

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
RESPONDENT,)	
)	
VS.)	No. SC88181
)	
SCOTT A. MCLAUGHLIN,)	
)	
APPELLANT.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,
DIVISION 12, HONORABLE STEVEN H. GOLDMAN, JUDGE

APPELLANT’S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant Scott A. McLaughlin was charged with: Count I – first degree murder, Count II – armed criminal action, Count III – forcible rape, and Count IV – armed criminal action. The jury found Scott not guilty of Count IV. The jury was unable to decide or agree on punishment and the trial court sentenced Scott to death for the murder, and to life imprisonment on Counts II and III all to be served consecutively. This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

In 2002,¹ Beverly Guenther became friends with Scott McLaughlin; within a couple of months, she asked him to move in with her and they began living together (T818-19,949,960).² Beverly was about 44; Scott

¹ Unless otherwise noted, the events noted in this statement of facts and those giving rise to the charged offenses took place in 2003.

² Citations to the Record: T: Trial Transcript; JJPMT: 7/9/04 and 6/20/05 Pretrial Motions Transcripts; NovPMT: 11/22/05 Pretrial Motions Transcript; LF: Legal File; SLF: Supplemental Legal File;

was in his early 30's (T821).

Their relationship had "a lot of ups and downs" (T803,813,819). Beverly would get restraining orders against Scott, they would break up, and Scott would move out (T803,813,819,832). Then the restraining orders would be dismissed, and they would get back together (T803,813).

The last breakup, in the spring of 2003, was different: Beverly "was serious about it" (T816, 821-22). After this last breakup, Beverly had Scott, his stepmother, his brother, and his brother's girlfriend at her house for a barbecue in September, 2003 (T841-42). Scott was at Beverly's on other occasions after the last breakup (T842-43).

Beverly worked at Compucard at 4175 Shoreline in St. Louis County (T800). Her work day ended at 6:00 p.m. (T803-04,949). In November, it was dark by 6:00 p.m. (T822,824).

Neither Beverly's boss, Ken Cayce, nor her coworker, Judi Gambino, ever observed any injuries on Beverly (T815-16,964). The only "violent" act Virginia Aurich, Beverly's close friend and neighbor, ever saw Scott do was "lift" a table in anger as though to "flip it" (T836-38).

Whether Beverly and Scott were "on" or "off," he frequently called

DossDepo: Melissa Doss' Deposition; ArcadoDepo: Pasquale Arcado's Deposition; State's Exhibit: StEx; Defense Exhibit: DefEx.

Compucard to talk to her (T803,814,961-62). When they were not “together,” he would come to the business at various times and hide in different places (T816).

Officer Jeremy Schwentker testified that on October 27th, he got a call for a “burglary in progress at Beverly’s house” in Moscow Mills (T898). As Schwentker arrived, Scott drove off (T899-90). Schwentker followed and arrested Scott who had stopped at a roadblock (T900-01). Scott made a written statement in which he said he went to Beverly’s that morning and while she was in another room, he unlocked her back door (T927; StEx5). After they left, Scott went back and took things from the house that he had bought or had owned already (T927-28; StEx5).

Court records from Lincoln County showing that as a result of this incident, Beverly obtained an order of protection and Scott was charged with burglary were introduced into evidence (T929-334; StEx’s74&74A). On November 18th, Scott was arraigned on the burglary charge (T936).

Prior to November, Scott had “ma[de] a nuisance of himself ... constantly calling” Compucard; Cayce told Beverly that Scott could not come to the business anymore (T951,955-56,962-63). The week before Beverly was killed, Scott’s calls to the office increased (T968-69).

Overruling defense objections that it was irrelevant, the trial court allowed the state to elicit from police officers Dan Wathen and Gabriel

Crocker that on October 30th and November 14th, respectively, they were assigned to provide escort service to Beverly at her request (T851-65). Over defense objections, the state was allowed to elicit from Officer Crocker that the person he escorted was the same person depicted in StEx-3A—a close-up of Beverly’s face after she had been killed—and to show the photograph to the jury (T865-70).

Beverly’s neighbors knew she usually arrived at home no later than 7:00 p.m. (T822). When she failed to come home on November 20th, they called her emergency contacts including Ken Cayce (T826,877,956). Cayce contacted the St. Louis County Police and asked them to go to the business to check on Beverly (T957).

Beverly’s truck was in the Compucard parking lot, parked next to a bush (T958,1018,1023; StEx-13). She was not inside the building (T958). Beverly’s flashlight was about five feet from her truck (829,1018,1023-24). The police found a trail of “blood stains going across the parking lot and stopping at the end of a parking spot where it appeared that a car had been parked prior to that” (T1092). The trail began with “droplets” just behind Beverly’s truck (T1098-99). The trail went west through the parking lot, the amount of blood increasing to “almost puddles” until ending abruptly at a parking spot (T1099-99). In the trail, the police found car keys, a pack of cigarettes, and a broken knife handle (T959,

1020). A photo taken the next day, StEx-44, showed a pool of blood near the rear of a car then parked in that parking spot (T1128-29). This pool of blood, also shown in StEx's-22&23, was consistent with Beverly being on the ground (T1130-31).

There was no blood or sign of a struggle in the path from the Compucard doorway to Beverly's truck, nor was anything found in that path (T1028-30,1095).

"[D]rag marks" or clothing transfer swipe patterns appearing in the blood stains indicated "that at some point in time the victim was on the ground" (T1100). The blood splatter pattern was consistent with a struggle occurring on the parking lot (T1113).

Detective Neske learned that Beverly had been having problems with Scott (T1160-64). He learned she had an order of protection from Lincoln County that was served on Scott on November 18th (T1164-66; StEx74).

Neske called Scott's mother, Louise McLaughlin to locate Scott (T1160-61,1164,1166-68). On November 21st, Louise called Neske that Scott was at his nephew's-Patrick Dewey's-house and was "going to a hospital in St. Charles to get ... his mental pills" (1171).

Scott's nephew, Patrick Dewey, testified that Scott came to visit him about a week before Beverly was killed (T1031-32). He asked Dewey what he should do about his relationship with Beverly; Dewey said to "leave it

alone ... let her go” (T1039). Scott talked about Beverly and said “his life would be over if he couldn’t have her” (T1032). Scott never said anything about being violent toward her or killing her (T1039-40).

After arranging for Scott to be arrested when he got to the hospital, Neske went to the Dewey’s house where he found Scott’s car and had it towed (T1171-72). Portions of the rear seats of Scott’s car had previously been removed before the car was seized by the police (T1117-18,1173). The car smelled of bleach (T1173). There were red stains in the rear, hatchback and back seat areas of Scott’s car, and red stains on the back door hatch that ran down into the spare tire well (T1114-20,1173).

On November 21st Scott arrived at Dewey’s house about 6:00 a.m. (T1033-34). Scott “stunk real bad” and “needed to take a shower” (T1033-34). Dewey, who was going to work, told Scott he could not stay (T1035). Scott was gone when Dewey returned, but his car was still there (T1035). The clothes that Scott was wearing when he arrived at Dewey’s – a flannel shirt and blue jeans – were seized by the police (T1036).

Shenia Hodges had met Scott through the Deweys and liked him and went out with him (T1042,1045-46). Early in the morning of November 21st, Scott called Shenia; he told her he had a flat tire and asked her for a ride (T1046). Shenia went back to sleep.

Shenia went to the Deweys’ the next morning; Scott was asleep on the

couch (T1047). His arms were scratched and his blue jeans were dirty; Scott said the scratches were from unloading boxes at work (T1047-48). Scott changed into different pants, and Shenita took him to get his paycheck and to shop at Wal-Mart (T1049-50). Scott bought “bleach and some other cleaning supplies” to get rid of a mildew smell in his car (T1050-51). Back at the Deweys’, Shenita went inside while Scott used the bleach on the car (T1051).

During the evening, Scott grew hyperactive and nervous and asked Shenita to take him to a hospital in St. Charles to get medicine for his bipolar disorder (T1052,1058). Shenita drove Scott to the hospital where the police were waiting to arrest him (T1054-55,1061-63).

Bill McLaughlin – Scott’s brother – was staying at Michael White’s apartment on South Broadway in November (T971-73). On the 21st, Scott came to White’s apartment between 4:00 and 5:00; White testified Scott said, “I’m fucking killing that bitch” and that he didn’t want “to be locked up ... because of her” (T971-72,974-75,978). Scott looked “upset and mad” and left after approximately 15 minutes (T975,977).

Scott returned about 7:30 p.m. and “had a little bit of blood on him ... on his face” and on his shirt (T978-79). Scott seemed scared and nervous (T980). Scott and Bill left together (T980).

The next morning, the police came to White’s apartment; Bill was

there (T981). White told the police that Scott came to his house around 6:00 p.m. the previous night (T985,1009). White also told the police that Scott left and came back several times (T1009).

Detective Vogel testified that White never told the police that Scott was “bloody” at any time when he returned (T1009). White also never told the police that Scott said anything about killing someone (T1011-12). And Detective Vogel testified Billy was not at White’s apartment when the police were there (T1012).

Det. Neske interviewed Scott who had been brought from St. Charles to the St. Louis County Police Department in Clayton (T1069-71). Scott initially denied knowing anything about Beverly being missing, but when Detective Neske said evidence had been recovered and “we need to give her family the respect of giving her a proper burial,” Scott “began to cry” (T1184-85). “He put his hands to his head and he was crying, and he told us that she was dead and that he had dumped her in the river....” (T1185). When Detective Neske asked, “what river,” Scott said “off of South Broadway” (T1185). Scott was unable to tell Detective Neske how to get there, but agreed to take him there (T1185).

Detectives Neske and Walls followed Scott’s directions and eventually arrived at South Broadway in the City of St. Louis near Steins street (T1187). Scott directed them to a lot muddy lot where he had parked

(T1187-88). Going through the lot, they reached a brushy hill or knoll (T1188). Scott “said that he had drug her through that area” (T1188). They forced their way through “brush, down a pretty steep hill” to railroad tracks along a river bottom (T1188). They went across “some old... barges... or some type of equipment like that on this riverbed shoreline” (T1188). At a tree, Scott pointed out the area where Beverly’s body would be (T1188). To see this area, Detective Neske had to hold onto a tree branch and hang over the riverbank; he saw feet tied with a rope and realized it was Beverly (T1189).

Scott told Detective Neske he tried to talk to Beverly when she came down the steps (T1224). The lack of blood on the steps outside Beverly’s office and at her truck is consistent with Scott “not stabbing her after she came down those steps or as she was getting in her vehicle” (T1224).

In his recorded statement, Scott said drove from south St. Louis City at about 4:30 p.m to Beverly’s place of employment (StEx’s-70,71,71A:6-8). He parked behind another truck so she couldn’t see his car and kneeled down at the steps to her building, so she couldn’t see him (StEx’s-70,71,71A:9-10).

After about 15 minutes, Beverly walked out of the building, alone, carrying a purse and a small flashlight (StEx’s-70,71,71A:10-11). When she reached the parking lot, Scott stood and said, “Beverly” (StEx’s-

70,71,71A:11). She dropped the flashlight and told Scott to leave her alone and “get out of here” (StEx’s-70,71,71A:11-12).

Scott tried to talk to her (StEx’s-70,71,71A:12). He had a knife in his pocket, and walked with her toward her truck (StEx’s-70,71,71A:12). Close to her truck, Scott stabbed her in the neck with the knife (StEx’s-70,71,71A:13). She resisted and scratched him (StEx’s-70,71,71A:14). Scott did not know how many times he struck her StEx’s-70,71,71A:14).

Beverly fell to the ground and Scott dragged her to his car (StEx’s-70,71,71A:14-15). She was stopped moving before they reached Scott’s car; he didn’t know if she was breathing (StEx’s-70,71,71A:15). Scott believed she was dead (StEx’s-70,71,71A:15).

Scott put her in the back hatch area of his car and drove to South Broadway and Steins and put her body down by the river (StEx’s-70,71,71A:16). At some point, he took her clothes off to make it easier for her body to sink in the river (StEx’s-70,71,71A:16). After getting her out of his car, he tied twine around her ankles “to be, be, be tied around the concrete block to sink her” (StEx’s-70,71,71A:16-17). He carried and dragged her through “thick stuff” but could not get to the river (StEx’s-70,71,71A:17).

Scott threw the clothes into a dumpster near to where he left the body (StEx’s-70,71,71A:17-18). His front tire was flat, and he called Shenia for

a ride; she would not come get him, so he slept in his car (StEx's-70,71,71A:18-19). The next morning he drove to his nephew's mobile home, parked, and went to sleep on the couch (StEx's-70,71,71A:19-20).

Later, he took pieces of "material ... [o]ff the seats" and used bleach to clean his car of Beverly's blood (StEx's-70,71,71A:21-22). He threw the material from his car into a nearby dumpster (StEx's-70,71,71A:22).

That night, he got Shenia to take him to the mental hospital in St. Charles (StEx's-70,71,71A:22). The St. Charles police arrested him when he arrived (StEx's-70,71,71A:22).

Scott said that the previous Tuesday he had told Billy he wished he could "get rid of Beverly" (StEx's-70,71,71A:22-23). He was frustrated and angry with her because she'd "done [him] wrong" playing "head games" with him and "using" him (StEx's-70,71,71A:23).

When asked why he had killed Beverly, Scott said, "I have no idea. I've never done something like this before" (StEx's-70,71,71A:24). When asked if he thought "it would solve your problem?" Scott said, "no" (StEx's-70,71,71A:24). When asked if "it was basically just anger?" Scott responded, "I have no idea" (StEx's-70,71,71A:24).

Judi Gambino later found a message from Scott on Compucard's answering machine: "Ken and Judi, I just wanted to say I am sorry for what I did, and I am ashamed of it" (T807-10; StEx4).

Beverly's body was recovered from a remote, overgrown area on the banks of the Mississippi River covered with ruffraff (T1122-24,1136). To take the photographs of "the body recovery site" at the Mississippi River, the Fire Department scene commander required "a safety harness with a rope" held by firemen (T1124).

Pathologist Raj Nanduri performed an autopsy and determined that Beverly died at about 6:00 p.m. on November 20, 2003 (T1253-55,1259). There were antemortem and possibly postmortem injuries to Beverly's face that could have been caused by her face or head hitting a hard object – possibly a metal surface (T1256-57,1284-85). There were numerous injuries to her chest; some postmortem and some perimortem or postmortem: near or at the time of death (T1257,1267-68). Abrasions to her right wrist appeared antemortem; scratches and abrasions on her thigh, legs, and knees looked postmortem (T1268-69). Injuries to her back were perimortem and postmortem (T1270).

A stab wound to the right side of Beverly's neck partially cut the carotid artery going to her brain, caused extensive gushing or spouting type bleeding, and caused her death within a few minutes (T1272-73,1287-88,1291-92). The blood spatter pattern on the parking lot was consistent with the carotid artery bleeding (T1286-88;1291-94,1291-92,1294). Struggling would have accelerated blood loss (1287).

There was a nonfatal, stab wound near Beverly's collarbone, and defensive stab wounds arms, and on her hands and fingers (T1275-80).

At the conclusion of all evidence, Scott moved for a judgment of acquittal of forcible rape: "there has been no evidence submitted at all that Ms. Guenther was alive during the time that Scott McLaughlin had sex with her" (T1387;LF813-16). The trial court refused the motion and Instruction A—Scott's forcible rape converse (T1385-93;LF836).

I think forcible compulsion with [the] defense converse requires that the victim be alive, and I don't know that she actually has to be alive at the actual time—time of the sexual penetration. When it says forcible compulsion, that is all part of rape. So if a man, in the process of raping a woman, is killing her, that's the forcible compulsion.

(T1389).

The state argued that "the defendant's act in the killing of her and raping her" was "forcible compulsion" – the force used to rape Beverly (T1390). The court found the assault and the sexual intercourse happened at the parking lot, not at the river, and that Beverly died in the parking lot (T1390-91). The trial court added that even if the intercourse occurred at the riverbank, "it's still a part of the continuous series of events that's part of the rape" (T1393). "

Based on the trial court’s “position,” the defense asked “to submit an instruction for felony murder” (T1394). The state objected (T1394). Relying on *State v. Hall*, 982 S.W.2d 675,682 (Mo.banc 1998), the trial court refused Scott’s felony murder instruction—Instruction B (LF837;T1394-96).

Scott included the rulings concerning his motion for judgment of acquittal, and his proposed Instructions A and B, in his motion for new trial (LF897-99,901-02).

While deliberating, the jury sent out a question: “Is it rape if a person has sexual intercourse with a person who is deceased by law?” (LF840; T1450). Overruling defendant’s request to tell the jury this is not rape, the trial court responded, “I am not permitted to answer your question. You must be guided by the evidence and instructions of law” (LF840-41; T1450-55).

Jury deliberations began at 4:15 p.m. on Wednesday, September 27, 2006 (T1449). At 9:25 p.m., the jury sent a note: “We require a dictionary for a law definition for the word ‘compulsion’” (T1449). The judge answered, “I am not permitted to provide a dictionary or the definition. You must be guided by the evidence and instructions of law.” (T1449).

At about 10:00 p.m., the jury sent a note asking, “Is it rape if a person has sexual intercourse with a person who is deceased by law?” (T1450;

LF840). Denying Scott's request to respond "in the negative," the judge answered, "I am not permitted to answer your question. You must be guided by the evidence and instructions of law." (T1450-55; LF840-41).

The jury deliberated until 10:30 that night when the trial court adjourned (T1444-45,1455). Deliberations began the next day 9:00 a.m.; at 1:40 p.m. the jury returned verdicts finding Scott guilty as charged of Counts 1, 2, and 3 and not guilty of Count 4 (T1456-72).

At penalty phase, the state presented victim impact evidence from Beverly's mother – Bernice Wedepohl, Beverly's adult son – Christopher Guenther, and her brother – Alfred Wedepohl (T1489-1509). Over defense objections, Chris testified about his baby brother, Corey, dying (T1495,1497). When Chris was a child, Corey fell into an above-ground pool and died (T1495). It affected the whole family, including Beverly; there were fights, a lot of aggravation, and frustration (T1496). After Corey died, his parents divorced and he lived with his father; he didn't see his mother much and it was hard (T1496).

Chris' grandfather died while he was growing up (T1496). This death "impact[ed]" Beverly (T1498). Beverly and her husband split up after the death of Corey and of Chris' grandfather (T1498).

Over defense objections, via video deposition, Officer Melinda Doss testified that on November 14th, Beverly gave her the documents

comprising StEx-500: Beverly's handwritten log concerning Scott's activities and phone calls (StEx-101;StEx-500). The prosecutor read it all to the jury (T1514).

Previously, on October 30th, Officer Doss met Beverly at 4175 Shoreline to look at clothing that had been cut with a sharp object so they were unwearable (StEx-101). Beverly said Scott had not yet returned those clothes to her (StEx-101). Officer Doss called Scott and asked if he put the clothes in Beverly's truck; Scott said they were his (StEx-101). Officer Doss said some items were Beverly's and asked why he did it; "he said because he was mad at her" (StEx-101).

On November 13th, Officer Doss went to 4175 Shoreline responding to Beverly's report of an assault the previous night (StEx-101). Scott had jumped out of the bushes as Beverly left work, blocked her from her truck, and asked about the burglary case (StEx-101). She wouldn't talk to him; he tried twice to kiss her and assaulted her by grabbing her breast (StEx-101). She said Scott was "increasingly more violent and aggressive with each encounter" since they broke up (StEx-101). The only violence Beverly indicated was Scott touching her breast (StEx-101).

The prosecutor displayed on an overhead projector and read to the jury Beverly's petition for an order of protection based on "an act of abuse or stalking" at her home and at her work site indicating that Scott

had coerced, stalked, harassed, sexually assaulted, and followed her (StEx-74; T1529). The prosecutor also introduced into evidence and read to the jury the charges and disposition of Scott's prior guilty pleas and convictions for one count of the class D felony of tampering in the first degree, three counts of the class C felony of sexual assault, one count of the class C felony of forgery, one count of the class A misdemeanor of third degree assault, and one count of the class D felony of criminal nonsupport (T1530-35; StEx's 1000,1001,1002,1003&1004).

Defense penalty phase evidence included testimony from expert and lay witnesses.

In 1982, Scott, then nine, was evaluated at the Knights of Columbus Developmental Center (KCDC) at Cardinal Glennon Children's Hospital in St. Louis because of concerns that "he might have neurological issues" (T1541). Psychologist Anthony Udziela and Dr. Pasquale Accardo, a physician specializing in developmental pediatrics, were part of the team that evaluated Scott (T1536-41; DefEx-E; Accardo-Depo:5-7,10-11,20).

Dr. Udziela obtained information that Scott's mother had been a prostitute and Scott lived with her during his first three years; his dad was an alcoholic and not involved with Scott (T1545). Scott lived in several foster homes and with different relatives until age five when his adoptive parents, the McLaughlins, took custody of him (T1545-46). The

McLaughlins also took custody of his younger brother and sister – Kevin and Dawn and changed their names to Billy and Louann (T1546-47,1596,1906). Scott was traumatized by fear of losing his siblings when they visited with their natural mother and Scott’s behavior problems at school increased at those times (T1547). Scott’s behavior in school improved through second grade; he had “serious regression with severe acting out behaviors in third grade (T1548). His adoptive mother’s description of “him as a clingy child who always needed to know where his parents are at all times, especially his mother” indicated “significant insecurity and anxiety” corroborated by Scott’s staying up at night and inability to go to sleep until his adoptive father came home (T1548-49).

Scott had inappropriate and unusual language structures: “he used grammar unusually” and made “deviant verbalizations” associated with a language disorder (T1550).

Scott’s verbal IQ score of 74 on the Wechsler Intelligence Scale for Children, revised, fell in the borderline retarded range for his age, and his performance IQ was in the low average range (T1552). Scott’s full scale IQ of 82 fell in the low average range (T1552).

On tests of fine motor skills, Scott, then nine years and five months old, scored at six and six years, ten months (T1553). These scores indicated “processing difficulty... often associated with learning

difficulties in areas that required writing” (T1553).

Dr. Udziela diagnosed Scott with “significant issues with attachment and basic trust and mistrust that were associated with the very significant neglect and erratic first five years of his life” which “markedly affected his development and had a major impact on him resulting in an adjustment disorder with depressed features” (T1554). Scott also had “an expressed language disorder, as well as an attention deficit disorder with hyperactivity” or “ADHD” (T1554). Dr. Udziela recommended Scott receive individual psychotherapy and that, because of “stresses within the family, the entire family participate in family therapy (T1554,1557).

Scott felt bad about his poor school performance; he wanted to please adoptive mother by doing better (T1555).

Scott had abnormal dreams “about the dead” which were symptomatic of depression (T1556). He wanted to run away because of his dad getting mad when he did something wrong; this made Dr. Udziela concerned about the relationship between Scott and his adoptive father (T1556). There was no indication at all that Scott, in 1982, knew the difference between right and wrong (T1561).

Dr. Pasquale Accardo administered “Fog tests” to Scott which, along with Dr. Accardo’s examination of Scott’s fine motor movements, indicated brain impairment (DefEx-E; AccardoDepo:21-23). On the “Rey-

Osterreith” complex figure drawing test, used to assess brain damage, Scott’s score was below the lowest possible score of 5 years (DefEx-E; AccardoDepo:25-26). On the Visual Auditory Digit Span test, Scott’s ability to repeat numbers spoken or said to him was at the level of a six-year-old (DefEx-E; AccardoDepo:28-29). His ability to repeat them backwards was at the seven-year level (DefEx-E; AccardoDepo:29).

In response to Dr. Accardo’s question, what did Scott want to do when he grew up, Scott gave “[p]robably one of the most bizarre answers” Dr. Accardo ever heard: “he wanted to be dead” (DefEx-E; AccardoDepo:33). Scott said there “would be no body because it would have drowned” (DefEx-E; AccardoDepo:33). This “strikingly unguarded... response... support[ed] a diagnosis of a depressive syndrome....” (DefEx-E; AccardoDepo:34-35).

Scott was not retarded; he was “low normal” on cognitive tests and was a “slow learner” (DefEx-E; AccardoDepo:35-36). His “cognitive level” was above seventy

[b]ut he was really significantly distant from ninety to one-ten, which would be more average. He was more seventy-ish, which is slow, which means that academically, if he were in third grade, to expect him to be better than a first, second grader might have been challenging.

(DefEx-E; AccardoDepo:35-36).

Scott “had a striking attention deficit hyperactivity disorder” (DefEx-E; AccardoDepo:36). He had mild neurological brain damage (DefEx-E; AccardoDepo:38-39).

The KCDC team ultimately diagnosed Scott as having attention deficit disorder with hyperactivity, a specific learning disability with a developmental disorder of expressive language, and adjustment reaction of childhood with depressive features (DefEx-C; DefEx-E; AccardoDepo: 40-41). Scott “had enough features of depression that if he were an adult, we would say he was depressed. But people were very leery in 1982 of making that diagnosis in a child, especially a child who had been through a lot of traumatic experiences.” (DefEx-E; AccardoDepo:40-41).

Scott “knew the difference between right and wrong and wanted to be good and couldn’t. Couldn’t help himself” (DefEx-E; AccardoDepo:66). He had more trouble than other kids behaving in a school setting though he “wanted to behave” (DefEx-E; AccardoDepo:66-67). The KCDC team “did not see this kid as an incipient sociopath” ((DefEx-E; AccardoDepo:67).

Louann McLaughlin, Scott’s sister, testified that when Jill, their biological mother came to visit, their adoptive parents, Harlan and Louise McLaughlin, would hide Scott (T1907,1911). Billy and Louann would spend the weekend with Jill, and Scott was kept at the McLaughlins

(T1911). The children had to sit in chairs until Harlan got home from work and he would paddle them with a homemade “board of education” (T1913-14).

Harlan was a police officer and, as Scott got older, sometimes used his taser and nightstick on him (T1913,1920). Scott began running away, and Billy did also (T1920). Eventually, when Louann was about 17, she left the McLaughlin’s (T1925-26). Louann testified that she and Jill both suffered from depression (T1928).

Louise and Harlan locked the refrigerator and cabinets to keep the children from getting to the food (T1916). If the cats had kittens, Louise made the children drown them (T1916-17).

Rhiannon Martin testified that she met Scott when she was fourteen and he was nineteen (T1575-77). Rhiannon lived with her mother who knew that Rhiannon and Scott were sexually involved; Scott spent the night with Rhiannon at her mother’s house (T1577-78,1581). Rhiannon became pregnant (T1578). Scott was charged with sexual assault and Rhiannon was named as the victim (T1580-82; StEx-1001).

Scott’s biological Aunt Tammy Sinclair – his biological mother’s sister – testified that Howard Daffner, Scott’s biological father, was an alcoholic who drank every day when Scott, then a toddler, was living with him ((T1592). During this time, Jill, Scott’s mother, would sometimes be

covered with bruises when Tammy saw her (T1593).

Once, when Scott was no older than 3, he got in trouble in his grandparents' living room (T1594). Howard picked up Scott "like a football" to carry him into the bedroom; as Howard turned to go into the bedroom, Scott's head bumped and he cried "even harder" (T1594). Howard didn't check to see if Scott was injured; he threw Scott on the bed and told him to stay there (T1594, 1612-13).

Scott was adopted by the McLaughlins before his siblings (T1596-97). The McLaughlins were related to Howard Daffner and let Scott have contact with Howard but not with his mother Jill or his maternal grandparents (T1600-01). Kevin told Scott what to do and dominated him (T1603). Scott did what Kevin told him to do (T1604).

When Scott was about 18, he ran away from the McLaughlins' to his maternal grandparents (T1602). Kevin also ran away (T1607-08).

Scott's grandfather's funeral and burial was on November 19th, 2003, the day before Beverly's death (T1609-11). Scott was crying and distraught; Scott talked about his grandpa, how he "wished he could have been there growing up, and how he was just starting a relationship with his grandpa since he had been back and gotten older..." (T1611).

After his grandfather's funeral, Scott talked to Tammy about Beverly: "he didn't know what to do, but he loved her, and that she was messing

with his head” (T1609). Tammy told Scott to “just leave her alone” “[a]nd he said he couldn’t because he loved her (T1609).

Shawn Delgado, Tammy’s daughter and Scott and Billy’s cousin, testified that she first met Scott when he stole a truck and ran away from the McLaughlins’ house – which was known as the “House of Horrors” – to their grandparents’ house (T1615-16, 1618). At their grandfather’s funeral on November 19th, Scott “looked terrible” (T1619).

The trial court sustained the state’s objections and overruled Scott’s offer of proof that Shawn would testify that Billy had said that it was his idea to bind Beverly’s ankles and take her to the river, that he tied Beverly’s legs together, that he helped drag her to the riverbank, and that Scott had sex with her at the riverbank (T1622-26).

Billy McLaughlin’s former girlfriend, Kimberly Barrett, testified that in the summer of 2003 she let Scott and his girlfriend Melanie stay after she broke up with Billy (T1628-30). Scott helped her pay bills and was never mean or violent toward her (T1631). He was in the mental hospital for a week that summer; some days he was “really out of it” (T1639).

Kimberly knew Scott had been charged with burglary; he did not show concern about it (T1639-40). A week before Beverly was killed, Scott said he had a court date coming up: “he was going to go and tell his side of it, and he didn’t think they were going to end up charging him with

anything after all” (T1643-44).

Earlier that summer, just after he had a fight with Beverly, Scott talked about killing her; Kimberly didn’t take it seriously (T1645-46). The week before Beverly’s death, Scott talked about getting the police to go to her house with him to get his stuff: “he was through” and “didn’t want to keep going back and forth” (T1645).

Dr. Sripatt Kulkamthorn testified that in October, 2002, prescribed SSRI, Paxil, for Scott’s depression and anxiety (T1657). Dr. Kulkamthorn gave Scott samples because he didn’t have medical insurance and otherwise probably wouldn’t get the medication (T1659-60). At Scott’s last visit, September 9th, he said he had not been on any medication and Dr. Kulkamthorn prescribed a different antidepressant: Lexapro (T1663). It is recommended that patients who stop taking Lexapro be closely monitored (T1675).

Dr. Mark Cunningham, an expert in clinical and forensic psychology, interviewed Scott, his biological mother, his adoptive mother, his biological father, and other relatives; he reviewed interviews done by other people and Scott’s school, psychological, mental health, adoption, and criminal records and reports; and he consulted “a significant body of research” to investigate possible connections between “the events and factors” in Scott’s life and the impact they had on his development into

an adult (T1690-92). These included various studies by the U.S. Department of Justice identifying various risk factors and the outcome of children who do, and children do not, have those factors (T1693-99).

Scott's background shaped how he looked at his choices and made the choice to kill Beverly (T1692-93). That choice rested on his entire life structure including factors such as family history of addiction or psychological disorder, childhood maltreatment or violence exposure, development abandonment or instability (T1693-94).

Scott had numerous developmental risk factors for delinquency and violence in all aspects of his life predisposing him to criminality (T1700-1806). Between ages 9 and 17, Scott had IQ scores of 73, 79, 75, and 77 that were "clearly deficient in nature" and "bumping right up against the mentally retarded range" (T1738-42). Scott's psychological disorders contributed to his predisposition towards criminality (T1806-23).

Of all the records he reviewed, Dr. Cunningham found a note from Robert Slominsky, an elementary school counselor, most significant in describing the severity of psychological problems Scott lived with; Mr. Slominsky wrote of Scott, then almost nine:

I would evaluate Scott's psychological problems as being extremely serious. I have worked as an elementary school counselor for nine years in three different schools and had to deal with some very

serious cases. Scott's is the most serious of all.

(T1730).

The jury began penalty phase deliberations at approximately 12:30 p.m. (T1996). Just before 7:00 p.m., the jury returned a verdict of "unable to decide or agree upon the punishment" (T1998-2000). The jury found one of four statutory aggravators submitted (LF856-57) and did not "unanimously" find the mitigating facts and circumstances sufficient to outweigh the aggravating facts and circumstances (T2000; LF865-66).

Judge Goldman overruled Scott's timely filed motion for new trial and his motion for imposition of a sentence of life imprisonment without probation or parole and sentenced Scott to death (T2002-06; LF868-906,907; SLF6-26).

To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I

The trial court erred in sentencing Scott to death. This violated his rights to jury trial, reliable sentencing, and due process, U.S.Const., Amend’s VI, VIII, & XIV; Mo.Const., Art. 1, §§18(a), 10, & 21. Section 565.030.4’s directive that the judge make death-eligibility fact-findings whenever “required to determine punishment for murder in the first degree,” violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). In these circumstances, §565.040 mandates Scott be resentenced to life imprisonment without probation or parole.

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

Apprendi v. New Jersey, 500 U.S. 466 (2000);

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

State v. Duren, 547 S.W.2d 476 (Mo.banc 1977).

II

The trial court erred in denying Scott’s motion for judgment of acquittal of forcible rape; alternatively, it erred in refusing Instruction A directing if the jury had reasonable doubt Beverly was alive when Scott had sexual intercourse with her, to find him not guilty. This violated his rights to due process and fair jury trial, U.S.Const., Amend’s V, VI, & XIV, Mo.Const., Article 1, §§10 & 18(a). The state failed to prove beyond a reasonable doubt that Scott’s stabbing and killing Beverly forcibly compelled her to have sexual intercourse or that he had sexual intercourse with her by forcible compulsion. The Court should hold “forcible compulsion” requires proof beyond a reasonable doubt that the victim was alive at the time forcible compulsion was used to have sexual intercourse, and that it was error to refuse Instruction A which correctly presented the law.

People v. Hutner, 530 N.W.2d 174 (Mich.App. 1995);

Lewis v. State, 889 So.2d 623 (Ala.Crim.App. 2003);

State v. Perkins, 811 P.2d 1142 (Kan. 1991);

Jackson v. Virginia, 443 U.S. 307 (1979).

III

The trial court erred in refusing Scott's Instruction B: second degree felony murder. This violated his rights to due process, jury trial, and a defense, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, &XIV; Mo.Const., Amend's 10 & 18(a). The trial court's view—the rape and murder were continuous and Scott killed Beverly to rape her—supported a felony murder instruction. Refusing Instruction B but instructing on rape, and the penalty phase “rape during murder” statutory aggravator, based on the same facts, let the state use inconsistent theories and prejudiced Scott. The conventional second degree murder instruction did not cover the facts, law, or a fact-based defense as the felony murder instruction would have done. Unless Scott chose to submit only felony murder, felony and conventional second degree murder instructions should have been given. *Beck v. Alabama*; *Spaziano v. Florida*.

State v. Beeler, 12 S.W.3d 294 (Mo.banc 2000);

State v. Avery, 120 S.W.3d 196 (Mo.banc 2003);

Spaziano v. Florida, 468 U.S. 447 (1984);

Beck v. Alabama, 447 U.S. 625 (1980).

IV

The trial court erred in overruling Scott's objections to the testimony of Police Officers Wathen and Crocker that at Beverly's request, they escorted her from her office to her car. This violated Scott's rights to due process, confrontation, a defense, and jury trial. U.S.Const., Amend's VI&XIV; Mo.Const., Art. 1, §§10&18(a). The escort evidence prejudiced Scott. Its only conceivable purpose was to establish Beverly's state of mind: that she feared Scott. But Beverly's state of mind was not at issue: Scott did not use self-defense, accident, or suicide as a defense. That Beverly called for police escorts, and got them, was irrelevant to, and non-probative of, any issue in the case. It comprised inadmissible, inferred hearsay: that Beverly told the police

she needed an escort because Scott was a danger to her and she feared him.

Crawford v. Washington, 541 U.S. 36 (2004);

Davis v. Washington, 126 S.Ct. 2266 (2006);

State v. Revelle, 957 S.W.2d 428 (Mo.App.S.D. 1997);

State v. Earvin, 743 S.W.2d 125 (Mo.App.E.D. 1988).

V

The trial court erred in overruling Scott's objections to portions of Christopher Guenther's penalty phase testimony. This violated his right to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const., Art.1, §§10&18(a). Guenther's testimony about the deaths of his younger brother Corey and his grandfather was irrelevant: it had nothing to do with the impact of Scott's crime on Beverly's family and exceeded the scope of *Payne v. Tennessee*, 501 U.S. 808 (1991). It was prejudicial in that it encouraged the jury, in determining Scott's punishment, to consider irrelevant, but

tragic, life events of the witness and his family and to make its decision based on passion, prejudice, and emotions.

Darden v. Wainwright, 477 U.S. 168 (1986);

Caldwell v. Mississippi, 472 U.S. 320 (1985);

People v. Dunlap, 975 P.2d 723,745 (Colo. 1999);

Payne v. Tennessee, 501 U.S. 808 (1991);

VI

The trial court plainly erred in permitting the prosecutor to argue at closing that the jurors, like soldiers, had a duty to do. This was a manifest injustice violating Scott's rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VII, and XIV; Rule 30.20. The argument encouraged the jurors to base punishment on matters outside the evidence and on the prosecutor's "testimony": that jurors are like soldiers who did their duty by killing "other young men" in World War II, even though it wasn't

what they wanted to do, and the jurors should also do their duty to sentence Scott to death. In violation of *Caldwell v. Mississippi*, it undermined the jurors' sense of responsibility by inviting them to think that in sentencing Scott to death, they, like soldiers who follow orders given by higher officers, were just doing their duty and were not really responsible.

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006);

Caldwell v. Mississippi, 472 U.S. 320 (1985);

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985).

VII

The trial court erred in overruling Scott's motion to instruct the jury at penalty phase in accordance with §565.032 and refusing Instruction C. This violated his rights to due process, jury trial, a defense, and reliable sentencing. U.S.Const. Amend's V, VI, VIII, & XIV; Mo.Const., Art. 1, §§10, 18(a), & 21; §565.032. Section 565.032.1(2) requires the jury to be

instructed that: “If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, *whether the evidence as a whole justifies a sentence of death or life imprisonment...*” and “in determining” this issue, “the trier shall consider all evidence which it *finds* to be in aggravation or mitigation of punishment, including evidence” at both stages of trial; emphasis added. Scott was prejudiced: no other instruction told the jury to consider “whether the evidence as a whole” justifies a life or death sentence.

State v. Harris, 313 S.W.2d 664 (Mo. 1958);

State v. Gotthardt, 540 S.W.2d 62 (Mo.banc 1976);

Section 565.032.1

VIII

The trial court erred in overruling Scott’s objections and admitting, at penalty phase, hearsay evidence of Beverly’s testimonial statements under the “forfeiture by wrongdoing” doctrine. This violated Scott’s rights to confront witnesses,

due process, jury trial, and reliable sentencing, U.S.Const., Amend’s VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 18(a), & 21. Missouri should not adopt the “forfeiture by wrongdoing” exception to the hearsay rule or apply it in this case. The statements and “wrongdoing” concerned matters other than the then-nonexistent charges in the instant case. Admitting hearsay evidence of Scott’s uncharged bad acts, misconduct, and offenses towards and involving Beverly prejudiced him.

Davis v. Washington, 126 S.Ct. 2266 (2006);

People v. Maher, 677 N.E.2d 728 (N.Y. 1997);

Commonwealth v. Laich, 777 A.2d 1057 (Pa. 2001);

State v. Henderson, 129 P.3d 646 (Kan.App. 2006).

IX

The trial court plainly erred in overruling Scott’s offer of proof concerning Shawn Delgado’s testimony that Billy Mclaughlin told her he was involved in the disposal of Beverly’s body and in sustaining the state’s objection to

Shawn's testimony on that matter. This violated Scott's rights to due process, a defense, jury trial, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const., Art. 1, §§10,18(a),&21. Shawn's testimony would have mitigated Scott's conduct in disposing of Beverly's body. The jury never heard this evidence and was unable to consider it in attempting to determine punishment. Exclusion of Shawn's testimony about Billy's participation in disposing of Beverly's body was a manifest injustice prejudicing Scott. It cannot be shown that, beyond a reasonable doubt, the outcome at penalty phase would have been the same if this evidence had been admitted.

State v. Phillips, 940 S.W.2d 512 (Mo.banc 1997);

Green v. Georgia, 442 U.S. 95 (1979);

Lockett v. Ohio, 438 U.S. 586 (1978);

X

The trial court erred in overruling Scott's objections, submitting Instruction No. 23 to the jury, and sentencing him to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's VI, VIII, & XIV. Instruction 23 included an aggravating circumstance based on §565.032.2(7): whether Beverly's murder "involved depravity of mind" and was therefore "outrageously and wantonly vile, horrible, and inhuman" in that Scott "committed repeated and excessive acts of physical abuse upon" Beverly "and the killing was therefore unreasonably brutal." Scott and Beverly struggled and he stabbed her several times; one of the stab wounds killed her. Although the language "repeated and excessive" is unconstitutionally vague, several stab wounds is not excessive.

State v. Phillips, 940 S.W.2d 512 (Mo.banc 1997);

Green v. Georgia, 442 U.S. 95 (1979);

Lockett v. Ohio, 438 U.S. 586 (1978).

XI

The trial court erred in overruling Scott's motion to quash the information or, alternatively, preclude the death penalty, and sentencing him to death. This violated his rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const. Amend's V,VI,&XIV; Mo.Const., Art. 1, §§ 10, 17, 18(a) & 21. In Missouri, at least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Statutory aggravators are alternate elements of the greater offense of first-degree murder and must be pled in the charging document for the charged murder to be punishable by death. Scott's death sentence was unauthorized; it must be reduced to life imprisonment.

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

Apprendi v. New Jersey, 500 U.S. 466 (2000);

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

State v. Nolan, 418 S.W.2d 51 (Mo. 1967).

ARGUMENT

I

The trial court erred in sentencing Scott to death. This violated his rights to jury trial, reliable sentencing, and due process, U.S.Const., Amend’s VI, VIII, & XIV; Mo.Const., Art. 1, §§18(a), 10, & 21. Section 565.030.4’s directive that the judge make death-eligibility fact-findings whenever “required to determine punishment for murder in the first degree,” violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). In these circumstances, §565.040 mandates Scott be resentenced to life imprisonment without probation or parole.

Ring v. Arizona, 536 U.S. 584 (2002), applied *Apprendi v. New Jersey*, 500 U.S. 466 (2000), to capital sentencing and held, “Capital defendants, no less than noncapital defendants... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Ring*, 536 U.S. at 589. *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), held that under *Ring*, a sentence of death imposed by a judge who, “as required by section 565.030.4 ... made the

requisite factual findings for imposition of a sentence of death,” violated the defendant’s “right to have a jury determine the facts rendering him eligible for death.” *Id.* at 256.³

The Missouri legislature has never revised §565.030.4 to comply with *Ring*; it still requires the judge to make death-eligibility fact-findings when the jury is unable to determine punishment. Judicial death-eligibility fact-finding is as unconstitutional today as when *Ring* was issued in 2002.

But the trial court in this case relied on the court’s own fact-finding—in violation of *Ring*, *Whitfield*, and the Sixth Amendment—to impose a death sentence. That death sentence is unconstitutional and unauthorized. “Under section 565.040, the only possible sentence is life imprisonment.” *Whitfield*, 107 S.W.3d at 257. Scott’s death sentence must be reduced to life imprisonment.

Pretrial, Scott moved to preclude the death penalty on the grounds that §565.030.4’s requirement for judicial fact-finding when it is required

³ The legislature revised §565.030.4’s death-eligibility provisions but retained the requirements that at least one statutory aggravator exist and that the mitigation weigh less than the aggravation. §565.030.4(2) and (3), RSMo. (Supp. 2006).

to determine punishment violated *Ring*, *Whitfield*, and the Sixth, Eighth, and Fourteenth Amendments, and provided for an unconstitutional death penalty (LF63-70). Scott renewed this motion in his timely filed motion for new trial (LF 869-70). The trial court overruled Scott's motion for new trial and sentenced him to death (T2002-06; LF907-12).

Appellate review of this point, concerning whether the trial court was authorized to sentence Mr. McLaughlin to death, is *de novo*. *Tyson v. State*, WD66469, 2007 WL 1974947*3 (Mo.App.W.D. July 10, 2007).

At penalty phase, Judge Goldman instructed the jury on four statutory aggravators: 1. Whether there was "depravity of mind" because "the defendant committed repeated and excessive acts of physical abuse..."; 2. "Whether the murder was committed while the defendant was engaged in the perpetration of forcible rape"; 3. Whether Beverly "was a potential witness in a pending prosecution for burglary in the second degree and was killed" because of that; and 4. Whether she "was a potential witness in a pending investigation concerning an Order of Protection and was killed" because of that (LF856-57). The jury returned a verdict of "unable to decide or agree upon the punishment" indicating it found only the depravity aggravator (LF865-66; T1999-2000).

Even assuming, *arguendo*, the judge could have relied on verdict returned by the jury to impose the death sentence, he did not do so.

Instead, violating *Ring*, *Apprendi*, *Whitfield*, and the Sixth Amendment, the judge made his own fact-findings of aggravating circumstances and used those to sentence Scott to death:

The Court finds that the findings made by the jury in the second stage of the sentencing stage, in particular, the depravity of mind, by repeated and excessive acts of physical abuse encompassing beating, stabbing, *and sexual intercourse on a continuous basis*, and are a part of the murder, the court finds that particular aggravating circumstance and concurs with that and with the jury's findings in that regard....

And the Court further concurs with the jury that there's not – no substantive mitigating circumstances to outweigh the aggravating circumstances.

By mitigating circumstances, I know it's been brought up that it's not clear from the instructions as to what was considered, but certainly what was considered would be evidence that we've heard throughout the trial and certainly have considered the mental condition of Mr. McLaughlin as well as his relationship and the volatility of the relationship between him and Beverly Guenther as well as anything that would be mitigating that was brought up on his behalf, and I agree with the findings of the jury that they don't

outweigh the aggravating circumstance that was found.

[D]epravity of mind really comes from the condition, not just the assaults themselves, but the nature of the assaults in the form of sexual intercourse with the body. That's depravity of mind. It would encompass repeated physical assaults. That's just a terrible crime.

(T2004-05).

The jury made no fact-findings that would support the trial court's findings of "sexual intercourse on a continuous basis" or "assaults in the form of sexual intercourse with the body" as facts supporting depravity. (LF856,865-66). In fact, the jury had rejected as a statutory aggravator that "the murder of Beverly Guenther was committed while the defendant was engaged in the perpetration of forcible rape" (LF856). And, although the depravity statutory aggravator, paragraph one of Instruction 23, could have been submitted with language allowing the jury to "make a determination of depravity" by finding "that the defendant, while killing Beverly or immediately thereafter, had sexual intercourse with her," (Notes on Use to MAI-CR3d 314.40, Note 6), the state instead chose to submit a different narrowing construction of "repeated and excessive acts of physical abuse..." (LF856; A48).

In sum, the trial court found aggravating facts that were presented to, but rejected by the jury, and aggravating facts never presented to the

jury. The court made its own fact-findings and relied on them to impose death. This violates *Ring* and *Whitfield, supra*; it makes Scott's sentence unconstitutional.

Further, determining what mitigation exists is a fact-finding required by §565.030.4(3). *Whitfield, supra*. This step involves weighing mitigation against "found" statutory and nonstatutory aggravators. But nothing indicates what mitigating facts and nonstatutory aggravating facts, if any, the jury found.

Section 565.030.4 provides the only authority for the judge to impose sentence in this case. It directs the judge to "follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree." As the judge did not have specific mitigating fact-findings and specific nonstatutory aggravating fact-findings from the jury, the judge obviously could not use such findings in performing §565.030.4(3)'s requisite weighing. The judge would have had to make his own fact-findings.

This Court has no findings from either the judge or the jury as to nonstatutory aggravators. In §565.030.4(3), the legislature restricted the aggravation that may be weighed to that "found," so it is critical that the Court know what aggravating facts the jury "found."

A related problem is that the Court has no means of reviewing the

fact-findings to determine if sentence was appropriate. Because the mitigating facts found are critical to determining sentence, this Court must know what facts the *jury* found to be able to determine if the sentence imposed is appropriate.

Even assuming that it would have been permissible for the trial court to rely on the jury's fact-findings, there were no mitigating and nonstatutory aggravating fact-findings from the jury for the trial court to use. This lack of fact-findings leaves this Court unable to determine if the death sentence imposed by the trial court in this case is appropriate and supported by evidence. This violates Scott's rights to jury trial, reliable sentencing, and due process. U.S.Const., Amend's VI, VIII, and XIV.

There are additional reasons that Scott's sentence of death is unconstitutional and must be reduced to life imprisonment.

At sentencing, the trial court said that §565.030.4 was "procedural" and, therefore, Missouri's Approved Instructions gave him authority to sentence Scott to death:

[I]f there's a difference between the Supreme Court instructions which emanate from the Supreme Court rules, and the statutes [that] have been in effect, it's my thinking that the procedural matters will be governed by the instructions because they are authorized by the Supreme Court rules.

(T2003). The trial court cited no authority for the proposition that the MAI's authorized him to sentence Scott to death.

The trial court overlooked §565.040:

1. 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....

2. 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 except by act of the governor....

(A15).

“The power to prescribe the penalty to be imposed for the commission of a crime rests with the legislature and not with the courts.” *State v. Bibee*, 496 S.W.2d 305 (Mo.App.Spfd. 1973). “Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights.” *State v. Jaco*, 156 S.W.3d 775, 781 (Mo.banc 2005) citing *Wilkes v. Mo. Highway and*

Transp. Comm'n, 762 S.W.2d 27, 28 (Mo.banc 1988).

“[S]ubstantive law is that which declares what acts are crimes and prescribes the punishment for committing them as distinguished from the procedural law which provides or regulates the steps by which one who commits a crime is to be punished.” *Barnes v. Scott*, 201 F.3d 1292, 1295 (10th Cir. 2000) quoting 88 C.J.S. *Criminal Law* § 2 (1989).

“The provisions of a legislative act are not read in isolation but construed together and read in harmony with the entire act.” *State v. Brookside Nursing Center, Inc.*, 50 S.W.3d 273, 276 (Mo.banc 2001). “The language of a statute is given its plain and ordinary meaning.” *Id.*

Reading Chapter 565’s provisions together, this Court must consider §565.040 in determining whether the trial court erred in sentencing Scott to death. Section 565.040 is substantive because it prescribes when a sentence of life imprisonment must be imposed. Specifically, it mandates a sentence of life imprisonment when the death penalty provided by Chapter 565 is unconstitutional.

As a result of *Ring*, the death penalty provided by §565.030.4 is unconstitutional. Because the legislature never amended or corrected §565.030.4 to comport with *Ring*, *Whitfield*, and the Sixth Amendment, it provided an unconstitutional death penalty when Scott committed his offenses, at his trial, and at his sentencing. Section 565.040 applies.

State v. Duren, 547 S.W.2d 476 (Mo.banc 1977), is instructive.

In 1976, Duren was charged with capital murder under §§559.005 and 559.009, RSMo. (Supp. 1975) (repealed). 547 S.W.2d at 477. Relying on *Woodson v. North Carolina*, 428 U.S. 280 (1976), (finding unconstitutional a North Carolina post-*Furman* statute that provided for a mandatory death penalty), the trial court found §§559.005 and 559.009 “authorized imposition of the death penalty in a manner violative of the Eighth and Fourteenth Amendments to the United States Constitution,” held the statutes unconstitutional, and granted Mr. Duren’s motion to dismiss his indictment. *Id.*

On appeal, this Court held that then-current §559.011 (Supp. 1975) — titled “Alternative punishment if death penalty declared unconstitutional” — applied to “save” the indictment and authorized Mr. Duren to be sentenced, if found guilty, to life imprisonment. *Id.* at 480-81. Section 559.011 provided, “If the category of capital murder or the penalty prescribed herein is declared to be unconstitutional by the Missouri supreme court or the United States Supreme Court, all killings which would be capital murder under any of the circumstances specified in section 559.005 shall be deemed to be murder in the first degree and the offender shall be punished accordingly...” (See AA5).

Duren claimed §559.011 did not apply since the United States

Supreme Court did not find the death penalty “per se” unconstitutional. This Court disagreed:

We think the argument lacks merit. In the first place, *the legislative intent obviously was to provide for the possibility the “penalty” could not be imposed for any reason*; and secondly, this court, having now ruled that the “penalty” is unconstitutional under the existing statutes, has made the second contingency effective.

Id. at 480-81; emphasis added.

The language of §§565.040.1 and .2, the successor to §§559.011 and 559.016 (A5-A6) referring to “the death penalty provided in *this chapter*” and “the death penalty imposed pursuant to *this chapter*,” makes an even stronger case that in enacting §565.040, the legislature intended a sentence of life imprisonment to be imposed when, under the terms of Chapter 565, the death penalty imposed is unconstitutional. Under §565.040.1, the trial court should have sentenced Scott to life imprisonment. *Id.* Under §565.040.2, Scott’s sentence must now be reduced to life imprisonment. *Whitfield, supra.*

The final reason Scott’s death sentence should be set aside is that Instructions 24 and 26—MAI-CR3d 314.44 and 314.46—incorrectly told the jury it must *unanimously* find that the mitigating circumstances outweighed the aggravating circumstances. But §565.030.4(3) does *not*

require unanimity for a life sentence; it requires only that the jury “conclude” the mitigation outweigh the aggravation: “(3) If the trier concludes that there is evidence in mitigation of punishment... which is sufficient to outweigh the evidence in aggravation of punishment found by the trier...”

The plain language of §565.030.4(3), *supra*, does not require a unanimous jury to find the mitigating evidence outweighs the aggravating evidence and return a verdict of life imprisonment. But MAI-CR3d 314.44 and MAI-CR3d 314.48 alter the statute and increase the defense burden: they do not allow a life sentence unless **all** jurors agree that the mitigating evidence outweighs the aggravating evidence.

A majority of jurors in this case—7 or possibly 11—could have “concluded” the mitigation outweighed the aggravation; if so, under §565.030.4(3) the jury should have returned a verdict of life imprisonment. But because the *instruction* required unanimity, though the statute does not, the jury would have to indicate on the verdict form that it did not find mitigation outweighed aggravation.⁴ The jury’s verdict

⁴ The trial judge’s report claims the jury “found beyond a reasonable doubt that the mitigating circumstances did not outweigh the statutory aggravating circumstances” (LF929). This is incorrect; the verdict form

of “unable to decide or agree” is unreliable; the death sentence imposed is equally unreliable and violates Scott’s rights to jury trial, reliable sentencing, and due process. U.S.Const., Amend’s VI, VIII, and XIV.

Although the Court may keenly appreciate the need to bring Missouri’s capital statutory scheme into line with *Ring* and its progeny, that task is for the legislature: “If a statute needs an amendment, the legislature is the one to do it.” *Martinez v. Lea-Ed, Inc.*, 155 S.W.3d 809, 810 (Mo.App.E.D. 2005). The Court lacks the authority to effect such changes. *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 192-93 (Mo.banc 2006) (“This Court must enforce statutes as written, not as they might have been written....”); *Dorsey v. State*, 115 S.W.3d 842, 844 (Mo.banc 2003) citing *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo.banc 1993) (“Where the language of a statute is clear, courts must give effect to the language as written”).

In *State v. Rowe*, 63 S.W.3d 647 (Mo.banc 2002), the question was

indicated only that the jury did not “unanimously” find mitigation outweighed aggravation (LF866). Neither the instructions nor the verdict forms mentioned “reasonable doubt” in connection with this finding (LF858-62;866). Quite possibly a majority of jurors, but not all, found the mitigation did outweigh the aggravation.

whether the following statute applied to a defendant whose license had been suspended by the state of Iowa: “A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked *under the laws of this state* and acts with criminal negligence with respect to knowledge of the fact that his driving privilege has been canceled, suspended or revoked.” *Id.* at 648-49; emphasis in opinion.

Acknowledging that “it seems unlikely that the Missouri legislature intended to let out-of-state drivers with multiple offenses suffer only the consequences of a misdemeanor for driving after revocation while subjecting Missouri drivers to a felony for the same act,” *Id.* at 649-50, the Court nevertheless held it was for the legislature to make the necessary changes:

Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. [Citation omitted.] The legislature may wish to change the statute to cover out-of-state multiple-offense drivers such as Rowe. But this Court, under the guise of discerning legislative intent, cannot rewrite the statute.

Id. at 650.

Rowe applies here. This Court cannot rewrite §565.030.4.

As other state legislatures have done, it is up to the Missouri legislature to modify the statutory provisions to comply with the recent opinions of the United States Supreme Court. *See, e.g., People v. Montour*, 157 P.3d 489, 503 (Colo. 2007) (Colorado’s General Assembly amended its death penalty statute “ in 2002 at an extraordinary session that the governor called in response to Ring... to ensure that Colorado has a constitutional death penalty statute” that “comport[s] with Ring's jury trial requirement”); *State v. Pillatos*, 159 Wash.2d 459, 465-68, 150 P.3d 1130, (Wash. 2007); *State v. Lovelace*, 140 Idaho 73, 76, 90 P.3d 298, 301 (Idaho 2004) (“Subsequent to the *Ring* decision, the legislature revised Idaho's capital sentencing statutes, requiring that a jury find and consider the effect of aggravating and mitigating circumstances in order to decide whether a defendant should receive a death sentence”); *State v. Gales*, 265 Neb. 598, 626, 658 N.W.2d 604, 625 (Neb. 2003) (“during a special session, the Nebraska Legislature enacted... [legislation] with the emergency clause “to satisfy the new 6th Amendment requirements articulated in *Ring*....”).

For all of the foregoing reasons, the death sentence in this case is unconstitutional. Under §565.040.2, it must be reversed and a sentence of life imprisonment imposed.

II

The trial court erred in denying Scott's motion for judgment of acquittal of forcible rape; alternatively, it erred in refusing Instruction A directing that if the jury had reasonable doubt Beverly was alive when Scott had sexual intercourse with her, it must find him not guilty. This violated his rights to due process and fair jury trial, U.S.Const., Amend's V, VI, & XIV, Mo.Const., Article 1, §§10 & 18(a). The evidence failed to prove beyond a reasonable doubt that Scott's stabbing and killing Beverly was done to forcibly compel her to have sexual intercourse or that Scott had sexual intercourse with Beverly through the use of forcible compulsion. The Court should hold that "forcible compulsion" requires proof beyond a reasonable doubt that the victim was alive at the time forcible compulsion was used to have sexual intercourse, and it was error to refuse Instruction A which correctly presented the law.

The state charged Scott with forcible rape, §566.030, by having

“sexual intercourse with Beverly Guenther” without her consent “by the use of forcible compulsion” (LF756-57). The verdict director instructed the jury to find Scott guilty if it found beyond a reasonable doubt he had sexual intercourse with Beverly, knowingly, by the use of forcible compulsion (LF830). The trial court overruled Scott’s motions for judgment of acquittal and to submit a converse—Instruction A—directing the jury to find Scott not guilty of forcible rape if it had reasonable doubt that Beverly was alive when he had sexual intercourse with her (T813-86,1385,1387,1392;LF836; A40). Scott included these rulings in his motion for new trial (LF897-98,901-02).

“A person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion....” §566.030.1, RSMo (Supp.2006). “‘Forcible compulsion’ means either: (a) Physical force that overcomes reasonable resistance; or (b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person.” §556.061(12), RSMo. (Supp.2006).

“[F]orcible compulsion implies the use of physical force to lead a person to act against his will.” *State v. Sandles*, 740 S.W.2d 169,174 (Mo.banc 1987). “Physical force is simply ‘[f]orce applied to the body.’” *State v. Niederstadt*, 66 S.W.3d 12, 15 (Mo.banc 2002); citations omitted.

“[P]hysical force that ‘overcomes reasonable resistance’ ... need not come after the victim has physically resisted.” *Id.*; citation omitted. “The force involved need not come after the victim has physically resisted.” *State v. Vandevere*, 175 S.W.3d 107, 108 (Mo.banc 2005). “Rather, the force used must be calculated to overcome the victim's resistance.” *Id.* “Reasonable resistance is that which is suitable under the circumstances.” *Id.* at 109. “[T]he law does not require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury.” *State v. Spencer*, 50 S.W.3d 869, 874 (Mo.App.E.D. 2001).

Section 566.030 is silent as to whether forcible rape requires a live victim. The statute does not state whether the victim must be alive when physical force is used. Nor does it specify whether the victim must be alive at the time of sexual intercourse.

The concepts of “forcible compulsion” and “reasonable resistance” are inconsistent with the victim being dead at the time of sexual intercourse. “Reasonable resistance” incorporates the requirement of the victim resisting to the extent that is reasonable in the circumstances at the time forcible compulsion is used to have sexual intercourse. Because forcible compulsion sufficient to overcome reasonable resistance is an element of the offense of rape, the statute appears to require the victim to be alive.

Appellant’s research suggests this is a matter of first impression in Missouri. There is a split of authority among the states that have considered whether proof beyond a reasonable doubt of forcible rape requires a live victim at the time of sexual intercourse.

Alabama’s Court of Criminal Appeals has concluded:

[T]he proper inquiry is not whether the sexual act occurred after the victim was dead, but whether the murder and the rape formed a continuous chain of events, i.e., whether the intent to commit the rape was formed before or during the murder.... We adhere to the view enunciated in *Padgett* that “[i]f the intent to have sexual intercourse arose after the victim was already dead, there could be no forcible compulsion of the victim to engage in sexual intercourse, thus, although the appellant's act was offensive and repugnant, it could not be rape.”

Lewis v. State, 889 So.2d 623, 683 (Ala.Crim.App. 2003) citing *Padgett v. State*, 668 So.2d 78, 84-85 (Ala.Crim.App. 1995).

In *People v. Hutner*, 209 Mich.App. 280, 530 N.W.2d 174 (Mich.App. 1995), the Michigan Court of Appeals noted that states “faced with the question whether a defendant may be convicted of rape where the victim was dead at the time of penetration, have reached contrary results,” but were fairly unanimous in holding that the applicable statutory language

must be carefully examined in order to determine this issue. *Id.* at 283, 176; citations omitted. The Court held that the statute’s use of the term “person” required a live victim at the time of penetration:

Our statute, like the statutes at issue in *Sudler, supra*, and *Sellers, supra*, defines third-degree criminal sexual conduct as engaging in nonconsensual sexual penetration with another “person.” Furthermore, a “victim” is a “person alleging to have been subjected to criminal sexual conduct.” A dead body is not a person. It cannot allege anything. A dead body has no will to overcome. It does not have the same potential to suffer physically or mentally as a live or even an unconscious or dying victim. See *Stanworth, supra; Sellers, supra.*

Id. at 283-84, 530 N.W.2d at 176; citing *Commonwealth v. Sudler*, 496 Pa. 295, 302-303, 436 A.2d 1376 (1981); *People v. Stanworth*, 11 Cal.3d 588, 605, 114 Cal.Rptr. 250, 522 P.2d 1058 (1974); *People v. Sellers*, 203 Cal.App.3d 1042, 1050, 250 Cal.Rptr. 345 (1988).

Other states requiring a live victim for forcible rape include Kansas: *State v. Perkins*, 248 Kan. 760, 771, 811 P.2d 1142, 1150-51 (Kan. 1991) (Relying on statute’s definition—“Rape is sexual intercourse with a person” under certain conditions to hold, “Rape can only be committed against a living person”); Kentucky: *Smith v. Commonwealth*, 722 S.W.2d

892, 894 (Ky. 1987) (Victim must be alive at start of assault to support finding of “sexual intercourse by forcible compulsion” but need not be alive when penetration occurs); Nevada: *Doyle v. State*, 112 Nev. 879, 921 P.2d 901 (Nev. 1996) (collecting cases) *overruled on other grounds*, *Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (Nev. 2004); New Jersey: *State v. Spencer*, 319 N.J.Super. 284,306, 725 A.2d 106, 117 (N.J.Super. 1999) (“victim must be alive at the time the assaultive behavior begins in order to support a conviction of aggravated sexual assault or felony murder” but “need not be alive at the time of penetration”); Oklahoma: *Rogers v. State*, 890 P.2d 959, 969 (Okla.Cr. 1995).

States not requiring a live victim include Arizona: *State v. Gallegos*, 178 Ariz. 1,10, 870 P.2d 1097,1105 (Ariz. 1994); Tennessee: *State v. Brobeck*, 751 S.W.2d 828, 832 (Tenn. 1988); Connecticut: *State v. Solek*, 66 Conn.App. 72, 783 A.2d 1123 (Conn.App. 2001); Georgia: *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840 (1988).

Missouri’s forcible rape statute, like those of Kansas, Michigan, California, and Pennsylvania, uses the term “person” which indicates a legislative intent that the victim be alive when forcible compulsion is being used to accomplish sexual intercourse. This indicates that in Missouri, at a minimum, there must be proof that at the time the forcible compulsion is employed, the defendant intends to have sexual

intercourse with the victim.

Here, the evidence shows the force Scott used to kill Beverly at the parking lot would have killed her within a few minutes (T1272,1287-88,1291-92). But there is no evidence Scott raped Beverly at the parking lot. The evidence did not show when and where Scott had sexual intercourse with Beverly: at Shoreline before or after he killed her or at a later time at a different location.

The evidence does not show that the force Scott used to kill Beverly was also used to rape her. There is no evidence showing that when Scott killed Beverly at the parking lot, he had, or even planned to have, sexual intercourse with her.

The evidence does show an extended period of time *after* Scott killed Beverly, put her into his car and drove away from Compucard, a period of time in which Beverly was already dead, in which he could have decided to have sexual intercourse with her dead body and done so. If so, however offensive it may have been for him to have sexual intercourse with her body after her death, it was not the crime of forcible rape.

Scott could have had sexual intercourse with Beverly's corpse anytime during the approximately 8-hour period between 6:00 p.m., when Beverly left work, and 2:00 a.m. the next morning, when Scott called Shenia Hodges (T793,803-04,949,1046; StEx's-70,71,71A:18). The evidence

shows that time, distance, and intervening events likely separated the killing and the sexual intercourse with Beverly's body.

Michael White's testimony places Scott at White's house at 7:30 p.m. on the 20th (T978). Although Scott may have gone to the river and had sexual intercourse with Beverly's body before going to White's house, the evidence shows this is unlikely: there was not enough time for him to have encountered Beverly at 6 p.m. and killed her, put her in his car, driven to the river, dragged her body across the rough terrain, and still have reached White's house at 7:30 p.m. Further, the lot near the river where Scott parked was so muddy that Detective Neske didn't want to pull in there, [he] might get his car stuck" (T1188). But White did not mention any mud on Scott: just a little blood that he washed off before leaving with his brother Billy (T978-80). In contrast, Patrick Dewey testified that Scott "stunk real bad" and "needed to take a shower" when Scott showed up at the Dewey's at 6:00 a.m. on the 21st (T1033-34). Scott's clothes, later seized by the police, were dirty (T1036-37,1047). Scott's clothes becoming dirty between the time he was at White's house at 7:30 p.m. on the 20th and at the Deweys' house on the morning of the 21st is consistent with Scott taking Beverly's body to the river at some point after he had been to White's house and had left with his brother.

There is no evidence of what Scott and Bill McLaughlin did after

leaving White's house. The muddy, "very rough... very overgrown... very dangerous" route to where Beverly's body was discovered, as described by Detectives Peeler and Neske, would have taken quite some time to traverse with a body even if two people were moving the body. T1122-25,1188-91, StEx's56-60). It was not until the early morning hours of November 21st, "two o'clock in the morning" according to the prosecutor, T796, that Scott called Sheniah Hodges saying he had a flat tire and asking for a ride (T1046; StEx's-70,71,71A:18).

The evidence shows it was very possible that Scott stabbed Beverly on the parking lot, dragged her to his car, and drove her to south St. Louis. Then, either before taking her body to the Mississippi River or before leaving it there, at an "isolated" location (T1408), he had sexual intercourse with her body.

The prosecutor maintained that sexual intercourse occurred at the parking lot while Beverly was still alive (T1414-15,) or if not, that she was dead didn't matter (T1441), and that Scott "raped" Beverly and used a knife to do so, (T795, 1441). The absence of proof that Scott used forcible compulsion to have sexual intercourse with Beverly is shown by the fact that the jury evidently rejected the state's theory that Scott committed rape "through the use of th[e] knife," T795, because it found Scott not guilty of Count 4—the armed criminal action for rape (LF845-46). The

jury's rejection of the armed criminal action count accompanying the rape could only be because the jury determined that Scott's stabbing of Beverly was not the forcible compulsion used for sexual intercourse (LF830,832). The jury's note asking, "Is it rape if a person has sexual intercourse with a person who is deceased, by law?" is evidence that the jury did not think the sexual intercourse occurred on the parking lot while Beverly was still alive (LF840).

Under the law discussed, *supra*, for the force used to kill Beverly to be the forcible compulsion used to commit the charged offense of rape, Scott must have intended to have sexual intercourse with Beverly when he stabbed her. If Scott killed Beverly, and only thought of having sexual intercourse with her sometime afterward—while driving to south St. Louis or after reaching White's house, or after arriving at the river—Scott did not use forcible compulsion to have sexual intercourse with Beverly and did not commit the crime of rape.

Conviction upon evidence insufficient to establish guilt beyond a reasonable doubt, "defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense," violates due process of law. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). The Fourteenth and Sixth Amendments "indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every

element of the crime with which he is charged, beyond a reasonable doubt.” *Apprendi v. New Jersey*, *supra* 530 U.S. at 476-77.

Appellate review of the sufficiency of the evidence “is limited to a determination of whether the state presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty.” *State v. Niederstadt*, 66 S.W.3d. 12, 13-14 (Mo.banc 2002). Evidence and inferences are viewed “in the light most favorable to the verdict, ignoring all contrary evidence and inferences.” *Id.* at 14.

The evidence here does not support Scott’s conviction of forcible rape. There was no evidence that Scott stabbed Beverly to have sexual intercourse with her or that when he stabbed her he contemplated having sexual intercourse with her. There is no evidence that Beverly was alive when Scott had sexual intercourse with her. These are possibilities, but no more than possibilities. This is not proof beyond a reasonable doubt.

In reviewing a claim that the evidence is insufficient, the appellate court views the evidence in the light most favorable to the state. *State v. Grim*, 854 S.W2d 403,405 (Mo.banc 1993). Even under this strict standard, as shown above, the evidence falls short of proving beyond a reasonable doubt that Scott used forcible compulsion to rape Beverly.

This Court must find that the forcible compulsion used to have sexual

intercourse must occur while the victim is alive. Because Scott's conviction or rape was not supported by sufficient evidence, he was deprived of his rights to due process guaranteed under the United States and Missouri Constitutions.

The trial court erred in overruling Scott's motion for judgment of acquittal of rape; his conviction must be reversed and he must be discharged of that offense.

In the alternative, the Court should find that the trial court erred in failing to submit Instruction A. As demonstrated, *supra*, Instruction A correctly stated the law.

As shown by the jury's question during deliberations, *supra*, and the jury's failure to convict Scott of armed criminal action, refusing this instruction prejudiced him. Without the instruction, counsel could only argue that if Beverly was dead when Scott had sex with her, he did not use forcible compulsion to have sex and did not rape her (T1429). But without the requested instruction, counsel could not argue that they should follow the law as given in the instruction, and if the jurors had reasonable doubt that Beverly was alive when Scott had sexual intercourse with her, they must find Scott not guilty (LF836).

"The trial court was duty-bound to correctly instruct the jury on the substantive law that governed Defendant's trial." *State v. Langston*, 229

S.W.3d 289, 296 (Mo.App.S.D. 2007) citing *State v. Gotthardt*, 540 S.W.2d 62, 66 (Mo.banc 1976) (MAI's do not eliminate trial court's "duty to correctly instruct the jury on the law of the case").

[W]hen a defendant in a criminal case formulates and requests an instruction that correctly declares the law which is the converse of the State's principal instruction, it is the duty of the trial court to give the same. Moreover, it is reversible error to refuse such a converse instruction when the State's instruction, as here, does not clearly submit the converse of the issues upon which convictions are authorized.... [C]oncluding the State's main instruction with the words 'and unless you so find the facts to be you will acquit the defendant,' or words to like effect, is not sufficient reason for refusing the converse instruction offered by the defendant.

State v. Smith, 485 S.W.2d 461, 468 (Mo.App.Spf.D. 1972).

Scott's converse, Instruction A, correctly stated the law and put the factual issue – was Beverly alive at the time of sexual intercourse – before the jury. The verdict director did not put this issue to the jury, and therefore it was prejudicial error, in violation of Scott's rights to due process, fair jury trial, and a defense, U.S.Const., Amend's V, VI, and XIV, to refuse the converse. Scott's conviction of forcible rape must be reversed and the cause remanded for a new trial.

III

The trial court erred in refusing Scott's Instruction B: second degree felony murder. This violated his rights to due process, jury trial, a defense, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const., Amend's 10 & 18(a). The trial court's view—the rape and murder were continuous and Scott killed Beverly to rape her—supported a felony murder instruction. Refusing Instruction B but instructing on rape, and the penalty phase “rape during murder” statutory aggravator, based on the same facts, let the state use inconsistent theories and prejudiced Scott. The conventional second degree murder instruction did not cover the facts, law, or a fact-based defense as the felony murder instruction would have done. Unless Scott chose to submit only felony murder, felony and conventional second degree murder instructions should have been given. *Beck v. Alabama*; *Spaziano v. Florida*.

The prosecutor claimed Scott raped Beverly as he killed her (T795). The trial court agreed Scott killed Beverly so he could rape her:

THE COURT: When it says forcible compulsion, that is all part of rape. So if a man, in the process of raping a woman, is killing her, that's the forcible compulsion....

MR. STEELE [DEFENSE COUNSEL]: The example where an individual killed a woman during the course of a rape is not what we have here. We have the converse of that: we have a murder, and then that rape subsequently occurring after the murder. It is not the example you gave in which there is some struggle and a rape during the commission of the offense. Here, we don't have that. We have a murder and then a rape some hours later....

THE COURT: If that were the case, that wouldn't be forcible compulsion....

MR. LIVERGOOD [PROSECUTOR]: I think that because of the defendant's act in the killing of her and raping her, that's forcible compulsion. He used force in order to rape her....

The Court: That would have been my thinking of continuing action. In other words, he's doing this to rape her....

There's sufficient evidence to submit to the jury that forcible compulsion was part of the rape and that it occurred in all one continuous series of events....

(T1389-91).

THE COURT: I've been thinking more about this—that the continuous series of event, which there is evidence of: There's an assault on the parking lot, and then Ms. Guenther was taken to the river where her body was left. That was over a period of an hour or so. So I think that even if he did—there was some intercourse or he penetrated her at the riverbank, it's still a part of the continuous series of events that's part of the rape....

At some point, he raped her, either while she was alive or very later by the riverbank, even though I before—I thought this might be a problem with the State's evidence. I think it's just a continuous series of events that one included by the term forcible compulsion because he couldn't have gotten her by the river and had intercourse with her if he didn't use forcible compulsion. So—and, like I said, if I'm wrong, that's wrong—and the Supreme Court can define that more clearly.

MR. STEELE: If that's the Court's position, then the defendant would like the opportunity to submit an instruction for felony murder. If it's the Court's position or the State's position that she was killed during the commission of the rape, then we would request a few minutes to prepare an instruction for felony

murder indicating to the jury a murder was committed during the commission of a felony, that felony being forcible rape and they should find him guilty of that charge.

(T1393-94).

Relying on *State v. Hall*, 982 S.W.2d 675, 682, (Mo.banc 1998), the trial court found no prejudice in refusing a felony murder instruction (T1394-96; LF837). Defense counsel argued

Mr. McLaughlin is prejudiced... there's two different theories. One theory being he went to her workplace to kill her, to murder her, and the other theory being he went there to rape her.... If the state says he went there to rape her, and he subsequently killed her, then I think we are entitled to the felony murder.

(T1397-98). The trial court responded, "It could be he went there for both purposes" (T1398). Defense counsel said, "In that case, I still think we are entitled to felony murder" (T1398).

Stating, "any time you give more instructions, it confuses the jury" the trial court instructed on conventional second degree murder but refused Scott's felony murder instruction "B"; Scott included this ruling in his motion for new trial (T1397-98; LF827,837,902;A41).

Conventional, second-degree murder, like first-degree murder, is a knowing killing. *Cf.* §565.020.1: "A person commits the crime of murder

in the first degree if he knowingly causes the death of another person after deliberation upon the matter,” and 565.021.1(1): “A person commits the crime of murder in the second degree if he: knowingly causes the death of another person....” Conventional second degree murder “tests” the element of deliberation by omitting it as an element of culpability; it is first degree murder minus one element.

Felony murder, however, is based on a completely different theory of the killing: a *felony* was intended, and the killing occurred in the course of committing the felony. See §565.021.1(2): (“A person commits the crime of murder in the second degree if he... Commits or attempts to commit any felony, and, in the perpetration... of such felony... another person is killed as a result of the perpetration... of such felony....”)

Here, failing to instruct the jury on felony murder when the evidence—as the trial court and the prosecutor stated—provided a basis for finding that the killing was committed in the course of the felony and for acquitting of a knowing killing upon which the defendant deliberated, prejudiced Scott. It prejudiced him by denying him an opportunity to put before the jury, and argue to the jury, a theory of how and why the killing occurred completely different from first degree and conventional second degree murder. In practical effect, felony murder is a true alternative to first degree murder—not to conventional second degree murder.

If the trial court truly thought it would be “confusing” to submit another instruction, the instruction to omit was the conventional murder second degree, Instruction 10, which the *state* requested (LF827). The object of jury instructions is to correctly instruct the jury according to the law. Quantity should not prevent the jury from being correctly instructed.

In determining whether a refusal to submit an instruction was error, "the evidence is viewed in the light most favorable to the defendant." *State v. Avery*, 120 S.W.3d 196, 200 (Mo.banc 2003). “If the evidence tends to establish the defendant's theory, *or supports differing conclusions*, the defendant is entitled to an instruction on it.” *Id.* (citation omitted); emphasis added.

“Instruction on a lesser-included offense is required if the evidence produced at trial, by fact or inference, provides a basis both for the acquittal of the greater offense and the conviction of the lesser offense.” *Id.* at 205. “When in doubt, courts should instruct on the lesser-included offense, leaving it for the jury to decide of which offense, if any, the defendant is guilty.” *Id.* This is because “*the jury as fact finder [is] entitled to consider all of the evidence and make its own credibility determination.*” *Id.* at 206; emphasis added. “[I]n any charge of murder in the second degree, the jury shall be instructed on... any and all of the subdivisions

in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.” §565.021.3

A defendant may not be denied an instruction that is supported by the evidence even if at odds with his defense. *State v. Santillan*, 948 S.W.2d 574,576 (Mo.banc 1997); *State v. Redmond*, 937 S.W.2d 205,209-10 (Mo.banc 1996) (seemingly inconsistent instructions may be submitted if supported by the evidence). In deciding whether to submit a lesser instruction, the court is not to “determine [the witnesses] credibility, nor to weigh the evidence in any other respect.” *Id.* at 209 (citation omitted). “The court's role is to determine whether the testimony presented would support” conviction of the lesser offense bearing in mind that a jury may decide what evidence to accept or reject and may accept part of it “while disbelieving other portions.” *Id.*

The prosecutor was able to tell the jury that Scott “forcibly raped Beverly Guenther and used force to stab her, to overcome her... [a]nd... did rape Beverly Guenther and use that knife in connection with it” (T798-99). The prosecutor was able to argue to the jury that in the parking lot, after stabbing Beverly, Scott “raped her... exercising more power and control” (T1414). The prosecutor was able to argue that as Beverly was “lying there” on the parking lot, “not moving,” Scott raped her to exercise power and control over her (T1415).

The same facts the prosecutor relied on to make those statements and arguments supported a felony murder instruction; if the judge had instructed on felony murder, defense counsel could have used the state's own evidence and arguments—that in stabbing Beverly on the parking lot, Scott was using forcible compulsion to rape her—to defend against the charge of first degree murder (T1414-15). Counsel would have been able to argue that if the jury agreed with the state that the killing was the force used to accomplish the rape (T1414-15), then at the most, Scott was guilty of no more than second degree felony murder.

Had a felony murder instruction been given, then based on exactly the same evidence that the state relied on, the jury could have found Scott guilty of felony murder. Without this instruction, Scott could only argue there was insufficient evidence to show that he planned to kill, or deliberated on killing, Beverly (e.g., T1420,1424-26). And, of course, the jury could not find Scott guilty of killing Beverly “as a result of the perpetration of that forcible rape” (LF837; A41)

Appellant is cognizant of *State v. Hall, supra*, which the trial court here relied on to deny the felony murder instruction. *Hall* held “that when ‘a jury convicts on first-degree murder after having been instructed on both first degree and second-degree murder, there is no prejudice to the defendant by the refusal to submit a second degree felony murder

instruction.’ *Id.* at 683; citations omitted.

Hall is distinguishable. In *Hall*, the jury was not instructed on the underlying felony. Nothing in *Hall* indicates that, as here, the prosecutor and the judge claimed the murder was committed so the felony could be committed. Regarding the fact that the prosecutor’s and judge’s statements concerning instructing the jury on the rape actually support submitting a felony murder instruction, the instant case is unique.

Further, *State v. Beeler*, 12 S.W.3d 294 (Mo.banc 2000) issued two years after *Hall*, has called the rule relied on in *Hall* into question.

In *Beeler*, the defendant was charged with second degree murder; the issue was whether a lesser included offense instruction for involuntary manslaughter should have been given. *Id.* at 299. The Court held that “where the evidence permits an inference of” conduct needed to support the instruction, and the instruction is requested, the trial court “is obligated” to submit it. *Id.* at 300.

Beeler teaches that determining whether to submit a lesser instruction requires examining the evidence and inferences from the evidence to see if they support the instruction. *Id.* at 299-300. If the evidence would support acquittal of the charged offense and conviction of the lesser-offense in question, the lesser-offense instruction should be submitted. *State v. Frost*, 49 S.W.3d 212

(Mo.App.W.D. 2001), illustrates.

In *Frost*, the trial court instructed on second-degree murder, voluntary manslaughter and self-defense; appellant was convicted of second degree murder. *Id.* at 216. Appellant offered an involuntary manslaughter instruction, but the trial court refused it when the State argued that involuntary manslaughter “would be inconsistent with the defense submission of voluntary manslaughter and self-defense. *Id.*”

Relying on *Beeler*, the Western District examined the evidence to determine if it would support conviction of involuntary manslaughter and acquittal of second degree murder. *Id.* at 217. Significantly, unlike the procedure currently utilized in first degree murder cases in denying a felony murder instruction because a conventional second degree murder instruction has been given, *Frost* did not consider the effect of any other lesser-included instructions. *Frost* did not decline to instruct on involuntary manslaughter because the intervening manslaughter had been given.

In light of *Beeler* and its progeny, appellant respectfully asks the court to revisit and find insufficient *Hall's* “no-prejudice-because-conventional-murder-suffices-to-test-deliberation” rule. If a noncapital case requires use of a detailed evidentiary analysis to determine whether lesser included offense instructions should be submitted, in a capital case, the

defendant's rights to due process, to jury trial and a defense, and to reliable sentencing require no less. U.S.Const., Amend's V,VI,VIII,XIV.

A detailed *Beeler* analysis, examining the evidence here in the light most favorable to the lesser-offense instruction, shows it supports acquittal of first degree murder and conviction of felony murder.

Scott and Beverly's entire relationship had "a lot of ups and downs" (T819,831-32,961). Beverly and Scott repeatedly broke up and got back together (T813). Her co-workers never saw any signs that Beverly had been physically abused (T815-16,964). Beverly would get restraining orders against Scott, dismiss them, and she and Scott would get back together (T832). Even after the "final" breakup in March, 2003, Scott was sometimes at Beverly's; she had a barbecue for Scott and his family in September, 2003 (T842).

Scott called Beverly frequently whether they were together or apart (T962). In the weeks before he killed Beverly, Scott repeatedly called her office to talk to her, drove by her trailer, and went to her office to see her (StEx's74, 101,500). On November 12th, Scott jumped out of the bushes as Beverly left work and tried to talk to her about the burglary case (StEx-101). When Beverly refused to talk, he tried twice to kiss her and grabbed her breast (StEx-101).

Once, after an argument with Beverly, he told Virginia Aurich, "if he

couldn't have Beverly, no one would have Beverly" (T827). The week before the murder, Scott talked with his nephew, Patrick Dewey, about Beverly; Scott said "his life would be over if he couldn't have her" (T1032). Scott didn't say anything to Dewey about being violent toward Beverly or killing her (T1039-40).

On November 20th, Scott hid behind the steps at Beverly's building so she couldn't see him and waited until she left work (StEx's-70,71,71A:9-10). When she reached the parking lot, Scott stood up and said, "Beverly" (StEx's-70,71,71A:11). Beverly told Scott to leave her alone and "get out of here" (StEx's-70,71,71A:11-12). He tried to talk to her and walked with her toward her truck (StEx's-70,71,71A:12). At some point, he took a knife from his pocket and stabbed her (StEx's-70,71,71A:13). The knife was one Scott had gotten from his brother's ex-girlfriend's house, and had with him "for months" (StEx's-70,71,71A:12-13).

The evidence did not establish when Scott had sexual intercourse with Beverly. But the trial court and the state maintained that sexual intercourse was contemporaneous with the killing at the parking lot (T1389-90). The trial court and the state said the evidence showed the assault occurred on the parking lot and that it was the forcible compulsion of the forcible rape:

MR. LIVERGOOD [PROSECUTOR]: I think that because of the

defendant's act in the killing of her and raping her, that's forcible compulsion. He used force in order to rape her....

The Court: That would have been my thinking of continuing action.

In other words, he's doing this to rape her....

(T1390).

The trial court added,

In other words, he's doing this to rape her. There's no indication he would have raped her by the riverbank. The assault occurred on the parking lot. I think the natural inference from all that in the rape, intercourse would have happened at that time, not down by the river. There's no evidence of any struggling or anything going on down by the river.

So I think she died in the parking lot, and that was all part of my thinking. There's sufficient evidence to submit to the jury that forcible compulsion was part of the rape and that it occurred in all one continuous series of events. So if that's wrong, I'm sure the appellate courts will make that clear.

(T1390-91).

The evidence, viewed in the light most favorable to the requested instruction, supported a felony murder instruction. The trial court's and prosecutor's own words describe felony murder. From the evidence, the

jury could have found that Scott wanted to “have” Beverly sexually and waited for her to try to talk her into having sex with him.

From this evidence, the jury could have found that when Beverly resisted his advances and told Scott to leave her alone and go away, he stabbed her to compel her to have sexual intercourse with him. This is felony murder.

There was evidence from which the jury could infer that Scott deliberated about killing Beverly, but the evidence of deliberation was not overwhelming or compelling (T971-72,974-75; StEx’s-70,71,71A:22-23).

Failing to submit the requested instruction to the jury was error and it prejudiced Scott:

Detective Neske testified that “forcible rape is a crime of power and control” (T1211-12). In his guilt phase closing argument, the prosecutor argued the case was about “power and control” and that “rape” is “an issue of power and control” (T1406). “Power and control is what he wanted over her....” (T1407). “He’s the one that killed her....” (T1407). “What other evidence did he leave.... It’s just almost something you can’t even imagine, but he left his semen in her vagina. I mean that’s the evidence we have” (T1407-08).

What’s the ultimate power and control besides killing her? It’s raping her. He raped her....

Was she dead at the time she was raped? I doubt it. I doubt it. And the reason I doubt it is because power and control, and if she's lying there not moving, what power and control can you have over her? He's going to make sure that she knows. He's going to make sure he has that one last time to show force on her as her blood is pouring out of her.

(T1414-15).

Because the jury was not instructed on felony murder, defense counsel's hands were tied: counsel could not use the same facts that the prosecutor used (in arguing that Scott raped Beverly) to argue that if the jury found Scott killed Beverly in the course of raping her, they should find him guilty of felony murder.

The trial court's determinations that the evidence supported instructing the jury on forcible rape and the statutory aggravator that the murder was committed "while the defendant was engaged in the perpetration of forcible rape," LF856, are inconsistent with the trial court's refusal to instruct the jury on felony murder. The same evidence was the basis for each of these rulings. The same evidence was the basis for the prosecutor's and trial court's statements concerning why an instruction on forcible rape and the statutory murder-during-rape aggravator were warranted. The prosecutor's and trial court's arguments

and statements were classic descriptions of felony murder. The evidence warranted an instruction of felony murder, and the trial court's error in refusing an instruction on felony murder prejudiced Scott.

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Supreme Court held that “a sentence of death [may not] constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict[.]” *Id.* at 627. Recognizing that a lesser included offense instruction was of value as a procedural safeguard, the Supreme Court held that “if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case. *Id.* at 637-38. “For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense,--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the “third option” of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.” *Id.* at 637.

In *Spaziano v. Florida*, 468 U.S. 447 (1984), the statute of limitations had run on several lesser included, noncapital offenses. *Id.* at 450. The

defendant refused to waive the statute of limitations on the lesser offenses, and the trial court refused jury instructions on them. *Id.*

Relying on *Beck v. Alabama*, the Supreme Court held that “the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. *Id.* at 456.

Spaziano is significant for two reasons. First, it implicitly applied *Beck* to a situation where more than one lesser included offense applied. Second, it gave the defendant the “choice of having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses.” *Id.*

The *Spaziano-Beck* rule should apply here, also. Under state law, both felony murder and conventional second degree murder are lesser included offenses of first degree murder, and there was evidence supporting instructions on both. Under *Spaziano* and *Beck*, instructions on both should have been given to the jury or, at the very least, Scott should have been given the choice of which to submit: conventional second degree murder or felony second degree murder. The trial court’s failure to instruct the jury on second degree felony murder or to give Scott the choice of which lesser included instruction to submit, where both were supported by the evidence, violated his rights to due process, a

defense, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV; *Beck v. Alabama*; *Spaziano v. Florida*.

For the foregoing reasons, the trial court's error in failing to submit Scott's proposed felony murder instruction, Instruction B, was prejudicial. The cause must be reversed and remanded for a new trial.

IV

The trial court erred in overruling Scott's objections to the testimony of Police Officers Wathen and Crocker that at Beverly's request, they escorted her from her office to her car. This violated Scott's rights to due process, confrontation, a defense, and jury trial. U.S.Const., Amend's VI&XIV; Mo.Const., Art. 1, §§10&18(a). The escort evidence prejudiced Scott. Its only conceivable purpose was to establish Beverly's state of mind: that she feared Scott. But Beverly's state of mind was not at issue: Scott did not use self-defense, accident, or suicide as a defense. That Beverly called for police escorts, and got them, was irrelevant to, and non-probative of, any issue in the case. It comprised inadmissible, inferred hearsay: that Beverly told the police she needed an escort because Scott was a danger to her and she feared him.

Prior to the testimony of Officers Wathen and Crocker, defense counsel objected that what they were about to testify to—that Beverly asked the police to escort from her office building door to her car—was irrelevant (T847-50,859). The only possible purpose of the testimony would be to establish Beverly’s reason for requesting a police escort which would be based on inferred hearsay statements that she feared Scott (T847-51,859). The trial court overruled Scott’s objections; he included these rulings in his motion for new trial (T851,859;LF888-90).

Officer Wathen testified that on October 30th, at 5:40 p.m., he went to 4157 Shoreline responding to Beverly’s call for a police escort (T854-55). Upon arriving, he met Beverly who explained why she called (T856-57). Officer Wathen escorted Beverly “outside to her vehicle” (T857).

After that date, Officer Wathen had no further direct contact with Beverly, but he would park across the street from the business from 5:45 p.m. to 6:00 p.m.—the time when Beverly left work (T857-58). Officer Wathen took this additional action without regard to whether Beverly had called for an escort (T858).

Officer Crocker testified that on November 14th, he went to 4157 Shoreline responding to Beverly’s call for a police escort (T861-62). He arrived about 5:30 p.m., and it was dark outside (T863). Officer Crocker escorted Beverly to her car (T863). Beverly then “made a specific request

that evening that [he] follow her out of the Earth City business park... several square miles” to Interstate 70 (T864).

“A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.” *State v. Kemp*, 212 S.W.3d 135,146 (Mo.banc 2007). It violates “the hearsay rule to set up a set of circumstances by the testimony of a witness which invites the inference of hearsay.” *State v. Valentine*, 587 S.W.2d 859,861 (Mo.banc 1979).

The officers’ in this case testimony comprised irrelevant, inadmissible, testimonial hearsay. Under *Valentine*, it was hearsay because it allowed the inference of hearsay: that Beverly told the police she needed an escort because she feared Scott. It allowed the jury to infer Beverly called the police for an escort because she thought Scott was dangerous. It further allowed the jury to find that the police provided an escort for Beverly because they believed Scott was dangerous.

Admission of testimonial hearsay without an opportunity to cross-examine the declarant violates the Sixth Amendment confrontation clause. *Crawford v. Washington*, 541 U.S. 36,53-54 (2004). The testimony of Officers Wathen and Crocker comprised inferred hearsay: it allowed the inference that Beverly called the police to request that she be

escorted to her car because she feared Scott. This was testimonial hearsay and its admission violated the Sixth Amendment:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S.Ct. 2266, 2273-74 (2006).

Here, there was no testimony of an ongoing emergency either at the time of the calls or when the police officers arrived at Beverly's workplace. Admission of the inferred hearsay that Beverly told the police she needed an escort because she feared Scott and he was dangerous was testimonial hearsay violating *Crawford* and requires reversal.

But even assuming, *arguendo*, that the inferred hearsay admitted in this case through the "escort" testimony of Officers Wathen and Crocker is not "testimonial," it is still hearsay. It is inadmissible unless it falls within an exception to the rule prohibiting admission of hearsay. *State v. Sutherland*, 939 S.W.2d 373,376 (Mo.banc 1997).

To be admissible, evidence must be relevant. *State v. Anderson*, 76 S.W.3d 275,276 (Mo.banc 2002). In this case, the inferred hearsay showed Beverly's state of mind. The victim's state of mind must be relevant: "probative of an ultimate issue in the case." *State v. Revelle*, 957 S.W.2d 428,432 (Mo.App.S.D. 1997). Evidence of the victim's state of mind has been found relevant and admissible "when the defendant "claims self-defense, suicide, or accidental death." *Id.*

"The general rule is that extrajudicial statements of a declarant-victim's present state of mind are excepted from the hearsay ban, provided the declarant's state of mind at the time is an issue in the case." *Id.* "Because of the danger" that evidence concerning the victim's fear of the defendant "might be considered for an improper purpose, its use is "generally limited to cases where hearsay declarations of mental condition are especially relevant—particularly where the defendant has put the decedent's mental state at issue by claiming accident, self-defense or suicide." *State v. Bell*, 950 S.W.2d 482,484 (Mo.banc 1997).

The only possible exception to the hearsay rule that could apply in this case, the state of mind exception, does not apply. It does not apply because Beverly's state of mind was not probative of any issue. Scott did not raise self-defense, accident, or suicide, or any other defense that would put Beverly's state of mind at issue.

Admission of this evidence served only to prejudice jury against Scott and to imply uncharged misconduct requiring an escort. Additional prejudice was generated: the jury could find that because the police provided Beverly an escort to her car when she called, they also believed Scott was dangerous and to be feared.

In *State v. Earvin*, 743 S.W.2d 125 (Mo.App.E.D. 1988), the Eastern District held that eliciting the victim's statement that she came to court with an "armed police escort," was reversible error. *Id.* at 128. The Eastern District found this was "evidence of an inflammatory nature" that did "not reasonably tend to prove or disprove a disputed fact in issue" and reversed.

The trial court's admission of evidence is not disturbed, absent an abuse of discretion." *State v. Anderson, supra*, 76 S.W.3d at 276. Here, as in *Earvin*, there was an abuse of discretion. Without this evidence, the jury may have found Scott was a nuisance, and that Beverly was tired of his constant calling. With this evidence, the jury had a basis to find Beverly truly, and with good reason, feared Scott. The escort evidence in this case, as in *Earvin*, was inflammatory.

The admission of the escort evidence portrayed Scott as a danger to Beverly. The jury could have found it supported the state's claim that Scott deliberated on killing Beverly. Admitting this evidence was

prejudicial error affecting the outcome of the trial. *State v. Kemp, supra*, 212 S.W.3d at 145-46. Scott's conviction must be reversed and remanded for a new trial.

V

The trial court erred in overruling Scott's objections to portions of Christopher Guenther's penalty phase testimony. This violated his right to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const., Art.1, §§10&18(a). Guenther's testimony about the deaths of his younger brother Corey and his grandfather was irrelevant: it had nothing to do with the impact of Scott's crime on Beverly's family and exceeded the scope of *Payne v. Tennessee*, 501 U.S. 808 (1991). It was prejudicial in that it encouraged the jury, in determining Scott's punishment, to consider irrelevant, but tragic, life events of the witness and his family and to make its decision based on passion, prejudice, and emotions.

During the penalty phase testimony of Beverly's 29-year-old son,

Christopher Guenther, the prosecutor elicited that when Christopher was a child, his little brother, Corey, died (T1495). When the prosecutor asked, “what happened with that,” defense counsel objected that it was irrelevant (T1495). The state responded, “it’s how it affects their lives,” and the trial court overruled the objection (T1495).

Christopher then testified, “The steps were left out to an above ground pool, and without nobody watching him, he got out to that pool, climbed the steps, and fell in” (T1495). Corey’s death affected the entire family including Beverly (T1495). Corey’s death affected his family: “a lot of fights” and “[p]robably a lot of aggravation, frustration” (T1496).

After Corey died, Christopher’s parents divorced (T1496). Christopher went to live with his father (T1496). His mother, Beverly, went to live somewhere else and Christopher “didn’t see a lot of [his] mother for a while, but it was hard” (T1496). Christopher thought what happened to Corey had a lot to do with his parents separating (T496).

When the prosecutor elicited that Christopher’s grandfather also had died and said, “[t]ell us about that,” defense counsel again objected (T1496-97). Counsel argued that, “the victim impact testimony is supposed to concern the effect that the victim’s death had on them” and the testimony being elicited was not relevant (T1497). The trial court overruled the objection (T1497-98). Christopher then testified that the

death of his grandfather impacted his mother (T1498). It was after the deaths of his grandfather and Corey that his parents split up (T1498).

Scott included these rulings in the motion for new trial (LF900).

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held that the Eighth Amendment did not prohibit states from admitting “victim impact” evidence at capital trials. The Court described “victim impact evidence” as “designed to show” the “victim's ‘uniqueness as an individual human being....’” *Id.* at 823.

Payne defines victim impact evidence as “evidence of the *specific harm caused by the defendant.*” *Id.* at 825; emphasis added. This may include evidence showing “the victim is an individual whose death represents a unique loss to society and in particular to his family.” *Id.* at 825.

Recognizing that “[e]vidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation,” *Id.* at 836, Souter, J., concurring, the Court said the Due Process Clause would provide relief from victim impact “so unduly prejudicial that it renders the trial fundamentally unfair” *Id.* at 825,836 citing *Darden v. Wainwright*, 477 U.S. 168 (1986).

When error in the admission of evidence is of constitutional magnitude, the reviewing court must reverse unless it can say with

confidence that the state has proved beyond a reasonable doubt the error was harmless. *State v. Driscoll*, 55 S.W.3d 350,356 (Mo.banc 2001).

Missouri allows admission of “victim impact” evidence. *State v. Storey*, 40 S.W.2d 898,909 (Mo.banc 2001). This includes “evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.” §565.030.4. Such evidence “may be presented subject to the rules of evidence at criminal trials.” §565.030.4.

One of “the rules of evidence at criminal trials” is that evidence must be relevant to be admitted. *State v. Anderson, supra*, 76 S.W.3d at 276. Evidence must be relevant to be admitted. *Id.* In Missouri, “relevance is two-tier: logical and legal.” *Id.* “Evidence is logically relevant if it tends to make the existence of a material fact more or less probable.” *Id.* “Logically relevant evidence is admissible only if legally relevant.” *Id.* Evidence is legally relevant if its probative value outweighs its “costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness.” *Id.*

Here, the testimony the prosecutor elicited from Christopher Guenther blatantly violated *Payne* because it said nothing about *the specific harm caused by the defendant.*” 501 U.S. at 825; it was prejudicial in that it invited the jury to feel sympathy for the Guenther family’s painful times – the loss of a two generations – a child and a grandparent – and use that

irrelevant evidence to sentence Scott to death. Overruling Scott's objections encouraged the jury to make its sentencing decision based on passion and emotion rather than relevant facts.

This evidence did not inform the jury about Beverly or, in particular, how Scott's murder of Beverly affected Beverly's family and friends. It was not remotely "evidence of the specific harm caused by the defendant." *Payne*, 501 U.S. at 825.

Here, evidence about family deaths unrelated to Beverly's murder was no more relevant than "[e]vidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes...." *People v. Dunlap*, 975 P.2d 723,745 (Colo. 1999) citing *People v. Hope*, 184 Ill.2d 39, 702 N.E.2d 1282,1289 (1998). In neither situation does the evidence say anything about "the actual crime caused by the defendant as a result of the homicide for which he is being sentenced. *Id.*

Christopher Guenther's testimony concerning the tragic death of his baby brother, his grandfather dying, and the affect of both of these deaths on his family, served only to evoke the emotions and sympathies of the jurors. It was so prejudicial as to render the trial fundamentally unfair. *State v. Deck*, 994 S.W.2d 527,538-39 (Mo.banc 1999). Admission of this testimony injected arbitrary, emotional factors into the sentencing decision violating Scott's rights to due process, jury trial, reliable

sentencing and freedom from cruel and unusual punishment.

Scott's jury was unable to decide or agree on punishment; it cannot be said that this error made no difference in the outcome of the penalty phase proceeding. For this and all the foregoing reasons, Scott's death sentence must be reversed and the cause remanded for a new penalty phase trial.

VI

The trial court plainly erred in permitting the prosecutor to argue at closing that the jurors, like soldiers, had a duty to do. This was a manifest injustice violating Scott's rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VII, and XIV; Rule 30.20. The argument encouraged the jurors to base punishment on matters outside the evidence and on the prosecutor's "testimony": that jurors are like soldiers who did their duty by killing "other young men" in World War II, even though it wasn't what they wanted to do, and the jurors should also do their duty to sentence Scott to death. In violation of *Caldwell v. Mississippi*, it undermined the jurors' sense of responsibility by inviting them to think that in sentencing Scott to death, they, like soldiers who follow orders given by higher officers, were just doing their duty and were not really responsible.

At the end of his penalty phase argument, just before the jurors retired to deliberate, the prosecutor said:

You know, sometimes when you come in, you have a duty. You've all seen this. You've all seen the soldiers in World War II. You know, they're now what? In their 70s and 80s, if they're still around.

They went back in World War II, and they did their duty. The war wasn't something I'm sure they took pleasure in. They didn't want to do that. They didn't want to get taken away from their families and go over and fight the Germans and the Nazis. That wasn't what they wanted to do; they had a duty to do it, and they did their duty. And just as you have a duty to do....

When you talk to those men now, and you look at those men, you know what? They're able to stand up there tall, and they're proud. They're not proud because of what they had to do to those other young men, but they're proud because they're able to do their duty. They did what was right even though it was hard to do that.

(T1994)-95. Defense counsel did not object. Scott respectfully asks the Court to review this point for plain error. Rule 30.20.

This Court has repeatedly condemned arguments that go beyond the evidence and "turn the prosecutor into an unsworn witness not subject

to cross-examination.” *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc 1995). “Sympathy... is not a proper factor for the jury to consider in reaching its decision as to punishment.” *State v. Clemmons*, 753 S.W.2d 901, 910 (Mo.banc 1988). Limiting a jury’s consideration at sentencing to “matters introduced in evidence before it... fosters the Eighth Amendment’s ‘need for reliability in the determination that death is the appropriate punishment in a specific case.’” *California v. Brown*, 479 U.S. 538, 544 (1987) citing *Woodson v. North Carolina*, 428 U.S. 280,305 (1976). In *State v. Storey*, 901 S.W.2d 886 (Mo.banc 1995), this Court found irrelevant the prosecutor’s comments about whether he would accomplish what the victim had, that the defendant’s crime had “affected his family” and the prosecutor “[felt] for them.” *Id.* at 901. The Court condemned “this form of argument” as “turn[ing] the prosecutor into an unsworn witness not subject to cross-examination.” *Id.* “The error is compounded because the jury believes—properly—that the prosecutor has a duty to service justice, not merely to win the case. *Id.* citing *Berger v. United States*, 295 U.S. 78, 88 (1935).

Storey also found prejudicial an argument asking the jury to “think about” the victim’s brother who, if he had “happened” to see his sister being murdered, would have been justified in killing the defendant. *Id.* at 901-02. Among other reasons, this argument was improper because it

“was irrelevant and induced the jury to apply emotion, not reason” in determining punishment. *Id.* at 902 citing *Gardner v. Florida*, 430 U.S. 349, 438 (1977) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”).

Other courts have disapproved of prosecutorial arguments that “compare[e] a penalty phase jury with soldiers in war, defendant being one of the enemy, the criminal element in society.” *Brooks v. Kemp*, 762 F.2d 1383, 1412-13 (11th Cir. 1985), vacated on other grounds, 478 U.S. 1016 (1986), reinstated, 809 F.2d 700 (11th Cir. 1987). In disapproving the prosecutor’s argument in *Brooks*, the Court of Appeals noted, that “the jury’s discretionary function is unlike that of soldiers who are ordered to kill enemies” and that the argument “misrepresents the task the jury is charged by law to carry out.” *Id.* at 1412. An argument analogizing jurors to soldiers “undermines the crucial discretionary element required by the Eighth Amendment.” *Id.* at 1413.

In *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), the Eighth Circuit upheld the federal district court’s reversal of the death sentence in *State v. Weaver*, 912 S.W.2d 499 (Mo.banc 1995), based on improper prosecutorial arguments. In *State v. Weaver*, also tried in St. Louis County, the prosecutor reminded the jury of a scene from the movie

“Patton” in which Patton talked to young, scared, soldiers going into battle the following day: “he’s explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning.” *Id.* at 836. The prosecutor said Patton was encouraging his troops to do their duty: “sometimes you’ve got to kill and sometimes you’ve got to risk death because it’s right.” *Id.* Patton told his soldiers that when they saw what the enemy had done, they would “know what to do.”

The Eighth Circuit strongly criticized the prosecutor’s arguments:

When a prosecutor tells a jury that they have a duty to kill and, as in this case, uses a graphic story from a movie to support that duty, the statement should be taken as “calculated to remove reason and responsibility from the sentencing process....” Soldiers have no choice but to kill. Soldiers follow orders when they kill. The responsibility for a particular death lies, therefore, with a commanding officer or the declaration of war itself, and not with a soldier's individual conscience. Furthermore, wartime killing is not a deliberative process, not a considered choice.

Describing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment.... Not only was the main thrust of the prosecutor's

argument diametrically opposed to the requirement that capital sentencing be at the jury's discretion, it also “diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)...”

Weaver v. Bowersox, 438 F.3d at 840.

Here, instead of using a story from a movie, the prosecutor’s argument asked the jury to think of the soldiers from World War II and the duty they did. It implicitly told the jurors to imagine themselves as soldiers carrying out the same kind of duty. The argument asked the jurors to consider that just as the soldiers in the War may not have really wanted to cause anyone’s death but had to kill because it was their duty, so, too, the jurors should do their duty and sentence Scott to death because it would be the right thing to do.

This argument came at the end of the prosecutor’s rebuttal just before the jury retired to determine punishment. Defense counsel did not object and the trial court did not, *sua sponte*, take any action to minimize the prejudice. The jury would not know the argument was improper.

Uncorrected, this argument worked a manifest injustice to Scott. Scott’s jury was unable to decide or agree on punishment; but for this argument, the jury might have returned a verdict of life imprisonment. It

cannot be said that this error made no difference in the outcome of the penalty phase proceeding. For this and all the foregoing reasons, Scott's death sentence must be reversed he must be resentenced to life imprisonment or the cause remanded for a new penalty phase trial.

VII

The trial court erred in overruling Scott's motion to instruct the jury at penalty phase in accordance with §565.032 and refusing Instruction C. This violated his rights to due process, jury trial, a defense, and reliable sentencing. U.S.Const. Amend's V, VI, VIII, & XIV; Mo.Const., Art. 1, §§10, 18(a), & 21; §565.032. Section 565.032.1(2) requires the jury to be instructed that: "If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, *whether the evidence as a whole justifies a sentence of death or life imprisonment...*" and "in determining" this issue, "the trier shall consider all evidence which it *finds* to be in aggravation or mitigation of punishment, including evidence" at both stages of trial; emphasis added. Scott was prejudiced: no other instruction told the jury to consider "whether the evidence as a whole" justifies a life or death sentence.

At penalty phase, Scott moved the trial court to instruct the jury in accordance with §565.032; Scott also tendered a proposed instruction to

that effect (T1940-42; SLF1-5). The trial court denied Scott's request and refused his tendered Instruction "C" (T1942; SLF5). Scott included these rulings in his motion for new trial (LF880-811).

Section 565.032 provides:

In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or *he shall include in his instructions to the jury for it to consider*.

- (1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and
- (2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, *whether the evidence as a whole justifies a sentence of death or life imprisonment without eligibility for probation, parole, or release except by act of the governor*. In *determining* the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the

statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section.

Emphasis added.

The language of the statute—requiring the jury to **determine... whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment**—indicates that this is a factual issue that must be decided by the jury. The statute itself mandates that the jury be instructed on its obligation to make this finding.

This finding, although not placed with the other death-eligibility fact-finding steps in §565.030.4, is also a death eligibility requirement: a sentence of death is contingent on the jury finding that “the evidence as a whole justifies a sentence of death.” Otherwise, the defendant is not eligible for a death sentence. Under *Ring v. Arizona, supra*, the jury should be instructed to make this finding beyond a reasonable doubt.

MAI-CR3d does not include any such instruction. No MAI instruction presents the question of whether the evidence as a whole justifies a sentence of death or life imprisonment.

“The basic function of an instruction is to aid the jury to apply the law as declared by the court to the facts in evidence. And the instructions must cover such legal principles, applicable to the evidence, which are necessary for the jury to apply to reach correct

conclusions on submitted issues.”

State v. Harris, 313 S.W.2d 664,671 (Mo. 1958) *quoting State v. Bartlett*, 359 Mo. 881, 224 S.W.2d 100, 104 (Mo. 1949).

“The well established rule, prior to adoption of MAI-CR, was that the trial court is obligated to instruct on the law of the case, whether requested or not. [Citations omitted.] That duty included the obligation to instruct correctly thereon. [Citations omitted.] The adoption of MAI-CR did not change that obligation. MAI-CR was adopted in the hope that it would simplify instructions and make them more understandable for lay juries and that it would assist court and counsel in the preparation for and trial of felony cases. However, it was not intended to and did not alter the existing obligation of the trial court to see that the jury is instructed correctly on the law of the case.

State v. Gotthardt, supra, 540 S.W.2d at 66. The trial court’s refusal to submit an instruction will only be reversed if it is an abuse of discretion and there is prejudice. *State v. Hashman*, 197 S.W.3d 119,127 (Mo.App.W.D. 2006). Both are present here.

Scott was entitled, by the terms of the statute, to this instruction. He tendered an instruction that should have been given to the jury. Because §565.032.1(2) *required* such an instruction, it was an abuse of discretion

not to submit it to the jury.

The failure to give this instruction prejudiced Scott. Scott's jury found only one statutory aggravating circumstance and was unable to determine punishment. Scott was prejudiced because had this instruction been given, it cannot be said that the jury would not have found that the evidence as a whole *did not* justify a sentence of death.

For the foregoing reasons, Scott's death sentence must be vacated and he must be resentenced to life imprisonment without probation or parole or, in the alternative, the cause must be remanded for a new penalty phase proceeding.

VIII

The trial court erred in overruling Scott's objections and admitting, at penalty phase, hearsay evidence of Beverly's testimonial statements under the "forfeiture by wrongdoing" doctrine. This violated Scott's rights to confront witnesses, due process, jury trial, and reliable sentencing, U.S.Const., Amend's VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 18(a), & 21. Missouri should not adopt the "forfeiture by wrongdoing" exception to the hearsay rule or apply it in this case. The

statements and “wrongdoing” concerned matters other than the then-nonexistent charges in the instant case. Admitting hearsay evidence of Scott’s uncharged bad acts, misconduct, and offenses towards and involving Beverly prejudiced him.

At penalty phase, overruling defense objections, the trial court admitted hearsay evidence of Beverly’s statements concerning Scott’s uncharged bad acts, misconduct, and offenses (T1510-14,1521,1529-30;StEx74,StEx101,StEx500). Scott included these rulings in his motion for new trial (LF902-03).

The challenged hearsay evidence included the following:

On October 30th, Beverly told St. Louis County Police Officer Melissa Doss about some of her clothes that Scott had not previously returned to her that had been put in her truck and were cut to the point of being unwearable (StEx101: 8-10). Beverly said Scott had called her several times that day from a pay phone (StEx101: 10-11).

On November 13th, Beverly called Officer Doss reporting that Scott assaulted her the previous evening:

As she was leaving work, Scott had blocked her into the parking lot not allowing her to get in her vehicle and was asking her about a prior incident, I guess a burglary that happened in Moscow Mills.

And she said she didn't want to talk to him, he tried to kiss her, she wouldn't allow it, he tried to kiss her again."

(StEx101: 13-14).

Scott "jumped out from the bushes" and assaulted her by grabbing her left breast (StEx101: 15). Beverly said Scott was "increasingly more violent and aggressive with each encounter" (StEx101: 15-16).

On November 14th, Officer Doss spoke to Beverly and obtained her handwritten statements detailing Scott's repeated calls to her in October and November and showing up when she was leaving work on November 11th and 12th (StEx101: 6-7; StEx500).

The prosecutor read to the jury the contents of State's Exhibit 500: Beverly's written statement on a St. Louis County Police Department form and a "log" of Scott's calls and visits to her (T1514). The following is from Beverly's written statement in State's Exhibit 500:

Scott kept calling Beverly at work on November 11th and she told him to "quit calling." He wanted "information" about the burglary charges in Lincoln County and "kept arguing" with Beverly "about all the things he took out of [her] home." Scott wanted Beverly "to meet him to talk." She "told him no that [she] didn't want to see him or talk to him" and "wasn't going to meet him" but he kept asking and tried to call again.

Scott was waiting outside for Beverly when she left work because

when she “got in her truck and was pulling out he pulled in and yelled for [her] to wait because he wanted [her] to talk to him.” Beverly stopped “because he was running behind [her] truck” and she couldn’t back up. She opened her window an inch and told him she wouldn’t open it any further. Scott kept trying to talk to her “about everything again” that they had discussed on the phone; she told him “the things he was talking about it didn’t matter no more.” After 15 minutes, she left, but he followed her “all the way until [she] had to get off on 40/61 hwy.”

On November 12th, Scott called her repeatedly between 4:00 p.m. and 5:30 p.m. She avoided his calls. When she “got to the steps to go to [her] truck Scott came out of some bushes in the parking lot.” He went up to Beverly and tried to put his arm around her. She told him not to touch her and to leave her alone. He kept trying to talk to her. Scott was standing by her truck door, and she told him to move so she could get in. He moved, but when she opened the door, he stood inside the door and kept talking. He tried to kiss her. She told him to leave her alone; he put his arm around her neck, pulled her to him, and tried to kiss her again. She turned her head and he could only kiss her cheek. Beverly pushed him and told him to leave her alone and Scott asked why she was treating him that way. She said she was done with him and didn’t want to talk to him anymore and wanted to go. Scott grabbed her left breast

and said “I played with your titties.” She pushed him and told him to quit. He laughed and walked away. She went home and called the police.

The prosecutor also read to the jury Beverly’s statements from her petition for an order of protection in the Lincoln County Adult Abuse proceeding, State’s Exhibit 74, indicating an act of abuse or stalking occurred at her home and at her workplace (T1520-22). The prosecutor displayed the petition on an overhead projector and read to the jury Beverly’s allegations that Scott “knowingly and intentionally” coerced, stalked, harassed, sexually assaulted, and followed her from place to place (T1529; StEx74).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment’s confrontation clause prohibits admission of “testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53-54. Beverly’s hearsay statements were made for the purpose of a burglary prosecution and an adult abuse proceeding. She would have expected them “to be used prosecutorially” *Crawford*, 541 U.S. at 51, and to “be available for use at a later trial,” *Id.* at 52. Beverly’s statements are testimonial and the confrontation clause prohibits their admission.

Crawford, however, did not eliminate “exceptions to the Confrontation

Clause that make no claim to be a surrogate means of assessing reliability.” *Id.* at 62. The Court expressly cited “the rule of forfeiture by wrongdoing” as a rule it accepted because it “extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.” *Id.* citing *Reynolds v. United States*, 98 U.S. 145,158-59 (1879).

Reynolds, however, is inapposite here and illustrates the problem with applying the forfeiture by wrongdoing rule in the instant case. Reynolds was charged with bigamy. *Id.* at 146. The government subpoenaed one of Reynold’s wives, but when the deputy appeared at Reynold’s house to serve the subpoena, Reynolds said the woman wasn’t there and “would not appear in this case.” *Id.* at 148-49. Over Reynold’s objection, the trial court admitted the wife’s testimony from a “former trial, tending to show her marriage with the defendant.” *Id.* at 150.

Reynolds was convicted; his case went to the Supreme Court where he claimed error in the admission of his wife’s testimony from the previous trial. *Id.* at 151-52. The Court stated:

The constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of

that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Id. at 158.

Two salient features distinguish *Reynolds* from the present case. First, the testimony of the wife who Reynolds “kept away” from his bigamy trial was admitted *at that bigamy trial*. Second, the evidence admitted was the wife’s “testimony on a former trial” in which Reynolds “was present at the time the testimony was given, and had full opportunity of cross-examination.” *Id.* at 160-61.

Here, according to the state, Scott’s wrongdoing in killing Beverly was to prevent her from testifying at the *burglary* and *adult abuse* trials; those proceedings were in existence at the time Beverly was killed but the murder case did not then exist (*e.g.*, T790-92,1406). Unlike *Reynolds*, Beverly’s statements concerning the *burglary* and *adult abuse* cases were admitted at Scott’s *murder* trial. Also unlike *Reynolds*, Scott had no

“opportunity of cross-examination” of Beverly about her statements.

The rationale for the forfeiture by wrongdoing doctrine quoted in *Reynolds*—if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away”—makes no sense when applied to a case not in existence at the time of the wrongdoing. It is not logical to argue that Scott “procured” Beverly’s “absen[ce]” from his murder trial by killing her.

Whether to adopt the forfeiture by wrongdoing doctrine is an issue of first impression in this state as is the closely related issue of whether to limit the scope of the doctrine to require that the defendant’s intent in procuring the victim’s absence from a trial was for the purpose of making the victim unavailable in that particular trial. Appellant’s research, although not exhaustive, indicates other state courts are divided on whether the forfeiture by wrongdoing doctrine requires the state to prove the defendant intended to prevent a witness from testifying and whether the doctrine should apply to a case that was not in existence at the time of the wrongdoing procuring the victim’s absence. *See Gonzalez v. State*, 195 S.W.3d 114 (Tex.Crim.App. 2006) (citing cases and discussing Federal Rule of Evidence 804(b)(6) which “codified” the forfeiture by wrongdoing rule).

States requiring proof of intent—that the wrongdoing was intended to keep the victim from testifying against the defendant—include: Illinois: *People v. Stechly*, 225 Ill.2d 246,269-73, 870 N.E.2d 333,348-50 (Ill. 2007) (holding proof of intent is required and finding support in the statement in *Reynolds, supra*, “that the accused forfeits his confrontation rights when he ‘voluntarily’ keeps the witnesses away” and the statement in *Davis v. Washington*, 126 S.Ct. 2266,2280 (2006) that “defendants who seek to undermine the judicial process” by procuring or coercing silence from witnesses and victims should not be afforded the protections of the Sixth Amendment); Kansas—*State v. Henderson*, 35 Kan.App.2d 241, 253, 129 P.3d 646,654 (Kan.App. 2006) citing *United States v. Cherry*, 217 F.3d 811, 819 (10th Cir. 2000) (doctrine requires showing that “defendant ““(1) causes a potential witness’s unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial””); *State v. Romero*, 156 P.3d 694, 702-03 (N.M. 2007) *petition for cert. filed* (July 6, 2007) (No. 07-37) (holding the prosecution must “prove intent to procure the witness’s unavailability in order to bar a defendant’s right to confront that witness”; and finding that majority of jurisdictions follow that rule; citing cases); Pennsylvania: *Commonwealth v. Laich*, 566 Pa. 19,28, 777 A.2d 1057,1062 (Pa. 2001) (The language of Pennsylvania’s forfeiture by

wrongdoing rule--“wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness”—makes clear that it “only applies when a party’s wrongdoing is done with the intention of making the declarant unavailable as a witness.... If a party’s wrongdoing was for another purpose, *e.g.*, killing the declarant based upon personal animosity, the exception does not apply”); *People v. Maher*, 89 N.Y.2d 456,462, 677 N.E.2d 728,731 (N.Y. 1997) (forfeiture by wrongdoing doctrine was inapplicable given lack of evidence that “defendant’s acts against the absent witness were motivated, even in part, by a desire to prevent the victim from testifying against him...” and “even more anomalous where, as here, it is invoked against a defendant in the very trial in which the charge is “murder of the unavailable witness”).

Among the states that have found the doctrine applies regardless of the defendant’s intent are Washington—*State v. Mason*, 160 Wash.2d 910,924-26, 162 P.3d 396,403-04 (Wash. 2007) (noting that “every federal circuit” and 21 states had adopted the doctrine and rejecting a requirement that the state prove “[s]pecific intent to prevent testimony”); and California—*People v. Giles*, 40 Cal.4th 833, 152 P.3d 433 (Cal. 2007) (Applying the doctrine where the statements concerned a previous incident and but defendant is on trial for “the alleged wrongdoing”); Colorado—*People v. Moore*, 117 P.3d 1,5 (Colo.App. 2004).

The Court should decline to apply the forfeiture by wrongdoing rule here. If, as the state maintained, Scott killed Beverly to keep from going to prison in the existing burglary case, or because he was unhappy about the existing order of protection, then those would be the cases in which to apply the forfeiture by wrongdoing rule.

The rationale articulated in *Davis, supra*, that defendants who “seek to undermine the judicial process by procuring or coercing silence from witnesses and victims should not be afforded the protections of the Sixth Amendment” does not logically apply to cases not in existence when the wrongdoing. Scott had not been charged with Beverly’s murder when he killed her – as wrong as that murder was, it was not done to undermine the judicial process of the then nonexistent murder case or to keep Beverly silent in that case.

Beverly’s statements prejudiced Scott. As shown above, they made Scott look very bad. They described Scott’s nonstop harassment of Beverly—from calling her repeatedly to driving by her house to hiding in the bushes and jumping out at her as she left work. At best, Beverly’s statements painted Scott as a persistent source of grief and aggravation; at worst, they showed him to be an increasingly violent, persistent, and scary person.

When error in the admission of evidence violates the defendant’s

constitutional rights, the state must prove beyond a reasonable doubt that the error was harmless—that the verdict would have been the same. *State v. Driscoll*, 55 S.W.3d 350,356 (2001). The state cannot meet this burden. This jury was undecided about Scott’s sentence. Had this evidence not been admitted at penalty phase, it cannot be said that Scott’s jury would still have been unable to agree or decide on punishment.

It cannot be said that it would have made no difference in the outcome of the penalty phase trial. For this and all the foregoing reasons, Scott’s sentence must be reduced to life imprisonment without probation or parole or he must be granted a new penalty phase trial.

IX

The trial court plainly erred in overruling Scott's offer of proof concerning Shawn Delgado's testimony that Billy Mclaughlin told her he was involved in the disposal of Beverly's body and in sustaining the state's objection to Shawn's testimony on that matter. This violated Scott's rights to due process, a defense, jury trial, and reliable sentencing. U.S.Const., Amend's V,VI,VIII,&XIV; Mo.Const., Art. 1, §§10,18(a),&21. Shawn's testimony would have mitigated Scott's conduct in disposing of Beverly's body. The jury never heard this evidence and was unable to consider it in attempting to determine punishment. Exclusion of Shawn's testimony about Billy's participation in disposing of Beverly's body was a manifest injustice prejudicing Scott. It cannot be shown that, beyond a reasonable doubt, the outcome at penalty phase would have been the same if this evidence had been admitted.

The state objected when, at penalty phase, the defense attempted to elicit from Shawn Delgado what Kevin – Billy McLaughlin had told her about his involvement in the offense (T1620-21). Out of the hearing of the jury, the defense made an offer of proof. In the offer of proof, Shawn testified that Kevin is her cousin and that “he had told [her] he had tied her legs together and helped drag the body to the riverbank (T1623). He said at the riverbank, “Scott had cut her again and then had sex with her” (T1623). Kevin told Shawn Beverly’s neck was “cut from ear to ear and her neck to her pelvic bone” (1623). Kevin said they threw the body down the hill (T1623). It was Kevin’s idea to bind Beverly’s ankles and to take her to the river (T1623-24). Kevin also told Shawn that he had been present at the actual murder “and laughed about it” (T1623). He said “Scott stabbed her in the back, and Beverly was begging for her life” and Kevin had said, “I ain’t helping that bitch” (T1623-24).

The trial court overruled the offer of proof and sustained the state’s objection to Shawn’s testimony about Billy’s involvement in disposing of Beverly’s body (T1626-27). Scott did not include the court’s rulings in his motion for new trial. Because the rulings implicate the Eighth Amendment’s requirement of heightened reliability in ensuring the appropriateness of a sentence of death, *Woodson v. North Carolina*, 428 U.S. 280,305 (1976), Scott respectfully requests the court to review this

point for plain error. Rule 30.20.

“The Eighth and Fourteenth Amendments require, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and *any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586,604 (1978). In *Green v. Georgia*, 442 U.S. 95 (1979), the evidence at the Green’s trial “tended to show that [Green] and Moore” kidnapped the victim and, either acting together or separately, raped and murdered her.” *Id.* at 96. The jury found Green guilty of murder. At a second trial, to determine whether he should be sentenced to death, Green attempted to introduce the testimony of a witness in whom Moore had confided that it was he who killed the victim and that Green was not present when the victim was killed and did not participate in her death. *Id.* The Georgia Supreme Court excluded the evidence as hearsay. *Id.*

The Supreme Court reversed:

Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial... and substantial reasons existed to

assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.... In these unique circumstances, “the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Id.* at 97; citing *Lockett v. Ohio*, *supra*, 438 U.S. at 604-605; quoting *Chambers v. Mississippi*, 410 U.S. 284,302 (1973).

This Court applied *Green* in a case presenting facts much like the present case. In *State v. Phillips*, 940 S.W.2d 512 (Mo.banc 1997), the state did not disclose an audiotape in which a witness, Joyce Hagar, said that the defendant’s son, “Buddy,” told her “that he and his mom killed [the victim] and that his mom drove while he scattered her body.” *Id.* at 516. Hagar’s statement also said Buddy “told her that they threw [the victim’s] hands into the creek.” *Id.* “Hagar said that Buddy even told her that he killed his grandmother and that he was the one that cut up “all of ‘em.” *Id.*

Although the Court found that Buddy’s statement “directly

implicate[d]” the defendant in the murder, “Buddy’s comment that he was the one who cut up the bodies is exculpatory, however, because it tends to clear Phillips of involvement in that aspect of murder—the disposition of the body.” *Id.* at 517. “Buddy’s admission that he was the one who cut up the body” inferred that the defendant “did not do so herself....” *Id.* This evidence was material to the issue of punishment because it minimized or eliminated the defendant’s involvement in the dismemberment of the body. *Id.*

This Court applied *Green* to find that the hearsay rule should not be applied to exclude Hager’s testimony. Buddy’s statements met *Green*’s relevancy requirement because the statements were material to punishment. *Id.* They also met *Green*’s reliability requirement because, even though “Buddy was not a close friend of Hagar,” he spontaneously made the statements at a “social gathering.” *Id.* Buddy had knowledge of the details of the crime which corroborated his statement. *Id.* at 518. And, they “were obviously statements against penal interest.”

As in *Phillips*, this Court must find that Shawn Delgado should have been allowed to testify to Billy’s statements because here, too, they were relevant and material to punishment. Billy’s statements, like Buddy’s, did not exculpate Scott from killing Beverly, but they mitigated his conduct in disposing of Beverly’s body. Billy’s statements were reliable

because they were made to his cousin, Shawn. They were corroborated by Michael White's testimony that Billy left White's house with Scott at about 7:30 p.m. on the 21st (T980). And Billy told Shawn details—her legs being tied together—that matched the facts.

Billy's statement is further corroborated by the physical facts. To get to Beverly's body, it was necessary to cross very rough terrain including a hill—terrain that would have been difficult or impossible for one person, carrying or dragging a body, to navigate (T1122-24,1136,1188-89). Billy's story may have contained embellishments, but that does not make it inadmissible under *Green* or *Phillips*.

This jury found only one of the four statutory aggravators submitted. Without this evidence, the jury did not return a death sentence. The exclusion of this evidence violated Scott's right to present a defense, due process, and reliable sentencing. U.S.Const., Amend's VI,VIII,& XIV. The state cannot prove beyond a reasonable doubt that it was harmless. *State v. Walkup*, 220 S.W.3d 748,758 (Mo.banc 2007). Scott's death sentence must be vacated and he must be sentenced to life imprisonment or, in the alternative, the cause must be remanded for a new penalty phase proceeding.

X

The trial court erred in overruling Scott's objections, submitting Instruction No. 23 to the jury, and sentencing him to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's VI, VIII, & XIV. Instruction 23 included an aggravating circumstance based on §565.032.2(7): whether Beverly's murder "involved depravity of mind" and was therefore "outrageously and wantonly vile, horrible, and inhuman" in that Scott "committed repeated and excessive acts of physical abuse upon" Beverly "and the killing was therefore unreasonably brutal." Scott and Beverly struggled and he stabbed her several times; one of the stab wounds killed her. Although the language "repeated and excessive" is unconstitutionally vague, several stab wounds is not excessive.

At penalty phase, Scott objected to Instruction 23, submitting the statutory aggravating circumstances, on the grounds that there was insufficient evidence to submit this statutory aggravator (T1949-50; A48). The trial court overruled the objection; Scott included this in his motion for new trial (LF871-72).

The “depravity” statutory aggravator was as follows:

1. Whether the murder of Beverly Guenther involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant committed repeated and excessive acts of physical abuse upon Beverly Guenther and the killing was therefore unreasonably brutal.

(LF856;A48).

A meaningful basis must exist for distinguishing the few cases where death is appropriately imposed from the many where it is not. *Furman v. Georgia*, 408 U.S. 238,313 (1972). A statutory aggravator that fails to provide adequate guidance for making this distinction is unconstitutional. *Maynard v. Cartwright*, 486 U.S. 356, 365 (1988).

The "depravity of mind" aggravator has twice before been subject to a "limiting construction" by this Court in an attempt to save it from unconstitutional vagueness. In *State v. Preston*, to avoid the "standardless sentencing discretion" invalidating Georgia's "depravity" aggravator, *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court stated, although not “expressly adopting a precise definition... the following factors [were] to be considered in finding ‘depravity of mind’: mental

state of defendant, infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime.” 673 S.W.2d 1, 11 (Mo.banc 1984).

In *State v. Griffin*, 756 S.W.2d 475 (Mo.banc 1988), four years later, addressing a challenge based on *Maynard v. Cartwright* 486 U.S. 356 (1988), that the depravity aggravator had “not been given a sufficiently narrow construction to avoid arbitrary and capricious imposition of death sentences as required by” *Godfrey*, the Court “expressly” held that “at least one of the *Preston* factors must be present before a finding of depravity of mind will be found to be supported by the evidence.” *Id* at 489-90. The Court then limited “brutality” to murders “involv[ing] serious physical abuse.” *Id.* at 490. “Serious physical abuse” was not defined. The Court said, “evidence that the murder victim or other victims at the murder scene were beaten or evidence that numerous wounds were inflicted upon a victim will support the aggravating circumstance.” Id.

But even after *Godfrey v. Georgia* and *Maynard v. Cartwright*, and *Preston* and *Griffin*, the depravity aggravating circumstance remains too broad. It could still apply to any murder and is unconstitutionally vague.

MAI-CR3d 314.40 currently instructs that the jury may only find the “depravity aggravator” if it finds the murder was “unreasonably brutal” meaning that “repeated and excessive acts of physical abuse” were committed upon the murder victim. Neither “repeated” nor “excessive” is described, limited or defined. Nothing guides the jury in determining what acts of physical abuse, and how much physical abuse, are sufficient to “find” this aggravating circumstance.

The jury is not told what is meant by “excessive” - whether “excessive” acts of physical abuse include or exclude those acts inflicted to commit the murder. The jury is not instructed on whether “repeated” means anything greater than one. Are whether multiple injuries, alone, sufficient to find “excessive” physical abuse? Does “excessive” mean something different than “repeated?” Does the instruction simply say the same thing twice? Must the defendant have an intent, separate from the intent to commit murder, to commit “repeated” and “excessive” acts of physical abuse.

“Repeated” is an inadequate guideline. “Repeated” violence toward a victim, such as multiple gunshot injuries or multiple stab wounds, do not even prove the deliberation required for first degree murder. *See, e.g., State v. Samuels*, 965 S.W.2d 913,923 (Mo.App.W.D. 1998) (“victim was killed by a semi-automatic pistol which fired rapidly. All seven bullets

could have been fired in the span of three seconds. Multiple gunshot wounds do not conclusively establish deliberation and thus guarantee that a jury will convict defendant of first degree murder.”).

If an act - or acts - will not necessarily establish an element of the offense of first degree murder, how can such act or acts serve to distinguish an unaggravated murder from an aggravated murder?

The vagueness of the depravity aggravator and in particular the terms “repeated” and “excessive,” and the difficulty in determining what evidence is sufficient to establish this aggravator is illustrated by the following cases. In *State v. Butler*, 951 S.W.2d 600 (Mo.banc 1997), the Court held that “[a] gunshot wound to the head is an excessive act of physical abuse.” *Id.* at 606. Because the victim had been shot twice, the Court found both “repeated and excessive acts of physical abuse.” *Id.* If the Court meant what it said in *Butler*, then a single gunshot wound to the head is “excessive.”

In contrast with *Butler*’s one or two shot definition of “excessive,” the Court in *State v. Goodwin*, 43 S.W.3d 805, 816 (Mo.banc 2001), found the depravity aggravator when the “defendant pushed a sixty-two year old woman down the stairs to the concrete floor below... followed and watched her ... took a hammer and struck the woman's head three times, fracturing her skull.”

The several stab wounds here do not appear to be “excessive” compared with such cases as *State v. Johns*, 34 S.W.2d 93, 100, 115 (Mo.banc 2000) (victim shot in wrist, belly, side, upper right leg, lower right leg, right side of his body, left side of the back of his head), *State v. Brown*, 998 S.W.2d 531, 552 (Mo.banc 1999) (victim was strangled with an electrical cord and stabbed with a large butcher knife), and *State v. Roberts*, 948 S.W.2d 577, 606-07 (Mo.banc 1997) (defendant “struck the victim numerous times with a hammer, kicked her, choked her, stabbed her, slashed her, and finally tried to drown her”).

As illustrated above, the vagueness of the depravity aggravator and in particular the terms “repeated” and “excessive” creates problems with determining if there is sufficient evidence to support it. “[I]f an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.” *Newlon v. Armontrout*, 885 F.2d 1328,1334 (8th Cir. 1989); citations omitted.

In the instant case, the evidence showed several stab wounds. Even without specific definitions of “excessive,” when measured against cases such as *Goodwin* and *Johns* and others such as *State v. Williams*, 97

S.W.3d 462 (Mo. 2003), in which the defendant stabbed and cut the victim forty three times, the evidence falls short of “excessive.”

For the foregoing reasons, the Court must find that there was insufficient evidence to support the depravity aggravator. Accordingly, Scott's sentence of death must be reversed and a sentence of life imprisonment without probation or parole imposed or the cause remanded for a new penalty phase trial.

XI

The trial court erred in overruling Scott's motion to quash the information or, alternatively, preclude the death penalty, and sentencing him to death. This violated his rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const. Amend's V,VI,&XIV; Mo.Const., Art. 1, §§ 10, 17, 18(a) & 21. In Missouri, at least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Statutory aggravators are alternate elements of the greater offense of first-degree murder and must be pled in the charging document for the charged murder to be punishable by death. Scott's death sentence was unauthorized; it must be reduced to life imprisonment.

Additional Facts and Preservation:

Before trial, relying on *Ring v. Arizona*, *supra*, *Apprendi v. New Jersey*, *supra* and *Jones v. United States*, 526 U.S. 227 (1999), Scott moved to

quash the information or preclude the death penalty (LF271-302). The trial court overruled his motion; Scott included this ruling in his new trial motion (JJPMT-42; LF876).⁵

In *Apprendi, supra*, the Supreme Court ruled that under the Due Process Clause, a factual determination authorizing an increase in the maximum prison sentence must be made by a jury based on proof beyond a reasonable doubt.” 530 U.S. at 469. Subsequently, in *Ring, supra*, the Court applied *Apprendi* to a capital case to hold the factual finding that a statutory aggravating circumstance exists must be made by a jury; the Court explained: the Sixth Amendment requires jury fact finding beyond a reasonable doubt “[b]ecause *Arizona's enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense...,’*” *Id.* at 609 *citing Apprendi*, 530 U.S. at 494, n.19; emphasis added.

In Missouri, a defendant convicted of first-degree murder may not be death-sentenced unless a jury additionally finds, beyond a reasonable

⁵ Scott acknowledges this Court has denied similar claims, *e.g.*, *State v. Glass*, 136 S.W.3d 184,193-94 (Mo.banc 2005). Scott requests full review because it raises a federal constitutional issue that has not yet been ruled on by the United States Supreme Court.

doubt, at least one statutory aggravator. Section 565.030.4(2), RSMo. (Supp. 2006); *see e.g., State v. Whitfield, supra.*

Missouri's statutory aggravators, like Arizona's, are facts required to increase the punishment for a defendant convicted of first-degree murder from life imprisonment to death. Missouri's statutory aggravators have precisely the same effect as Arizona's statutory aggravators: they serve as "the functional equivalent of an element of a greater offense...." *Ring*, 536 U.S. at 609 *citing Apprendi*, 530 U.S. at 494,n.19. Because statutory aggravators authorize an increase in punishment and serve as elements of the greater offense of aggravated first-degree murder, the state must plead in the charging document the statutory aggravators it will rely on at trial to establish the offense as death-eligible.

"An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224,228 (1998); *State v. Barnes*, 942 S.W.2d 362, 367 (Mo. banc 1997). A person may not be convicted of a crime not charged unless it is a lesser included offense. *State v. Parkhurst*, 845 S.W.2d 31,35 (Mo.banc 1992).

Although §565.020 ostensibly establishes a single offense of first-degree murder punishable by either life imprisonment or death, under *Ring*, *Apprendi*, *Jones*, and *Whitfield*, the combined effect of §§565.020, 565.030.4, and 565.032.2 is to create two kinds of first-degree murder:

unaggravated first-degree murder which does not require proof of a statutory aggravating circumstance, and the greater offense of *aggravated* first-degree murder which requires the additional finding of fact, and includes as an additional element, at least one statutory aggravator. To charge aggravated first-degree murder, the state must plead in the charging document the statutory aggravators on which it will rely at trial to obtain a death sentence.

Missouri law supports this argument. In *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), the defendant was charged with first-degree robbery. Although the robbery statute authorized an enhanced punishment of ten years imprisonment “for the aggravating fact for such robbery being committed “by means of a dangerous and deadly weapon,”” the information failed to charge this aggravating fact. *Id.* at 52. The jury, however, found the defendant guilty of “[r]obbery first degree, by means of a dangerous and deadly weapon” and based on this aggravator, enhanced his punishment. *Id.*

The question on appeal was whether the “aggravating circumstances” authorizing additional punishment must be pled in the charging document. *Id.* at 53. The state claimed the defendant had adequate notice “of the cause and the nature of the offense for which he was convicted,” so it was not necessary to charge the aggravating

circumstance in the information. *Id.* at 53-54. The state argued the defendant had “notice” from other language in the charge referring to a weapon; further, the defendant’s motion to vacate his sentence indicated he knew the state would try the case as an aggravated robbery. *Id.* at 53-54.

This Court rejected these arguments holding that other language in the charging document, “with force and arms,” was insufficient to charge the aggravator: that the robbery was committed by means of a dangerous and deadly weapon. *Id.* at 54. “The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal” and “[t]he trial court was without power or jurisdiction to impose that sentence.” *Id.*

Here, the state did not plead any statutory aggravators in the Information, (LF79-84). Under *Nolan, supra*, the Information did not charge Scott with an offense punishable by death. The state charged only unaggravated first-degree murder for which the maximum sentence is life imprisonment. Scott’s death sentence cannot stand.

For the foregoing reasons, the Court should find the state charged only unaggravated first-degree murder and the trial court exceeded its jurisdiction in sentencing Scott to death. Scott’s sentence must be

vacated and he must be resentenced to life imprisonment without probation or parole.

Conclusion

Wherefore, for the foregoing reasons, as to Points 2, 3, and 4, Scott McLaughlin prays that the Court will reverse the judgment of the circuit court and grant him a new trial; in the alternative, as to Points 1, 5, 6, 7, 8, 9, and 10, he prays that the Court will vacated his sentence of death and resentence him to life imprisonment without probation or parole or, in the alternative, grant him a new penalty phase proceeding.

Respectfully submitted,

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Certificate of Compliance and Service

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rules 84.05 and 84.06. The brief comprises 29,569 words according to Microsoft word count.

The CD Rom disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

This 1st day of October, 2007, a true and correct copy of the attached brief, the separately bound appendix, and a CD Rom containing a copy of this brief were mailed, first class postage pre-paid, to the Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102, and an email with this brief attached was sent to Shaun.Mackelprang@ago.mo.gov.

Attorney for Appellant