once after the man swung his bike helmet at him (State's Ex. 21). Mr. Green's face was kind of swollen, but not bleeding (State's Ex. 21).

Mr. Hart further stated he thought Mr. Green had taken the man's book bag, but he couldn't remember Mr. Green coming back to the car with anything after having approached the man (State's Ex. 21).

Detectives asked Mr. Hart what if they had a witness who had tentatively identified him as being outside the car at the scene of the shooting and had described his height, his braids, and his face (State's Ex. 21). Mr. Hart said he didn't get out of the car, and suggested that perhaps the witness knew his description because he had seen him inside the car (State's Ex. 21).

Mr. Hart later admitted getting out of the car and walking to where Mr. Green and the man were (State's Ex. 21). Mr. Ivy told him to do so (State's Ex. 21).

Twenty seconds after Mr. Green had gotten out of the car, Mr. Hart got out of the car to see if everything with Mr. Green was "cool" and what was taking Mr. Green so long (State's Ex. 21). He would probably have tried to grab Mr. Green away and told him to come on (State's Ex. 21).

As Mr. Hart approached Mr. Green from behind, he saw Mr. Green struggle with the man (State's Ex. 21). He didn't see the man hit Mr. Green with the bike helmet (State's Ex. 21). He said as he got closer to Mr. Green, he heard the man yell for help and saw Mr. Green shoot the man (State's Ex. 21). Mr. Hart ran and got back into the car (State's Ex. 21).

They dropped Mr. Hart off at home at Mr. Hart's request (State's Ex. 21). Mr. Hart said he didn't know where the gun was and didn't have it (State's Ex. 21). He said that he had never touched it, and that Mr. Green always wanted to be the gunman (State's Ex. 21). The gun was Mr. Ivy's (State's Ex. 21).

Detectives asked about the Hellrich robbery (State's Ex. 21). Mr. Hart again stated that he was with Mr. Ivy and Mr. Green for that robbery (State's Ex. 21). He said Mr. Green got out of the car first and asked her to give him her purse (State's Ex. 21). Mr. Hart got out of the car next (State's Ex. 21). Mr. Green snatched the purse and they got back in the car (State's Ex. 21).

Mr. Hart asked if he was going to spend his whole life in jail, and the detective told him that would be up to a jury (State's Ex. 21).

*Laron Hart's Alibi*

At trial, Mr. Hart testified that he lied to police about being present at the scene of the offenses, and that he was not present for the commission of either offense (Tr. 666-667, 695). He also testified, as he had maintained in his statement to detectives, that he wasn't the gunman in the robbery or the shooting (Tr. 693, 695).

He said he lied because off-camera, detectives had pressured him (Tr. 660-661). He said they told him if he didn't admit he was present for the offenses, the judge would put him so far up under the bridge that he would never see daylight or his daughter again (Tr. 661, 677, 695). He said detectives told him if he just admitted he was present, they would let him go after 24 hours (Tr. 666, 678, 686, 689, 695). He said he was scared, nervous, and under pressure (Tr. 661, 689, 692-693, 698).

He further testified that officers had shown him photos of the purse, the body, and the car off-camera, so he would know what they looked like (Tr. 679). He said officers funneled him information about the offenses (Tr. 687).

Eight hours after he had been in their custody, detectives turned on the camera (Tr. 698). Mr. Hart said when he was on camera, he initially denied involvement in the offenses because he was skeptical about admitting his presence like detectives had instructed him, and unsure what the situation would bring (Tr. 682, 684, 688).

Mr. Hart maintained that the witnesses had misidentified him (Tr. 693-694). Through his testimony and that of his mother, two sisters, and his cousin's girlfriend, Mr. Hart put on an alibi defense (Tr. 593-700). They testified he was at home on January 14, 2010 and left home only once for a fifteen- to twenty-minute trip to the liquor store with older cousin, Corey Hart (Tr. 587, 627-628, 651, 655). Between the hours of 6:30 p.m. and 12:30 to 1:00 a.m. of the next day, he played cards with Corey, his mother, and Corey's girlfriend at his home (Tr. 582-584, 593, 597, 606-608, 610, 618-619, 654-656).

Mr. Hart will state additional facts in the body of his brief as necessary.

POINT – I.

The trial court, plainly erred, causing manifest injustice or a miscarriage of justice, in entering judgment of conviction on Count I of murder in the first degree under § 565.020 because while Mr. Hart's direct appeal was pending, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), making the penalty provision in § 565.020.2 unconstitutional as applied to Mr. Hart, and the absence of a valid penalty provision for juvenile offenders post-*Miller* renders § 565.020 unenforceable against Mr. Hart. The trial court's error deprived Mr. Hart of his rights to due process of law and protection against cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 21 of the Missouri Constitution. This Court must reverse Mr. Hart's conviction of Count I of murder in the first degree and the concomitant Count II of armed criminal action and discharge him, or in the alternative, enter judgment of conviction for murder in the second degree.

*Weems v. United States*, 217 U.S. 349 (1910);

*State v. Burgin*, 203 S.W.3d 713 (Mo. App. E.D. 2006);

*Miller v. Alabama*, 132 S.Ct. 2455 (2012);

*Roper v. Simmons*, 543 U.S. 551 (2005);

U.S. Const., Amend. V, VIII, & XIV, & Mo. Const., Art. I, §§ 10 & 21;

§§ 558.011, 565.020, & 571.015;

Rule 30.20.

POINT – II.

The trial court plainly erred, causing a manifest injustice or miscarriage of justice, in imposing a mandatory sentence of life without the possibility of parole for a first-degree murder conviction for an offense committed when Mr. Hart was 17 years old, in that under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), decided June 25, 2012, the sentence violated the principle of proportionality and Mr. Hart's constitutional rights to due process of law and protection against cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 21 of the Missouri Constitution. This Court must grant Mr. Hart the opportunity for jury sentencing and resentencing on Count I to an authorized term of imprisonment for a class A felony.

*Miller v. Alabama*, 132 S.Ct. 2455 (2012);

*Schriro v. Summerlin*, 542 U.S. 348 (2004);

*State v. Bridges*, 360 S.W.2d 648 (Mo. 1962);

*State v. Chapman*, 167 S.W.3d 759 (Mo. App. E.D. 2005);

U.S. Const., Amend. V, VIII, & XIV;

Mo. Const., Art. I, §§ 10 & 21;

§§ 1.140, 557.036, 558.011, & 565.020;

Rule 30.20.

POINT – III.

The trial court abused its discretion in failing to exclude from evidence references on Mr. Hart's videotaped statement to an uncharged stealing and six uncharged robberies that allegedly occurred the day before the charged offenses because the references constituted inadmissible propensity evidence that was neither logically, nor legally, relevant and substantially prejudiced Mr. Hart. The evidence was not admissible to show motive, intent, absence of mistake or accident, a common scheme or plan, identity, or *res gestae*. But for the admission of the evidence, there is a reasonable probability that the jury would not have convicted Mr. Hart of the offenses for which he was on trial, and would have acquitted him. The trial court's ruling denied Mr. Hart's right to due process of law, right to be tried only for the offense for which he was on trial, and right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 17, and 18(a) of the Missouri Constitution. This Court must reverse Mr. Hart's convictions and remand for a new trial.

*State v. Batiste*, 264 S.W.3d 648 (Mo. App. W.D. 2008);

*State v. Wallace*, 943 S.W.2d 721 (Mo. App. W.D. 1997);

*State v. Davis*, 226 S.W.3d 167 (Mo. App. W.D. 2007);

*State v. Frezzell*, 251 S.W.3d 380 (Mo. App. E.D. 2008);

U.S. Const., Amend. V, VI, & XIV, & Mo. Const., Art. I, §§ 10, 17, & 18(a);

Rules 29.11 and 30.20.

## POINT – IV.

The trial court clearly erred in admitting evidence of Mr. Hart's videotaped statement over the objection of defense counsel because under the totality of the circumstances, Mr. Hart's videotaped statement was unknowing, unintelligent, and involuntary and the product of a coercive interrogation in which detectives promised him if what he was saying was true and he didn't have, and never had, the gun, he would not spend the rest of his life in prison. The trial court's error denied Mr. Hart's right to due process of law, right to freedom from self-incrimination, and right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 19 of the Missouri Constitution. This Court must reverse Mr. Hart's convictions and remand for a new trial.

*Bram v. United States*, 168 U.S. 532 (1897);

*State v. Williamson*, 99 S.W.2d 76 (1936);

U.S. Const., Amend. V, VI & XIV;

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

Rules 29.11 & 30.20.

## ARGUMENT – I.

**The trial court, plainly erred, causing manifest injustice or a miscarriage of justice, in entering judgment of conviction on Count I of murder in the first degree under § 565.020 because while Mr. Hart's direct appeal was pending, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), making the penalty provision in § 565.020.2 unconstitutional as applied to Mr. Hart, and the absence of a valid penalty provision for juvenile offenders post-*Miller* renders § 565.020 unenforceable against Mr. Hart. The trial court's error deprived Mr. Hart of his rights to due process of law and protection against cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 21 of the Missouri Constitution. This Court must reverse Mr. Hart's conviction of Count I of murder in the first degree and the concomitant Count II of armed criminal action and discharge him, or in the alternative, enter judgment of conviction for murder in the second degree.**

*Jurisdiction*

This Court should transfer this appeal to the Missouri Supreme Court because Mr. Hart made a real and substantial challenge to the constitutional validity of section 565.020. The Missouri Supreme Court has exclusive jurisdiction over appeals involving the constitutional validity of a state statute, and this Court is divested of jurisdiction if it determines that Mr. Hart's constitutional challenge is real and substantial, and not merely colorable. *State v. Dillard*, 158 S.W.3d 291, 302 (Mo. App. S.D. 2005); Mo. Const., Art. V, § 3. Jurisdiction over real and substantial constitutional challenges rests with the

Missouri Supreme Court, even if the Court will likely reject the challenge on the merits by unanimous decision. *State v. Fields*, 186 S.W.3d 501, 504 (Mo. App. S.D. 2006).

In determining whether a constitutional claim is real and substantial, this Court must inquire whether it presents a contested matter of right that involves fair doubt and reasonable room for disagreement. *Higgins v. Treasurer of State of Missouri*, 140 S.W.3d 94, 98 (Mo. App. W.D. 2004). Or stated another way, a claim is real and substantial if it presents an issue of first impression. *State v. Peeples*, 288 S.W.3d 767, 774 (Mo. App. E.D. 2009).

The constitutionality of section 565.020 after *Miller v. Alabama*, 132 S.Ct. 2455 (2012) is an issue of first impression that the Missouri Supreme Court has not yet addressed, and which no Missouri court has addressed on the merits. Mr. Hart has raised his challenge at the first available opportunity. Consequently, this Court should transfer his case to the Missouri Supreme Court.

*Preservation of the Error and Standard of Review*

Mr. Hart concedes that this assignment of trial court error is not preserved for appellate review, but respectfully requests plain error review under Rule 30.20. Rule 30.20 provides, in pertinent part, that plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted.

Reviewing a claim for plain error is a two-step process. *State v. Stewart*, 113 S.W.3d 245, 248 (Mo. App. E.D. 2003). In the first step, this Court reviews the record to

determine if the trial court committed error, affecting substantial rights, that was "evident, obvious, and clear." *State v. Beam*, 334 S.W.3d 699, 704 (Mo. App. E.D. 2011) (citing *State v. Freeman*, 189 S.W.3d 605, 608 (Mo. App. W.D. 2006)). If this Court finds such error did occur, then the next step is to determine whether the error resulted in manifest injustice or a miscarriage of justice. *Id.* This Court will reverse the defendant's conviction if manifest injustice or a miscarriage of justice resulted. *Freeman*, 189 S.W.3d at 609.

*Argument*

The trial court, plainly erred, causing manifest injustice or a miscarriage of justice, in entering judgment of conviction on Count I of murder in the first degree under § 565.020. Section 565.020 provides:

> 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.
>
> 2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

§ 565.020.

In Count I of its indictment, the State charged Mr. Hart committed murder in the first degree in violation of § 565.020, in that "the defendant after deliberation, knowingly caused the death of Alan Sindelar by shooting him" (L.F. 16). On July 28, 2011, the jury found Mr. Hart guilty of Count I of murder in the first degree (Tr. 737-738; L.F. 72-75).[2]

For his conviction of Count I of murder in the first degree, the trial court on September 9, 2011, imposed the only penalty then available for Mr. Hart, who was 17 years old on the date of the commission of the offense, a mandatory term of imprisonment of life without parole (S. Tr. 13; L.F. 10, 15, 77-78). The imposition of the other statutorily mandated penalty – death – was prohibited by the United States Supreme Court's opinion in *Roper v. Simmons*, 543 U.S. 551, 568 (2005). There, the Supreme Court held imposition of the death penalty against a defendant less than 18

[2] "[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action . . ." § 571.015.1. The State charged Mr. Hart committed Count II of armed criminal action in that he "committed the felony of Murder in the First Degree charged in Count I, . . . by, with and through the knowing use, assistance and aid of a deadly weapon" (L.F. 15-16). Consequently, Mr. Hart's guilt of the charge of armed criminal action was dependent upon a jury finding that Mr. Hart committed the underlying offense of murder in the first degree. *State v. Weems*, 840 S.W.2d 222, 228 (Mo. banc 1992) (holding reversal of murder conviction required reversal of armed criminal action conviction).

years old at the time of his offense was unconstitutional and violated the Eighth Amendment's prohibition of cruel and unusual punishment. *Roper*, 543 U.S. at 568.

While Mr. Hart's direct appeal was pending, the United States Supreme Court issued its opinion in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), also making the only other penalty then available for Mr. Hart under § 565.020.2, a mandatory non-parolable life sentence, unconstitutional as applied to him. In *Miller v. Alabama*, decided June 25, 2012, the Supreme Court held the Eighth Amendment's prohibition against cruel and unusual punishment prohibited so harsh a punishment as a mandatory non-parolable life sentence for a juvenile offender under the age of 18 at the time of his offense. 132 S.Ct. at 2469. The Supreme Court stated the following as support for its holding:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surround him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and

> convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [citation omitted.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

*Miller*, 132 S.Ct. at 2468.

In Missouri, post-*Miller*, there is no valid penalty provision for defendants under the age of 18 at the time of their offenses of murder in the first degree. The plain language of § 565.020 classified murder in the first degree as a class A felony, but specifically mandated that punishment for this class A felony would not be the usual range of from 10 to 30 years or life imprisonment, authorized for other class A felonies. §§ 558.011.1(1), RSMo Cum. Supp. 2009 & 565.020.2. The legislature mandated punishment for murder in the first degree was either death or imprisonment for life without eligibility for probation or parole, two penalties that are both unconstitutional as applied to Mr. Hart. *Roper*, 543 U.S. at 568; *Miller*, 132 S.Ct. at 2468; § 565.020.

The primary rule of statutory construction is to give effect to the legislative intent reflected in the plain language of § 565.020. *Winfrey v. State*, 242 S.W.3d 723, 725 (Mo. banc 2008). The plain and ordinary meaning of the language in the statute must be considered. *State v. Wahby*, 775 S.W.2d 147, 151 (Mo. banc 1989). "Every word, clause, sentence and section of a statute should be given meaning, and under the rules of

statutory construction statutes should not be interpreted in a way that would render some of their phrases to be mere surplusage." *State v. Graham*, 149 S.W.3d 465, 467 (Mo. App. E.D. 2004), (citing *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993) and *Stewart v. Williams Communications, Inc.*, 85 S.W.3d 29, 35 (Mo. App. W.D. 2002)).

In addition, the rule of lenity requires that any ambiguity in a statute be strictly construed against the State. *State v. Baumann*, 217 S.W.3d 914, 920 (Mo. App. S.D. 2007); *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006).

When every word, clause, and sentence of § 565.020 is given effect, it is clear that the legislature did not authorize any punishment for murder in the first degree other than death or life without parole. The clause in § 565.020.2, "*Murder in the first degree is a class A felony*," is essentially and inseparably connected with the clause that follows behind it, "*the punishment shall be either death or imprisonment for life without eligibility for probation or parole*." [Emphasis added.] The clauses are dependent upon one another for meaning, and when read together, there is no mistaking the legislature's intent.

When the legislature joined those two clauses with the conjunctive, "*and*," the legislature implicitly invalidated the punishment of 10 to 30 years or life with parole, permitted for other class A felonies, as a punishment for murder in the first degree. §§ 558.011.1(1), RSMo Cum. Supp. 2009 & 565.020.2. The use of the word, "shall," in the latter clause mandated the imposition of death or life without parole for murder in the first degree, and the inclusion of the words, "*without eligibility for probation or parole*,"

expressly prohibited the imposition of a parolable life sentence for murder in the first degree. § 565.020.

The legislature is presumed to have intended what § 565.020, by its terms, says, and because its language is clear, there is no room for construction beyond the plain meaning of the law. *State v. Thesing*, 332 S.W.3d 895, 897-898 (Mo. App. S.D. 2011). There is a presumption that the legislature did not intend to include omitted language within the statute, such as language authorizing life with parole or imprisonment of 10 to 30 years or life for first-degree murder convictions. *Id.* at 898.

Furthermore, in the absence of additional legislative guidance, this Court cannot presume that the legislature would have authorized a minimum 10-year sentence and a maximum parolable life sentence for juvenile offenders convicted of murder in the first degree. "In our tripartite form of government, it is the function of the legislature to define criminal offenses and to establish the ranges of punishment thereof." *State ex rel. Hughes v. Kramer*, 702 S.W.2d 517, 519 (Mo. App. E.D. 1985). "The judicial function is limited to the imposition of a sentence within the range of punishment fixed by the legislature." *Id.*; Mo. Art. II, § 1.

Post-*Miller*, § 565.020, does not fix a valid penalty for juvenile offenders convicted of murder in the first degree, and when a statute fails to provide a penalty, it has been uniformly held that it is beyond the power of the court to proscribe a penalty. *See, e.g.*, *United States v. Evans*, 333 U.S. 483, 486-487 (1948); *Whalen v. United States*, 445 U.S. 684, 689 (1980) (concluding federal court of appeals was mistaken in believing Congress

authorized the consecutive sentences imposed). A criminal statute without a penalty is a nullity and has no force or effect. *State v. Harper*, 510 S.W.2d 749, 750 (Mo. App. K.C.D. 1974). Consequently, this Court should reverse Mr. Hart's conviction of Count I of murder in the first degree under § 565.020, and discharge him from service of his sentence on Count I and the concomitant Count II of armed criminal action.

In *Weems v. United States*, 217 U.S. 349, 381-382 (1910), the Supreme Court held that the penalty imposed for the defendant's offense constituted cruel and unusual punishment. The Supreme Court found fault in the statute, and lacking direction as to what sentence it could constitutionally impose, it reversed the defendant's conviction with directions to dismiss the proceedings. *Weems*, 217 U.S. at 382.

Similarly, this Court lacks direction as to what sentence to constitutionally impose after *Miller*'s holding that Mr. Hart's mandatory sentence of life without parole constitutes cruel and unusual punishment.

What's more, manifest injustice has occurred. The trial court's error of convicting Mr. Hart under an unconstitutional and unenforceable statute deprived Mr. Hart of his rights to due process of law and protection against cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 21 of the Missouri Constitution. A conviction under an unconstitutional statute is void. *State v. Burgin*, 203 S.W.3d 713, 716 (Mo. App. E.D. 2006) (citing *Ex Parte Smith*, 36 S.W. 628, 629 (Mo. 1896)).

In *Burgin*, while the defendant's case was pending on direct appeal, the Missouri Supreme Court handed down its opinion in *State v. Beine*, 162 S.W.3d 483, 486 (Mo. banc 2005) in which it held § 566.083.1 was "patently unconstitutional" as written. The defendant, who was convicted under § 566.083.1, challenged his conviction under that statute as plain error on appeal. *Burgin*, 203 S.W.3d at 716-717.

This Court reviewed the defendant's challenge for plain error, noting that the defendant's conviction under an unconstitutional statute facially established grounds for believing manifest injustice occurred. *Id*. at 716. Upon review, this Court further found a manifest injustice had actually occurred and reversed the defendant's conviction. *Id.* at 717-718. The defendant got the benefit of the change in law made in *Beine*, even though his challenge was unpreserved. *State v. Molsbee*, 316 S.W.3d 549, 553 (Mo. App. W.D. 2010) (discussing *Burgin* and the "change of law" as an exception to the rule that a constitutional issue is waived if not timely raised).

In *Burgin*, this Court held: "[A]n unconstitutional law is no law . . . and therefore the trial court has no jurisdiction, because its jurisdiction extends only to such matters as the law declares to be criminal; if there is no law . . . if that law is unconstitutional . . . then the court transcends its jurisdiction and [the defendant] is entitled to his discharge." 203 S.W.3d at 717 (citing *Ex Parte Smith*, 36 S.W. 628, 630 (Mo. 1896)).

Mr. Hart is entitled to discharge because the court convicted and sentenced him under an unconstitutional and unenforceable statute. Or, in the alternative, this Court should enter judgment of conviction for murder in the second degree. *See*, *e.g.*, *State v.*

*O'Brien*, 857 S.W.2d 212, 220 (Mo. banc 1993) (stating, "where a conviction of a greater offense has been overturned for insufficiency of the evidence, the reviewing court may enter a conviction for a lesser offense if the evidence was sufficient for the jury to find each of the elements and the jury was required to find those elements to enter the ill-fated conviction on the greater offense").

## ARGUMENT – II.

**The trial court plainly erred, causing a manifest injustice or miscarriage of justice, in imposing a mandatory sentence of life without the possibility of parole for a first-degree murder conviction for an offense committed when Mr. Hart was 17 years old, in that under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), decided June 25, 2012, the sentence violated the principle of proportionality and Mr. Hart's constitutional rights to due process of law and protection against cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 21 of the Missouri Constitution. This Court must grant Mr. Hart the opportunity for jury sentencing and resentencing on Count I to an authorized term of imprisonment for a class A felony.**

*Jurisdiction*

Mr. Hart incorporates by reference "Jurisdiction" from his previous point and argument, as if fully set forth herein.

*Preservation of the Error*

This assignment of trial court error is presented in the alternative to Point I, Argument I, of Appellant's brief. Mr. Hart concedes that this assignment of trial court error is not preserved for appellate review, but respectfully requests plain-error review under Rule 30.20, as he has asserted substantial grounds for believing manifest injustice or a miscarriage of justice occurred.

This Court should exercise its discretion to review for plain error whenever the defendant asserts facially substantial grounds for believing manifest injustice or a

miscarriage of justice occurred. *State v. Irby*, 254 S.W.3d 181, 192 (Mo. App. E.D. 2008). Manifest injustice or a miscarriage of justice results whenever the trial court imposes a sentence that exceeds that authorized by law. *State v. Greer*, 348 S.W.3d 149, 153 (Mo. App. E.D. 2011) (citing *State v. Anderson*, 294 S.W.3d 96, 98 (Mo. App. E.D. 2009)).

*Standard of Review*

For reversal under the plain-error standard, there must be plain error affecting a substantial right that resulted in manifest injustice or a miscarriage of justice. *State v. Johnson*, 220 S.W.3d 377, 383 (Mo. App. E.D. 2007); Rule 30.20. Plain errors are evident, obvious, and clear, and this Court determines whether such errors occurred based on the facts and circumstances of each case. *State v. Nesbitt*, 299 S.W.3d 26, 28 (Mo. App. E.D. 2009). This Court will grant relief under the plain-error rule if it finds the alleged error so substantially affected the rights of the accused that a manifest injustice or miscarriage of justice will result if not corrected. *State v. Hawkins*, 308 S.W.3d 776, 777 (Mo. App. E.D. 2010).

*Argument*

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. This amendment prohibits a term of years that is grossly disproportionate to the severity of the crime. *Rummel v. Estelle*, 445 U.S. 263, 271 (1980); *Solem v. Helm*, 463 U.S. 277, 284 (1983); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). The Eighth Amendment applies will equal force to the states via the

Fourteenth Amendment to the United States Constitution, and its language is mirrored in article I, section 21 of the Missouri Constitution. *Robinson v. California*, 370 U.S. 660, 667 (1962); Mo. Const., Art. I, § 21.

Beginning in 2005, the United States Supreme Court began holding that certain sentences constitute cruel and unusual punishment when imposed upon juvenile offenders, those under 18 at the time of their offenses. In *Roper v. Simmons*, 543 U.S. 551, 568 (2005), the Supreme Court held the imposition of the death penalty on the juvenile offender unconstitutional. There, the Supreme Court reasoned that three differences between juvenile offenders and adults justified punishing juvenile offenders differently from adults: (1) juvenile offenders more often lack maturity and have an "underdeveloped sense of responsibility," and those qualities result in "impetuous and ill-considered actions and decisions"; (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) "the character of a juvenile is not as well formed as that of an adult" and is "more transitory, less fixed." *Roper*, 543 U.S. at 569-570.

In *Graham v. Florida*, 130 S.Ct. 2011, 2026, 2034 (2010), the Supreme Court reiterated the reasoning from *Roper* in holding that a sentence of life without parole violates the Eighth Amendment when imposed on juvenile non-homicide offenders. The Supreme Court noted that "life without parole is an especially harsh punishment for a juvenile," and likened it to the death penalty. *Graham*, 130 S.Ct. at 2027-2028. It quoted another court in stating: life without parole "'means denial of hope; it means that good

behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" *Id.* at 2027 (citing *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)).

Most recently in *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012), the Supreme Court cited *Graham* in holding that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. As support for its holding, the Court stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surround him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a

> plea agreement) or his incapacity to assist his own attorneys. [citation omitted.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

*Miller*, 132 S.Ct. at 2468.

The Supreme Court held that by making youth irrelevant to imposition of life without parole, a sentencing that mandates life without parole "poses too great a risk of disproportionate punishment." *Id.* at 2469. While the Supreme Court did not foreclose the sentencing court from imposing life without parole on a juvenile offender convicted of homicide, it noted that it would be rare that such a harsh punishment would be appropriate. *Id.* It further required consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

- ***The trial court erred and committed a manifest injustice or miscarriage of justice in imposing a mandatory sentence of life without parole for Mr. Hart.***

The Supreme Court's June 25, 2012 opinion in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) rendered the mandatory sentence of life without eligibility for probation or parole imposed for Mr. Hart's conviction of Count I of first-degree murder unconstitutional. On the date of the commission of the homicide offense, January 14, 2010, Mr. Hart, who was born on September 5, 1992, was 17 years old (L.F. 10, 15).

For the offense committed when Mr. Hart was 17, the trial court sentenced Mr. Hart to imprisonment for life without eligibility for probation or parole, one of two punishments statutorily mandated for the offense of first-degree murder (S. Tr. 13; *see* L.F. 77-81). § 565.020. Section 565.020.2 provides "Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor . . ." Because *Roper* removed the possibility of sentencing Mr. Hart to death, at the time of sentencing, the "only sentence available" for Mr. Hart was life without parole. *State v. Andrews*, 329 S.W.3d 369, 376 (Mo. banc 2010); *Roper* 543 U.S. at 568.

While Mr. Hart was appealing his non-parolable life sentence, *Miller* set out a new rule invalidating Mr. Hart's mandatory sentence of life without parole. "When a [Supreme Court decision] results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

Because Mr. Hart's case is still pending on direct review before this Court, and because Mr. Hart was 17 at the time of the offense and mandatorily sentenced to life without parole, *Miller* applies.

Consequently, the trial court plainly erred, causing a manifest injustice or miscarriage of justice, in imposing a mandatory sentence of life without the possibility of parole for a first-degree murder conviction for an offense committed when Mr. Hart was 17 years old. The sentence violated the principle of proportionality and Mr. Hart's

constitutional rights to due process of law and protection against cruel and unusual punishment as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 10 and 21 of the Missouri Constitution.

- ***This Court must grant the opportunity for jury sentencing and resentencing to an authorized term of imprisonment for a class A felony.***

Since both punishment provisions contained in § 565.020.2 – death and life without eligibility for probation or parole – are unconstitutional as applied to Mr. Hart, the question is what punishment to impose for juvenile offenders such as him. Mr. Hart posits that the punishment for juvenile offenders convicted of murder in the first degree is that for a class A felony, ten to thirty years or a parolable life sentence. § 558.011.1(1), RSMo Cum. Supp. 2009.

The unconstitutional punishment provisions in § 565.020.2 do not invalidate, and are severable from, the remaining provisions of the section, making first-degree murder punishable as a class A felony.

Section 1.140 provides for severance of statutes:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably

> connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

"Severance is inappropriate if the valid provisions of the statute are so essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one." *Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012) (citing *Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 889 (Mo. banc 2006)). Severance is also inappropriate if the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. *Id.*

But if the remainder of the section is not inseparably connected with, or dependent upon, the unconstitutional part and it is obvious that the legislature would have enacted the valid provisions without the invalid one, then severance is appropriate. *State v. Bridges*, 360 S.W.2d 648, 651-652 (Mo. 1962) (holding portion of the statute making addiction to a narcotic drug an offense and punishing it by imprisonment is invalid but that such invalidity did not invalidate the remainder of the section).

Here, severance is appropriate. When the unconstitutional punishment provisions of § 565.020.2 are excised from the section, we are left with the following punishment for juvenile offenders convicted of murder in the first degree: "Murder in the

first degree is a class A felony, ~~and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor~~ . . ." This provision, "Murder in the first degree is a class A felony," is not inseparably connected with, or dependent upon, the unconstitutional punishment provisions. Also, it is obvious the legislature would have enacted this provision even without the punishment provisions that are unconstitutional as applied to juvenile offenders.

After severance of § 565.020.2, the punishment applicable to Missouri juvenile offenders convicted of murder in the first degree is that provided by § 558.011.1(1), "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." § 558.011.1(1), RSMo Cum. Supp. 2009. Consequently, this Court must grant Mr. Hart a new penalty phase and resentencing to an authorized term of imprisonment for a class A felony.

Mr. Hart further respectfully requests the opportunity to exercise his right to jury sentencing, if he so chooses, on remand for resentencing. "While there is no constitutional right to jury sentencing, Missouri provides a statutory right to jury sentencing unless . . . the defendant requests in writing, prior to voir dire, that the trial court assess punishment." *State v. Collins*, 290 S.W.3d 736, 744 (Mo. App. E.D. 2009); § 557.036. Specifically, sections 557.036.2 and 557.036.3 provide for two jury trial stages, a guilt stage and a punishment (penalty) stage at which the defendant may present evidence mitigating punishment. The second stage will not proceed, however, and the trial court will assess punishment, if the defendant executes a written waiver prior to voir dire. § 557.036.4(1).

Mr. Hart acknowledges that at his July 2011 trial, he executed just such a written waiver, but states that his waiver was solely or partly conditioned upon the fact that at the time of trial, the only available punishment for him if convicted of murder in the first degree was life without parole (Tr. 15-18; L.F. 28); § 565.020.2. No evidence that Mr. Hart could have presented in mitigation at jury sentencing would have changed the fact that the law mandated he receive a sentence of life without parole. § 565.020.2. Undoubtedly, had Mr. Hart chosen to present any evidence at his July 2011 trial in mitigation of his sentence for murder in the first degree, it would have proven a useless exercise, as the only sentence the jury could lawfully recommend was life without parole.

*Miller*, decided almost a full year after Mr. Hart's 2011 trial, has now changed the law and Mr. Hart should have the opportunity to exercise his right to jury sentencing. In *State v. Chapman*, 167 S.W.3d 759, 762-763 (Mo. App. E.D. 2005), this Court remanded the defendant's case to the trial court for jury sentencing, even though the defendant had not had a bifurcated (two-phase) trial, and his trial had preceded the enactment of § 557.036. There, this Court determined the defendant, who was entitled to resentencing because his sentences exceeded the maximum allowable punishment for his offenses, would receive the benefit of the new law, § 557.036, which was effective at the time of the Court's opinion. *Chapman*, 167 S.W.3d at 762-763. This Court remanded the case for jury sentencing in accordance with the procedure established by § 557.036. *Id.*

This Court should similarly remand Mr. Hart's case for jury sentencing in accordance with the procedure established by § 557.036. Mr. Hart, who is entitled to resentencing because his sentence for murder in the first degree is illegal under the new

law of *Miller*, should receive the full benefit of the new law. He should receive not only resentencing, but the opportunity to present evidence in mitigation of sentence to a post-*Miller* jury who can lawfully recommend a sentence other than life without parole.

## ARGUMENT – III.

**The trial court abused its discretion in failing to exclude from evidence references on Mr. Hart's videotaped statement to an uncharged stealing and six uncharged robberies that allegedly occurred the day before the charged offenses because the references constituted inadmissible propensity evidence that was neither logically, nor legally, relevant and substantially prejudiced Mr. Hart. The evidence was not admissible to show motive, intent, absence of mistake or accident, a common scheme or plan, identity, or *res gestae*. But for the admission of the evidence, there is a reasonable probability that the jury would not have convicted Mr. Hart of the offenses for which he was on trial, and would have acquitted him. The trial court's ruling denied Mr. Hart's right to due process of law, right to be tried only for the offense for which he was on trial, and right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 17, and 18(a) of the Missouri Constitution. This Court must reverse Mr. Hart's convictions and remand for a new trial.**

*Facts and Preservation of the Error*

On the videotaped statement, detectives asked Mr. Hart if he had been involved in a string of uncharged robberies that had allegedly occurred the day before the charged offenses (State's Ex. 21: *see* 14:44-15:49). Detectives asked Mr. Hart if he did any other robberies and Mr. Hart said no (State's Ex. 21). Detectives asked Mr. Hart if he knew about the other robberies on the South Side, including the robbery of a man at a 7-11 (State's Ex. 21). Mr. Hart said he did not know anything about them (State's Ex. 21). He

told detectives that the others had dropped him off at home and that afterwards, he did not know what they had done (State's Ex. 21).

The detectives clarified that the other robberies had occurred the day before (State's Ex. 21) The detectives stated that early in the morning on January 13, 2010, the car in which Mr. Hart rode on January 14, 2010 was stolen on Lindenwood (State's Ex. 21). The detectives stated that a half-hour later, robberies occurred at 6:37, 6:42, 6:48, 6:53, 7:04, and another time (State's Ex. 21). Mr. Hart stated he was not with them when they stole the car or committed the robberies on January 13, 2010 (State's Ex. 21). Mr. Hart indicated he had not known the car was stolen (State's Ex. 21).

At trial, defense counsel objected to the admission of this portion of Mr. Hart's videotaped statement as it constituted evidence of uncharged crimes (Tr. 450-456). Defense counsel stated, "I don't want the jury to get the idea that he was involved in a string of robberies that the codefendants are charged with but my client's not charged with. I don't want them to take a negative inference from that" (Tr. 454). The trial court admitted this portion of Mr. Hart's videotaped statement at trial over defense objection (Tr. 492-493, 513, 539-540).

Defense counsel subsequently included an assignment of trial court error in Mr. Hart's timely-filed, new-trial motion.[3] The trial court overruled and denied Mr. Hart's

[3] Undersigned counsel has determined Mr. Hart's motion for new trial is not in the circuit court's file, even though defense counsel properly and timely filed it. Undersigned counsel will request that opposing counsel stipulate the file-stamped file copy of Mr.

new-trial motion (S. Tr. 3-4). Consequently, this assignment of trial court error is properly preserved for appellate review. Rule 29.11(d). Should this Court find otherwise, Mr. Hart requests plain error review under Rule 30.20.

*Standard of Review*

The trial court possesses broad discretion in the admission or exclusion of evidence. *State v. Pennington*, 24 S.W.3d 185, 189 (Mo. App. W.D. 2000). On appeal, the appellate court will not disturb the trial court's ruling regarding the relevancy, materiality, and admissibility of evidence unless it is shown that the trial court abused that discretion. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991).

"A trial court abuses its discretion when the decision is against the logic of the circumstances and when 'it is so arbitrary and unreasonable as to shock the sense of justice and indicates a lack of careful consideration.'" *State v. Mabry*, 285 S.W.3d 780, 785 (Mo. App. E.D. 2009) (citing *State v. Chism*, 252 S.W.3d 178, 182 (Mo. App. W.D. 2008)). This Court will reverse the trial court's decision if the trial court abused its discretion and thereby prejudiced the defendant. *Id.*

"In criminal cases involving the improper admission of evidence, the test for prejudice is whether the improper admission was outcome-determinative." *State v. Davis*, 226 S.W.3d 167, 171 (Mo. App. W.D. 2007). The improper admission is outcome-determinative if "the erroneously admitted evidence so influenced the jury that, when

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Hart's motion for new trial in defense counsel's possession is an exact duplicate of the original filed with the circuit court.

considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence." *State v. Frezzell*, 251 S.W.3d 380, 387 (Mo. App. E.D. 2008).

*Argument*

The trial court abused its discretion in failing to exclude from evidence references on Mr. Hart's videotaped statement to an uncharged stealing and six uncharged robberies that allegedly occurred the day before the charged offenses. The Fifth and Fourteenth Amendment's guarantee of "due process of law" and the Sixth Amendment's guarantee of a "right to a speedy and public trial, by an impartial jury" require that criminal convictions rest upon the jury's determination that the defendant is guilty of the *charged* offense beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995), (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993)).

Moreover, article 1, sections 17 and 18(a) of the Missouri Constitution guarantee a criminal defendant the right to be tried only on the offense charged. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998); Mo. Const., Art. I, §§ 17 and 18(a). This right protects the defendant from trial on what he might do in the future, *State v. Raspberry*, 452 S.W.2d 169, 172 (Mo. 1970), and from trial on what he was found to have done in the past, *State v. Edwards*, 750 S.W.2d 438, 439-441 (Mo. banc 1988) (reversing for improper use of the defendant's prior convictions). Missouri courts have long maintained a general prohibition against the admission of evidence of uncharged crimes out of concern that admission of such evidence will violate the defendant's constitutional rights. *State v.*

*Ellison*, 239 S.W.3d 603, 606 (Mo. banc 2007); *State v. White*, 230 S.W.3d 375, 378 (Mo. App. S.D. 2007).

Evidence of uncharged crimes has a "dangerous tendency," a "misleading probative force," and "an inevitable tendency to raise a legally spurious presumption of guilt in the minds of jurors." *State v. Reese*, 274 S.W.2d 304, 307 (Mo. banc 1995). When admitted, it creates the risks (1) that the evidence will confuse or mislead the jury, (2) that from the evidence, the jury will infer the defendant's propensity to commit crime, (3) that admission of the evidence will force the defendant to defend against the prior crime and the charged crime, and (4) that the jury will overlook the State's failure to prove the defendant's guilt of the charged crime and convict the defendant as punishment for the uncharged crimes. *State v. Berwald*, 186 S.W.3d 349, 358 (Mo. App. W.D. 2005) (citing *State v. Bernard*, 849 S.W.2d 10, 22 (Mo. banc 1993)). Because of these inherent risks, the trial court should admit evidence of uncharged crimes only if it is strictly necessary, and only after it is subject to rigid scrutiny. *State v. Henderson*, 105 S.W.3d 491, 497 (Mo. App. W.D. 2003) (citing *Pennington*, 24 S.W.3d at 190); *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992).

As a general rule, "[e]vidence that a defendant has committed crimes separate and distinct from the crime for which he or she is standing trial is generally inadmissible." *State v. Holleran*, 197 S.W.3d 603, 608-611 (Mo. App. E.D. 2006) (citing *State v. Mallett*, 732 S.W.2d 527, 534 (Mo. banc 1987)). And, evidence of uncharged crimes, even when the uncharged crimes are similar to the one charged, is *never* admissible to show that a person

has a propensity to commit crimes such as the crime charged. *Ellison*, 239 S.W.3d at 606; *State v. Aye*, 927 S.W.2d 951, 955 (Mo. App. E.D. 1996). [Emphasis added.]

To be admissible, evidence of uncharged crimes must be both logically and legally relevant. *State v. Nelson*, 178 S.W.3d 638, 642 (Mo. App. E.D. 2005) (citing *Bernard*, 849 S.W.2d at 13). Evidence of uncharged crimes is legally relevant if its probative value outweighs its prejudicial effect. *Id.* Evidence of uncharged crimes is logically relevant if it has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial. *Id.* Logically relevant evidence tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the person charged with commission of the crime. *Davis*, 226 S.W.3d at 170.

Evidence of uncharged crimes may also be relevant and admissible if it is part of the *res gestae*, or the circumstances surrounding the charged crime, and provides a complete and coherent picture of the events that transpired. *Pennington*, 24 S.W.3d at 190. When admitting evidence for a *res gestae* purpose, however, courts must take special care not to admit evidence that is remote in time or nature from the crime at issue. *Davis*, 226 S.W.3d at 170. The prior crime must be "so closely connected" with the charged offense as to "constitute a part of it": "it must precede the offense immediately or by a short interval of time and tend, as background information, to elucidate a main fact in issue;" and as always, the prior crime evidence must be both logically and legally relevant. *Id.* at 170-171 (reversing because evidence that defendant attempted to use his car to hit the victim two days before the charged shooting was not admissible as *res gestae*);

*Pennington*, 24 S.W.3d at 190-191 (chastising the State for ignoring that evidence that presents a complete and coherent picture must also be logically relevant to be admissible).

Here, the challenged evidence was neither logically, nor legally, relevant and substantially prejudiced Mr. Hart. Mr. Hart was neither tried for the stealing and robberies on January 13, 2010, nor charged with the stealing and robbery offenses committed on that date. The prosecutor at trial acknowledged this while continuing to argue for admission of evidence of those uncharged crimes: about the offenses, the prosecutor stated, "It's [sic] crimes he's not charged with" (Tr. 456). They were also offenses that Mr. Hart denied all involvement in, and to which Mr. Hart was not connected through evidence (Tr. 453, 457; State's Ex. 21). Yet, the jury was permitted to hear about them.

The evidence of the uncharged stealing and robberies was inadmissible to show motive, intent, and absence of mistake or accident, as neither of these was a legitimate issue at Mr. Hart's trial. "In order for intent and absence of mistake or accident to serve as the basis for the admission of evidence of similar uncharged crimes, it is necessary that those be legitimate issues in the case." *Aye*, 927 S.W.2d at 955. Mr. Hart did not claim self-defense, did not claim that he had accidentally committed the charged offenses, did not claim that he had committed the acts by mistake, and did not claim the acts were unintentionally committed. He also did not otherwise open the door to the challenged evidence, and the *mens rea*, or the intent with which the offenses were committed, was

evident from proof of the acts. *See State v. Wallace*, 943 S.W.2d 721, 724 (Mo. App. W.D. 1997).

The identity and common scheme or plan exceptions don't apply here to render evidence of the uncharged stealing and robberies admissible either. Again, there was no evidence tying Mr. Hart to the commission of these uncharged offenses, and nothing, other than Mr. Hart's association with Mr. Ivy and Mr. Green and his presence in their car the day after the uncharged offenses occurred, even hinted at Mr. Hart's involvement in the uncharged offenses. That there was an absence of any evidence identifying Mr. Hart as a participant in the commission of the uncharged offenses meant that evidence of the uncharged offenses had no legitimate tendency of establishing Mr. Hart was the committer of the offenses for which he was on trial. The State had other evidence, which it presented in the form of eyewitness identification testimony and Mr. Hart's videotaped statement, that proved more probative of identity.

Moreover, not enough about the uncharged offenses is known for one to reasonably conclude that the uncharged offenses constituted a part of a common scheme or plan, or that if a common scheme or plan existed, Mr. Hart shared in it. The method used in the commission of the uncharged offenses and the specific acts performed to commit them are unknown.

Lastly, the evidence of the uncharged stealing and robberies was not admissible as *res gestae* because its admission was not necessary to prove or understand the facts surrounding the charged murder and robbery. *See Davis*, 226 S.W.3d at 170 (finding evidence inadmissible under *res gestae* exception where it "was not necessary to prove or

understand the facts surrounding the shooting"). The circumstances of the charged offenses were adequately explained by witness testimony.

Under the circumstances, the trial court erred in admitting evidence of the uncharged offenses because the evidence was not admissible to show motive, intent, absence of mistake or accident, a common scheme or plan, identity, or *res gestae*.

The admission of the evidence also prejudiced Mr. Hart. Evidence Mr. Hart had allegedly committed an uncharged stealing and uncharged robberies was superfluous, unnecessary to the jury's deliberation of Mr. Hart's guilt and more prejudicial than probative. Its admission likely convinced jurors that Mr. Hart had a propensity to commit robberies, and that Mr. Hart was, therefore, more likely than not, guilty of the offenses for which he was on trial.

But for the admission of the evidence, there is a reasonable probability that the jury would not have convicted Mr. Hart of the offenses for which he was on trial, and would have acquitted him. Mr. Hart called several alibi witnesses and recanted his prior statement to detectives (Tr. 660-667; *see* Tr. 593-700, *et al.*). His defense evidence, taken together with the lack of physical evidence connecting him to the offenses and Mr. Bardon's tentative eyewitness identification, raised reasonable doubt about his guilt of one or more of the offenses for which he was on trial. But the challenged evidence tended to remove this doubt.

Consequently, the trial court's ruling denied Mr. Hart's right to due process of law, right to be tried only for the offense for which he was on trial, and right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States

Constitution and Article I, §§ 10, 17, and 18(a) of the Missouri Constitution. This Court must reverse Mr. Hart's convictions and remand for a new trial. *See, e.g., State v. Batiste*, 264 S.W.3d 648, 651 (Mo. App. W.D. 2008) (reversing for admission of evidence that defendant abused child before the charged incident).

## ARGUMENT – IV.

**The trial court clearly erred in admitting evidence of Mr. Hart's videotaped statement over the objection of defense counsel because under the totality of the circumstances, Mr. Hart's videotaped statement was unknowing, unintelligent, and involuntary and the product of a coercive interrogation in which detectives promised him if what he was saying was true and he didn't have, and never had, the gun, he would not spend the rest of his life in prison. The trial court's error denied Mr. Hart's right to due process of law, right to freedom from self-incrimination, and right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 19 of the Missouri Constitution. This Court must reverse Mr. Hart's convictions and remand for a new trial.**

*Facts and Preservation of the Error*

At trial, defense counsel objected to the admission of any testimony about Mr. Hart's interrogation, as well as the part of the videotaped statement referencing uncharged offenses (Tr. 451). Defense counsel later objected to the admission and playing of State's Exhibit 21, Mr. Hart's videotaped statement, during Detective Blansitt's testimony and again, during Detective Sailor's testimony (Tr. 492-493, 540).

Defense counsel subsequently included an assignment of trial court error in Mr. Hart's timely-filed new-trial motion. The trial court overruled and denied Mr. Hart's new-trial motion (S. Tr. 3-4). Consequently, this assignment of trial court error is

properly preserved for appellate review. Rule 29.11(d). Should this Court find otherwise, Mr. Hart requests plain error review under Rule 30.20.

*Standard of Review and Applicable Law*

An appellate court's review of a trial court's ruling on a motion to suppress statements is based upon the whole record and the totality of the circumstances, and the court will affirm if the ruling is supported by substantial evidence. *State v. Bohn*, 950 S.W.2d 277, 280 (Mo. App. E.D. 1997); *see also State v. Tally*, 153 S.W.3d 888, 891-892 (Mo. App. S.D. 2005) (citing *State v. Donnell*, 849 S.W.2d 733, 733(Mo. App. S.D. 1993)). In determining whether the ruling is supported by substantial evidence, the appellate court will view the facts in the light most favorable to the trial court's ruling and disregard contrary evidence and inferences. *State v. Davis*, 980 S.W.2d 92, 94 (Mo. App. E.D. 1998). If the totality of the circumstances supports the conclusion that the trial court erred in not suppressing the defendant's statement, the appellate court must reverse. *Bohn*, 950 S.W.2d at 282.

In considering a challenge to the voluntariness of a confession, this court should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *State v. Bucklew*, 973 S.W.2d 83, 88 (Mo. banc 1998). The criminal defendant is denied due process if his conviction is founded, in whole or in part, upon an involuntary confession. *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986). The State has the burden of showing the confession was voluntary, the defendant was advised of his constitutional rights and that no physical force, threats or coercive tactics were used to obtain the

confession. *State v. Harris*, 670 S.W.2d 526, 528 (Mo. App. E.D. 1984); *Davis*, 980 S.W.2d at 94.

A juvenile's confession requires "special caution." *State v. Pierce*, 749 S.W.2d 397, 402 (Mo. banc 1988); *Haley v. Ohio*, 332 U.S. 596, 599 (1948). "Voluntariness is determined on a case-by-case basis." *State v. Clements*, 789 S.W.2d 101, 105 (Mo. App. S.D. 1990). Factors such as the "defendant's age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion" are considered. *Lytle*, 715 S.W.2d at 915. The test for voluntariness is whether, under the totality of the circumstances the "defendant was deprived of the free choice to admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that his will was overborne at the time he confessed." *Id.*

*Argument*

The trial court clearly erred in admitting evidence of Mr. Hart's videotaped statement over the objection of defense counsel because under the totality of the circumstances, Mr. Hart's videotaped statement was unknowing, unintelligent, and involuntary and the product of a coercive interrogation in which detectives promised him if what he was saying was true and he didn't have and never had the gun, he would not spend the rest of his life in prison.

It is well settled that a statement is not voluntary and is inadmissible if it was extracted by promises, direct or implied. *State v. Simmons*, 944 S.W.2d 165, 175 (Mo. banc 1997); *Bram v. United States*, 168 U.S. 532, 542-543 (1897). "A promise to a defendant in

custody does not *per se* make any statement he gives thereafter involuntary." *State v. Dixon*, 332 S.W.3d 214, 218 (Mo. App. E.D. 2010) (citing *State v. Stokes*, 710 S.W.2d 424, 428 (Mo. App. E.D. 1986)). A promise will render the statement involuntary if it overcomes the defendant's free will and impairs his capacity for self-determination. *Culombe v. Connecticut*, 367 U.S. 568, 576 (1961).

Promises affect the voluntariness of a statement if they are direct, positive, suggest the suspect may gain an advantage, such as escape from punishment or mitigation of punishment, through making a statement, and induce an expectation or hope of a worldly benefit. *State v. Dennis*, 153 S.W.3d 910 (Mo. App. W.D. 2005) (citing *State v. Williamson*, 99 S.W.2d 76, 79 (1936)).

Here, not once but twice the detective told Mr. Hart that he would not serve the rest of his life in prison if he what he was saying was true. The effect of this statement was twofold: it not only encouraged Mr. Hart to continue making statements to the detectives and stating he never had the gun, but also promised Mr. Hart he would not spend the rest of his life in prison if he did so.

The promise was direct, positive, and suggested that Mr. Hart would receive this benefit if he continued with his statements. Mr. Hart clearly expected to receive this benefit because near the conclusion of his videotaped statement, he asked a different detective if he would spend his life in prison (State's Ex. 21). Mr. Hart was "mak[ing] sure the promise was still the same" (Tr. 690). But the detective told him that it would be up to a jury whether he spent life in prison (State's Ex. 21).

The detectives promise had been false. The jury found Mr. Hart guilty and for his guilt, the trial court imposed the sentence that the detective told Mr. Hart he would not receive – life in prison (State's Ex. 21; Tr. 737-738; S. Tr. 13; L.F. 72-75, 77-81).

*Prejudice*

Under the totality of the circumstances, Mr. Hart's videotaped statement to detectives was inadmissible as involuntary, and the trial court's admission of the videotaped statement at trial was prejudicial. Trial court error in the admission of an involuntary statement is subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-311 (1991). "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *State v. Dixon*, 916 S.W.2d 834, 838 (Mo. App. W.D. 1995).

Yet, in order to rely on this principle, the State must demonstrate that the challenged evidence did not contribute to the defendant's conviction. *Id.*; *State v. Fuente*, 871 S.W.2d 438, 443 (Mo. banc 1994).

Here, there is no doubt that Mr. Hart's videotaped statement to police substantially contributed to his conviction, especially given the lack of physical evidence connecting Mr. Hart to the offenses and Mr. Bardon's tentative eyewitness identification of Mr. Hart as Mr. Sindelar's shooter. Had the trial court suppressed Mr. Hart's videotaped statement to detectives as involuntarily made, there is a reasonable probability that jurors would have had a significantly different impression of the veracity of Mr. Hart's alibi defense, and would have returned one or more not-guilty verdicts. The

trial court's error denied Mr. Hart's right to due process of law, right to freedom from self-incrimination, and right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 19 of the Missouri Constitution. This Court must reverse Mr. Hart's convictions and remand for a new trial, excluding his unknowing, unintelligent, and involuntary videotaped statement.

## CONCLUSION

WHEREFORE, based on his argument in Points I and II, Appellant Laron Hart requests this Court to reverse his convictions of Counts I and II and discharge him, or in the alternative, grant the opportunity for jury sentencing and resentencing. Based on his argument in Points III and IV, Mr. Hart requests this Court to reverse and remand for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 361, I hereby certify that on Thursday, November 15, 2012, a true and correct copy of the foregoing brief was e-filed with this Court. Also, a copy of the foregoing brief was sent to Shaun Mackelprang at Shaun.Mackelprang@ago.mo.gov the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 via Missouri Case.net. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Californian FB 13 point font, and contains 15,290 words, excluding the Table of Contents (Index) and Table of Authorities.

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