No. SC89830

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

CARMAN L. DECK,

Appellant.

Appeal From Jefferson County Circuit Court
Twenty-Third Judicial Circuit
The Honorable Gary P. Kramer, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3700
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

Appellant appeals from a Jefferson County Circuit Court judgment imposing two death sentences on him following the retrial of his penalty-phase proceeding. Appellant's first-degree murder convictions and two previous death sentences were affirmed by this Court in *State v. Deck*, 994 S.W.2d 527 (Mo banc 1999) ("*Deck I*"). On appeal from the circuit court's judgment overruling Appellant's Rule 29.15 motion for post-conviction relief, however, this Court reversed the death sentences, but affirmed the finding of guilt for the murder charges as well as Appellant's convictions for robbery, burglary, and armed criminal action arising out of this incident. *See Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002) ("*Deck II*"). After a second penalty-phase proceeding, another jury recommended, and the circuit court imposed, two more death sentences. Although those death sentences were affirmed by this Court on appeal in *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004) ("*Deck III*"), that judgment was reversed by the United States Supreme Court, which held that Appellant's constitutional rights were violated by the use of visible restraints during the second penalty-phase retrial. *Deck v. Missouri*, 544 U.S. 622 (2005). The two death sentences involved in the current appeal were imposed after a third jury recommended them following the third retrial of Appellant's penalty-phase proceeding. Since Appellant was sentenced to death, this Court has exclusive appellate jurisdiction over this appeal. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

A. Procedural History.

Appellant was charged as a persistent offender in Jefferson County Circuit Court with two counts of murder in the first degree (§ 565.020.1, RSMo 1994), two counts of armed criminal action (§ 571.015, RSMo 1994), one count of robbery in the first degree (§ 569.020, RSMo 1994), and one count of burglary in the first degree (§ 569.160, RSMo 1994), for the 1996 robbery and shooting deaths of James and Zelma Long in their rural Jefferson County home. (L.F. 62-64).[1] In February 1998, Judge Gary P. Kramer presided over a trial in which the jury found Appellant guilty on all charges (L.F. 28-30). Appellant was given two death sentences for the murder convictions, in accordance with the jury's recommendation, and two concurrent sentences of life imprisonment for the armed criminal action convictions, thirty years for the robbery conviction, and fifteen years for the burglary conviction (L.F. 30-31; 1st Tr. 1073-75). The sentences for the armed criminal action convictions were ordered to be served concurrently with each

---

[1] The abbreviations "L.F." and "Tr." refer to the legal file and transcript in the present appeal involving Appellant's third penalty-phase retrial. The abbreviations "1st Tr." and "1st L.F." refer to the transcript and legal file in Appellant's first trial, Case No. SC80821 (*Deck I*), and the abbreviation "2nd Tr." refers to the transcript in Appellant's second penalty-phase retrial, Case No. SC85443 (*Deck III*). In this case, this Court has taken judicial notice of the records filed in these two previous cases.

other, but consecutively to the other convictions, all of which were ordered to run consecutively. (L.F. 31; 1st Tr. 1073-75).

Appellant's convictions and two previous death sentences were affirmed by this Court in *Deck I*. (L.F. 33). On appeal from the circuit court's judgment overruling Appellant's Rule 29.15 motion for post-conviction relief, however, this Court in *Deck II* reversed the death sentences, but affirmed the finding of guilt for the murder charges and Appellant's other convictions. After a second penalty-phase proceeding, another jury recommended, and the circuit court imposed, two more death sentences. (L.F. 38-39). Although those death sentences were affirmed by this Court on appeal in *Deck III*, (L.F. 40), that judgment was reversed by the United States Supreme Court in *Deck v. Missouri*, which held that Appellant's constitutional rights were violated by the use of visible restraints during the second penalty-phase retrial. This Court then recalled its mandate in *Deck III*, and remanded the case to Jefferson County Circuit Court for a third penalty-phase proceeding, (L.F. 40), which is the subject of Appellant's current appeal.

Following the most recent penalty-phase proceeding, yet another jury (Appellant's third) recommended, and the circuit court again imposed, two more sentences of death. (L.F. 53-54). The jury in this proceeding found the same 6 statutory aggravating circumstances on both murder counts as were found by Appellant's previous two juries.[2] (L.F. 30, 38, 673, 674).

[2] The aggravators the juries found are discussed in more detailed in Point X.

B. The facts pertaining to Appellant's crimes.

Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

In June 1996, Appellant and his mother's boyfriend, Jim Boliek, devised a plan to obtain money that Mr. Boliek needed for a trip to Oklahoma. (Tr. 644; State's Exhibits 53, 54).[3] Appellant planned to steal the money from James and Zelma Long because, while living in De Soto, Missouri, several years earlier, he had went to the Longs' house with their grandson, who then stole money from his grandparent's safe and gave it to Appellant. (Tr. 497-503; 1st Tr. 695-699, 704, 762; State's Exhibits 53, 54).

Appellant had planned to break into the Longs' house on a Sunday, while they were at church, and take money from their safe. (Tr. 644-45; 1st Tr. 603, 762; State's Exhibits 53, 54). He drove to DeSoto with Mr. Boliek several times to canvass the area. (Tr. 644-45; 1st Tr. 762; State's Exhibits 53, 54). Appellant bragged to a woman he met during this time period that he knew some people with money and that he was prepared to do "anything it took" to take it. (1st Tr. 603-04). He urged this woman to accompany him, but when she refused Appellant told her that she was "ruining the night." (1st Tr. 604-05).

---

[3] State's Exhibits 53 and 54 contain Appellant's tape-recorded confession to police that was played to the juries in all three of Appellant's cases. (Tr. 649-54; 2nd Tr. 446-47; 1st Tr. 769-70). Exhibit 53 is the audio-cassette recording of that confession, and Exhibit 54 is a CD recording of it made for preservation purposes. (Tr. 651).

Several Sundays passed without Appellant carrying out his plan. (Tr. 644-45; 1st Tr. 763; State's Exhibits 53, 54). On Monday, July 8, 1996, Mr. Boliek told Appellant that he and Appellant's mother wanted to leave for Oklahoma that Friday. (Tr. 645; 1st Tr. 763; State's Exhibits 53, 54). Mr. Boliek then gave Appellant his .22 caliber High Standard automatic pistol. (Tr. 439; 1st Tr. 725, 763; State's Exhibits 53, 54).

That afternoon, Appellant waited for his sister, Tonia Cummings, to return to her St. Louis County apartment, and then he and his sister drove in her car to rural Jefferson County, near DeSoto, where they parked on a back road and waited for dark. (Tr. 646; 1st Tr. 763; State's Exhibits 53, 54). At nine o'clock, they drove closer to the Longs' house and pulled into their driveway. (Tr. 646; 1st Tr. 763-64; State's Exhibits 53, 54).

Appellant and his sister knocked on the door and when Zelma Long answered, they asked for directions. (Tr. 646; 1st Tr. 764; State's Exhibits 53, 54). Mrs. Long then invited them into the house. (Tr. 646; 1st Tr. 764; State's Exhibits 53, 54).

Mrs. Long explained the directions and Mr. Long wrote them down (Tr. 646; 1st Tr. 764; State's Exhibits 53, 54). As Appellant walked toward the front door he pulled the concealed pistol from his waistband, turned and pointed the gun at the Longs, and ordered them to go to their bedroom and lie face down on the bed. (Tr. 647; 1st Tr. 764; State's Exhibits 53, 54). They complied without a struggle and pleaded with Appellant not to hurt them. (Tr. 647; 1st Tr. 764; State's Exhibits 53, 54).

Appellant told Mr. Long to open the safe, but Mr. Long told him that he did not know the combination. (Tr. 647; 1st Tr. 765; State's Exhibits 53, 54). Mrs. Long knew the combination and opened the safe for Appellant. (Tr. 647; 1st Tr. 765; State's Exhibits

53, 54). Mrs. Long took papers and jewelry out of the safe. (1st Tr. 563, 596, 765; State's Exhibits 53, 54). Mrs. Long also told Appellant that she had $200 in her purse which was in the kitchen. (Tr. 647; 1st Tr. 765; State's Exhibits 53, 54). Appellant sent Mrs. Long into the kitchen and she brought the money back to him (Tr. 647; 1st Tr. 765; State's Exhibits 53, 54). Mr. Long told Appellant that there was about two hundred dollars in a canister on top of the television set and Appellant took that also. (1st Tr. 765; State's Exhibits 53, 54). Mr. Long also offered to write Appellant a check (Tr. 648; 1st Tr. 765). Later, Appellant, in referring to this offer, said, "That's just how nice he was." (Tr. 648; 1st Tr. 765).

Appellant ordered the Longs to lie on the bed on their stomachs with their faces to the side. (1st Tr. 765; State's Exhibits 53, 54). Appellant stood at the foot of the Longs' bed for ten minutes deciding what to do with them. (Tr. 648; 1st Tr. 765-66; State's Exhibits 53, 54). He later said that at the time he thought, "If I leave 'em, I'm fucked. If I shoot 'em, I'm fucked." (Tr. 648; 1st Tr. 766). As he stood there, the Longs begged him to take anything he wanted and said to him "just don't hurt us." (State's Exhibits 53, 54).

Appellant's sister, who had been watching at the front door, came down the hallway and called, "Let's get out of here." (1st Tr. 765; State's Exhibits 53, 54). She then ran out the door to the car. (State's Exhibits 53, 54).

Appellant put the gun to James Long's head and fired twice into Mr. Long's temple, above his ear and just behind his forehead (Tr. 600-01, 648; 1st Tr. 708-09, 766;

State's Exhibits 13-15, 20-22, 53, 54). Both wounds were contact wounds, meaning that the gun muzzle was touching his head when Appellant shot him. (Tr. 600-01).

Appellant then either reached across or walked around the bed and put the gun to Zelma Long's head. (Tr. 648; 1st Tr. 714, 766; State's Exhibits 53, 54). He shot her twice—once in the back of the head and once above the ear. (Tr. 603; 1st Tr. 714, 766; State's Ex. 24). Both of her wounds were also contact wounds. (Tr. 604). Mrs. Long's hands were clenching the pillow so tightly that officers could not remove them. (Tr. 518; State's Ex. 23).

Appellant grabbed the money and left. (Tr. 648; 1st Tr. 766; State's Exhibits 53, 54). On the drive back, Appellant's sister complained of stomach pains and Appellant dropped her off at a hospital. (Tr. 648; 1st Tr. 766; State's Exhibits 53, 54). Appellant gave his sister about two hundred fifty dollars of the Longs' money, kept the quarters in a decorative tin he took from the Longs, and drove back to her apartment in St. Louis County. (1st Tr. 766; State's Exhibits 53, 54).

Based on information the Jefferson County Sheriff's Office received earlier that day, St. Louis County Police were asked to assist in locating Appellant and his sister. (Tr. 508-09; 1st Tr. 554-55, 565). The sheriff's office also began a house-to-house search in rural Jefferson County in an effort to either thwart the crimes or find the crime scene. (Tr. 520-21).

Appellant was arrested in front of his sister's apartment. (Tr. 554; 1st Tr. 566). Inside the car police found the .22 caliber gun and the decorative tin filled with quarters. (Tr. 558-60; 1st Tr. 572-573, 653-654, 664, 720, 722, 727, 732). Appellant was also

wearing a "fanny pack" containing two hundred forty-two dollars in cash. (Tr. 555-56; 1st Tr. 571, 578, 673-74).

Appellant was given the Miranda warnings and agreed to speak with detectives from the Jefferson County Sheriff's Department. (Tr. 627-29; 1st Tr. 743-745; State's Ex. 43). At first, Appellant said that he and his sister had been in Jefferson County looking for cars to buy. (Tr. 631-32; 1st Tr. 748). Four hours later, Appellant changed his story said that his mother's boyfriend, Jim Boliek, asked Appellant and his sister to follow him to DeSoto. (Tr. 634-40; 1st Tr. 752). Appellant said he parked on a back road and about fifteen minutes later Mr. Boliek returned and handed him the .22 caliber pistol and the canister full of coins through the car window. (Tr. 636-40; 1st Tr. 753). After being informed that Mr. Boliek had an alibi, Appellant finally confessed to the murders and made a tape-recorded statement. (Tr. 641-42; 1st Tr. 761-66, 769; State's Exhibits 53, 54).

Appellant did not testify at the first trial, or at either the second or third penalty-phase retrials. (Tr. 889; 2nd Tr. 533-34; 1st Tr. 792, 798).

During this penalty-phase proceeding, the State presented several witnesses and exhibits from the guilt-phase of the first trial to acquaint the jurors with the nature of the murders Appellant committed. (Tr. 506-680, 708-10). In addition, three of the Longs' children and a grandchild testified about the impact the murders had on them and their family. (Tr. 480-505, 682-708). Finally, the State presented evidence of Appellant's numerous prior convictions from 1985 until 1992. (Tr. 677-82; State's Exhibits 55-63). Appellant offered the testimony of several family members, a former foster parent, a

child psychiatrist, and a child-development expert concerning his difficult childhood. (Tr. 721-888).

The jury found all six statutory aggravating circumstances presented to it on both counts of first-degree murder and recommended death sentences on both murder counts. (L.F. 673-74). After overruling Appellant's motion for new trial, the trial court imposed two death sentences on Appellant. (Tr. 989-90; L.F. 717-18).

ARGUMENT

I (Section 565.040, RSMo 2000).

Appellant was not entitled to an automatic sentence of life without parole under § 565.040, RSMo 2000, because that statute applies only in the event a court declares either capital punishment or the statutory scheme provided by Chapter 565 under which it is imposed unconstitutional, neither of which occurred in Appellant's case.

Section 565.040, RSMo 2000, provides that if a court declares either the death penalty itself, or the statutory scheme provided for under Chapter 565 for imposing it, unconstitutional, the penalty for first-degree murder shall be life without parole. The statute further provides that if any death sentence imposed under Chapter 565 is held unconstitutional, the defendant shall be returned to the trial court and sentence to life without parole. This statute does not apply in Appellant's case because his death sentences were not held to be unconstitutional. Instead, the two death sentences imposed on Appellant following the second retrial of his penalty-phase proceeding were reversed based on unrelated trial court error—the use of visible restraints in front of the jury—that had a constitutional basis; specifically, a violation of Appellant's right to due process. Appellant's broad reading of the statute—applying it in every case in which a death sentence is imposed is reversed on any ground having a constitutional basis—is inconsistent with the plain language of the statute read as a whole, the legislative intent and history behind its enactment, and this Court's opinion in *State v. Whitfield*, all of which suggest a narrow reading of this language.

A. The record regarding Appellant's claim.

After the circuit court imposed two death sentences following the 2003 retrial of Appellant's penalty-phase proceeding, (L.F. 38-39), a judgment affirmed by this Court in *Deck III*, the United States Supreme Court granted a writ of certiorari to consider whether Appellant's constitutional rights were violated by the use of visible restraints on him during that proceeding. *See Deck v. Missouri*, 544 U.S. at 624. The Court ultimately held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* at 629. It further held that this rule equally applied during the penalty phase of a capital proceeding. *Id.* at 633. Because the trial court had failed to make a record identifying any special circumstances or security concerns that necessitated the use of visible restraints, the Supreme Court found that Appellant's constitutional rights had been violated and reversed this Court's decision affirming Appellant's death sentences. *Id.* at 634-35.

After the United States Supreme Court's decision, this Court recalled its previous mandate affirming Appellant's sentences of death, reversed the death sentences imposed following the 2003 penalty-phase retrial, and remanded the case to Jefferson County Circuit Court for a third retrial of Appellant's penalty-phase proceeding. (L.F. 40). Before this retrial began, Appellant filed and argued a motion, which the circuit court overruled, claiming that § 565.040 mandated that a sentence of life without parole be imposed on him on the ground that the United States Supreme Court had held that

Appellant's death sentences were unconstitutional.[4] (L.F. 106-09; Tr. 45-55). After Appellant's efforts in the court of appeals and this Court to secure a writ of mandamus or prohibition were unsuccessful, he renewed the motion for a life sentence before the circuit court, which again overruled it. (Tr. 84-85; L.F. 44-45, 173-75).

B. Standard of review.

Appellant's claim involves the construction and application of § 565.040. "Construction of a statute is a question of law, which this Court reviews de novo." *State v. Perry*, 275 S.W.3d 237, 242 (Mo. banc 2009).

C. The statutory language does not suggest the broad reading urged by Appellant.

The specific language Appellant relies on to support his claim is contained in subsection 2 of section 565.040, which states that in the event any death sentence imposed under Chapter 565 is held unconstitutional, the defendant must be brought back before the trial court and sentenced to life imprisonment:

> In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release

---

[4] Appellant did not file a similar motion before his second penalty-phase proceeding after this Court ruled in *Deck II* that his previous death sentences were unconstitutionally imposed in violation of Appellant's Sixth Amendment right to effective assistance of counsel. *See Deck II*, 68 S.W.3d at 421-31.

except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

Section 565.040.2, RSMo 2000.

But, in considering Appellant's claim, the specific language in this subsection cannot be considered alone and out of context. In "determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 35 (Mo. banc 2008) (internal citations and quotations omitted). Moreover, the "provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Id.* Thus, to arrive at the true meaning of the language in subsection 2 as intended by the legislature, the language in subsection 1 must also be considered.

Subsection 1 provides that if the death penalty under Chapter 565 is ever held unconstitutional, any person convicted of first-degree murder shall be sentenced to life imprisonment:

> In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a

specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036.

Section 565.040.1, RSMo 2000.

The legislature passed this statute as a contingency in the event that a court should ever determine that the death penalty itself, or the statutory scheme under which it is imposed, is unconstitutional. The plain meaning of these subsections read together reveals that the legislature intended that this section apply only in the event a court should declare the death penalty itself, or the statutory scheme under which it is imposed, unconstitutional. By enacting this statute, the legislature intended to accomplish at least two goals if this contingency occurred. The first was to clarify that the crime of first-degree murder was punishable by life imprisonment without parole. The second was to insure that defendants who had been convicted of first-degree murder and sentenced to death would still be subject to a sentence—life imprisonment without parole—for their crime. Accomplishing this goal was important to thwart later claims by defendants sentenced to death that they be released because they had no sentence to serve. In connection with this second goal, the statute provides a mechanism to return those defendants sentenced to death to the trial court so that a sentence of life imprisonment without parole may be imposed. If the contingency upon which the statute is based—a judicial declaration that the death penalty itself, or as it is imposed under Chapter 565, is unconstitutional—never comes to fruition, the statute has no application.

Appellant contends that the statute requires that a life sentence be imposed whenever a court reverses a judgment imposing a sentence of death on any constitutional ground. Appellant relies on the opening clause of subsection 2, which provides that "[i]n the event any death sentence imposed pursuant to this chapter is held to be unconstitutional," to argue that the statute requires that any sentence of death reversed on constitutional grounds automatically results in imposition of a life sentence without parole. Appellant argues that since the judgment in his case was reversed, and his death sentences set aside, on the ground that his due process rights under the Constitution were violated by the use of visible restrains at his second penalty-phase retrial he is automatically entitled to be sentenced to life imprisonment under the statute. This broad reading of the statute is not only inconsistent with its plain language, it is also contrary to legislative intent.

"The general rule of statutory construction requires a court to determine the intent of the legislature based on the plain language used and to give effect to this intent whenever possible." *Soto v. State*, 226 S.W.3d 164, 166 (Mo. banc 2007). "To ascertain legislative intent, the courts should examine the words used in the statute, the context in which the words are used, and the problem the legislature sought to remedy by the statute' s enactment." *Id.* "The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes." *Id.* Courts apply "rules of statutory construction that subserve rather than subvert legislative intent." *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 716 (Mo. banc 2004) (quoting *Kincade v.*

Treasurer of Mo., 92 S.W.3d 310, 311 (Mo. App. E.D. 2002)). A court will "not construe the statute so as to work unreasonable, oppressive, or absurd results." *Id.*

When these two subsections are read together, it is evident that the legislature intended that the statute take effect if—and only if—the death penalty itself, or the statutory scheme provided under Chapter 565 for its imposition, was declared unconstitutional. Appellant's argument that the reversal of his case by the United States Supreme Court on the ground of trial court error with respect to the use of visible restraints somehow constitutes a declaration that his death sentence was "held to be unconstitutional" stretches the language of subsection 2 beyond its plain meaning and obvious intent.

Appellant's death sentences were not held to be unconstitutional by the United States Supreme Court. Rather, the Court determined that a procedural error occurring during the retrial of Appellant's penalty-phase proceeding violated his due process rights under the Constitution. The error was not directly related to Appellant's death sentences, but was one that pertained to any criminal proceeding. In fact, the Court held that any criminal defendant's due process rights are violated whenever visible restraints are used in a criminal trial without justification appearing in the record. *Deck*, 544 U.S. at 629. Because Appellant's case involved only the retrial of the penalty phase in a capital proceeding, in which the defendant's guilt had already been determined, the Court went on to consider whether this circumstance made any constitutional difference. *Id.* at 630-34. The Court determined that it did not. *Id.*

In fact, the Court's opinion implies that if a better record had been made for the need to use visible restraints in Appellant's case, no constitutional violation would have occurred.[5] *Id.* at 634-35. Under the Court's opinion, the finding of a constitutional violation can turn on the adequacy of the record made by the trial court: "[D]ue process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Id.* at 632. It found that this constitutional rule was "not absolute" if special circumstances exist that justify the use of visible restraints, as long as those circumstances appear in the record:

> The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

Id. at 633. The constitutional error in Appellant's case was complete because of the "the record's failure to indicate that the trial judge saw the matter as one calling for discretion." *Id.* at 634. The Court then observed that the record in Appellant's case

---

[5] In the record of this appeal, the trial court noted that Appellant was a possible escape risk. (L.F. 42-43). In any event, no visible restraints were used during the retrial of Appellant's penalty phase. (Tr. 915-16).

contained no finding by the judge that Appellant was an escape risk and no explanation why the jurors would have any "special reason for fear" if he were not visibly restrained. *Id.* at 634-35. The implication from the Court's opinion is if the record had outlined any special circumstances reflecting the need for visible restraints, no constitutional violation may have been found.

Curiously, if Appellant's construction of § 544.040 were accepted, one capital defendant's death sentence could be commuted to life imprisonment based solely on the trial court's failure to make a proper record regarding the need to use visible restraints, while another defendant's death sentence would not if a proper record justifying the need for visible restraints had been made. This Court should not construe the statute to produce such inequitable, and obviously unintended, results.

Even more disturbing is the fact that Appellant's construction of the statute would result in the commutation of death sentences for any trial court error premised on a violation of a constitutional provision having no bearing on the sentence itself. For instance, if a conviction were reversed because hearsay evidence was admitted in violation of the Confrontation Clause, Appellant's construction of the statute would require the automatic imposition of a sentence of life imprisonment without parole on the ground that the court held the death sentence in that case to be unconstitutional. Likewise, a reversal for a violation of the Sixth Amendment right to counsel based on the trial court's failure to adequately advise a capital defendant about the perils of self-representation would require imposition of a life sentence. And what about a reversal for a new trial or the retrial of a penalty-phase proceeding in capital cases premised on a

finding that the defendant received ineffective assistance of counsel in violation of the Sixth Amendment right to counsel? Appellant's construction of the statute would require the automatic imposition of a life sentence, not a retrial. In these examples, as well as numerous others that can be readily imagined, the constitutional violation that caused the reversal had nothing to do with the constitutionality of the death penalty itself. The legislature did not intend such absurd results.

Consequently, Appellant's argument that the Court in *Deck v. Missouri* held that Appellant's death sentences were unconstitutional has no merit. The Court simply held that any defendant's due process rights are violated by the use of visible restraints before the jury, and that this rule applied equally to penalty-phase proceedings in capital cases. In other words, the death sentences, or the statutory scheme under which they were imposed, were not held to be unconstitutional. The constitutional violation was predicated on trial court error related to procedure in all criminal jury trials. The Court simply rejected the state's argument that this rule should not apply in penalty-phase proceedings after the defendant's guilt had already been established.

The exception related to the invalidation of statutory aggravating circumstances provided for in both subsections of the statute also supports a narrow construction. This language, which follows the words "with the exception," is considered a proviso that qualifies as an exception to the general language preceding it in each subsection. *Compare Lonergan v. May,* 53 S.W.3d 122, 130 (Mo. App. W.D. 2001) (use of the word "provided" before language in a statute made it a proviso); *Thoroughbred Ford Inc. v. Ford Motor Co.*, 908 S.W.2d 719, 729 (Mo. App. E.D. 1995) (same). "Generally, a

proviso is confined to the clause or distinct portion of the statute to which it pertains." *Lonergan*, 53 S.W.3d at 130. "The natural and appropriate office of a proviso is to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to exclude from the scope of the statute that which would otherwise be within its terms." *Id.*, (quoting 73 Am. Jur. 2d *Statues* § 318 (1974)). *See also Brown v. Patterson*, 124 S.W. 1, 6 (Mo. 1909). A proviso is not considered separate legislation, and it does not enlarge or extend the provision to which it is attached. *See Thoroughbred Ford*, 908 S.W.2d at 729; *Brown*, 124 S.W. at 6. It only limits or restricts the general language preceding it. *See Brown*, 124 S.W. at 6. Finally, a "proviso can have no existence apart from the provision it is designated to limit or qualify." *State ex inf. Taylor v. Kiburz*, 208 S.W.2d 285, 288 (Mo. banc 1948).

A judicial declaration that a specific aggravating circumstance contained in Chapter 565 was unconstitutional would otherwise trigger application of § 565.040 if not for the proviso. In other words, if a death sentence was reversed because it was premised on an unconstitutional aggravator, this would be a holding that the death penalty itself was unconstitutional. The legislature recognized this and made an exception to the statute for only those cases. The canons of statutory construction pertaining to provisos, however, does not enlarge the remaining statutory language to apply to every other case in which a capital case is reversed on constitutional grounds not directly pertaining to imposition of the death sentence itself.

Finally, Appellant's reliance on the use of the word 'any' before the phrase 'death sentence' in subsection 2 does not compel a different result. Appellant relies on this

word to argue that whenever a conviction resulting in a death sentence is reversed based on a constitutional violation, the result must be the automatic imposition of a life sentence. But the "word 'any' is not an unyielding term, but one which readily yields to the legislative intent as reflected by the context of the act." *State ex inf. Gentry v. Long-Bell Lumber Co.*, 321 Mo. 461, 498, 12 S.W.2d 64, 80 (Mo. banc 1928). The use of this word in subsection 2 simply reflects the legislative intent that whenever a death sentence imposed under Chapter 565 is itself held unconstitutional in a particular case, the defendant must be brought back before the court and sentenced to life imprisonment.

D. This Court's opinion in *State v. Whitfield* supports a narrow construction of the statute.

This Court has previously indicated that trial court procedural error premised on a constitutional violation not directly affecting the imposition of the death penalty should not result in the application of § 565.040. In *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), the jury found the defendant guilty of first-degree murder, "but could not agree on punishment during the penalty phase, voting 11 to 1 in favor of life imprisonment." *Id.* at 256. Since the jury was unable to reach a verdict on punishment, the trial "judge then undertook the four-step process required by section 565.030.4 for determining punishment." *Id.* (footnote omitted). "He found the presence of statutory and non-statutory aggravating circumstances, determined these circumstances warranted death, considered whether there were mitigating circumstances and found they did not outweigh the circumstances in aggravation, and decided under all the circumstances to impose a death sentence." *Id.* After all the defendant's appeals and claims of ineffective

assistance of counsel had been exhausted, the United States Supreme Court held in *Ring v. Arizona* that capital defendants had the right under the Sixth Amendment to a jury determination of any fact that increases their maximum punishment, which included the finding of any statutory aggravating circumstances. *Id.*; *see also Ring v. Arizona*, 536 U.S. 584, 589 (2002). Since the judge, and not the jury, had made those factual findings and sentenced the defendant in *Whitfield* to death, this Court held that the sentence of death was unconstitutionally imposed. *Id.*

This Court then applied § 565.040 and sentenced the defendant in *Whitfield* to life imprisonment without parole. *Id.* This result was premised on the fact that the scheme provided for under Chapter 565, which allowed the trial court to make factual findings and sentence the defendant to death in case of a jury deadlock, was itself unconstitutional. In reaching this holding, however, this Court noted that the error alleged in *Whitfield* was not "some unrelated trial error, but the very entry of a judgment of death based on the judge's findings" in violation of *Ring*, which made the death sentence itself "unconstitutional." *Id.* at 270 n.20. This Court held that § 565.040 applied because the entry of the death sentence itself was accomplished through application of an unconstitutional procedure under Chapter 565 in which the trial judge made the prerequisite factual findings to impose a sentence of death that the Sixth Amendment required a jury to make. *Id.* at 271. In applying § 565.040, this Court stressed that the situation in *Whitfield*, in which the entry of the death sentence itself was unconstitutional or imposed under an unconstitutional statutory scheme, was distinguishable from a case,

such as Appellant's, in which a new trial is ordered because of unrelated trial court error that violates a defendant's constitutional rights:

> This [case] is to be distinguished from situations . . . in which a new trial was ordered because of unrelated trial error of constitutional dimension. Here, . . . it is the very entry of the death sentence that is held to be unconstitutional, since [it was] made without the very jury findings required for imposition of the death penalty under Missouri law, and hence the only remedy is to order imposition of the proper penalty—a life sentence.

Id. at 271 n.23. This reasonable construction of § 565.040 was amplified by the dissent in *Whitfield*:

> Section 565.040, however, does not apply to situations of mere procedural error, even if such error is rooted in constitutional principles. First, the plain words of the statute limit its application to events in which "the death penalty [in its totality] . . . is held to be unconstitutional" or in which "any death sentence imposed [as to a particular offender] . . . is held to be unconstitutional". Second, there is no policy reason to mandate a particular more extreme remedy when a lesser, more moderate remedy, is sufficient to guard the procedural rights of the offender.

Id. at 274 (Price, J. dissenting) (alteration in original). This observation is consistent with the legislative intent behind the passage of § 565.040. The dissent went on to point out the several cases in which this Court had concluded that although a death sentence had

been imposed, a remand for a retrial of the penalty phase proceeding was the appropriate remedy for a procedural error premised on a constitutional violation. *Id.*

Appellant's case is fully and readily distinguishable from *Whitfield*. The limitation put on the application of § 565.040 evidenced in both the majority and dissenting opinions in *Whitfield* is in perfect harmony with the legislative intent and history behind its enactment.

E. The legislative history behind the statute's enactment reveals that it should be construed narrowly.

The circumstances that led the General Assembly to pass § 565.040 also militate against the broad reading Appellant urges. "The history of the evolution of the law into its present shape throws light upon the intention of the lawmakers, and aids in arriving at the true meaning" of a statute. *State ex rel. Frisby v. Stone*, 152 Mo. 202, 53 S.W. 1069, 1070 (1899); *see also Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920, 925 (1933) ("the manifest purpose of the statute, considered historically, is properly given consideration").

The history behind § 565.040 begins in 1972, when the United States Supreme Court issued a per curiam opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), which set aside the death sentences in three cases from two states. *Id.* at 239-40. The five justices who voted in the majority each wrote a separate opinion. Justice Douglas wrote that the Eighth Amendment was violated because a lack of standards on imposition of death sentences in general caused them to be arbitrarily imposed. *Id.* at 240-57. Justice Brennan concluded that the death penalty itself was a cruel and unusual punishment, but

based this conclusion on the fact that death sentences were arbitrarily imposed. *Id.* at 257-306. Justice Stewart opined that the death sentences imposed in these cases violated the Eighth Amendment because they were "wantonly and freakishly imposed." *Id.* at 306-10. Justice White concluded that the death penalty was arbitrarily imposed because the decision to impose it was left solely to judges and juries. *Id.* at 310-14. Justice Marshall, concluded that the death penalty itself constituted cruel and unusual punishment because it was excessive and morally unacceptable to the citizenry. *Id.* at 314-405.

The fractured nature of the decision caused Justice Marshall to write that the "actual scope of the Court's ruling . . . is not entirely clear." *Id.* at 397. He observed that the Court's opinion had left capital punishment "in an uncertain limbo." *Id.* at 403. But he noted that what was apparent from the Court's opinion was that if "the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past." *Id.* at 397. Although the opinion itself was unclear, the gist of the Court's decision was that "the method then utilized by juries to decide between a death sentence and alternative punishments was a violation of the Eighth Amendment because the jury's unguided discretion rendered the final determination as to who would die and who would live arbitrary and capricious." *Newberry v. State*, 812 S.W.2d 210, 212 (Mo. App. W.D. 1991).

In 1975, the General Assembly responded to the *Furman* decision by enacting a capital-murder statute that gave juries or judges no discretion in sentencing. *Id.*; *see also*

State v. Duren, 547 S.W.2d 476, 478 (Mo. banc 1977). Instead, the statute provided for a mandatory death penalty upon conviction of capital murder. See §§ 559.005 and 559.009.3, RSMo Cum. Supp 1975 ("Persons convicted of capital murder shall be punished by death."). Mindful that a mandatory death-penalty law might be found unconstitutional, and still unsure what direction the Supreme Court would take on the newly-enacted capital-punishment statutes appearing in several states, the legislature passed § 559.011, RSMo Cum. Supp 1975, the predecessor to § 565.040, "as a safeguard" if "'the category of capital murder or the [death penalty was] declared to be unconstitutional . . . .'" *Newberry*, 812 S.W.2d at 212 (quoting § 559.011, RSMo Cum. Supp. 1975). If this contingency occurred, "all killings which would be capital murder . . . shall be deemed to be murder in the first degree and the offender shall be punished accordingly, except that he shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence."[6] Section 559.011, RSMo Cum. Supp. 1975.

In July 1976, the United States Supreme Court struck down as unconstitutional a North Carolina statute that, in the wake of *Furman*, had been construed by the state supreme court as imposing a mandatory death penalty. *See Woodson v. North Carolina*, 428 U.S. 280, 285-87, 305 (1976). In another case handed down that same day, the Court

---

[6] At the time, the sentence for a defendant convicted of first-degree murder was "imprisonment by the division of corrections during their natural lives." Section 559.009.3, RSMo Cum. Supp. 1975.

issued a plurality decision holding that Louisiana's death-penalty statutes were unconstitutional under the Eighth Amendment because they did not provide for jury consideration of mitigating circumstances. *See Roberts v. Louisiana*, 428 U.S. 325 (1976). The same day it handed down *Woodson* and *Roberts*, the Court handed down decisions in three other cases upholding death-penalty statutes enacted by Georgia, Florida, and Texas. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). In the plurality opinion in *Gregg*, however, the Court noted that while the Eighth Amendment is primarily focused on the method of punishment, it must be interpreted under "evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). "Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." *Id.* This, of course, connotes that the constitutionality of the death penalty, or the statutes under which it is imposed, is not static, but may be reconsidered as contemporary values "evolve."

In March 1977, this Court, obviously aware that the United States Supreme Court had struck down a mandatory death-penalty statute in *Woodson v. North Carolina*, held in *State v. Duren* that Missouri's capital murder statute providing for a mandatory death penalty was unconstitutional. *Duren*, 547 S.W.2d at 479-80. This Court recognized that the "General Assembly, obviously appreciative of the confusion surrounding death penalty statutes and recognizing the lack of any definitive law in that area, passed" § 559.011, the so-called "safeguard" statute and obvious predecessor to § 565.040. *Id.* at

480. In *Duren*, this Court applied the contingency statute in a case in which the defendant had been found guilty of capital murder and given what later turned out to be an unconstitutional mandatory death sentence. *Id.* at 480-81.

Also in 1977, the legislature repealed several sections contained in Chapter 559, including the contingency statute this Court applied in *Duren*, and replaced them with several new sections contained in Chapter 565. These new sections created an offense of capital murder to be punished by either death or life imprisonment, established a bifurcated trial process consisting of a guilt phase and a penalty phase, provided for the consideration of aggravating and mitigating evidence on the issue of punishment, and listed aggravating circumstances, one of which had to be found before a death sentence could be considered. §§ 565.001, .006, .008, and .012, RSMo Cum. Supp. 1977. The legislature also passed a new contingency statute to apply in the event a court declared the death penalty unconstitutional. Section 565.016, RSMo Cum. Supp. 1977. Subsection 1 of this new section provided that in the event the United States Supreme Court or the Missouri Supreme Court declared the offense of capital murder or the death penalty unconstitutional, "any killing which would be capital murder . . . shall be deemed . . . murder in the first degree and the offender shall be charged and, if convicted, punished as provided by law, except that, he shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence." Section 565.016.1, RSMo Cum. Supp. 1977. Subsection 2 provided that in the event the United States Supreme Court or the Missouri Supreme Court would declare the offense of capital murder or the death penalty to be unconstitutional, then any defendant convicted of capital murder and

sentenced to death after May 26, 1977, "shall be brought back before the court which originally passed sentence and that court shall resentence such person to imprisonment by the division of corrections during his natural life" with no eligibility for parole for 50 years. Section 565.016.2, RSMo Cum. Supp. 1977.

In 1983, the legislature made comprehensive changes to Chapter 565, including repealing the capital murder statute and the sections related to its trial procedures (§§ 565.001, .006, .012, and .014). In its place, the General Assembly enacted several new statutes, including creating the crime of first-degree murder punishable by either death or life imprisonment without parole. Section 565.020, RSMo Cum. Supp. 1983. It also enacted the statute at issue in this appeal, § 565.040. Section 565.040, RSMo Cum. Supp. 1983.[7]

Appellant's suggestion that the passage of this statute indicated a "radical" change misconstrues the changes that were made. The old statute limited its application only to cases that had been heard by the Missouri Supreme Court or the United States Supreme Court. It also applied only if the death penalty or the offense of capital murder were declared unconstitutional. The extremely limited nature of this language created a situation in which the statute would not have applied in cases that the legislature had intended it to apply. The current version of the statute removes these barriers and allows the statute to operate as the "safeguard" the legislature intended it to be.

---

[7] A 1984 amendment to this section simply changed its effective date from July 1, 1984 to October 1, 1984. Section 565.040, RSMo Cum. Supp. 1984.

Although much of the confusion concerning the constitutionality of the death penalty and statutory schemes under which it is imposed has abated, the contingencies addressed by the enactment of § 565.040 and its predecessors are still concerns today. The United States Supreme Court decisions described above teach that the Eighth Amendment is to be interpreted under an evolving standard of decency that marks the progress of a civilized society. This means that what may be a constitutional imposition of capital punishment today, may not be so tomorrow. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that "evolving standards of decency" prohibit the execution of the mentally retarded and overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that a national consensus had developed against the execution of offenders under 18 years of age and overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

Section 565.040 is the legislature's proactive response to the potential that the death penalty itself or the statutes under which it is imposed may be declared unconstitutional at some point in the future. The legislature did not intend, however, to give every defendant sentenced to death a windfall simply because a procedural error of constitutional dimension unrelated to the actual imposition of the death penalty itself occurred during trial. The grossly inequitable and "freakishly wanton" application of the statute to commute the death sentences of defendants on nothing more than whether the error that occurred was constitutionally based or not is so far removed from reason, much less legislative intent, that such a construction of the statute is beyond contemplation. Indeed, insofar as most (if not all) reversible errors have a constitutional dimension (e.g.,

the right to "due process"), such an application of § 565.040 would serve to eliminate the retrial of any capital sentencing proceeding.

F. The rule of lenity does not apply.

The "rule of lenity" requires that criminal statutes "be strictly construed against the state." *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007). *See also J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo. banc 2000) (the "rule of lenity" provides "that ambiguity in a penal statute will be construed against the government or party seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed"). The rule of lenity applies when there is an ambiguity in criminal prohibitions and the penalties they impose. *State v. Stewart*, 832 S.W.2d 911, 912 (Mo. banc 1992) (internal quotation marks omitted). "[T]his rule applies to statutes defining criminal behavior and providing for sentencing," and when "a civil statute has penal consequences." *United Pharmacal Co. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. banc 2006).

This rule has no application, however, when a criminal statute is not ambiguous. *See Mullins v. State*, 262 S.W.3d 682, 686 (Mo. App. E.D. 2008). Moreover, even if an ambiguity exists, courts will apply the rule of lenity only as a last resort and only after exhausting other canons of statutory construction to resolve the ambiguity and determine legislative intent. *See Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008) (describing the "rule of lenity" as a "default rule" to be employed only when canons of statutory construction fail to reveal legislative intent). "[T]he rule of lenity applies to interpretation of statutes only if, after seizing everything from which aid can be derived,

we can make no more than a guess as to what the legislature intended." *Fainter v. State*, 174 S.W.3d 718 (Mo. App. W.D. 2005) (citing *United States v. Wells*, 519 U.S. 482, 499 (1997)). It is only after application of these canons of statutory construction fails to resolve the ambiguity will a court consider applying the rule of lenity. Even still, the rule does not mandate that a court "dispense with common sense or disregard an evident statutory purpose." *State v. Myers*, 248 S.W.3d 19, 27 (Mo. App. E.D. 2008); *see also State v. Stewart*, 113 S.W.3d 245, 249 (Mo. App. E.D. 2003); *State v. Condict*, 65 S.W.3d 6, 12 (Mo. App. S.D. 2001) (the rule of lenity "does not require a reviewing court to dispense with common sense or to ignore an evident statutory purpose").

In the criminal-law arena, the rule of lenity has been applied only to ambiguities in criminal statutes that define criminal offenses, impose enhanced punishment for certain offenses, or provide an unlimited time for prosecution of certain offenses. *See Turner*, 245 S.W.3d at 828-29 (prior municipal intoxication-related convictions resulting in a suspended imposition of sentence cannot be used to enhance penalty under state DWI law); *State v. Graham*, 204 S.W.3d 655, 657-58 (Mo. banc 2006) (statute providing no limitation period for prosecution applied only to those offenses for which the only penalties were death or life imprisonment); *Woods v. State*, 176 S.W.3d 711, 712-13 (Mo. banc 2005) (statute providing enhanced penalty for defendant who had previously pleaded or had been found guilty of stealing offense on two separate occasions); *State v. Salazar*, 236 S.W.3d 644, (Mo. banc 2007) (holding that an administrative order for child support does not constitute "legal process" under the criminal non-support statute); *Fainter*, 174 S.W.3d at 720-21 (holding that a riding lawn mower was not considered a

"motor vehicle" under statute providing enhanced penalty for stealing). The statute at issue here falls into none of these categories. In fact, it is not even a penal stautue. It is simply a saving statute that operates only on a contingency and has no application unless the death penalty, or the statutes under which it is imposed, is declared unconstitutional.

Even if this statute were determined to be penal, the rule of lenity need not be reached in this case because the saving statute is not ambiguous. To the extent there is any ambiguity, application of the canons of statutory construction described above resolves any ambiguity in the statute and reveals that the legislature intended the statute to apply only in the event that the death penalty itself or the statutory scheme under which it is imposed is declared unconstitutional.

II (veniremembers' removal for cause).

The trial court did not abuse its discretion in sustaining the State's objections and removing veniremembers Coleman and Ladyman for cause because an examination of the entire record shows that their beliefs would have substantially impaired their ability to serve as jurors in that they would have been unwilling or unable to follow the court's instructions on the issue of punishment or consider the full range of punishment.

Although both the veniremembers in question initially indicated that they could fairly consider both punishments in this case, their response to the question of whether they could sign a death verdict if they were selected as foreperson of the jury casted considerable doubt on their ability to do so. Veniremember Coleman refused to directly answer the question and ultimately said that she could not promise that she would be able

to follow the court's instructions on this matter. Veniremember Ladyman also claimed that he could fairly consider both punishments, but flatly stated that he would not sign a death verdict. This Court has held that a veniremember's refusal to sign a verdict imposing a sentence of death by itself is a sufficient ground to sustain a motion to strike for cause. Moreover, for a veniremember to take such a stance while at the same time indicating they could fairly consider the full range of punishment, creates an equivocation substantial enough to sustain a trial court's removal for cause.

A. The law regarding jury selection in capital cases.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a State cannot automatically exclude jurors from a death-penalty case simply because they had "conscientious scruples against capital punishment" or were opposed to it. *Id.* at 512; *see also Wainwright v. Witt*, 469 U.S. 412, 418 (1985). The Court refined this doctrine in two cases following *Witherspoon*. *See Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (noting that a person who has a fixed opinion against or does not believe in capital punishment may nevertheless be able to follow the law and fairly consider imposition of the death penalty in a particular case); *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (holding that prospective jurors were properly disqualified when they were unable to set aside their personal beliefs or convictions regarding capital punishment and take an oath to follow the law).[8]

---

[8]In *Lockett*, the excluded jurors were unable to respond affirmatively to the following question: "Do you feel that you could take an oath to well and truely [sic] try this

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court, in considering the holdings of these previous cases, held that the standard for establishing whether a prospective juror in a capital case may be excused for cause is whether that person's views about capital punishment would prevent or substantially impair the performance of that person as a juror:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45; *see also Witt*, 469 U.S. at 424; *Johnson*, 22 S.W.3d at 187 ("The relevant question is whether a venireperson's beliefs preclude following the court's instructions so as to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

The *Adams* court also noted that a State "does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality." *Id.* at 46. The Court read

---

case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment." 438 U.S. at 595-96.

Witherspoon as a limitation on the State's power to exclude prospective jurors on a basis any broader than their inability to follow the law or abide by their oaths. *Id.* at 48; *see also Lockhart v. McCree*, 476 U.S. 162 (1986) (holding that the Sixth Amendment's fair-cross-section requirement was not violated when prospective jurors were excluded for cause after stating that under no circumstances would they vote for death).

Consequently, no one can seriously argue that a prospective juror who cannot or will not follow the law in a capital case may be excluded for cause. The easy cases are those in which prospective jurors unequivocally state that under no circumstances will they follow the law and consider the death penalty. The more difficult cases are the ones in which jurors adopt no firm position or give no definitive answer about their ability to set aside their personal beliefs and follow the law.

In *Witt*, after reaffirming the *Adams* "standard" for juror exclusion, the Court held that a prospective juror's bias need not be proved with "unmistakable clarity" and that a trial judge may still lawfully exclude such jurors if the judge believes that the prospective juror would be unable to follow the law:

> [T]his standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or

> may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-26.

Consistent with these principles, this Court has held that potential jurors in a capital case "may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths." *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000). "A challenge for cause will be sustained if it appears that the venireperson cannot 'consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case.'" *Id.* (quoting *State v. Rousan*, 961 S.W.2d 831, 839 (Mo. banc 1998)).

A juror's "equivocation about his ability to follow the law in a capital case together with an unequivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury." *Smith*, 32 S.W.3d at 544-45 (quoting *Rousan*, 961 S.W.2d at 940)). But, as Appellant concedes, this Court has held that the record need not contain both showings to sustain a removal for cause; an "unequivocal statement" that a potential juror would not sign a death verdict is enough to justify removal:

> It does not follow, however . . . that both equivocation and an unequivocal statement about being able to sign the death verdict are required before the trial court may disqualify a venireperson. An unequivocal statement concerning a venireperson's inability to sign a death verdict alone is enough. An uncompromising statement by a juror that he or she refuses to sign a death warrant hints at an uncertainty underlying the juror's determination to consider the full range of punishment. No panel of twelve jurors, all of whom decided that he or she could not sign a verdict form assessing the death penalty against the defendant, could be said to have the unimpaired ability to consider the appropriateness of the death penalty.

Smith, 32 S.W.3d at 545 (citation omitted).

B. Standard of review.

"The trial court's 'ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.'" *State v. Taylor*, 134 S.W.3d 21, 29 (Mo. banc 2004) (quoting *Smith*, 32 S.W.3d at 544).

The qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. *State v. Johnson*, 22 S.W.3d 183, 188 (Mo. banc 2000). The trial court can better evaluate a venireperson's commitment to follow the law and has broad discretion to determine the qualifications of prospective jurors. *Id.* "Under *Wainwright*, the trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors (including the ability to follow instructions on the burden of proof)." *Id.*

Accordingly, a great deal of deference is owed to the trial court's determination that a prospective juror is substantially impaired. *See Uttecht v. Brown*, 555 U.S. 1, 7 (2007). This deferential standard applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; even the simple act of granting a motion to excuse for cause "constitutes an implicit finding of bias." *Id.* at 7. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of *critical* importance in assessing the attitude and qualifications of potential jurors. *Id.* at 9. The trial court's "finding may be upheld even in the absence of clear statements from the juror that he or she is impaired." *Id.* at 7. "Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'" *Id.* (quoting *Witt*, 469 U.S. at 434); *see also State v. Tisius*, 92 S.W.3d 751, 763 (Mo. banc 2002) (quoting *State v. Roberts*, 948 S.W.2d 577, 597 (Mo. banc 1997)) ("Where there is conflicting testimony regarding a prospective juror's ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than to another and in finding that the venireperson could not properly consider the death penalty."). Even a juror's assurance that he or she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that he or she may be unable or unwilling to. *Uttecht*, 555 U.S. at 18.

C. The record regarding the veniremembers' responses.

1. Veniremember Coleman.

Although Veniremember Coleman said she could consider a sentence of death, she repeatedly responded with, "I don't know," when asked if she could sign a verdict of death, even knowing that she was not signing simply for herself, but on behalf of the jury as a whole. Ultimately, she said she could make no promises that she could sign a death verdict:

> [The Prosecutor]: . . . . Ms. Coleman, if you're that juror in that situation, could you give meaningful, realistic, honest consideration to a sentence of death?
>
> Venireperson Coleman: Yes.
>
> [The Prosecutor]: Could you give that same sort of consideration to life imprisonment without the possibility of probation or parole?
>
> Venireperson Coleman: Yes.
>
> [The Prosecutor]: Could you, if you were the foreperson, sign a verdict?
>
> Venireperson Coleman: I don't know.
>
> [The Prosecutor]: Well, you rolled your eyes first, so I kinda thought in my experience, you might say I don't know. Because that can be the weight to your issue. I mean, some people feel sometimes that by signing that, I'm the only one responsible for that. And is it fair to say that's kind of what's going through your mind?
>
> Venireperson Coleman: Yes.

[The Prosecutor]: I bet when you asked all about this subject, you didn't think about that issue, did you?

Venireperson Coleman: No.

[The Prosecutor]: And my concern is, is that you might not be able to function as a juror. Do you understand that?

Venireperson Coleman: I understand.

[The Prosecutor]: And—but so what I need you to know is, can you assure me that you can do that. Or, is your situation because of your concerns that . . . I just don't know that I can sign that form. I can't promise you that I'll be able to?

Venireperson Coleman: I don't know that I could.

[The Prosecutor]: Would it be fair to say that you can't promise me that you would be able to?

Venireperson Coleman: No, I can't.

(Tr. 278-80). Appellant's attorney did not ask Veniremember Coleman any questions. (Tr. 286-303). The trial court sustained the State's motion to strike Veniremember Coleman for cause based on her inability to state whether she could sign the verdict form. (Tr. 446-47). Appellant raised this claim in his motion for new trial. (L.F. 684).

2. Veniremember Ladyman.

Veniremember Ladyman also claimed that he could consider both punishments, but said that he would not sign a verdict imposing a death sentence because it was "like playing God":

[The Prosecutor]: Thank you. Mr. Ladyman. Sir, if you were in that circumstance, asked to consider those things, would you be able to give the same level of consideration to a sentence of death, as a life sentence?

Venireperson Ladyman: Yes, I could.

[The Prosecutor]: Would you be able to, also consider or sign the verdict form, sentencing someone—or sentencing someone to die?

Venireperson Ladyman: No.

[The Prosecutor]: And—I don't—is it the same sort of thing we've talked about with others, that it's very personal, and you couldn't stand out alone?

Venireperson Ladyman: Well, if—it's like playing God. I don't want to be part of it, nuh-uh.

[The Prosecutor]: So while you might be able to deliberate and decide—

Venireperson Ladyman: Yeah, I can decide.

[The Prosecutor]: And you view that part as playing God?

Venireperson Ladyman: Yes.

(Tr. 335-36). Veniremember Ladyman maintained this position even though he had heard the prosecutor repeatedly tell others that the jury foreperson signs the verdict form not on behalf of himself or herself, but on behalf of the unanimous jury as a whole. (Tr. 314-16, 324, 329, 331-33).

During questioning by Appellant's attorney, Veniremember Ladyman said that he could follow the court's instructions and consider imposing the death penalty or life imprisonment without parole. (Tr. 343-45). Appellant's counsel also asked him about

his statement that he would refuse to sign a verdict form imposing a death sentence. (Tr. 360-62). Although Veniremember Ladyman said that he could consider the death sentence, he still affirmed that he would refuse to sign a verdict form for a sentence of death:

> [Appellant's Counsel]: Mr. Ladyman, we also went through the process together. Unless there's something else that you want to mention to me or state that you believe would be helpful in our consideration to consider whether or not you would be appropriate for the jury?
>
> Venireperson Ladyman: [Shakes head.]
>
> [Appellant's Counsel]: You're shaking your head. I'll take that as a no.
>
> Venireperson Ladyman: I'm just saying I ain't signing it. I don't want to be the—
>
> [Appellant's Counsel]: Let me ask you about that. You talked about that you would not sign the verdict form.
>
> Venireperson Ladyman: Right.
>
> [Appellant's Counsel]: Does the fact that you do not want to sign the verdict form, or that you don't want to serve as the foreman of the jury, does that prevent you from being a jury—a juror in this case, in the sense that—my question is in your mind, I can't be a part of that. I can't be a part of that? You are there. But does that prevent you from giving a realistic consideration to the death penalty?
>
> Venireperson Ladyman: That's all the time.

[Appellant's Counsel]: Sure. Is your reluctance—or I'll even call it refusal to sign the verdict form, does that prevent you from considering the death penalty in this case?

Venireperson Ladyman: No.

[Appellant's Counsel]: You could be one of the jurors?

Venireperson Ladyman: Yeah.

[Appellant's Counsel]: You would just defer, as I understand it correctly, and have somebody else serve as a foreperson?

Venireperson Ladyman: Right.

[Appellant's Counsel]: Correct me if I'm wrong, but you could realistically consider the death penalty?

Venireperson Ladyman: Yeah.

[Appellant's Counsel]: And you could realistically consider the life in prison?

Venireperson Ladyman: Yeah.

(Tr. 360-62). The trial court sustained the State's motion to strike Veniremember Ladyman for cause based on his refusal to sign a verdict form imposing a sentence of death. (Tr. 450-51). Appellant raised this claim in his motion for new trial. (L.F. 714).

D. The trial court acted within its discretion.

This Court held in *Smith* that a veniremember's unequivocal statement that he or she could not sign a death verdict can provide a basis for the trial court to sustain a motion to remove the veniremember for cause. Both veniremembers in question here either unequivocally stated that they would not sign a death verdict, or, despite repeated

questioning, would not answer the question and said that they could not promise that they would follow the court's instructions. The court acted in its discretion in considering this refusal, or refusal to answer, in making its determination that based on the entire record of these jurors' responses a motion to strike for cause should be sustained.

Appellant offers no compelling reason why this Court should now reverse field and abandon its holding in *Smith*, a holding relied upon by the criminal bar and courts, including in this case, in determining whether a motion to strike for cause should be sustained. Simply because other states require all jurors to sign the verdict form does not offer an adequate basis for a different rule. Missouri requires that the verdict "be in writing" and "signed by the foreman." Rule 29.01(a). The law also requires that if the sentence is death, the statutory aggravating circumstances found by the jury shall be listed in the verdict. Section 565.030.4, RSMo 2000. If each juror decided that he or she did not want to sign the verdict—a distinct possibility if the jury is composed of some members who have already decided that they would not sign the verdict and by their refusal prompt others to consider not doing so also—a lawful verdict could not be returned. In short, it is critical that all the jurors are equally qualified.

Moreover, it is not the simple refusal to sign the verdict that warrants removal, though that could be considered by itself an indication that the veniremember could not follow the law. If a veniremember claims, on the one hand, that he or she could fairly consider both punishments, but, at the same time, unequivocally states that he or she would not sign a verdict of death, the record contains sufficient evidence of equivocation creating a doubt as to whether that veniremember would be able to fairly consider both

punishments. At a minimum, such a response reveals an inability to follow the court's instructions if that person were chosen as foreman of the jury.[9] The trial court did not abuse its discretion in sustaining the state's motion to strike these venirmembers for cause.

[9] Under MAI-CR 3d 313.48A, the jury in this case was instructed that the foreperson must sign the verdict. (L.F. 602, 610).

III (notice of argument).

The trial court did not err in overruling the State's argument about Appellant's prior conviction for aiding an escape because Appellant was fully aware that the State would present evidence of this conviction during the penalty-phase proceeding.

Although Appellant was fully aware that the State intended to admit evidence of his prior conviction for aiding an escape, he now complains that the law required that he be given notice of every argument the State was going to make about this evidence at trial. Nothing in the law requires such notice, and the trial court did not abuse its discretion in overruling Appellant's objection during closing argument.

A. The record regarding this claim.

The State's amended information charged that Appellant was a persistent offender. (L.F. 62-64). One of the convictions relied on to support that allegation was Appellant's 1985 conviction for aiding an escape. (L.F. 64). When the State offered a certified copy of that conviction during the third penalty-phase retrial, Appellant's counsel objected on the ground that this conviction was more prejudicial than probative and that there had been no notice of "an aggravator that [he] can't behave himself in jail, and has poor conduct." (Tr. 677-79). The trial court overruled the objection and admitted the certified copy of the conviction into evidence.[10] (Tr. 679-80; State's Ex. 57). This conviction was

[10] A certified copy of this conviction was admitted into evidence in both of Appellant's previous penalty-phase proceedings. (1st Tr. 839; 2nd Tr. 404).

not mentioned during the prosecutor's initial closing argument. (Tr. 943-54). During rebuttal closing argument, the prosecutor told the jurors that their verdict can protect society and reminded them that Appellant had helped others to escape:

> [The Prosecutor]: Sometimes when horrible crimes are committed by wolves, we've got to come to court, and we've got to count our sheepdogs like for you, and you're our sheepdogs, today. You're our sheepdogs, that by your verdict, can protect the rest of society. While he's going to be in prison for the rest of his life if you let him live, remember, he knows how to escape. He aided and abetted others trying to.
>
> [Appellant's Counsel]: Objection; not a noticed aggravator.
>
> The Court: Overruled.
>
> [Appellant's Counsel]: Irrelevant.
>
> The Court: Overruled.
>
> [The Proseuctor]: He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates. But I need you and our society need you to be the sheepdog.

(Tr. 968-69).

B. The trial court committed no error.

Under § 565.005, within a "reasonable time" before trial begins, the parties must provide each other with the following:

(1) A list of all aggravating or mitigating circumstances as provided in subsection 1 of section 565.032, which the party intends to prove at the second stage of the trial;

(2) The names of all persons whom the party intends to call as witnesses at the second stage of the trial;

(3) Copies or locations and custodian of any books, papers, documents, photographs or objects which the party intends to offer at the second stage of the trial. If copies of such materials are not supplied to opposing counsel, the party shall cause them to be made available for inspection and copying without order of the court.

Section 565.005.1, RSMo 2000. Appellant does not complain that the State violated any specific provision of the notice statute. In fact, he concedes that the State gave him notice that it would offer evidence of this conviction. App. Br. 77. He does not suggest that the State failed to provide notice of all statutory aggravating circumstances, or that it did not disclose witnesses and evidence.

Instead of complaining about a lack of notice on a matter covered by the statute, Appellant complains that the State failed to give him notice about an *argument* it intended to make at trial. He contends that the argument about Appellant's future dangerousness should have been specifically disclosed to the defense before trial. But his claim that the State was required to provide him notice about every type of argument it intended to make about disclosed evidence is not supported by the language of the statute.

Although this Court has noted that evidence of future dangerousness may be admitted during the penalty phase of a capital case, *State v. Chambers*, 891 S.W.2d 93, 107 (Mo. 1994), Missouri statutes, unlike those in some other states, do not make future dangerousness an issue that must be considered by the jury during its penalty phase deliberations. *See* § 565.032.2. The closest Missouri comes to a statutory aggravating circumstance that potentially touches on the issue of future dangerousness is one asking the jury whether the "offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions." Section 565.032.2(1). This latter circumstance was not a statutory aggravating circumstance in Appellant's case.

An argument of future dangerousness based on a defendant's numerous convictions or on a defendant's conviction for aiding an escape is not a statutory aggravating circumstance that requires notification under the statute. See § 565.032.2, RSMo 2000.

In *State v. Crespo*, 664 S.W.2d 548 (Mo. App. E.D. 1983), the defendant objected to an argument the State made during closing argument that one bullet had made two holes in the victim's collar, when a lab report the State had disclosed to the defense suggested that the holes were made by two bullets. *Id.* at 552. The defendant argued on appeal that the State violated discovery rules by not disclosing this argument. *Id.* at 553. The court rejected this argument and held that the state had complied with discovery by disclosing the report, but that it had no duty "to tell the defense that it doubted the results

of the test" and that the "decision" of the prosecutor in arguing the effect of the report was not subject to disclosure. *Id.*

Appellant's reliance on *Simmons v. South Carolina*, 512 U.S. 154 (1994), to support his claim that Appellant was denied due process by this argument is entirely misplaced. In *Simmons*, the Court stated that a capital defendant must be allowed to inform the jury of accurate information concerning his parole ineligibility when future dangerousness is at issue. *Id.* at 178. The Court held that a defendant, who was sentenced to death and whose future dangerousness was made an issue by the State, was denied due process when the trial court prevented him from presenting evidence or argument during the penalty phase that he was ineligible for parole, and the only sentencing alternatives available to the jury were death or life imprisonment without parole.[11] *Id.* This case is inapposite because Appellant was not precluded from making any argument; instead, he is complaining that he should have received notice of every argument the State intended to make.

Finally, even if the law could be stretched to require notice of arguments, Appellant's claim of prejudice is entirely speculative. He suggests that if he had known the State was going to make this argument his counsel "could have presented rebuttal evidence" or that "perhaps" there were "mitigating factors" relating to this guilty plea.

---

[11] Although she wrote a concurring opinion, Justice O'Connor supplied the fifth vote in *Simmons* and thus wrote the "prevailing opinion" that controls. *Kelly v. South Carolina*, 534 U.S. 246, 258 (2001) (Rehnquist, J., dissenting).

But "[b]are assertions of prejudice are not sufficient to establish fundamental unfairness and does not show how the trial was substantially altered." *Tisius*, 92 S.W.3d at 762. Appellant has failed to carry his burden of demonstrating prejudice. In fact, it is likely that Appellant would have done nothing to further highlight this conviction because while the State told jurors that Appellant was convicted for aiding an escape, it did not give them the details of the conviction, which included Appellant's efforts to procure a saw blade so that some other inmates could saw through the jail bars. (Tr. 677-80).

The trial court did not err in overruling Appellant's objection to the State's argument. The law does not require that parties in a capital case give notice of every argument they intend to make, and Appellant has failed to demonstrate that he was prejudiced by the State's brief mention of Appellant's potential for future dangerousness.

IV (closing arguments).

The trial court did not err, plainly or otherwise, in overruling Appellant's objection to the State's closing argument or in failing to unilaterally intervene to declare a mistrial during other portions of the argument that were not objected to.

A. Standard of review.

"Both parties have wide latitude in arguing during the penalty phase of a first degree murder case." *State v. Storey*, 40 S.W.3d 898, 911 (Mo. banc 2001); *see also State v. Ringo*, 30 S.W.3d 811, 821 (Mo. banc 2000). The trial court has broad discretion in controlling the scope of closing argument, and the court's rulings will be reversed only upon a showing of abuse of discretion. *Deck I*, 994 S.W.2d at 543; *Black*, 50 S.W.3d at 790. Error during closing argument will cause a reversal only if there is "a reasonable probability that the verdict would have been different had the error not been committed." *Deck I*, 994 S.W.2d at 543; *State v. Williams*, 97 S.W.3d 462, 475 (Mo. banc 2003).

Plain error relief is rarely appropriate for claims involving closing arguments. *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983). Courts are especially reluctant to find plain error in the contest of closing argument because the decision to object is often a matter of trial strategy, and without an objection and request for relief, the court options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. *State v. Mayes*, 63 S.W.3d 615, 633 (Mo. banc 2001); *State v. Wise*, 879 S.W.2d 494, 516 (Mo. banc 1994). "[R]elief should be rarely granted on assertions of plain error to matters contained in closing argument, for

trial strategy looms as an important consideration and such assertions are generally denied without explication." *State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999).

Under plain error review, a conviction will be reversed for improper argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice." *State v. Middleton*, 995 S.W.2d at 456. "The burden is on the defendant to prove the decisive significance." *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

B. None of the arguments constituted reversible error.

1. "Was justice done?"

During the prosecutor's rebuttal closing argument, he told jurors that they would decide what justice required in this case:

> [The Prosecutor]: The last thing I'm gonna tell you and say to you is this: I—I've done this job long enough, and this isn't about me—but I've done this long enough that on occasion, five years after a case like this has gone—
>
> [Appellant's Counsel]: Objection; vouching, personalization.
>
> The Court: Sustained.
>
> [The Prosecutor]: Often times, I'll get a phone call later on from a family member, and they'll say—
>
> [Appellant's Counsel]: Objection; relevance, same objection.
>
> The Court: Overruled.
>
> [The Prosecutor]: And they'll say to me, to my granddaughter, I've told them about my loved one that was murdered. They want—they want to know

> what happened. Can you explain it to them. There are 19 grandchildren, 19 great-grandchildren, and I don't know how many more there'll be. And some day these people are going to be told about James and Zelma Long. And they're gonna be told about what wonderful parents they were, how they liked to fish. How their Grandmother got her masters and taught. They're gonna be told about these wonderful people. And you know the question they're gonna ask, is they're gonna say well, where are they now? They're gonna have to be told about this. And then they're gonna ask another question, and that question I get to some—unfortunately sometimes explain is was justice done? When you go up there, you'll tell us if justice is done. Now, I'm gonna sit down and wait for your answer, so I can tell them.

(Tr. 969-70).

Appellant claims that he preserved appellate review of this claim by objecting on grounds of vouching, personalization and relevancy. App. Br. 85. But he asserts in his brief that the prosecutor's argument was objectionable because it improperly appealed to sympathy and urged jurors to consider matters outside the record. App. Br. 88. Consequently, this claim is not preserved for appellate review. *State v. Boydston*, 198 S.W.3d 671, 675 (Mo. App. S.D. 2006) (holding that the defendant failed to preserve issue for appellate review because his theory on appeal differed from the objection asserted at trial).

The prosecutor here neither told jurors that the victims' family would hold them accountable, nor did he make an improper appeal to sympathy. The comment was simply a rhetorical device to stress to jurors the impact this crime had on the victims' family and that it was the jurors' duty to see that justice was done in this case. This argument was similar to the victim-impact and justice arguments made by the prosecutor in *State v. Strong*, 142 S.W.3d 702 (Mo. banc 2004), and this Court found no plain error in that case. *Id.* at 726-27 (prosecutor argued that family members in courtroom were victims and described impact crime had on them).

Moreover, the prosecutor did not specifically say what justice required, but told the jurors that it was up to them to decide. This Court has found no plain error in cases in which the prosecutor argued that the defendant would "escape justice" if death were not imposed. *Id.* at 727-28; *see also State v. Ringo*, 30 S.W.3d 811, 821 (Mo. banc 2000) (characterizing a sentence less than death as a "reward"); *Deck I*, 944 S.W.2d at 543-44 (arguing that death was the "only sentence the jury could impose to show justice and mercy . . . to the people in the courtroom").

Neither did this argument constitute personalization. Improper personalization occurs when the prosecutor's argument suggests that the defendant poses a personal danger to the jurors or their families. *State v. Basile*, 942 S.W.2d 342, 352 (Mo. banc 1997). "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization." *Williams*, 97 S.W.3d at 474. The argument here neither implied any danger to the jurors, nor asked the jurors to place themselves in the victims' shoes.

Appellant's reliance on two out-of-state cases is misplaced. In both cases the arguments, which were decidedly more provocative than the one made in this case, were not made during the penalty phase of a capital case, but were made in non-capital cases to shame the jury into finding that the defendant committed the crime notwithstanding what the evidence showed. *See Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000); *Commonwealth v. Torres*, 772 N.E.2d 1046 (Mass. 2002). Consequently, the holdings in these cases provide no assistance in deciding the issue here.

2. Depravity-of-mind argument.

In arguing that the murders involved "depravity of mind," the prosecutor asked jurors to think about lying on a bed for ten minutes at gunpoint:

> Fourth—or three, depravity of mind. Is this the act of a depraved mind? And the instruction goes a little bit further than this. But it tells you what depraved mind in this situation means. But he rendered these people helpless before he killed them. And I would ask you to think about this: laying on a bed for ten minutes at gunpoint, rendered you helpless.

(Tr. 949). Although no objection was made to this argument, this can probably be explained by the fact that in two of Appellant's previous appeals this Court has rejected claims involving almost identical—and arguably less egregious—arguments. In *Deck I*, this Court rejected a plain error claim when the prosecutor asked the jurors during deliberations to "count out ten minutes and you think about how long that is and then think about somebody pointing a gun at your head at the same time. *Deck I*, 944 S.W.2d

at 544. In *Deck III*, this Court rejected a preserved claim of error based on the prosecutor stating:

> Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem that long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes."

Deck III, 136 S.W.3d at 488-89.

This Court has also denied similar claims in other cases. In *State v. Smith*, 944 S.W.2d 901 (Mo. banc 1997), the defendant challenged an argument "which described the murders from the point of view of the victims." *Id.* at 918. Noting that the argument had directly tracked the evidence at trial, this Court held that no reversible error occurred. *Id.*

Likewise, in *State v. Roberts*, the defendant objected to the prosecutor's argument discussing the details of the murder, which he described as "a horrible, horrible death" and "the most God-awful crime," and urged the jurors to "[t]hink about what [the victim] went through." *Roberts*, 948 S.W.2d at 594-95. In holding that these comments were not improper, this Court observed that when viewed in context of the entire argument, the comments at issue did not "present a situation like that in *Storey* where the jurors were asked to place themselves in the position of the victim and relive the crime in graphic detail." *Id.* at 595.

Finally, in *State v. Williams* the prosecutor asked the jurors "to imagine the fear [a prosecution witness] must have felt as [the defendant] choked her and told her not to tell

anyone that he had confessed to the murder." *Williams*, 97 S.W.3d at 474. The defendant contended that the trial court plainly erred in allowing this argument because it constituted improper personalization. This Court disagreed because the prosecutor's argument "did not suggest personal danger to the jurors or use the kind of graphic detail that would prejudice the defendant." *Id.*

Appellant's reliance on *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), and *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999), is entirely misplaced.

In his first appeal, Appellant also relied on *Storey* in arguing that the prosecutor's argument constituted error. This Court found no plain error because the argument was "distinguishable" from the argument made in *Story*. *See Deck I*, 944 S.W.2d at 544.

Moreover, the argument made in *Storey* is not comparable in any sense to the statement the prosecutor made here. In *Storey*, the defendant claimed that his counsel was ineffective for not objecting to an argument describing the murder in graphic detail as if the jurors themselves were the victims:

> Think for just this moment. Try to put yourselves in [the victim's] place. Can you imagine? And then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down your esophagus.

Storey, 901 S.W.2d at 901. This Court held that this argument was "grossly improper" because it had asked the jurors to "put themselves in [the victim's] place, then graphically detail[ed] the crime as if the jurors were the victims." *Id.* Here, of course, the prosecutor

did not ask the jurors to relive the crime as if they were the victims, but basically asked them to consider the evidence in determining whether Appellant's crime involved depravity of mind.

Appellant's reliance on *Rhodes* is equally misplaced. The argument in *Rhodes* consisted of the prosecutor physically demonstrating how the crime occurred while at the same time graphically describing its every detail:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up. . . . And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you up. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck. . . . Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

Rhodes, 988 S.W.2d at 529. This Court assailed this type of argument, in which the crime is graphically detailed as if the jurors were the victims, as one that could only arouse fear in the jury. *Id.* Again, the argument at issue here in no way rises to the level of the argument condemned in *Rhodes*.

This is not a case where the jurors were asked to "relive the crime in graphic detail," *Roberts*, 948 S.W.2d at 594, nor is it a case where the prosecutor's argument contained numerous "egregious errors, each compounding the other" as was the case in *Storey*. *See State v. Kreutzer*, 928 S.W.2d 854, 873 (Mo. banc 1996).

3. "Prior escapes."

Appellant contends that the prosecutor deliberately misstated the evidence when he argued that:

> The next thing we have to do is to convince you that all this bad evidence, the aggravating evidence in the case warrants a death sentence. It does. You can consider all his prior escapes. You can consider how he leaned over these bodies.

(Tr. 949). Since the record contains no evidence that Appellant himself ever escaped—only that he aided others in doing so, it appears that the prosecutor simply misspoke. Of course, a contemporaneous objection to this statement would have resolved the matter and avoided this issue on appeal.

The only evidence before the jury relating to escape was Appellant's conviction for aiding an escape. (Tr. 678; State's Ex. 57). Although the record does not reflect whether the jury actually saw the exhibit, the certified record showed that the state alleged that Appellant attempted to help two men escape from the county jail by procuring a saw blade from a third party to use to cut through jail bars. (State's Ex. 57; Tr. 678). The record also contains information that Appellant attempted to escape from the prison in Potosi, but statements pertaining to that incident were made at a sidebar conference outside the jury's hearing.[12] (Tr. 677-78; 772-73). Moreover, it appears that

---

[12] The State filed a motion in September 2007 asking the trial court to consider whether extra security was warranted at Appellant's trial on the ground that in the nineteen months before the motion was filed, Appellant had been in solitary confinement for

the parties had reached an agreement that evidence pertaining to Appellant's attempted escape from Potosi would not be introduced unless Appellant decided to testify. (Tr. 772-73). In any event, the jury was certainly entitled to consider Appellant's previous convictions, including the one for aiding an escape, in determining the appropriate punishment. *Middleton v. State*, 80 S.W.3d 799, 811 (Mo. banc 2002).

Based solely on the prosecutor's obscure, out-of-context statement in which the plural form of the word escape was used instead of the singular, it strains logic to believe that the jurors, through speculation, created and assumed facts not in evidence, and that they based their decision solely on this one comment. But comments made during closing argument "must be interpreted with the entire record rather than isolation." *State v. Graham*, 916 S.W.2d 434, 436 (Mo. App. E.D. 1996). Two other juries—twenty-four jurors in all—have unanimously voted to sentence Appellant to death, and there is nothing to suggest that this jury would have acted any differently. The jury was also instructed that arguments of counsel "are not evidence," (L.F. 638; Tr. 942), and nothing in the record suggests that it considered the prosecutor's statement as anything more than argument.

3. Future dangerousness argument.

Appellant finally complains about the prosecutor's argument asking the jurors to consider the protection of guards and other inmates:

---

conspiring with other inmates to escape from Potosi Correctional Center. (L.F. 190, 193).

> He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates.

(Tr. 969).

Although the prosecutor's comment about Appellant knowing how to escape was supported by the evidence in light of his conviction for aiding an escape, there was no evidence that the other inmates Appellant aided were "in for the rest of their lives." But, as mentioned above, the jury was instructed that argument was not evidence. Moreover, the jury was aware that if it did not sentence Appellant to death, he would be in prison for the rest of his life and that he had previously participated in an escape. It appears that the prosecutor was simply making the point that being sentenced to life in prison is not going to prevent someone from escaping.

Appellant's claim that this argument made the jurors responsible for any future murder victims is also without merit. One of the purposes of capital punishment is "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future." *State v. Bolder*, 635 S.W.2d 673 (Mo. banc 1982) (quoting *Gregg*, 428 U.S. at 183 n.28). The prosecutor's argument was not improper and certainly did not rise to the level of manifest injustice.

Appellant's reliance on *Schoels v. State*, 966 P.2d 735 (Nev. 1998), is misplaced. In that case, the court held that the prosecutor's argument suggested that the jurors themselves were responsible for the deaths of any future victims by the defendant's

hands. *Id.* at 739-40. In fact, although the court found the comment improper, it nevertheless affirmed. *Id.* Here, the prosecutor did not suggest or imply that the jurors would somehow be held responsible if Appellant murdered anyone else in the future.

V (motion to suppress).

The trial court did not abuse its discretion in overruling Appellant's motion to suppress the evidence found in his car and the statements he made to police confessing to the crimes because this claim is precluded by the law-of-the-case doctrine in that an identical claim was already rejected by this Court in Appellant's first direct appeal (*Deck I*).

Although this Court previously considered and rejected this claim in *Deck I*, Appellant nevertheless raises it again in this appeal. This claim can be quickly dispatched under the law-of-the-case doctrine. Nothing in the record suggests that this doctrine should not be applied here.

A. The record relating to the motion to suppress.

1. Appellant's first direct appeal (Case No. 80821).

Before Appellant's original 1997 trial in this case, he filed a motion to suppress both the items seized from his vehicle and his statements to police. (1st L.F. 36-42, 59-66). During the 1997 hearing on Appellant's motion to suppress, St. Louis County police officer Vince Wood testified that on July 8, 1996, he was informed by his sergeant that Jefferson County was trying to locate Appellant and his sister because it was believed that they might have been involved in a robbery and homicide. (Mot. Tr. 98-99).[13]

---

[13] The abbreviation "Mot. Tr." refers to the transcript of the hearing on Appellant's motion to suppress filed with this Court in Appellant's original direct appeal, Case No. SC80821 (*Deck I*).

Officer Wood was told to go to their residence in St. Louis County to see if he could locate them. (Mot. Tr. 99). He was also told that they might be driving a gold two-door vehicle, that a handgun might be inside the vehicle, and that he should consider them to be armed and dangerous. (Mot. Tr. 99-100).

At 11 p.m. on that date, Officer Wood, who was sitting in his marked police car preparing a log sheet near Appellant's sister's apartment, noticed a gold vehicle drive past him on the street where Appellant and his sister lived. (Mot. Tr. 100, 110-11). The vehicle drove by him without headlights or taillights on and pulled into a parking spot adjacent to the roadway about thirty feet away from where it first passed the officer.[14] (Mot. Tr. 100, 112). After Officer Wood approached the car and identified himself as a police officer, Appellant, who was driving the car, leaned over in his seat and went out of view. (Mot. Tr. 101, 115). Officer Wood told Appellant to get up and show him his hands, which he did. (Mot. Tr. 101). After the officer got Appellant out of the car, he found a handgun concealed underneath the front passenger seat. (Mot. Tr. 103). Also found in the car was a decorative tin filled with coins. (Mot. Tr. 105). Appellant was later turned over to Jefferson County Sheriff's deputies who, after giving Appellant the

---

[14] Officer Wood testified that there were parking spots on the right and left of the road that one can "just pull straight into." (Mot. Tr. 101). Officer Wood gave essentially the same testimony during the August 23, 1996 preliminary hearing when he said that he saw Appellant's car drive for approximately ten seconds and a distance of "fifteen—thirty feet" without headlights or taillights illuminated. (Prelim. Hrg. Tr. 40-41).

Miranda warnings, later questioned him; Appellant eventually made a full confession. (Mot. Tr. 105, 131-51).

On July 11, 1997, the trial court overruled Appellant's motion to suppress the evidence retrieved from his vehicle and his statements to Jefferson County Sheriff's deputies. (1st L.F. 13). An objection raised during Officer Wood's testimony at Appellant's 1998 trial was also overruled. (1st Tr. 565).

During Appellant's 1998 trial, Officer Wood testified that he saw Appellant's vehicle pass by him "without any headlights or taillights."[15] (1st Tr. 566). After seeing the car drive up to 1230 Enderbury (Appellant's sister's residence) with no headlights or taillights, the officer approached the driver's side with a flashlight. (1st Tr. 566-567, 763). As Officer Wood began to speak to Appellant, he saw Appellant turn away and lean toward the passenger's side floorboard. (1st Tr. 567). Officer Wood instructed Appellant to get out of the car. (1st Tr. 568). He searched the area Appellant had been reaching for and found a loaded pistol concealed under the seat. (1st Tr. 568-69).

Appellant was wearing a black "fanny pack" containing two hundred forty-two dollars in cash. (1st Tr. 571, 578, 673-674). The victims' decorative tin canister, containing thirty-one dollars and eighty-eight cents in change, was on the floorboard of the front passenger side of the car. (1st Tr. 572-573, 653-654, 664). After being advised of his *Miranda* rights, Appellant agreed to speak with detectives from the Jefferson

---

[15] No further testimony was elicited on the specific details regarding Appellant's driving without headlights or taillights at trial. (1st Tr. 566-76).

County Sheriff's Department. (1st Tr. 743-745). After several hours had passed and Appellant had changed his story at least twice, Appellant finally made a full confession and admitted that he had murdered the victims. (1st Tr. 748-66).

Claims related to the trial court's overruling of Appellant's motion to suppress the evidence seized from his car and the statements he made to police were raised in this Court and decided adversely to Appellant in his original direct appeal in Case No. SC80821. *See Deck I*, 994 S.W.2d at 534 ("Deck next claims that the trial court erred by overruling his motions to suppress and in admitting at trial the statements he made to the police as well as the pistol and other items seized from his car."). This Court determined that Appellant was not "seized" when Officer Wood first approached the car. *Id.* at 535. This Court noted, however, that Officer Wood could have lawfully stopped Appellant under *Terry v. Ohio* for driving without headlights in a "residential parking lot" when those facts were considered in conjunction with the information relayed to the officer that Appellant and his sister may be armed and dangerous. *Id.*

In fact, there seems to be some confusion regarding whether Appellant was driving on a public roadway when his lights were off. This confusion appears to have been created by Appellant's claim in *Deck I* that he was in a residential parking lot when Officer Wood saw him driving without lights. Even though this Court indulged that supposition in its opinion in *Deck I*, it appears that the record does not support this assertion and, in fact, suggests just the opposite.

Officer Wood testified that Appellant drove by him without his headlights or taillights on and pulled into a parking spot thirty feet away that was adjacent to the

roadway: "the roadway goes straight; there's parking spots on the right and the left to just pull straight into." (Mot. Tr. 101). He did not dispute defense counsel's description that it was a "combination of streets through the complex with parking on the street," and he likened it to a shopping center parking lot having an "aisleway with parking spots on both sides." (Mot. Tr. 112). Thus, it appears that the evidence showed that Appellant was actually driving on the roadway with his lights off as he pulled into a parking spot immediately adjacent to the road.[16]

2. Appellant's current appeal.

During the third penalty-phase retrial that is the subject of Appellant's current appeal, evidence was presented to the jury that on July 8, 1996, a detective with the Jefferson County Sheriff's Department received a call from the Arnold Police Department with information that a possible robbery and homicide may have been, or was about to be, committed in Jefferson County. (Tr. 507-08). The detective was told that Appellant and his sister, who were driving an early-80's model gold-colored car, and who resided in an apartment in St. Louis County, may be involved. (Tr. 508). The detective contacted the St. Louis County Police Department, gave them the information, and asked them to go to the apartment complex to see if they could find Appellant, his sister, or the car. (Tr. 508-09).

---

[16] During the second retrial of Appellant's penalty-phase proceeding, Officer Wood testified that "the vehicle turned off its headlights and then pulled into a parking spot." (2nd Tr. 290).

When a photograph of the decorative tin belonging to the victims was offered into evidence during the testimony of one of the victims' children, Appellant objected: "[W]hat I'd like to do is make the record clear that there was a Motion to Suppress evidence that was filed with the case, and I'd ask the Court to re-visit its ruling." (Tr. 491-92). The court overruled the objection because the "previous" motion to suppress—presumably the one filed before the original 1997 trial—had been overruled and that this ruling had been affirmed in the first appeal.[17] (Tr. 492). Appellant also renewed the motion to suppress evidence immediately before Officer Wood testified during the penalty-phase retrial. (Tr. 545).

Officer Wood testified at this retrial, and he again described how he had received information from his sergeant to go to an apartment complex in St. Louis County to see if he could find Appellant or the gold-colored Oldsmobile he may be driving. (Tr. 547-48). Officer Wood was told Appellant was being sought related to a possible robbery and homicide that may have been committed. (Tr. 547). Although Officer Wood's testimony was substantially the same as he had given previously, he did state that he saw Appellant turn out his lights as he passed by the officer's marked police car, (Tr. 548), and before Appellant pulled into the parking space:

> Q. And you mentioned being there about 11:00, 11:15 and stationery, how long do you think you had to wait before that vehicle actually showed up?

---

[17] It does not appear that Appellant filed another motion to suppress before this retrial, but that he was relying on, and renewing, the motion filed before his 1997 trial.

A. Wasn't very long. It was 12 years ago, but it was within ten minutes, the vehicle showed up.

Q. And can you—you were sitting there—can you tell us where—which direction the vehicle was coming from?

A. The vehicle came off of Lemay Ferry Road and was traveling east on Enderbury. When you come into Enderbury, it hooks a U-turn and goes back around to the west. And I was sitting kind of here, it came right at me, turned past me, and then went up and pulled into a parking spot.

Q. As that vehicle pulled in and turned in that manner, was there something unusual about the vehicle for nighttime driving?

A. Yes, sir; it was after dark, and once the vehicle passed me, before it turned into the parking spot, it turned off its headlights and then pulled into a parking spot.

Q. So it had its lights on initially, but turned them off before it parked?

A. That's correct.

(Tr. 549-50). Later, Officer Wood stated that as he and his partner "pulled behind it [Appellant's car], it turned off the lights, turned into a spot, and we just stopped to the rear of it." (Tr. 551).

During cross-examination, Officer Wood testified that Appellant turned the lights out on his car as he passed the officer's marked patrol car:

Q. Did—with your position there, it sounds like you had your headlights off?

A. Correct.

Q. But still a marked police car?

A. Correct.

Q. This gold Oldsmobile passes your car?

A. Um-hum.

Q. And when this gold Oldsmobile passes your car, it has its lights on at that point?

A. Correct.

Q. But as it passes your car, and as it's pulling into the parking spot, that's when it turns off the headlights?

A. Before coming to a complete stop, yes.

(Tr. 569).

Officer Wood testified that he approached Appellant's vehicle, which was 20 to 30 feet away from him, on foot and shined his flashlight at the driver's side door. (Tr. 551-53). Appellant turned and looked at Officer Wood and then "leaned across the front floorboard of the vehicle." (Tr. 553). Concerned that Appellant may be reaching for a weapon, Officer Wood yelled at Appellant to show his hands, which he did. (Tr. 553-54). After getting Appellant out of the car, Officer Wood searched Appellant and the interior of the car for weapons. (Tr. 554-58). This search led to the discovery of the murder weapon, a .22 caliber handgun, which was on the passenger-side floorboard. (Tr. 558). A further search of the car and Appellant after he was arrested led to the discovery of the decorative tin taken from the victims' home and the large amount of cash Appellant was carrying. (Tr. 559-61). After his arrest, Appellant was turned over to

Jefferson County deputies, to whom he later made a full confession as described above.[18] (Tr. 629-54; State's Exhibits 53, 54).

B. Standard of review.

The trial court is vested with broad discretion to admit and exclude evidence at trial, and error will be found only if this discretion was clearly abused. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

"When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence." *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The appellate court views the facts and any reasonable inferences from the evidence in the light most favorable to the ruling of the trial court and disregards any contrary inferences. *State v. Lewis*, 17 S.W.3d 168, 170 (Mo. App. E.D. 2000).

---

[18] Appellant objected on the grounds raised in the motion to suppress his statements to police immediately before the testimony of the officer to whom Appellant confessed and gave a recorded confession and before the playing of that recorded confession to the jury. (Tr. 628-54).

C. This claim was rejected by this Court in an earlier appeal.

"The doctrine of law of the case governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to later proceedings in that case." *State v. Johnson*, 22 S.W.3d 183, 189 (Mo. banc 2000); *see also State v. Johnson*, 244 S.W.3d 144, 163 (Mo. banc 2008) (holding that the law-of-the-case doctrine, which governs "successive appeals, states that the same issues may not be relitigated in a subsequent appeal as the previous holding on those issues becomes the law of the case"). "A previous holding is the law of the case, precluding re-litigation of issues on remand and subsequent appeal." *Id.*; *see also State v. Graham*, 13 S.W.3d 290, 293 (Mo. banc 2000) (holding that the law-of-the-case doctrine applied to preclude a claim on appeal even when that claim had previously been decided incorrectly by another appellate court). "[T]he decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not." *Graham*, 13 S.W.3d at 293 (quoting *Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999)) (alteration in original); *see also Johnson*, 22 S.W.3d at 189. "The law of the case doctrine prevents successive direct appeals not authorized by statute." *Graham*, 13 S.W.3d at 293. But "[a]ppellate courts have discretion not to apply the doctrine where there is a mistake, a manifest injustice, or an intervening change of law." *Id.* Only when "the issues or evidence on remand are substantially different from those vital to the first adjudication and judgment," will an appellate court consider not applying the doctrine. *Walton v. City of Berkeley*, 223 S.W.3d 126, 130 (Mo. banc 2007).

Appellant's claim here is simply a regurgitation of the claim he made during his first direct appeal and should be summarily rejected under the law-of-the-case doctrine. Moreover, Appellant has failed to make any showing that the evidence on remand was "substantially" different or that a mistake resulting in manifest injustice occurred during his first direct appeal in which this issue was decided. At most, the record shows only a slight, legally insignificant, discrepancy between Officer Wood's testimony at the third penalty-phase retrial and his trial testimony twelve years ago.

During Appellant's original trial, Officer Wood testified that Appellant's headlights and taillights were off when he drove by him. At this retrial, Officer Wood testified that Appellant turned his lights off as he drove by and before he pulled into the parking space. This discrepancy in details, not surprising considering that more than a decade has passed since the incident occurred and the witness testified in the first trial, is legally insignificant because in both instances the testimony shows that Appellant was driving without his lights on, which this Court held in *Deck I* would have justified a stop of the vehicle. In fact, Appellant's act of turning his lights off as he passed the officer's car is arguably more suspicious than not having had them on at all.

In any event, in *Deck I* this Court did not rest its ruling on the fact that Appellant drove without headlights because the officer did not seize Appellant for this traffic offense, though he could have. *Deck I*, 994 S.W.2d at 535. The Court found there was reasonable suspicion to stop Appellant apart from the driving offense based on Appellant driving late at night without his headlights coupled with the information the officer had received about Appellant possibly being involved in a robbery and homicide. *Id.*

Whether Appellant's headlights were off before he passed by the officer, or whether he turned them off as he went by, does not affect this Court's analysis and resolution of this claim in *Deck I*.

This is not the first time that a capital defendant involved in a retrial of his penalty-phase proceeding has attempted to relitigate in this Court claims that had been raised and decided adversely to him in a previous appeal in the same case. In the 2008 *Johnson* case, after the third retrial of his penalty-phase proceeding, a capital defendant raised a claim on appeal in this Court that this Court's method of proportionality review in capital cases violated the law. *See Johnson*, 244 S.W.3d at 163. But because the defendant had raised this same claim before this Court and had it rejected during the 2003 appeal from his second penalty-phase retrial, this Court held that the law-of-the-case doctrine precluded the defendant from raising it again in the pending appeal. *Id.*; *see also Johnson*, 22 S.W.3d at 193.

Ironically, in the 2003 *Johnson* case, this Court applied the law-of-the-case doctrine to the same defendant with respect to a different claim. *See Johnson*, 22 S.W.3d at 189. On appeal from the second retrial of his penalty-phase proceeding, the defendant claimed that Missouri's method of execution violated the Eighth Amendment. *See Johnson*, 22 S.W.3d at 189. This Court held that the law-of-the-case doctrine precluded consideration of this claim in the defendant's second appeal because this issue had been ruled on by the trial court during the defendant's original trial, and the defendant had chosen not to appeal that ruling in his first appeal. *Id.*

The law-of-the-case doctrine should presumptively apply in cases involving the retrial of a capital defendant's penalty-phase proceeding. In the retrial of a penalty-phase proceeding, the jurors will not have "participated in the guilt-phase proceeding, in which evidence of the crime . . . had been admitted into evidence." *Johnson*, 244 S.W.3d at 161. All they know is that the defendant had been convicted of murder, "and it was their responsibility to determine punishment." *Id.* "Normally, jurors would have already seen evidence about his crime from the guilt-phase proceeding." *Id.* "However, since this was a retrial of the penalty-phase proceeding, the jury had no prior opportunity to see any prior evidence." *Id.* "During the retrial of the penalty-phase proceeding, the State had the burden of proving the statutory aggravating circumstances that were alleged in the [defendant's] case."

If capital defendants who are appealing the retrial of their penalty-phase proceedings are permitted to routinely re-litigate guilt-phase issues that were previously raised, or could have been raised, during the original direct appeal, no issue can ever be considered finally decided. It certainly makes no sense for these defendants to attempt to prevent a later penalty-phase jury from hearing evidence that this Court previously determined was properly before a guilt-phase jury, which relied on it in finding that defendant guilty of murder. Permitting these defendants to parse the record and to present evidence and testimony solely to challenge previously decided guilt-phase claims would make a mockery of the judicial process. A penalty-phase jury should be permitted to view any and all evidence that was properly before the guilt-phase jury that decided the defendant's guilt.

Even if Appellant could show that he was illegally seized by the officer after he had parked his car, his confession to police would not be subject to suppression. It was admissible because it was not the result of the illegal arrest in that the causal chain between Appellant's arrest and his subsequent statements was broken by intervening events and his statements were "sufficiently an act of free will to purge the primary taint." *Brown v. Illinois*, 422 U.S. 590 (1975). "Whether a confession is a product of free will is a question to be determined on the facts of each case." *State v. Kilgore*, 771 S.W.2d 57, 61 (Mo. banc 1989). "Factors to be considered in making this determination are: (1) the issuance of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct." *Id*.

Regarding the temporal proximity factor, in *State v. Reynolds*, 619 S.W.2d 741, 747 (Mo. 1981), several hours were deemed to be sufficient, and in *Rawlings v. Kentucky*, 448 U.S. 98, 107 (1980), as little as forty-five minutes were sufficient to purge the taint of an unlawful arrest. Appellant's confession was obtained after repeated Miranda warnings well over twelve hours after his allegedly illegal arrest and after he had given at least two false statements in between. This coupled with the other circumstances surrounding his arrest and confession, would not render Appellant's statements to police subject to suppression.

VI (failure to read instruction).

The trial court did not plainly err in failing to read MAI-CR 3d 300.03A before death-qualification voir dire because this oversight did not result in manifest injustice in that the veniremembers were otherwise given the information contained in the instruction before any questioning began.

The trial court failed to read MAI-CR 3d 300.03A, an instruction containing introductory information that should be read before death-qualification voir dire, in this case. Although this oversight, to which Appellant failed to object, may be technically erroneous, Appellant has failed to show that he suffered manifest injustice because the information that would have been conveyed to the veniremembers by this instruction was otherwise told them before questioning began.

A. The record regarding this claim.

Immediately after the jury panel was sworn, the trial court read the opening instruction to the panel, part of which stated:

> The Court instructs you that, in order to consider the death penalty, you must find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the State.

(Tr. 93; L.F. 588). Later during jury selection, Appellant's attorney told the panel that "this is a capital case" and that the panel members would be asked about the "issue specifically of life in prison without the possibility of parole or the alternative, the death penalty." (Tr. 203). He also informed the panel that they would "talk about the issue of

the death penalty and . . . life in prison without parole." (Tr. 239). After general voir dire, the court told the jury panel that the attorneys would question them in groups of 12 about their "attitudes regarding the punishments that are available in this case." (Tr. 241).

Before death-qualification voir dire began with the smaller groups, the trial court failed to read the introductory instruction contained in MAI-CR 3d 300.03A as required by the supplemental notes on use to MAI-CR 3d 313.00. (Tr. 260, 305, 369, 406). Instead the court told the panels that the attorneys would ask them questions regarding their views about the punishments available in this case. (Tr. 260, 305, 369, 406).

When each panel was questioned, its members were told by the attorneys that a person must have been convicted of first-degree murder before a death sentence can be considered, that Appellant had previously been convicted of two counts of first-degree murder, and that the only available sentences were death and life imprisonment without parole. (Tr. 262, 266-67, 287, 306-07, 337, 371-72, 392-94, 407-08, 429, 442). The members were told that the purpose of the questioning was to determine whether each venirmember could realistically consider both punishments. (Tr. 268, 287-88, 313-14, 337, 339, 377-78, 393, 407, 414). The panels were also told that before a death sentence can be considered: (1) the State must first prove at least one statutory aggravating circumstance beyond a reasonable doubt, which the jury must unanimously agree on; (2) the jury must then also determine whether the aggravating circumstances as a whole justify a death sentence; and (3) the jurors must also conclude that the aggravating circumstances outweigh any mitigating circumstances. (Tr. 262-67, 306-12, 339-43, 372-

78, 400-01, 408-14). Each panel was also told that a juror is never required to vote for death, and that the failure to unanimously make the required findings automatically requires a verdict of life imprisonment without parole. (Tr. 262, 266, 306, 342-43, 347, 349, 352-53, 370, 407, 419, 431, 436). Finally, phrases unfamiliar to lay people embodied in these concepts, including statutory aggravating circumstances and mitigating circumstances, were explained to the panel members in easy-to-understand language. (Tr. 261-68, 306-13, 369-78, 406-14, 433-34).

B. Standard of review.

Since Appellant did not object when the trial court failed to read the introductory instruction contained in MAI-CR 3d 300.03 at the beginning of death-qualification voir dire, this issue has not been preserved for appeal and can only be reviewed for plain error. *See Johnson*, 244 S.W.3d at 162. "Plain error requires a finding that the trial court's error resulted in manifest injustice or miscarriage of justice." *Id.* "To prove that an instructional error rose to the level of plain error, [Appellant] must demonstrate that the trial court so misdirected the jury that it is apparent that the instructional error affected the jury's verdict." *Id.*

C. Appellant suffered no manifest injustice.

Before death-qualification voir dire during the retrial of the penalty phase in a capital case, the instruction contained in MAI-CR 3d 300.03A must be read to the jury panel. *See* MAI-CR 3d 313.00, Supp. Notes on Use 6(a)(1)(b). That instruction provides:

At this stage of the jury selection process, the attorneys are permitted to question you concerning your views on punishment. Nothing that is said by the attorneys or by another prospective juror during this process is evidence, and you should not let any such statements influence you in any way.

The possible punishments for the offense of murder in the first degree are imprisonment for life by the Department of Corrections without eligibility for probation or parole, or death. The purpose of this questioning is to discover whether or not you are able to consider both of these punishments as possible punishments.

The Court will instruct the jury as to the process it must follow to reach its decision on punishment. For present purposes, you should be aware that a conviction of murder in the first degree does not automatically make the defendant eligible for the death penalty. Before the jury may consider imposing the death penalty, it may be asked to consider whether or not the defendant is mentally retarded. If the jury unanimously finds that it is more likely to be true than not true that the defendant is mentally retarded, the defendant cannot be sentenced to death.

Before the jury may consider imposing the death penalty, it must also find, unanimously and beyond a reasonable doubt, that the evidence before it establishes the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance. If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death.

> If the jury does find at least one statutory aggravating circumstance, it still cannot return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment, taken as a whole, warrants the death penalty, and that this evidence is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death.
>
> Counsel for the State may proceed.

MAI-CR 3d 300.03A.[19]

Arguably, the only circumstance covered by this instruction that the jury was not informed about was the fact that if a jury finds by a preponderance of the evidence that a defendant is mentally retarded, it may not sentence him to death. But since that was not an issue in this case, Appellant can show no prejudice from this omission. In nearly all other respects, the information contained in the instruction was conveyed to the jury by the attorneys or the court before death-qualification voir dire began. Appellant does not specifically articulate how the failure to read this introductory instruction before jury selection misdirected the jury in his case, especially since the jury received far more detailed instructions about the process it must engage in determining Appellant's

---

[19] This instruction is contained in an Appendix to Chapter 313 of MAI-CR 3d. The instruction in that appendix includes crossed-out language indicating that it has been deleted from the instruction. Although that crossed-out language has not been reproduced in this portion of the brief, the appendix to this brief contains a complete copy of this instruction.

sentence. He also does not explain how the failure to read the instruction prejudiced him during death-qualification voir dire. He simply complains that the instruction was not read.

In other cases, including one of Appellant's previous appeals, this Court has held that the failure of a court to read a mandatory instruction did not result in plain error if the jury is otherwise informed of the information conveyed by the instruction. *See, e.g.*, *Deck III* (failure to read recess instruction required under MAI-CR 3d on several occasions did not rise to the level of plain error); *Williams*, 97 S.W.3d at 472 (failure to give the jury a written instruction on notetaking, "though technically erroneous" as violating MAI-CR 3d, was not plain error because the court read the instruction to the jury). *See also State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003) (although trial court's refusal to give no-adverse-inference instruction during penalty-phase of a capital case constituted instructional error, it was harmless under the facts of that case). Appellant has failed to carry his burden of proving that he suffered manifest injustice by the trial court's failure to read the introductory instruction before death-qualification voir dire.

VII (instructions—burden shifting).

The trial court did not err in giving the mandatory instructions required under MAI-CR 3d 313.44A because those instructions were presumptively valid, they did not impermissibly shift the burden of proof to the defendant, this Court has rejected identical claims in previous cases, and these are claims that Appellant raised and this Court rejected, or are claims he could have raised, in a previous appeal (*Deck III*) and, as such, they are barred by the law-of-the-case doctrine.

A. The record regarding the instructions.

During the instructions conference, Appellant objected to Instructions 8 and 13—identical instructions except that No. 8 referred to Count I and No. 13 referred to Count II—on the ground that these instructions impermissibly shifted the burden of proof to the defendant with respect to mitigating evidence. (Tr. 906-08). These instructions, which were patterned after MAI-CR 3d 313.44A, tell the jury that if it has found that the facts and circumstances in aggravation of punishment taken as a whole warrant a death sentence, it must then determine if there are facts or circumstances in mitigation of punishment sufficient to outweigh those in aggravation of punishment. (L.F. 600, 608).[20] It then instructs jurors that they do not have to agree on mitigating facts, but that if each

[20] The legal file contains two identical sets of instructions. The first set (L.F. 591-614) contains the "dirty" copies that include the MAI-CR 3d reference. The second set (L.F. 615-38) contains the copies that were submitted to the jury.

juror determines that the mitigating evidence outweighs the aggravating evidence, the jury must return a sentence of life without parole. (L.F. 600, 608).

B. Standard of review.

This Court will reverse on a claim of instructional error "only if there is error in submitting an instruction and prejudice to the defendant." *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005).

C. This argument has been previously rejected.

The instructions about which Appellant complains were patterned after MAI-CR 3d 313.44A, and as such are presumptively valid under Rule 28.02(c). *See Zink*, 181 S.W.3d at 74 ("MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions."); *see also State v. Ervin*, 979 S.W.2d 149, 158 (Mo. banc 1998). As Appellant concedes in his brief, this Court has previously addressed the claim Appellant raises here and has rejected it. *See State v. Johnson*, 284 S.W.3d 561, 587-88 (Mo. banc 2009) ("Appellant's argument that the instruction improperly shifts the burden of proof has been rejected by the United States Supreme Court and this Court."); *see also State v. Forrest*, 183 S.W.3d 218, 228-29 (Mo. banc 2006); *Zink*, 181 S.W.3d at 74; *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004). Appellant offers no reason why this Court should reconsider its holding in those cases, and raises this claim simply to preserve it for federal review. App. Br. 118-21.

Moreover, Appellant challenged the constitutionality of these penalty-phase instructions in *Deck III*. *See Deck III*, 136 S.W.3d at 486. To the extent that he is raising

the same claims in this appeal, they are barred by the law-of-the-case doctrine. *Johnson*, 22 S.W.3d at 189. To the extent that he is raising new claims, they are also barred by that doctrine since they could have been raised, but were not, in *Deck III*. *Graham*, 13 S.W.3d at 293.

VIII (instructions—burden of proof).

The trial court did not err in giving the mandatory instructions required under MAI-CR 3d 313.30A, 313.41A, and 313.44A because those instructions were presumptively valid, this Court has rejected identical claims in previous cases, and these are claims that Appellant raised and this Court rejected, or are claims he could have raised, in a previous appeal (*Deck III*) and, as such, they are barred by the law-of-the-case doctrine

A. The record regarding the instructions.

During the instructions conference, Appellant objected to Instruction Nos. 3, 7, 8, 12, and 13.[21] (Tr. 901-02, 905-09). The first of these instructions (Instruction No. 3) is patterned after MAI-CR 3d 313.30A, and instructs the jury that the burden is on the State to prove statutory aggravating circumstances beyond a reasonable doubt. (L.F. 594). The next instruction (Instruction Nos. 7 and 12—one for each count), patterned after MAI-CR 3d 313.41A, tells the jury that if it has determined that one or more aggravating circumstances exist, it is to next consider whether the facts and circumstances in aggravation of punishment taken as a whole are sufficient to warrant imposition of a sentence of death. (L.F. 599, 607). If the jury is unable to unanimously find that they do, it is instructed to return a verdict of life imprisonment. (L.F. 599, 607). Finally, Instruction Nos. 8 and 13, patterned after MAI-CR 3d 313.44A, tell the jury that if it has

[21] Appellant's challenge to Instructions Nos. 8 and 13 formed the basis for his claim raised in Point VII.

found that the facts and circumstances in aggravation of punishment taken as a whole warrant a death sentence, it must then determine if there are facts or circumstances in mitigation of punishment sufficient to outweigh those in aggravation of punishment. (L.F. 600, 608). It then instructs jurors that they do not have to agree on mitigating facts, but that if each juror determines that the mitigating evidence outweighs the aggravating evidence, the jury must return a sentence of life without parole. (L.F. 600, 608).

B. Standard of review.

This Court will reverse on a claim of instructional error "only if there is error in submitting an instruction and prejudice to the defendant." *Zink*, 181 S.W.3d at 74.

C. This argument has been previously rejected.

The instructions about which Appellant complains were patterned after MAI-CR 3d 313.30A, 313.41A, and 313.44A, and as such are presumptively valid under Rule 28.02(c). *See Zink*, 181 S.W.3d at 74 ("MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions."); *see also State v. Ervin*, 979 S.W.2d 149, 158 (Mo. banc 1998). As Appellant concedes in his brief, this Court has previously addressed the claim Appellant raises here and has rejected it. *See State v. Johnson*, 207 S.W.3d 24, 47 (Mo. banc 2006); *State v. Forrest*, 183 S.W.3d 218, 228-29 (Mo. banc 2006); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004); *see also Johnson*, 284 S.W.3d at 584-85 (holding that reasonable doubt standard does not apply to mitigating evidence, or non-statutory aggravating factors and that under *Ring* and *Apprendi* only evidence functionally equivalent to an element, including statutory aggravating circumstances,

must be found beyond a reasonable doubt). Appellant offers no reason why this Court should reconsider its holding in those cases, and raises this claim simply to preserve it for federal review. App Br. 122-26

Moreover, Appellant challenged the constitutionality of these penalty-phase instructions in *Deck III*. *See Deck III*, 136 S.W.3d at 486. To the extent that he is raising the same claims in this appeal, they are barred by the law-of-the-case doctrine. *Johnson*, 22 S.W.3d at 189. To the extent that he is raising new claims, they are also barred by that doctrine since they could have been raised, but were not, in *Deck III*. *See Graham*, 13 S.W.3d at 293.

IX (aggravators not charged).

The trial court did not err in overruling Appellant's Motion to Quash the Information and the court did not exceed its jurisdiction in sentencing Appellant to death because the State is not required to plead the statutory aggravating circumstances or any other facts on which it intends to rely under § 565.030.4(1), (2), or (3), RSMo 2000, in the Information in that: (1) this claim has been repeatedly rejected by this Court, including in one of Appellant's previous appeals; and (2) Appellant received pretrial notice of these circumstances according to § 565.005, RSMo 2000.

Although the State's amended information in this case did not charge which statutory aggravating circumstances the State intended to prove, (L.F. 62-65), the State provided written notice to Appellant of the statutory aggravating circumstances it would seek to prove during the penalty phase, (L.F. 65-66). Before trial, Appellant filed a motion to quash the information, to require the State to include the statutory aggravating circumstances in the information, or to preclude the State from seeking the death penalty on the ground that the Constitution required the statutory aggravating circumstances to be included in the indictment or information. (L.F. 334-56). The trial court overruled this motion. (Tr. 87-89). Appellant raises this claim here solely to preserve it for federal review. App. Br. 127.

Appellant raised an identical claim in *Deck III*, which this Court rejected. *See Deck III*, 136 S.W.3d at 490 ("Appellant finally argues that the trial court lacked . . . authority to sentence Appellant because the state failed to charge him with

'aggravated first-degree murder.'"). In *Deck III*, this Court observed that it had "addressed this claim numerous times before," and rejected it again. *Id.* This Court has rejected this same claim several more times since then. *See Johnson*, 284 S.W.3d at 589; *State v. Baumruk*, 280 S.W.3d 600, 618 (Mo. banc 2009); *Zink*, 181 S.W.3d at 74-75. Consequently, not only is Appellant's claim barred by the law-of-the-case doctrine, *Johnson*, 22 S.W.3d at 189; *Graham*, 13 S.W.3d at 293, it has also been rejected repeatedly and consistently in numerous previous cases decided by this Court. Appellant offers no compelling reason why this Court should depart from these prior holdings.

X (proportionality review).

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

This appeal is from Appellant's third penalty-phase proceeding, and three separate juries—thirty-six jurors in all—viewing essentially the same evidence have unanimously concluded that death is the appropriate sentence for Appellant's crimes. Twice before this Court has determined that: (1) Appellant's death sentences were not a product of passion, prejudice, or other arbitrary factor; (2) that the statutory aggravating circumstances found by each jury (and the same 6 aggravators were found by all three juries) were supported by the record; and, (3) that imposition of the death penalty in Appellant's case, which involved the execution-style murder of an elderly couple after a home-invasion robbery, was not excessive or disproportionate. *See Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 489-90.

Under the mandatory review procedure contained in § 565.035.3, RSMo 2000, this Court must determine:

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

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

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

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

Nothing in the record suggests that Appellant's sentence was imposed under the influence of prejudice, passion, or any other improper factor.

As mentioned above, in Appellant's previous appeals this Court found that Appellant's death sentences were not excessive or disproportionate. The juries in his previous cases found the same six statutory aggravating circumstances for each murder that the jury in this case found:

1. Each murder was committed while the defendant was engaged in the commission of another unlawful homicide, § 565.032.2(2).

2. The murders were committed for the purpose of receiving money or any other thing of monetary value, § 565.032.2(4).

3. The murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, § 565.032.2(7).

4. The murders were committed for the purpose of avoiding a lawful arrest, § 565.032.2(10).

5. The murders were committed while defendant was engaged in the perpetration of burglary, § 565.032.2(11).

6. The murders were committed while defendant was engaged in the perpetration of robbery, § 565.032.2(11).

(L.F. 30, 38, 673, 674). *See Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 489-90. In both previous appeals, this Court held that from its review of the record, the evidence "amply supports the statutory aggravators found by the jury." *Id.* Since the retrial of the penalty phase in this case involves virtually the same evidence as the first two cases, this Court's previous holdings should control.

Moreover, in Appellant's previous appeals this Court held that the previous four death sentences were not excessive or disproportionate. *See Deck I*, 994 S.W.2d at 545 ("[I]mposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor); *Deck III*, 136 S.W.3d at 490 ("The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant."). Both of this Court's previous opinions then cite numerous Missouri cases similar to Appellant's in which the death penalty was imposed when "the defendant murdered multiple victims, acted for pecuniary gain, or when the defendant sought to eliminate possible witnesses to avoid a lawful arrest." *Deck III*, 136 S.W.3d at 490; *see also Deck I*, 994 S.W.2d at 545.

The mitigating evidence Appellant offered during this third penalty-phase retrial was nearly identical to that offered in his previous cases. The same witnesses who testified during the first two penalty-phase proceedings (Bev Dulinsky, Major Puckett, and Michael Deck) testified during this retrial. (Tr. 854, 874, 876; 2nd Tr. 454-532; 1st Tr. 878-922). Their testimony, again similar to that presented at the first trial, was that Appellant had a difficult childhood. Also, during this retrial Appellant called a family member (Mary Banks) who had not testified previously and told the jury about Appellant's bad childhood. (Tr. 874). In addition to the child psychiatrist (Eleatha Surratt) who testified during Appellant's second penalty-phase retrial, (Tr. 797-850; 2nd Tr. 466-525), Appellant called a child-development expert (Wanda Draper) during this penalty-phase retrial, (Tr. 721-96).

The child psychiatrist and child-development expert, both of whom mainly offered hearsay testimony concerning events in Appellant's childhood, simply testified that in their opinions Appellant's childhood experiences had an adverse effect on his development. (Tr. 725-70; 800-27). The developmental expert flatly stated, however, that she was not offering any excuses for Appellant's behavior, that Appellant knew right from wrong, that he had the intelligence to follow rules, and that his commission of these crimes was by choice. (Tr. 782-84). Similarly, the child psychiatrist testified that Appellant's childhood did not cause him to commit these crimes, that he knew right from

wrong when he did so, and that he had the ability to get a job and make a living.[22] (Tr. 832-34, 847). These witnesses also conceded that similar experiences were shared by Appellant's siblings, including his brother, Michael Deck, who joined the military and later became a police officer for St. Louis City. (Tr. 784-85, 822-23).

A bad or difficult childhood is not sufficient grounds on which to set aside a death penalty, especially in a case as heinous as this one. *See State v. Brooks*, 960 S.W.2d 479, 503 (Mo. banc 1997) (refusing to find death sentence disproportionate on the ground that the defendant had an "extremely difficult childhood").

Appellant, relying on *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982), claims that his sentence is disproportionate because he confessed to the crimes. In *McIlvoy*, this Court set aside a death sentence in which the defendant was merely a "follower" in a murder scheme in which the primary perpetrator received only a life sentence. *Id.* at 341-42. Other factors contributing to this Court's decision were that the defendant had a minimal juvenile record, limited education and intelligence, and an alcohol problem. *Id.* This Court also noted that the defendant initiated a telephone call to St. Louis police from Dallas, where he had fled, to voluntarily turn himself in and then "patiently waited" in Dallas for the St. Louis police to pick him up. *Id.* But this alone was not a factor in setting aside the death sentence, instead it was more proof that the defendant was a "weakling and follower" in executing the murder scheme. *Id.*

---

[22] Other testimony from this witness showed that, in fact, Appellant went to college for awhile and even started his own business. (Tr. 783).

McIlvoy does not apply to Appellant's case. Here, Appellant was the obvious ringleader and the one who pulled the trigger. Moreover, Appellant did not turn himself in and confess his crimes. He was arrested after he was seen driving with his lights off trying to return to his sister's apartment. (Tr. 547-50). Back at the police station, Appellant at first said he had been in Jefferson County with his sister looking for cars to buy. (Tr. 631-32). Three hours later, Appellant changed his story and said that he had followed his mother's boyfriend, Jim Boliek, to Jefferson County and that Boliek had left him for fifteen minutes and when Boliek returned he handed Appellant the decorative tin and the pistol police found in Appellant's car. (Tr. 634-36). Appellant even wrote out a false statement attesting to this story. (Tr. 638-40). After being informed that Boliek had an alibi, Appellant finally confessed to shooting the Longs. (Tr. 641-51). This behavior can hardly be described as mitigating, and it certainly forms no basis for finding Appellant's sentences disproportionate.

Appellant also claims that this Court's proportionality review is fatally flawed because it considers only cases in which death was imposed and not all factually similar cases. These claims have been repeatedly rejected. *See Johnson*, 207 S.W.3d at 24; *Smith*, 32 S.W.3d at 558; *Rousan*, 961 S.W.2d at 854-55; *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998).

The Eighth Amendment's prohibition on cruel and unusual punishment does not require this Court to conduct a de novo review of the punishment imposed in this case because "proportionality review is not constitutionally mandated." *Morrow v. State*, 21

S.W.3d 819, 829 (Mo. banc 2000); *Murray v. Delo*, 34 F.3d 1367, 1377 (8th Cir. 1994); *Pulley v. Harris*, 465 U.S. 37 (1984).

This Court conducts proportionality review that utilizes de novo analysis when appropriate while at the same time giving proper deference to the facts supporting the conclusions made by juries and trial courts. In passing § 565.035, the legislature did not intend for this Court to ignore the findings made the jury and its recommendation as to punishment and to instead allow this Court to impose sentence as if it had been the trier of fact. This Court's proportionality review was "designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences." *Ramsey*, 864 S.W.2d at 328. Under this scheme, the trial court is the final sentencer. *State v. Feltrop*, 803 S.W.2d 1, 15 (Mo. banc 1991), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885, 888 n.7 (Mo. banc 2008). This Court simply reviews the sentence and, while giving due deference to the conclusions reached below, determines whether the sentence is disproportionate as a matter of law.

Even if the Eighth Amendment proportionality cases did apply, it would not assist Appellant because those cases do not authorize an appellate court to discard a sentence that it would not impose if it were the sentencer:

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of

> the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Solem v. Helm, 463 U.S. 277, 290 n.16 (1983).

In conducting such a review, the factual findings made by trial courts are accepted unless they are clearly erroneous, and the question of whether the sentence violates the Constitution is one of law, which is reviewed de novo. *Cooper Indus., Inc. v. Leatherman Toolgroup, Inc.*, 532 U.S. 424, 435 (2001); *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998). This same rule is consistently applied by appellate courts in other contexts. Facts are found by the lower court, while the appellate court determines the legal issues as a matter of law. *See State v. Goff*, 129 S.W.3d 857, 862 (Mo. banc 2004) (under Fourth Amendment analysis this Court conducts de novo review on legal issues but defers to trial court's factual findings).

The death sentences given Appellant in this case were neither excessive nor disproportionate to other similar cases.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's sentences should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

_____

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 27,045 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 9th day of October, 2009, to:

Rosemary E. Percival
920 Main Street, Suite 500
Kansas City, Missouri 64105

_____

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI