IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC89833**
	)	
BRIAN J. DORSEY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
13th JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S REPLY BRIEF

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INSTRUCTIONS

JURISDICTIONAL STATEMENT

The jurisdictional statement from the opening brief is incorporated by reference.

STATEMENT OF FACTS

The Statement of Facts in the opening brief is incorporated by reference.

POINTS RELIED ON

I. Brian's Sentences Are Disproportionate

The trial court erred in accepting the jury's death verdicts and in sentencing Brian to death, and this Court, in the exercise of its independent proportionality review, under §565.035 RSMo, should reduce Brian's sentences to life imprisonment with no opportunity for probation or parole, because Missouri's death penalty scheme, both facially and as applied, denies due process, fundamental fairness and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that Brian has consistently acknowledged his culpability for the offenses and has consistently expressed his heartfelt remorse for his actions; the evidence was insufficient to support one of the statutory aggravators submitted and found on Count II and the State submitted and the jury found duplicative statutory aggravators on both Counts; the jury was misinstructed and allowed to reach its sentencing decision by combining its consideration of both Counts and was misinstructed as to the burden of proof; the evidence and argument, including the State's photographic exhibits and the State's closing arguments, reveal that Brian's sentences were imposed because of passion, prejudice and other arbitrary factors; and, a review of cases in which the defendant has been highly intoxicated while killing two people reveals that a life sentence has been deemed appropriate and that the death sentences in this case are excessive and disproportionate. Should this Court fail to

consider all similar cases, including those in which the defendant has been sentenced to life without parole, due process and the Eighth Amendment will be violated, rendering the imposition of the death penalty arbitrary and capricious.

State v. McIlvoy, 629 S.W.2d 333 (Mo.banc 1982);

State v. Little, 861 S.W.2d 729 (Mo.App.,E.D. 1993);

State v. Beishline, 926 S.W.2d 501 (Mo.App.,W.D. 1996);

State v. DeLong, Greene County Case No. 31199CR0001

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

Mo.Const.,Art.I,§§10,18,21.

II. Instruction 10 Combines Both Counts for Final Step

The trial court plainly erred in submitting Instruction 10 to the jury and then accepting the jury's death verdicts on both counts because these actions denied Brian's rights to due process, a properly-instructed jury, a fundamentally fair trial, and freedom from cruel and unusual punishment, U.S.Const., Amends.VI,VIII,XIV; Mo.Const.,Art.I, §§10, 18(a), 21, in that Instruction 10, patterned after MAI-CR3d 314.46, told the jury that "As to Count I and Count II," while they were not compelled to fix death as the punishment, they were to consider "all the evidence in deciding whether to assess and declare the punishment at death." The instruction told the jury to consider the evidence as to *both* counts in deciding the punishment on each and thus allowed the jury to sentence Brian to death on each count based on evidence applicable to the other count. This destroyed the channeled discretion guaranteed by Missouri's death penalty statute and instructions.

State v. Cooey, 544 N.E.2d 895 (Ohio 1989);

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

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

Mo.Const.,Art.I,§§10,18(a),21.

III. Rape Statutory Aggravator Lacks Evidentiary Support

The trial court plainly erred in submitting Instruction 8, accepting the jury's death verdict on Count II, and sentencing Brian to death on that Count because those actions denied Brian due process, a properly-instructed jury, a fundamentally fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that the State presented no evidence that any sexual assault of Sarah Bonnie occurred before her death, and the State conceded that no such evidence existed. Since there was no evidence that any action in furtherance of a sexual assault occurred before her death, the State failed to prove beyond a reasonable doubt that the sexual assault occurred "by the use of forcible compulsion." The statutory aggravator that the murder was committed "while the defendant was engaged in the perpetration of rape" was thus invalid and its consideration by the jury improperly skewed the balance toward death.

State v. McLaughlin, 265 S.W.3d 257 (Mo.banc 2008);

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

Mo.Const.,Art.I,§§10,18(a),21.

VI. Instructions Violated Due Process and Right to Jury Trial

The trial court erred and plainly erred in denying Brian's motions objecting to Missouri's statutory death penalty scheme and Missouri's death penalty instructions; requesting that the death penalty statute be declared unconstitutional or that the State give notice of all evidence of unconvicted crimes that it intended to introduce, and for disclosure of evidence relating to victim impact; in submitting Instructions 7 and 9 to the jury, admitting evidence of non-statutory aggravating circumstances, including victim impact evidence, and accepting the jury's verdicts, because those actions denied Brian due process, a fundamentally fair jury trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that these Instructions improperly place the burden of proof on the defense; fail to require the State to prove an eligibility step beyond a reasonable doubt; are contrary to §565.030 RSMo by requiring that the jury unanimously find that mitigators outweigh aggravators to impose life; allow the jury to consider constitutionally-impermissible evidence in aggravation of punishment, and insulate the jury's decision from appellate review by not requiring that it make written findings on the second step. The jury likely considered the evidence adduced under those Instructions, giving it an unknown quantum of weight, in reaching its penalty phase decisions.

Ring v. Arizona, 536 U.S. 584 (2002);

Apprendi v. New Jersey, 530 U.S. 466 (2000);

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

In re Winship, 397 U.S. 358 (1970);

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

Mo.Const.,Art.I,§§10,17,18(a),21.

ARGUMENTS

I. Brian's Sentences Are Disproportionate

The trial court erred in accepting the jury's death verdicts and in sentencing Brian to death, and this Court, in the exercise of its independent proportionality review, under §565.035 RSMo, should reduce Brian's sentences to life imprisonment with no opportunity for probation or parole, because Missouri's death penalty scheme, both facially and as applied, denies due process, fundamental fairness and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that Brian has consistently acknowledged his culpability for the offenses and has consistently expressed his heartfelt remorse for his actions; the evidence was insufficient to support one of the statutory aggravators submitted and found on Count II and the State submitted and the jury found duplicative statutory aggravators on both Counts; the jury was misinstructed and allowed to reach its sentencing decision by combining its consideration of both Counts and was misinstructed as to the burden of proof; the evidence and argument, including the State's photographic exhibits and the State's closing arguments, reveal that Brian's sentences were imposed because of passion, prejudice and other arbitrary factors; and, a review of cases in which the defendant has been highly intoxicated while killing two people reveals that a life sentence has been deemed appropriate and that the death sentences in this case are excessive and disproportionate. Should this Court fail to

consider all similar cases, including those in which the defendant has been sentenced to life without parole, due process and the Eighth Amendment will be violated, rendering the imposition of the death penalty arbitrary and capricious.

This Court's obligation to undertake proportionality review arises out of its statutory authority, §565.035.3 RSMo, and the Eighth Amendment. It is provided to ensure that a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978). It is intended to serve "as a check against the random or arbitrary imposition of the death penalty." *Id.*

The State asserts that, post-*State v. Deck*, __S.W.3d __, 2010 WL 290450 (Mo.banc 2010), in light of a corrected vote count issued March 2, 2010 indicating that Judge Teitelman concurred only in the result of the case, this Court need not compare any cases other than those in which the death penalty was imposed in undertaking its proportionality review. As the concurring opinions in *Deck* of both Judge Breckenridge and Judge Stith; Judge Breckenridge's concurrence in *State v. Anderson*, SC89895 (Mo.banc, March 9, 2010), and Judge Wolff's dissent in *Anderson*, demonstrate, that approach is contrary to the express intent of the Legislature, as evidenced by §565.035 RSMo. And, as Judge Wolff further noted, especially since the theoretical underpinning for the death penalty statute has been nullified by the ALI's decision to withdraw from the Model Penal Code its recommendations for the administration of capital punishment, "If Missouri is

going to continue to sentence defendants to capital punishment under a statute that continues to be based on the now-abandoned Model Penal Code framework, the least that the courts can do is to ensure that *all* procedural safeguards are in place." *Anderson, supra*, dissenting opinion at 8).

This Court is mandated to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." §565.035.3(3) RSMo.[1] This Court is also mandated to "include in its decision a reference to those similar cases which it took into consideration" in conducting proportionality review. §565.035.5 RSMo. While the Legislature did not define "similar cases," it did not leave this Court without direction. Within the same statute, §565.035.6 RSMo, the Legislature mandated that

> there shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was

[1] If this Court solely considers whether imposing a death sentence is "freakish or wanton," as suggested in *Deck, supra* at 21, rather than using the standard statutorily-mandated, it will exacerbate the denial of due process, *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Ford v. Wainwright*, 477 U.S. 399, 428 (1986), and freedom from cruel and unusual punishment.

> imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

A primary tenet of statutory construction is that statutory sections that address the same matter or subject must be read *in pari materia*. *State v. Goebel*, 83 S.W.3d 639, 645 (Mo.App., E.D. 2002); *Romans v. Director of Revenue*, 783 S.W.2d 894, 895-96 (Mo.banc 1990). Further, the Legislature's inclusion of certain directives within a statute indicate its intent that following those directives is not optional. *See Mikel v. McGuire*, 265 S.W.3d 689, 692 (Mo.App., W.D. 2008).

A review of the entirety of §565.035 RSMo reveals a clear legislative intent—that this Court's proportionality review consider, as part of that review, "similar cases." The Legislature's directive that this Court's attorney assistant accumulate the records of "all cases" in which sentences of death or life imprisonment without probation or parole were imposed further reveals its intent that not just cases in which death was imposed be considered. If that were so, the Legislature would have engaged in a useless act in directing this Court's assistant to compile records in all cases and to provide this Court with a synopsis of the facts about the crime and the defendant. Given that the directive falls within the statute mandating proportionality review, those acts can have no purpose other than to inform this Court's review.

As Justice Stevens noted in *Walker v. Georgia*, 555 U.S. ___, 129 S.Ct. 453, 454-55, (2008), "a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." That body of cases must inform this Court's decision—whether, "considering both the crime, the strength of the evidence and the defendant," it should resentence Brian to life imprisonment without eligibility for probation or parole.

This Court exercised proportionality review to reduce a sentence of death in *State v. McIlvoy*, 629 S.W.2d 333 (Mo.banc 1982). McIlvoy was a follower, with a history of drug and alcohol abuse, a minimal juvenile record, was of limited intelligence, and had only completed the 9th grade. (Appendix, A-14-27). That McIlvoy had voluntarily turned himself in was an important factor in granting proportionality relief. *Id.*

Like McIlvoy, Brian voluntarily turned himself in. Brian, accompanied by his parents, went to the Fulton Jail on the morning of December 26th and took responsibility for his actions, acknowledging that he was the person the police needed to talk to about Ben and Sarah's deaths. (T25,36,44,900). Brian later pled guilty to both counts of first degree murder, acknowledging his guilt. (T88-100). He is remorseful for his actions, for having hurt his own family—people he loves. (T885-86,888). This Court must consider the defendant, in exercising its review. That Brian has taken responsibility and is highly remorseful is something that should weigh heavily in the balance toward a sentence of life without parole.

In *State v. Little*, 861 S.W.2d 729 (Mo.App.,E.D. 1993), where the jury convicted Little of three counts of first degree murder—one for having killed a nun—, one count of second degree murder—all by strangulation—, two counts of forcible rape, two counts of first degree robbery and one count of attempted rape, the State sought the death penalty on each murder charge. (Appendix, A-45). The jury rendered life verdicts on all four murders. *Id.* at 731. It heard, as non-statutory mitigation, evidence of Little's stunted emotional growth, due to his early incarceration; that he had maintained satisfactory employment; that he maintained close contact with family members; that he had improved his education and had assisted young offenders while in jail. (Appendix, A-48). The court instructed on Little's age, 34 at the time of trial and 29 at the time of the earliest crime, as a statutory mitigator. *Id.* The jury also heard evidence of Little's prior unrelated robbery and rape convictions and his uncharged sexual assaults. *Id.* The Court stated that "The sentence, not the usual issue of guilt or innocence, was the real contest in this case." *Id.* at 733.

Brian's death sentences are clearly disproportionate by comparison. While Little had a substantial history of prior rape, robbery and convictions (Appendix, A-49-50), Brian's prior convictions were all drug and alcohol-related, and none involved physical violence. Further, Little's crimes are those of a cold-blooded serial killer/rapist, who carefully planned his actions, while Brian's actions occurred while he was highly intoxicated, were not planned, and were completely out of character for him.

In *State v. Richard DeLong*, Greene County Case No. 31199CF0001, Richard DeLong strangled a mother, who was carrying her full-term unborn child, and her other three children. While the jury convicted DeLong of five counts of first degree murder, it returned five sentences of life without probation or parole. DeLong's jury considered his addiction to drugs and his use of drugs the night of the offense as evidence that mitigated punishment. (Appendix, A-90-93,97-98).

Eric Beishline was convicted of the first degree murder of an elderly woman in Troy, Missouri and sentenced to life without probation or parole. *State v. Beishline*, 926 S.W.2d 501, 505 (Mo.App.,W.D. 1996). The State introduced evidence that Beishline had assaulted another elderly woman in a similar fashion when he came to her house and used the ruse of selling her insurance. *Id.* The State also linked several other murder victims to Beishline. *Id.* The State also introduced evidence of Beishline's prior convictions for three separate burglaries; cocaine possession; unlawful use of a weapon; stealing and elder abuse. (Appendix, A-58-59,63-64). The State sought the death penalty, but the jury rejected it. Instead, after hearing of Beishline's cocaine psychosis as evidence in mitigation of punishment, the jury rendered a life without parole sentence. *Beishline*, 926 S.W.2d at 505.

Similarly here, Brian's addiction to drugs and alcohol, must be considered as evidence mitigating his punishment. For the two to three days prior to the offenses, Brian was awake and smoking crack cocaine. (T886-87). On the night of the offenses, he drank first a quantity of beer and then an entire bottle of vodka.

(T890,897,951). It was under the influence of those substances that he committed these acts. As family members testified, "The Brian I know couldn't hurt Sarah. The Brian I know would have taken a bullet for Sarah before he allowed her to be hurt. **Brian in his *right mind* never could have done it**. Not to Sarah. Not to anyone." (LF210)(emphasis in original). And, "Crack cocaine and addiction are the worst things that can ever touch a life. But Brian is not the worst of the worst as the death penalty is truly reserved for. It seems cruel and unusual to sentence to death a man who turned himself in and accepted responsibility by admitting his guilt: a man with no prior history of violence or intent." (LF212).

Brian's sentences are clearly disproportionate when viewed in light of these cases. Unlike Beishline, whose prior bad acts included first degree murder and elder abuse, Brian's three prior bad acts involved no violence against people. Two were for drug possession. The third involved a relatively minor car accident. (Exh.69-71).

Brian is addicted to crack cocaine and, at the time of the offense, was highly intoxicated and seeking the drug. Brian's ability to reason was impaired at the time of the offense because of the drugs.(T971). Crack cocaine is an extremely addictive substance, the craving for which is controlled by the same part of the brain that tells a person that he must have food or water. (T953-54). Brian has suffered from drug and alcohol addiction from his late teens onward, attempting to conquer it through treatment programs, counseling and prescription medications. (Defense Exhibit A; T939-41,943). Although his chance for success

in this battle would have more than doubled had he been placed in a residential treatment program for at least six months and then seen on an out-patient basis for another two to four months, his admissions were very short. (T947-49). For many years, Brian has suffered from Major Depressive Disorder. (Defense Exhibit A; T939-40). He has attempted suicide at least three times, all before this incident. (T864-67,944-45). He voluntarily turned himself in, has accepted responsibility for his actions in this case and he has consistently expressed his heartfelt remorse. (Defense Exh.A; T88-100,885-86,888). In that respect he is much like the defendant in *State v. McIlvoy*, *supra*. As family, teachers, coaches, and friends recognize, when Brian is not ingesting drugs or alcohol, he is "a ball player … a friend. This is somebody who you wanted to see succeed."(T932).

This Court should vacate Brian's sentences and order that he be re-sentenced to life imprisonment without probation or parole.

II. Instruction 10 Combines Both Counts for Final Step

The trial court plainly erred in submitting Instruction 10 to the jury and then accepting the jury's death verdicts on both counts because these actions denied Brian's rights to due process, a properly-instructed jury, a fundamentally fair trial, and freedom from cruel and unusual punishment, U.S.Const., Amends.VI,VIII,XIV; Mo.Const.,Art.I, §§10, 18(a), 21, in that Instruction 10, patterned after MAI-CR3d 314.46, told the jury that "As to Count I and Count II," while they were not compelled to fix death as the punishment, they were to consider "all the evidence in deciding whether to assess and declare the punishment at death." The instruction told the jury to consider the evidence as to *both* counts in deciding the punishment on each and thus allowed the jury to sentence Brian to death on each count based on evidence applicable to the other count. This destroyed the channeled discretion guaranteed by Missouri's death penalty statute and instructions.

The State has acknowledged that, by submitting Instruction 10, which told the jury to decide jointly, not separately and independently, for Counts I and II, the third step of the process by which it would impose penalty, the trial court committed error. (Resp.Br. at 37). The State argues, in its attempt to salvage the death sentences imposed in both Counts, that the error does not compel reversal. (Resp.Br. at 38). It argues that, by using a single instruction for both Counts, rather than the two mandated by the MAI-CR3d, "the trial court did not alter the

instructions that the jury otherwise would have received in any appreciable fashion" and "the jury's deliberations would have followed the same course." (Resp.Br. at 38). The State's speculation is unwarranted and must be rejected.

As the State acknowledges, the general instructions governing the MAI-Cr3d 314 series require that, for each count of first degree murder for which the State seeks the death penalty, the entire series of instructions be submitted. (MAI-Cr3d 314.00; Resp.Br. at 37). The general instructions do not exempt MAI-Cr3d 314.46 from that requirement. By thus requiring that the instructions as to each count be separately packaged, effectively telling jurors that they must separately decide the appropriate penalty for each count, this Court, through its Approved Instructions, has reinforced the constitutional guarantee of reliable, individualized sentencing reached through the finder of fact's guided discretion. Instruction 10, by contrast, destroyed that guarantee and undermined the channeled discretion that had occurred at the prior steps.

The State suggests that no prejudice accrued from the submission of one instruction, Instruction 10, that combined the jury's deliberative process at the third step since, for both Counts, the jury could consider "all the evidence" in reaching its decision. (Resp.Br. at 37-40). Were the State's argument correct, it would render meaningless the mandate that each count's instructions be packaged. It would allow the jury to fold its consideration of what penalty was appropriate for one count into its consideration of what penalty was appropriate for a second.

It would render unique, independent penalty phase verdicts in multiple count cases impossible.

As the State notes, (Resp.Br. at 40-41), separately, as to each Count, Mr. Dorsey's jury was first required to decide beyond a reasonable doubt whether one or more statutory aggravators existed. (LF176, 178). Then, separately, as to each Count, the jury was required to decide whether mitigators outweighed aggravators. (LF177, 180). At the second step, the jury was referred back up the path it had just trod, to the aggravators it had found **as to that Count**. (LF177, 180). But then, at this third step, with Instruction 10, the paths were joined, with the jury told to co-mingle its findings. Contrary to the State's assertion, it is highly likely that the precise error that occurred in *State v. Cooey*, 544 N.E.2d 895 (Ohio 1989), occurred here. Guided by the improper instruction, the jury may well have combined "the aggravating circumstances related to both murders, and weigh[ed] all of them collectively against the mitigating factors." *Id.* at 917. In that manner, Mr. Dorsey's Eighth and Fourteenth Amendment right to have "the penalty for each individual count … assessed separately" *Id*. at 916-17, was denied. In that manner, Mr. Ahsens' improper closing argument, in which he told the jury that a finding of a statutory aggravator on one count was sufficient to make Brian death-eligible for both, (T998-99), was reinforced. (See Point IV, Opening Brief at 73-74).

The prejudice arising from this instructional error becomes clear when viewed through the lens of the statute which controls the presentation of evidence

in penalty phase. Section 565.030.4 RSMo provides that, "subject to the rules of evidence at criminal trials," evidence in aggravation and mitigation of punishment may be presented. Within the trial court's discretion, "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others" may also be presented. In this case, prejudice arises in two specific contexts. It arises because the Instruction told the jury it could consider the victim impact evidence about Sarah Bonnie in deciding what penalty to impose for Ben Bonnie's death, and to consider the victim impact evidence about Ben Bonnie in deciding what penalty to impose for Sarah Bonnie's death. It also arises because the Instruction told the jury it could consider the "depraved" nature of Sarah Bonnie's death in deciding what penalty to impose for Ben Bonnie's death, and the "depraved" nature of Ben Bonnie's death in deciding what penalty to impose for Sarah Bonnie's death. Finally, Instruction 10 precludes any possibility of independent verdicts.

Victim impact evidence is "designed to show … *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Payne v. Tennessee*, 501 U.S. 808, 823 (1991)(emphasis in original). Finding no Eighth Amendment bar to the introduction of such evidence, the *Payne* Court noted that "'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death

represents a unique loss to society and in particular to his family.'" *Id.* at 825, citing *Booth v. Maryland*, 482 U.S. 496, 517 (1987)(White, J., dissenting).

Under *Payne* and §565.030.4, victim impact evidence is relevant to show the jury the unique loss caused by a particular person's death. The jury may consider that loss solely in determining the punishment to impose for that particular person's death. *Payne* and §565.030.4 also stand for the proposition that, while evidence about the impact of the particular act being prosecuted is admissible, victim impact evidence relating to other offenses is not because it is not "relevant to the character of the individual or the circumstances of the [capital] crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *State v. Bennett*, 632 S.E.2d 281, 290 (S.C. 2006)(Pleicones, J., dissenting). Yet, here, Instruction 10 told the jury to comingle the evidence from both Counts in determining the appropriate punishment for each. Instruction 10 may well have caused the jury to improperly consider the victim impact evidence offered as to Sarah Bonnie in imposing sentence for Ben Bonnie's death and vice-versa. That consideration improperly placed a thumb on death's side of the scale, skewing both sentences toward death. *Stringer v. Black*, 503 U.S. 222, 232 (1992). It effectively destroyed the guided discretion process established in the two preceding steps.

Instruction 10 also allowed the jury to consider the unique findings of "depravity" as to each victim in deciding punishment as to the other. As to Ben Bonnie, the State alleged that the murder was "depraved" because it was "part of defendant's plan to kill more than one person." (LF176). By contrast, as to Sarah

Bonnie, the State alleged that the murder was "depraved" because "while killing Sarah Bonnie or immediately thereafter, [the defendant] had sexual intercourse with her." (LF178). By telling the jury to consider not merely the underlying facts of both homicides in reaching its punishment decision on one, but also the highly unique characterization of those facts as "depraved," Instruction 10 allowed the jury to do something it was constitutionally and statutorily banned from doing.

Evidence considered in penalty phase is admissible subject to the rules of evidence in criminal trials. §565.030.4. Were these two Counts tried separately, **evidence** of one could be admitted as evidence in aggravation of punishment. Some of the facts of the other offense may be relevant and thus admissible. Yet, as this Court has noted, its admission should not be deemed a green light for a "mini-trial" of that other offense. *State v. Whitfield*, 837 S.W.2d 503, 511-12 (Mo.banc 1992). Especially as to the "depravity of mind" aggravator, which is not a fact but a characterization of those facts, §565.030.4 would not authorize its admission. And, because that characterization includes perceptions that are unique to that particular homicide, its admission would violate the due process, the Eighth Amendment and the Confrontation Clause. Here, since Instruction 10 allowed the jury to consider, as it decided what penalty to impose for Sarah Bonnie, that the murder of Ben Bonnie involved "depravity of mind," and vice-versa, once again, the guided discretion that channeled the jury's decision-making process until that point was destroyed.

Instruction 10 created prejudice. By telling the jury to combine its deliberations on both Counts at the third step of the process, essentially pouring into one pot the evidence in aggravation of punishment offered as to both Counts, the Instruction rendered impossible independent, distinct verdicts. It further increased the likelihood that, as to each Count, the jury would render a death verdict. The jury was told to consider in that mixture that Sarah Bonnie's body was sexually assaulted—twice on Count II—for a total of two times; that money or things of monetary value were taken—once on Count I and once on Count II—for a total of two times; and that each homicide was committed during the course of another homicide—twice on Count I and once on Count II—for a total of three times. Thus, although the State had submitted only three statutory aggravators as to Count I and four as to Count II, the jury may well have considered a total of seven statutory aggravators on each Count as it decided punishment.

The State's decision to offer Instruction 10 is not mere happenstance. Given the Instructions that preceded and followed it, it was purposeful. That purpose was to gain an advantage—to ensure two death verdicts in this case.

This Court must reverse and remand for a new penalty phase, or, in the alternative, re-sentence Brian to life imprisonment with no opportunity for probation or parole.

III. Rape Statutory Aggravator Lacks Evidentiary Support

The trial court plainly erred in submitting Instruction 8, accepting the jury's death verdict on Count II, and sentencing Brian to death on that Count because those actions denied Brian due process, a properly-instructed jury, a fundamentally fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that the State presented no evidence that any sexual assault of Sarah Bonnie occurred before her death, and the State conceded that no such evidence existed. Since there was no evidence that any action in furtherance of a sexual assault occurred before her death, the State failed to prove beyond a reasonable doubt that the sexual assault occurred "by the use of forcible compulsion." The statutory aggravator that the murder was committed "while the defendant was engaged in the perpetration of rape" was thus invalid and its consideration by the jury improperly skewed the balance toward death.

The State acknowledges and adopts the following facts:

That night, as Ben and Sarah lay in bed, Mr. Dorsey obtained the single-shot shotgun from the garage and loaded it. (Tr.961). He stood over Ben and Sarah's bed, and then he shot Sarah in the jaw, killing her instantly (Tr.717,961; State's Exhibits 28-29). This shot was a close-range shot from about twelve to fourteen inches away. (Tr.720). Mr. Dorsey then pressed the shotgun up against Ben's head, just below his right ear, and shot Ben in

> the head, killing him instantly (Tr.719,961; State's Ex.16). The shot was a single-shot gun that had to be emptied and reloaded before another shot could be fired.(Tr.826-827). Mr. Dorsey then engaged in sexual intercourse with Sarah.(Tr.847-848).

(Resp.Br. at 10). The State speculates that Brian collected property from the house after having shot the Bonnies and after having had sexual intercourse with Sarah's body. (Resp.Br. at 10-11).

The State's acknowledgement has focused the issues presented by this point for this Court. Sarah Bonnie was killed first. Then Brian shot Ben Bonnie. Only thereafter did Brian allegedly have sexual contact with the body. Under these facts, *State v. McLaughlin*, 265 S.W.3d 257 (Mo.banc 2008) does not control.

The facts of *McLaughlin* are important in understanding the rule this Court adopted. McLaughlin and Ms. Guenther had had a tempestuous relationship that lasted for several years. Then, in October, 2003, McLaughlin was arrested and charged with burglarizing her home. *Id.* at 260. She obtained an order of protection against him. *Id.* Within the month, he went to her job-site and waited in the parking lot for her to leave work. *Id.* As she left the building and walked toward her truck, he approached and spoke to her. *Id.* Expert evidence suggested that McLaughlin forced Ms. Guenther to the ground, raped her, stabbed her repeatedly, and dragged her body to his car. *Id.*

In concluding that McLaughlin could be charged with and convicted of rape, "even if portions of the rape, including penetration, occur once the victim

already has been killed," *id.* at 270, this Court relied on several out of state cases, including *State v. Brobeck*, 751 S.W.2d 828 (Tenn. 1988) and *Lipham v. State*, 364 S.E.2d 840 (Ga. 1988). In *Brobeck*, the evidence showed that the defendant and the victim had struggled as he attempted to rape her and that penetration occurred immediately after he killed her by shooting her in the head. *Brobeck*, 751 S.W.2d at 830-31. In *Lipham*, although the evidence suggested that the defendant had entered the house and ransacked it, looking for something to steal, the evidence also showed that the victim had a pressed contact wound to the head, for which the defendant would have had to have been on the bed and lying atop her to inflict. *Lipham*, 364 S.E.2d at 842. Both courts relied on the "ongoing criminal assault rule," which this Court thereafter adopted in *McLaughlin*.

The facts of those three cases demonstrate a dramatic difference between them and the case at bar. In *Brobeck*, *Lipham* and *McLaughlin*, the defendant clearly had some ultimate sexual purpose or motivation for his actions prior to the killing. Brobeck intended to rape the victim from the outset. Lipham's position on the bed and potentially on the body itself indicates more than happenstance—he, too, had a sexual purpose before the homicide occurred. McLaughlin and Ms. Guenther had had a relationship and the actions leading up to the homicide and rape were practically incapable of separation.

In stark contrast, here, even under the State's statement of facts, which speculates that any sexual contact occurred before Brian took items from the house, Sarah was killed first. Then, Ben was killed. Only then, at some point

after Ben was killed, was there sexual contact with Sarah's body. There is no suggestion that, at any point before either homicide, the purpose of the homicides was to effectuate a rape. This is not "a single, continuous act" or even a "series of closely related acts" such as those contemplated by this Court in *McLaughlin*. This Court's language suggests that some kind of pre-existing purpose for sexual assault is a necessary predicate for the "ongoing criminal assault" rule to be utilized. Indeed, if a shooting is done to overcome resistance to sexual assault, (Resp.Br. at 44, citing *McLaughlin*, 265 S.W.3d at 269), must not some inkling about an imminent sexual assault have existed? This Court notes that "it is rape … even if *portions of the rape* … occur once the victim already has been killed." 265 S.W.3d at 270 (emphasis added). If the purpose of this rule is to punish those who intend to rape for that rape even if they end up killing their victims before completing the rape, to impose that rule here is contrary to the facts.

This Court must vacate Brian's sentences and reverse and remand for a new trial[2]or re-sentence Brian to life imprisonment without probation or parole.

[2] Because Instruction 10 told the jury to consider all of the evidence on both Counts in determining the appropriate sentence on each, the error created by submitting this aggravator on Count II has also permeated Count I. *See Point II*.

VI. Instructions Violated Due Process and Right to Jury Trial

The trial court erred and plainly erred in denying Brian's motions objecting to Missouri's statutory death penalty scheme and Missouri's death penalty instructions; requesting that the death penalty statute be declared unconstitutional or that the State give notice of all evidence of unconvicted crimes that it intended to introduce, and for disclosure of evidence relating to victim impact; in submitting Instructions 7 and 9 to the jury, admitting evidence of non-statutory aggravating circumstances, including victim impact evidence, and accepting the jury's verdicts, because those actions denied Brian due process, a fundamentally fair jury trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that these Instructions improperly place the burden of proof on the defense; fail to require the State to prove an eligibility step beyond a reasonable doubt; are contrary to §565.030 RSMo by requiring that the jury unanimously find that mitigators outweigh aggravators to impose life; allow the jury to consider constitutionally-impermissible evidence in aggravation of punishment, and insulate the jury's decision from appellate review by not requiring that it make written findings on the second step. The jury likely considered the evidence adduced under those Instructions, giving it an unknown quantum of weight, in reaching its penalty phase decisions.

While an accurate recitation of this Court's decisions post-*State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), the State's argument, relying on this Court's decisions in *Zink v. State*, 278 S.W.3d 170 (Mo.banc 2009), *State v. Glass*, 136 S.W.3d 496 (Mo.banc 2004), and *State v. Gill*, 167 S.W.3d 184 (Mo.banc 2005), eviscerates Brian's state and federal constitutional rights to due process and freedom from cruel and unusual punishment.

Due process of law "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1969). This Court in *Whitfield, supra*, held that the then first three steps of the process in penalty phase are eligibility steps. *Whitfield*, 107 S.W.3d at 256, 261. If an "eligibility step," the factual findings to be made are facts upon which an increased punishment is contingent. *Id.* at 257; *Ring v. Arizona*, 536 U.S. 584, 600 (2002); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). They are the functional equivalent of an element of a greater offense. *Ring*, 536 U.S. at 609; *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000). If something constitutes an element of a crime, the State bears the burden of proving it and that burden is unanimously beyond a reasonable doubt. *Id.*; *Ring*, 536 U.S. at 609; *Winship*, 397 U.S. at 364.

Since this Court has concluded that all but the final step of the process are eligibility steps, *Whitfield*, 107 S.W.3d at 256, all of those steps require not merely jury findings but also that the State bear the burden of proof—unanimously and beyond a reasonable doubt. *Ring, Apprendi* and the state and federal Constitutions

compel this conclusion. *Accord, Miller v. State*, 843 A.2d 803, 837-38 (Md. 2004).

This Court therefore should reverse and remand for a new penalty phase before a properly-instructed jury or, in the alternative, reverse and order that Brian be re-sentenced to life without parole. §565.040 RSMo.

CONCLUSION

Based on the foregoing arguments and those contained in his opening brief, Brian requests that this Court reverse and remand for a new penalty phase. In the alternative, Brian requests that this Court re-sentence him to life without probation or parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of March, 2010, two true and correct copies of the foregoing reply brief and floppy disk(s) containing a copy of this brief were hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

_____

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached reply brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this reply brief contains 6,779 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Janet M. Thompson