

NO. SC87859

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IN THE SUPREME COURT OF MISSOURI

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STATE OF MISSOURI,

Respondent,

v.

WALTER E. BARTON

Appellant.

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Appeal from the Circuit Court of Cass County

Honorable Joseph Dandurand

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**BRIEF FOR APPELLANT**

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NO. SC87859

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IN THE SUPREME COURT OF MISSOURI

---

STATE OF MISSOURI,

Respondent,

v.

WALTER E. BARTON

Appellant.

---

**JURISDICTIONAL STATEMENT**

A jury convicted Walter Barton, appellant, of first degree murder on March 9, 2006. L.F. Vol. II, p. 177. On March 10, 2006, the same jury recommended a sentence of death. L.F. Vol. II, p. 189. A motion for new trial or for judgment of acquittal of the death penalty was filed on April 3, 2006, pursuant to the trial court's order allowing 25 days for its filing. L.F. Vol. II, p. 202. Sentence was imposed on July 6, 2006, and

the judgment was entered on July 11, 2006, sentencing appellant to death. L.F. Vol. II, p. 227. Notice of appeal was filed on July 6, 2006. L.F. Vol. II, p.. 229.

This court has exclusive jurisdiction of the appeal, pursuant to Article V, §3 of the Missouri Constitution as amended, in that appellant was sentenced to death.

## STATEMENT OF FACTS

### Method of Citing the Record

The long history of this case leads to a complicated record. Contemporaneously with the filing of this brief, counsel for Mr. Barton is filing a motion for this Court to transfer its files in Mr. Barton’s prior appeals to this Court concerning this case, as well as a motion for leave to file, as an appendix, the transcript of the evidentiary hearing conducted in the post-conviction case after this Court’s remand in Cause No. SC83615. The record will be cited as follows:

Legal File, State v. Barton, No.. SC77147 ..... SC77147 L.F.  
Transcript, State v. Barton, No.. SC77147..... SC77147 Tr.  
Supp. Transcript, State v. Barton, No. SC77147 .....SC77147 Supp. Tr.  
Legal File, State v. Barton, No. SC80931 ..... SC80931 L.F.

Transcript, State v. Barton, No. SC80931..... SC80931 Tr.  
 Legal File, Barton v. State, No. SC83615 ..... SC83615 L.F.  
 Supp. Legal File, Barton v. State, No. SC83615.....SC83615 Supp. L.F.  
 Transcript, Barton v. State, No. SC83615..... SC83615L.F.  
 2003 Transcript, Barton v. State, No. CV199-0453CC..... PCR Tr.  
 Legal File, current trial..... L.F.  
 Transcript, current trial.....Trial Tr.

**Overview and Statement of Issues**

This is an appeal from a conviction and sentence of death for first degree murder. The offense at issue occurred October 9, 1991. SC77147, L.F. 1. Mr. Barton’s case was first called for trial on April 5, 1993. On that date, after the jury had been sworn, Mr. Barton’s counsel moved for a mistrial on the ground that the state had failed to file an endorsement of witnesses with the court. The mistrial was granted. SC77147 L.F. p. 174. Mr. Barton’s case was next called for trial on October 25, 1993. After both sides presented evidence, the jury was unable to reach a verdict, and a second mistrial was declared on October 26, 1993. SC77147 L.F. pp. 119-121, 178. Mr. Barton’s case was next called for trial on April 8, 1994. At that trial, he was convicted

and sentenced to death. SC77147 L.F. pp. 158-159. The conviction was overturned on appeal by this Court on December 20, 1996, because the trial court improperly sustained the state's objection to defense final argument, and a retrial was ordered. *State v. Barton*, 936 S.W.2d 781 (Mo. banc 1996). Mr. Barton was again sentenced to death on June 10, 1998. L.F. Vol. I, p. 5. The conviction and sentence were affirmed on August 3, 1999. *State v. Barton*, 998 S.W.2d 19 (Mo. banc 1999).

Mr. Barton then filed a motion for relief under Sup. Ct. R. 29.15. The motion was denied. On appeal, this Court remanded the case for new findings of fact and conclusions of law, and ordered that a new judge re-hear the case. *Barton v. State*, 76 S.W.3d 280 (Mo. banc 2002). The Hon. John W. Sims, Benton County Circuit Judge, held a new evidentiary hearing as authorized by this Court. Following that hearing, on January 30, 2004, he entered an order granting relief under Sup. Ct. R. 29.15 and ordering a new trial on both guilt and sentencing. L.F. Vol. I, pp. 81-124. The state did not appeal from this judgment.

On January 21, 2005, Judge Sims recused himself on his own motion. L.F. Vol. I, p. 49. The Honorable Joseph Dandurand, Cass County Circuit Judge, was assigned to the case by this Court. L.F. Vol. I, p. 51. Subsequently, the parties agreed to a change of venue to Cass

County. L.F. Vol. I, p. 10. Trial was held in Cass County from March 6, 2006 through March 11, 2006. Mr. Barton was again convicted and sentenced to death. L.F. Vol. II, pp. 17, 189, 227. This appeal follows

The issues on appeal are as follows: 1) Sufficiency of the evidence; 2) Whether Mr. Barton's fifth trial violated double jeopardy because of previous prosecutorial misconduct; 3) Improper comment on post-arrest silence; 4) Improperly limited death qualification of the jury; 5) Improper admission of "expert" testimony on blood spatter; 6) Improper identification testimony; 7) Limitation of cross-examination of jailhouse snitch witness; 8) Improper jury instructions on mitigating circumstances; 9) Improper comment on redaction of Mr. Barton's statement concerning a prior offense; 10) Improper penalty phase argument; 11) Sentence improperly based on refusal of plea offer; 12) Unconstitutional proportionality review process; 13) death sentence excessive and disproportionate; 14) double jeopardy violation in Mr. Barton's third trial, and 15) unconstitutionally cruel and unusual method of execution.

## **Pretrial issues.**

The first time this cause was called for trial, on April 5, 1993, a jury was selected and sworn. SC77147 L.F.p.174. Defense counsel then pointed out to the trial court that no witnesses had been endorsed by the state. SC77147 Supp. Tr. pp. 94-104. The trial judge indicated that he believed the case could not go forward. Mr. Barton's counsel then moved for a mistrial. SC77147 Supp. Tr. p. 105. After the mistrial was declared, defense counsel moved for discharge of Mr. Barton. The trial court ruled that jeopardy had not attached, and denied the motion. SC77147 Supp. Tr. p. 107.

The next time Mr. Barton's case was called for trial, a mistrial occurred because the jury was unable to agree. Before his 1994 trial, Mr. Barton again requested that he be discharged on double jeopardy grounds. SC77147 L.F. p. 1-2. After Mr. Barton's 1994 conviction and death sentence, the issue of double jeopardy because of the initial mistrial was raised in the briefs but not addressed by this Court. *State v. Barton*, 936 S.W.2d 781,782 (Mo. banc 1996). Instead, the Court reversed and remanded for a new trial due to improper limitations on defense counsel's final argument.

Prior to the current trial, Mr. Barton filed a motion to dismiss the case or preclude the death penalty due to prosecutorial misconduct. L.F. pp. 77-104, 127-132. He cited the order of the Hon. John Sims, which was not appealed by the state, in connection with two of the grounds advanced in Mr. Barton's post-conviction motion. The first ground as to which relief was granted alleged that Mr. Barton was denied due process of law:

[W]hen the prosecutor failed to disclose to the defendant the fact that state's witness "Katherine Allen"<sup>1</sup> was not named Katherine Allen but was in fact named Katherine Shockley, had used numerous aliases and at least two birth dates, had a record of felony convictions for offenses involving deceit in Kansas, Indiana and Missouri, and had been examined in connection with mental illness defenses in Missouri and Indiana and found by the examiners to be malingering and lying about having a mental disease or defect.

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<sup>1</sup> Ms. Allen testified that Mr. Barton made an admission to her while they were both incarcerated in the Lawrence County Jail. SC83615 Tr. 770-771.

L.F. Vol. I, p. 96.

Ruling on this ground, Judge Sims's order stated, The court files in this case show that the movant's counsel filed a motion for discovery of the criminal history of witnesses on June 16, 1992. . . The court files in this case reveal no evidence that any criminal history of 'Katherine Allen' was disclosed to the defense. . . The state did not produce credible evidence showing that the criminal history of 'Katherine Allen' had been disclosed to the defense.

L.F. Vol. I, p. 16.

Judge Sims specifically rejected the evidentiary hearing testimony of Asst. Attorney General Robert Ahsens that he believed he had disclosed Ms. "Allen's" criminal history. Judge Sims further found that, contrary to Ms. "Allen's" testimony at prior trials that she had prior convictions only for six bad checks and one count of escape, SC80931 Tr. pp. 808-813, SC83615 Tr. p. 768, she actually had some twenty-nine convictions for offenses including theft, forgery, and escape, and that she had used numerous aliases, birthdates, and social security numbers. L.F. Vol. I, pp. 98-100.

The court also found that Asst. Atty. Gen. Robert J. Ahsens, III, who prosecuted this case until the most recent trial, had failed to disclose that he had agreed to have a Cass County, Missouri forgery case against Ms. “Allen” dismissed in exchange for her testimony. L.F. Vol. I, pp. 100-101.

Judge Sims also granted relief on Mr. Barton’s assertion that the state knowingly used perjured testimony by Ms. “Allen.” In connection with this ground, Judge Sims ruled,

Ms. “Allen” testified at trial that her only convictions included six bad check charges and an escape charge.

[SC83615] Tr. p. 768. . . [A]t the time of her testimony at Mr. Barton’s April, 1998 trial, she had actually been convicted of 10 counts of forgery, 6 counts of bad check charges, 10 counts of theft, 1 count of conversion, 1 count of credit card fraud and 1 count of escape.

The criminal history which the state has acknowledged was available to the prosecutor at the time of trial indicates that in addition to the deceptive check charges and escape concerning which she testified at trial, Ms. Allen had been

convicted of forgery and theft. The prosecutor failed to correct the false impression created by Ms. Allen's incomplete testimony. [SC83615 Tr.] p. 768. . .

The prosecutor testified at the evidentiary hearing that he was not sure Ms. Allen had intentionally lied, because she might have understood his question about "convictions" to mean the number of cases under which she was charged, rather than the number of offenses of which she was convicted. However, as the chart above illustrates, she had more than six sentencings, and far more than six case numbers, before she testified. Even if Ms. Allen did not know how many times she had been convicted, it was incumbent upon the prosecutor to correct the false impression created by her testimony.

L.F. p. 102-103

Based on these findings, Mr. Barton argued that due process of law required dismissal of the charges against him, or at least that the state be precluded from seeking the death penalty. The trial court took this motion under advisement but ultimately denied it.

### **Trial evidence and issues.**

At trial, the state presented evidence that on October 9, 1991, the body of Gladys Kuehler was discovered in her trailer at Riverview Trailer Park, in Ozark, Missouri. She had been repeatedly stabbed. Debbie Selvidge (Ms. Kuehler's granddaughter), Carol Horton (a neighbor) and Walter Barton were present when the body was discovered. Trial Tr. Vol. III, pp. 477-479.

Carol Horton testified that Mr. Barton had been at her trailer in the park from noon to 2:00 p.m. that day, when he left to go to Ms. Kuehler's to borrow some money. Trial Tr. Vol. III, p. 456. He returned about 10-15 minutes later saying that she had told him to come back later to get a check. Trial Tr. Vol. III, p. 457. He left again about 3:00 and was gone about an hour. Trial Tr. Vol. III, pp. 458-459. When he returned, he said he had been working on his car, asked to use the bathroom, and washed his hands there. Trial Tr. Vol. III, p. 459. Ms. Horton testified that his mood seemed different when he returned after leaving the second time. Trial Tr. Vol. III, p. 460. She was confronted with her prior testimony in which she had said that he seemed about the same as he had been before. Ms. Horton did not notice any blood on Mr. Barton. Trial Tr. Vol. III, p. 497. No blood was found on the soap, in

the sink, or in the drain trap at Ms. Horton's trailer. Trial Tr. Vol. IV, p. 687.

Mr. Barton told Ms. Horton that Ms. Kuehler was taking a nap and not to go to her trailer. Trial Tr. Vol. III, pp. 462-463. Ms. Kuehler, who was old and rather infirm, often napped in the afternoons, so Ms. Horton did not find this unusual. Trial Tr. Vol. III, p. 464. Mr. Barton and Ms. Horton both left Ms. Horton's home. She returned to her trailer at about 4:30. At that point, Mr. Barton was at her neighbor's trailer. He came over and fixed a board on her porch. Trial Tr. Vol. III, p. 464. He then left, and Ms. Horton went to Ms. Kuehler's trailer and knocked on the door. She received no response. Trial Tr. Vol. III, p. 465.

Dorothy Pickering, then an owner with her husband of the trailer park, testified that she visited with Ms. Kuehler around 2:00 p.m., when she went to Ms. Kuehler's trailer to pick up some rent that Ms. Kuehler, who managed the park, and collected from tenants. Trial Tr. Vol. IV, pp 611-612. Ms. Kuehler had guests, a man and woman who used to live at the trailer park. Trial Tr. Vol. IV, p. 611. Teddy Bartlett, one of the guests, testified that he visited Ms. Kuehler that day with his then wife Sharon. They left the trailer around 2:45 to 3:00 p.m. Trial Tr. Vol. IV, p. 615.

Testimony from Sharon Strahan, Mr. Bartlett's former wife, was read into evidence because she is deceased. Trial Tr. Vol. IV, p. 623. The testimony was partially redacted to remove references to a lineup to which an objection was sustained. Trial Tr. Vol. IV, p. 628. As read, the testimony included the statement that she saw Mr. Barton talking to someone outside the trailer when she and her husband left. Trial Tr. Vol. IV, p. 632. On cross-examination, Ms. Strahan said that she identified Mr. Barton only by his clothing because she did not see his face. No objection was made to the reading of this statement. Trial Tr. Vol. IV, pp. 633-634.

Mrs. Pickering's husband, Bill Pickering, testified that around 3:15, he had called Ms. Kuehler at her trailer. A man answered, and said that Ms. Kuehler was in the bathroom and could not come to the telephone. Mr. Barton told Officer Merritt that it was he who had answered.

The testimony of defense witness Brenda Montiel, who had died, was read into the record. Ms. Montiel testified that Mr. Barton came to her trailer at around 5:30 and asked about Ms. Kuehler's whereabouts. He stayed for supper with her. She noticed no blood on him. He went to

the door when someone honked a horn outside, and left with that person.

Around 6:00-6:30 p.m., Debbie Selvidge came to Ms. Horton's trailer. She asked Ms. Horton if she knew where Ms. Kuehler was, since Ms. Selvidge had not been able to reach her by phone since 4:00 p.m.

The two went to Ms. Selvidge's mother's home to make telephone calls (apparently neither Ms. Selvidge nor Ms. Horton had a phone) to try to locate Ms. Kuehler. They were unsuccessful. They then returned to the trailer park. Ms. Selvidge honked near Ms. Montiel's trailer, Mr. Barton came out, and Ms. Selvidge asked him to go with them to Ms. Kuehler's trailer.

Ms. Selvidge testified that she wanted Mr. Barton and Ms. Horton there when she tried to get into Ms. Kuehler's trailer so that Ms. Kuehler would not think she was breaking in. Ms. Selvidge had previously had a key to Ms. Kuehler's trailer, but Ms. Kuehler took it back the day before her death. Ms. Selvidge did not know why Ms. Kuehler had asked for the key back. Ms. Selvidge's key was not found in Ms. Kuehler's trailer after her death, and was never located.

When the three went to Ms. Kuehler's trailer, Ms. Horton and Ms. Selvidge knocked at the door. Mr. Barton went around to the side of the

trailer and knocked under Ms. Kuehler's bedroom window, calling, "Ms. Gladys, are you okay?" They got no response and the trailer was locked. Ms. Horton and Ms. Selvidge started into town and found Officer Lyle Hodges, who attempted to open the door. Since Ms. Selvidge did not want him to break the door down, Officer Hodges had his dispatcher call a locksmith. Officer Hodges then left for another call. The locksmith arrived and unlocked the door.

Ms. Selvidge, Ms. Horton and Mr. Barton entered the trailer. As they went down the hall, Ms. Selvidge noticed Ms. Kuehler's clothing in the bathroom. When Ms. Selvidge entered the bedroom, she saw Ms. Kuehler's mutilated body and began to scream. They left the bedroom. Mr. Barton tried to comfort Ms. Selvidge and said, "I'm sorry, Ms. Gladys."

Officer Hodges arrived and cleared the trailer. At some point, he noticed bloodspots on Mr. Barton's shirt and took him into custody. Mr. Barton explained to Officer Merritt that he must have gotten the stains on his shirt when he pulled Ms. Selvidge away from the body. He said he slipped as he did so, and probably came into contact with the blood at that point. Describing this testimony, Officer Jack Merritt stated that at one point after he had been given his *Miranda* warnings, Mr.

Barton had refused to answer further questions. An objection to this statement was sustained, and an instruction to disregard was given. However, Mr. Barton's motion for mistrial was denied.

On the night of the incident, Ms. Selvidge confirmed that Mr. Barton had pulled her away from Ms. Kuehler's body. She repeated this statement the next day to ? However, at trial, both she and Ms. Horton testified that Mr. Barton never entered the bedroom; he followed them down the hall but never got past the doorway.

Blood on Mr. Barton's shirt was found to be that of Ms. Kuehler. William Newhouse, a criminalist, testified that the stains on the shirt could only have been caused by a high speed impact similar that which would occur if Mr. Barton had stabbed Ms. Kuehler.

Ms. Kuehler had been stabbed numerous times. Blood was pooled on the floor of the bedroom and on the bed. She had lost so much blood that it was difficult to obtain a blood sample. The blood exhibits submitted to the crime lab were still wet when they were opened for analysis. Crime scene photos confirmed the existence of wet, liquid blood when the body was discovered. At autopsy, a hair was discovered on Ms. Kuehler's stomach which was not consistent with the hair of Mr. Barton or Ms. Kuehler.

Several days after Ms. Kuehler's death, a young girl named Krista Torrisi was picking up trash in the area with a church group. She found a check for \$20.00 made out to Mr. Barton and signed by Ms. Kuehler lying in a ditch. No usable fingerprints were recovered from the check.

The state also presented testimony that in 1993, when Mr. Barton was being housed in the Lawrence County jail, he threatened a fellow prisoner "Katharine Allen," saying that he would "kill her like I killed the old lady." Ms. "Allen" testified on direct examination that she had seven prior convictions. Trial Tr. Vol. VI, p. 930. On cross-examination, Ms. "Allen" was shown to have used numerous aliases and to have at least 13 criminal convictions for forgery, bad checks, theft and credit card fraud. Trial Tr. Vol. VI, pp. 934-943. Missouri State Highway Patrol Lieutenant Duane Isringhausen testified that when Ms. "Allen" provided this information to him, she claimed to have threatening letters from Mr. Barton, but never produced them. Trial Tr. Vol. VI, pp. 956-957. Ms. "Allen" denied making these statements to Lt. Isringhausen. Trial Tr. Vol. VI, p. 950.

In a hearing outside the presence of the jury, Larry Arnold, another jailhouse snitch who had testified at a previous trial that Mr. Barton had admitted the crime, testified that he had lied and that Mr.

Barton had never talked about the crime to him. Trial Tr. Vol. VI, p. 719. Also outside the presence of the jury, Craig Dorser, a third jailhouse snitch who had previously testified to admissions by Mr. Barton, SC80931 Tr. p. 777-778, testified out of the jury's presence that he had suffered a head injury and no longer remembered the incident.<sup>2</sup> Trial Tr. Vol. IV, p. 712. The state elected not to present the testimony of these witnesses before the jury. Ricky Ellis, who had previously testified that he heard Mr. Barton threaten Mr. Arnold, also testified out of the jury's presence. SC80931 Tr. p. 766. He said that he lived in the trailer park, and thinks that Mr. Barton came to his trailer that day to use the bathroom. SC80931 Tr. p. 733. The state did not present his testimony to the jury, either.

The jury was instructed on the offenses of first and second degree murder. L.F. Vol. II, pp. 170-171. The defense objected that these

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<sup>2</sup> In its consideration of the proportionality of Mr. Barton's sentence in its 1999 opinion, this Court cited Mr. Dorser's testimony that Mr. Barton had told him that he had licked Ms. Kuehler's blood off his face and liked it as a reason why the death sentence was appropriate. *State v. Barton*, 998 S.W.2d 19, 31 (Mo. banc 1999).

instructions were not supported by the evidence. Trial Tr. Vol. VI 1006. The jury found Mr. Barton guilty of first degree murder. L.F. Vol. II, p. 177.

During the penalty phase of the trial, the state presented documentary and testimonial evidence concerning Mr. Barton's two prior convictions for assault. Trial Tr. Vol. VI, pp. 1085-1118. They also presented victim impact evidence from Ms. Selvidge. Trial Tr. Vol. VI, pp. 1119-1129. The defense presented three brief witnesses. Two of them, Lucy Engelbrecht and Donna Potts, testified that they had been visiting Mr. Barton in prison for many years. Trial Tr. Vol. VII, pp. 1130-1142. The third, Mr. Barton's wife, testified that she had met him through a "pen friend" program and had married him 3½ years before trial. Trial Tr. Vol. VII, pp. 1143-1144.

The defense objection to penalty phase Instruction 15 was overruled. Trial Tr. Vol. VI, p. 1076. During final argument the trial court sustained an objection to a statement by the prosecutor that Mr. Barton should be given a death sentence as punishment for his prior crimes. An instruction to disregard was given. A mistrial was not requested. Trial Tr. Vol. VII, p. 1163. The jury recommended a death sentence, finding as aggravating circumstances Mr. Barton's two prior

offenses and the outrageously and the wantonly vile, horrible, and inhuman nature of the crime. L.F. Vol. II, p 189.

Mr. Barton's motion for new trial was overruled, and the trial judge accepted the recommendation of the jury and imposed the death sentence. L.F. Vol. II, p. 227. In making his ruling the trial judge cited the fact that Mr. Barton had turned down a plea bargain offer of a life without parole sentence. Trial Tr. Vol. VII, pp. 1184-1185.

Other events during the trial will be discussed in connection with the points to which they pertain.

## POINTS RELIED ON

### POINT I

THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL EVIDENCE. THE EVIDENCE WAS INSUFFICIENT TO SHOW MR. BARTON COMMITTED THE OFFENSE IN THE ABSENCE OF IDENTIFYING WITNESSES, CREDIBLE PHYSICAL EVIDENCE, OR CREDIBLE EVIDENCE OF INCULPATORY STATEMENTS BY MR. BARTON. MR. BARTON'S CONVICTION ON INSUFFICIENT EVIDENCE VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

*Jackson v. Virginia*, 433 U.S. 307 (1979)

*United States v. Scofield*, 433 F.3d 580, 586 (8<sup>th</sup> Cir. 2006)

*United States v. Mendoza-Larios*, 416 F.3d 872, 874 (8<sup>th</sup> Cir. 2005).

## POINT II

THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO PRECLUDE THE DEATH PENALTY BASED ON PERVASIVE PROSECUTORIAL MISCONDUCT IN THIS CASE, PARTICULARLY THE SUBORNATION OF PERJURY BY THE PROSECUTOR IN THE LAST TRIAL. DENYING THIS MOTION DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

*Oregon v. Kennedy*, 456 U.S. 667 (1982)

*Green v. United States*, 355 U.S. 184, 187-88 (1957)

*United States v. Catton*, 130 F.3d 805, 807 (7th Cir. 1997)

*State v. Barriner*, 210 S.W.3d 285 (Mo. App. 2006)

## POINT III

THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTION FOR MISTRIAL WHEN A LAW ENFORCEMENT WITNESS TESTIFIED THAT MR. BARTON HAD

REFUSED TO ANSWER QUESTIONS AFTER BEING GIVEN HIS *MIRANDA* WARNINGS. THE COMMENT VIOLATED MR. BARTON'S CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS OF LAW.

*Doyle v. Ohio*, 426 U.S. 610, 618 (1976)

*State v. Dexter*, 954 S.W.2d 332 (Mo. banc 1997)

*State v. Zindel*, 918 S.W.2d 239 (Mo. banc 1996)

*State v. Frazier*, 927 S.W.2d 378, 379 (Mo. App. 1996)

#### POINT IV

THE TRIAL COURT ERRED IN PREVENTING TRIAL COUNSEL FROM QUESTIONING JURORS DURING VOIR DIRE CONCERNING WHETHER THEY WOULD BE ABLE TO CONSIDER MITIGATING CIRCUMSTANCES AFTER FINDING THAT THE EVIDENCE IN AGGRAVATION WARRANTED THE DEATH PENALTY. THIS DECISION WAS REQUIRED BY THE COURT'S INSTRUCTIONS TO THE JURY, AND THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO ASK

THE JURY ABOUT IT DEPRIVED MR. BARTON OF HIS  
CONSTITUTIONAL RIGHTS TO AN UNBIASED JURY  
AND TO BE FREE FROM CRUEL AND UNUSUAL  
PUNISHMENT.

*State v. Grondman*, 190 S.W.3d 496 (Mo. App. 2006)

*State v. Smith*, 649 S.W.2d 417 428 (Mo. banc 1983)

*Morgan v. Illinois*, 504 U.S. 719, 729-730 (1992)

*Lockett v. Ohio*, 438 U.S. 586, 604 (1978)

#### POINT V

THE TRIAL COURT PLAINLY ERRED IN ALLOWING  
WILLIAM NEWHOUSE TO PROVIDE AN “EXPERT”  
OPINION ON BLOOD SPATTER EVIDENCE IN THIS  
CASE. MR. NEWHOUSE WAS NOT SHOWN TO POSSESS  
EXPERTISE SUFFICIENT TO OFFER THE OPINIONS TO  
WHICH HE TESTIFIED NOR TO HAVE USED PROPER  
METHODS TO FORM HIS OPINIONS. THIS ERROR  
DENIED MR. BARTON HIS CONSTITUTIONAL RIGHT  
TO DUE PROCESS OF LAW AND CAUSED MANIFEST  
INJUSTICE IN THAT MR. NEWHOUSE’S TESTIMONY

WAS CRITICAL CIRCUMSTANTIAL EVIDENCE OF MR.  
BARTON'S GUILT.

*Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)

*Butler v. State*, 108 S.W.3d 18, 23 (Mo. App. 2003)

*State v. Rose*, 86 S.W.3d 90 (Mo. App. 2002)

*State v. Smulls*, 71 S.W.3d 138, 150 (Mo. banc 2002)

#### POINT VI

THE TRIAL COURT PLAINLY ERRED IN ADMITTING  
THE FORMER TESTIMONY OF SHARON STRAHAN IN  
WHICH SHE IDENTIFIED MR. BARTON AND  
REFERRED TO A LINEUP AS TO WHICH AN  
OBJECTION HAD BEEN SUSTAINED. THIS ERROR  
DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL  
RIGHTS TO COUNSEL AND TO DUE PROCESS OF LAW.

*Kirby v. Illinois*, 406 U.S. 682 (1972)

*State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989)

*State v. Whitfield*, 837 S.W.2d 503, 507 (Mo. banc 1992)

*State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000)

## POINT VII

THE TRIAL COURT PLAINLY ERRED IN PREVENTING TRIAL COUNSEL FROM CROSS-EXAMINING “KATHERINE ALLEN” CONCERNING THE NATURE OF THE CRIMES OF WHICH SHE HAD BEEN CONVICTED. TRIAL COUNSEL SOUGHT TO ELICIT TESTIMONY THAT THESE CRIMES INVOLVED UNTRUTHFULNESS, WHICH WAS RELEVANT TO MS. “ALLEN’S” CREDIBILITY. THIS ERROR DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.

*Bruton v. United States*, 391 U.S. 123, 126 (1968)

*State v. Hill*, 823 S.W.2d 93, 102 (Mo. App. 1991)

*Miller v. SSM Health Care Corp.*, 193 S.W.3d 416, 422 (Mo. App. 2006)

## POINT VIII

THE TRIAL COURT PLAINLY ERRED IN GIVING INSTRUCTIONS 14 AND 15. THESE INSTRUCTIONS IMPROPERLY PREVENTED THE JURY FROM GIVING FULL CONSIDERATION TO MITIGATING EVIDENCE,

AND THEREFORE VIOLATED THE DUE PROCESS AND  
CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF  
THE UNITED STATES AND MISSOURI  
CONSTITUTIONS.

*Lockett v. Ohio*, 438 U.S. 586, 604 (1978)

*Penry v. Lynaugh*, 492 U.S. 302 (1989)

*Penry v. Johnson*, 532 U.S. 782 (2001)

*Chapman v. California*, 386 U.S. 18 (1967)

#### POINT IX

THE TRIAL COURT PLAINLY ERRED IN NOT SUA  
SPONTE INSTRUCTING THE JURY TO DISREGARD THE  
PROSECUTION'S STATEMENT THAT A TRANSCRIPT OF  
AN INTERVIEW WITH MR. BARTON CONCERNING A  
PREVIOUS CRIME HAD BEEN REDACTED PRIOR TO  
BEING READ TO THE JURY. THIS STATEMENT  
IMPROPERLY ALLOWED AND ENCOURAGED THE  
JURY TO SPECULATE ON WHAT WAS MISSING. THIS  
ERROR DEPRIVED MR. BARTON OF HIS  
CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

*Bruton v. United States*, 391 U.S. 123 (1968)

*United States v. Payne*, 923 F.2d 595, 597 (8<sup>th</sup> Cir. 1991)

*United States v. Long*, 900 F.2d 1270, 1280 (8<sup>th</sup> Cir.1990)

#### POINT X

THE TRIAL COURT PLAINLY ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE SUGGESTED, IN FINAL ARGUMENT AT THE PENALTY PHASE, THAT MR. BARTON SHOULD BE SENTENCED TO DEATH AS PUNISHMENT FOR HIS PAST CRIMES. THIS ERROR VIOLATED MR. BARTON'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

*State v. McFadden*, 2007 WL 827422 (Mo. banc March 20, 2007)

*State v. Storey*, 901 S.W.2d 886, 902 (1995)

#### POINT XI

THE TRIAL COURT ERRED IN SENTENCING MR. BARTON TO DEATH BASED ON HIS REJECTION OF A PLEA BARGAIN AGREEMENT, IN VIOLATION OF HIS

CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW,  
TO TRIAL BY JURY, AND TO BE FREE FROM CRUEL  
AND UNUSUAL PUNISHMENT.

*United States v. Jackson*, 390 U.S. 570 (1968)

*United States v. Sales*, 725 F.2d 458, 460 (8<sup>th</sup> Cir. 1984)

*Hess v. United States*, 496 F.2d 936, 938 (8<sup>th</sup> Cir.1974)

*State v. Thurston*, 791 S.W.2d 893, 897 (Mo. App. 1990)

## POINT XII

THE DEATH SENTENCE IN THIS CASE IS  
UNCONSTITUTIONAL AND MUST BE VACATED  
BECAUSE THIS COURT'S SCHEME OF  
PROPORTIONALITY REVIEW, DOES NOT COMPLY  
WITH THE REQUIREMENT OF MO. REV. STAT.  
§565.035.3(3) THAT THIS COURT DETERMINE  
WHETHER THE DEATH SENTENCE IN EACH CASE IS  
“EXCESSIVE OR DISPROPORTIONATE TO THE  
PENALTY IMPOSED IN SIMILAR CASES” IN VIOLATION  
OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

*Evitts v. Lucey*, 469 U.S. 387, 400 (1985)

*Easter v. Endell*, 37 F.3d 1343, 1345 (8<sup>th</sup> Cir. 1994)

*Rust v. Hopkins*, 984 F.2d 1486, 1493 (8<sup>th</sup> Cir. 1993)

*Harris v. Blodgett*, 853 F.Supp. 1239, 1286 (W.D. Wash 1994), affirmed  
64 F.3d 1432 (9<sup>th</sup> Cir. 1995)

### POINT XIII

THE DEATH SENTENCE MUST BE VACATED BECAUSE  
IT IS EXCESSIVE AND DISPROPORTIONATE TO THOSE  
IMPOSED IN OTHER SIMILAR CASES, IN VIOLATION  
OF MO. REV. STAT. §565.035 AND THE UNITED STATES  
CONSTITUTION, IN THAT THE EVIDENCE OF GUILT IS  
NOT SUFFICIENT TO SUPPORT A DEATH SENTENCE,  
AND MR. BARTON HAS BEEN PREJUDICED BY  
PROSECUTORIAL MISCONDUCT.

*State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998)

*Johnson v. State*, 102 S.W.3d 535 (Mo. banc. 2003)

### POINT XIV

THE TRIAL COURT ERRED IN FAILING TO DISMISS  
THE CASE AFTER A MISTRIAL WAS GRANTED WHEN

THE STATE WAS UNABLE TO PROCEED BECAUSE NO WITNESSES HAD BEEN ENDORSED ON THE INDICTMENT, IN VIOLATION OF MR. BARTON'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

*Oregon v. Kennedy*, 456 U.S. 667 (1982)

*State v. Nunley*, 923 S.W.2d 911, 922 (1996)

*State v. Destefano*, 211 S.W.3d 173 (Mo. App. 2007)

*State v. Hendrix*, 883 S.W.2d 935, 938-939 (Mo. App. 1994)

POINT XV

THE TRIAL COURT PLAINLY ERRED IN IMPOSING A SENTENCE OF DEATH BECAUSE THE METHOD OF EXECUTION PRESCRIBED BY MISSOURI LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, IN THAT THERE IS A REASONABLE PROBABILITY THAT MR. BARTON WILL SUFFER UNREASONABLY WHILE BEING PUT TO DEATH.

*Taylor v. Crawford*, 05-CV-4173-FJG, W.D. Mo. (June 26, 2006)

## ARGUMENT AND AUTHORITIES

### POINT I

**THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL EVIDENCE. THE EVIDENCE WAS INSUFFICIENT TO SHOW MR. BARTON COMMITTED THE OFFENSE IN THE ABSENCE OF EYEWITNESSES, CREDIBLE PHYSICAL EVIDENCE, OR CREDIBLE EVIDENCE OF INCULPATORY STATEMENTS BY MR. BARTON. MR. BARTON'S CONVICTION ON INSUFFICIENT EVIDENCE VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.**

No one saw the brutal murder of Gladys Kuehler, so the state did not present any eyewitness testimony. Nor did it present credible physical evidence connecting Mr. Barton with her death. No weapon was ever found. Trial Tr. Vol. IV, p. 641. Mr. Barton's pocket knife bore no sign of blood and was not consistent with Ms. Kuehler's wounds. Trial Tr. Vol. IV, p. 689. The only evidence that Mr. Barton might have been involved with the death was contradictory testimony that he did

not have contact with Ms. Kuehler's body, the presence of bloodstains on his shirt which an "expert" opined were more consistent with a splash after stabbing than a splash from wet blood after the murder, and a statement by a jailhouse snitch, who had been convicted of ten counts of forgery, six counts of bad check charges, ten counts of theft, one count of conversion, one count of credit card fraud and one count of escape, that Mr. Barton had threatened to "kill her like I killed the old lady." Trial Tr. Vol. III, pp. 480, 518; Vol. IV, pp. 542, 672; Vol. V, pp. 885-886; Vol. VI, pp. 934-943.

On the other hand, on the night of the death, Mr. Barton promptly explained that he got blood on his clothing when he pulled Debbie Selvidge away from her grandmother's body. Trial Tr. Vol. IV, p. 555. That night, and again the day after the murder, Debbie Selvidge confirmed that he had pulled her away. Trial Tr. Vol. IV, p. 544; Vol. V, p. 747. Ms. Selvidge, Carol Horton, and Brenda Montiel all saw Mr. Barton at various times throughout the afternoon and evening of Ms. Kuehler's death. Ms. Horton and Ms. Montiel were asked if they noticed the bloodstain which was obvious to the officer after Mr. Barton had been present for the discovery of Mr. Barton's body. Neither had. Trial Tr. Vol. III, p. 459; Vol. VI, p. 973.

The evidence indicated that the person who killed Ms. Kuehler would likely have been splashed with copious amounts of blood. Yet, there was no indication that Mr. Barton had changed clothes or showered; his body and clothes were dry when he returned to Ms. Horton's trailer around 4:00. Trial Tr. Vol. III, p. 497. He had no blood on his boots. Trial Tr. Vol. V, p. 903. The sink, soap and towel he used to wash his hands at Ms. Horton's were tested for blood, but none was found. Trial Tr. Vol. IV, p. 687.

The check written by Ms. Kuehler to Mr. Barton was not found on Mr. Barton's person, and was not cashed by him. It was found lying in a nearby ditch a day or two after Mr. Barton was placed in custody. Trial Tr. Vol. IV, p. 656. Hairs consistent with a third person (neither Mr. Barton nor Ms. Kuehler) were found on her body. Trial Tr. Vol. VI, pp. 966-968.

***Standard of review.*** This Court reviews questions of sufficiency of the evidence to determine whether any reasonable juror could have made the required finding. The evidence is considered in the light most favorable to the jury's verdict. *Jackson v. Virginia*, 433 U.S. 307 (1979).

***Argument.*** Mere presence at the scene of an offense is insufficient evidence to sustain a conviction. *United States v. Scofield*, 433 F.3d 580,

586 (8<sup>th</sup> Cir. 2006); *United States v. Mendoza-Larios*, 416 F.3d 872, 874 (8<sup>th</sup> Cir. 2005). Essentially, that is all the state can produce here. Mr. Barton was certainly in the trailer park where Ms. Kuehler's trailer was located on the day of her death. Indeed, he visited her there. And he was certainly present when her body was found. However, there is simply no evidence from which a reasonable juror could find beyond a reasonable doubt that Mr. Barton was the person who murdered Ms. Kuehler. Conviction on insufficient evidence violates a defendant's right to due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10; *Jackson v. Virginia*, 433 U.S. 307 (1979).

Reversal for acquittal is required. *Burks v. United States*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978).

## POINT II

**THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO PRECLUDE THE DEATH PENALTY BASED ON PERVASIVE PROSECUTORIAL MISCONDUCT IN THIS CASE, PARTICULARLY THE SUBORNATION OF PERJURY BY THE PROSECUTOR IN THE LAST TRIAL. DENYING THIS MOTION DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

Prior to trial, Mr. Barton filed a “Motion to Dismiss or in the Alternative Preclude the State from Seeking the Death Penalty,” contending that because of prosecutorial misconduct in his case, he was entitled to relief. L.F. Vol. I, p. 117-124. In his motion, Mr. Barton detailed the history of his case, including the four previous times his case had been called for trial, including two mistrials and a reversal by this Court.<sup>3</sup> He noted that after the previous 1998 trial, the motion

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<sup>3</sup> The summary contains an error, found at L.F. Vol. I, p. 78. After Mr.

court (PCR) judge had granted relief under Rule 29.15 because the prosecutor both failed to disclose known convictions of his jailhouse snitch witness “Katherine Allen,” and knowingly allowed her to lie about those convictions. L.F. Vol. I, p. 78.

The Motion urged the Court to find that the Double Jeopardy Clause (U.S. Const. Amend. V) barred retrial of Mr. Barton because it was necessitated by prosecutorial misconduct. In the alternative, Mr. Barton requested that the court preclude the death penalty in this case.

At a hearing on the motion, the court stated,  
I find clearly, clearly, that the Defendant has been  
prejudiced by having to come back over and over again  
because clearly the State’s case has been improved time after  
time because they find more snitches. They find two things I  
think most important. They find more snitches, and they get  
the benefit of technological advantages and DNA, none of

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Barton’s third trial, this Court did not reverse because of improper prosecution argument. Rather, this Court held that the trial court had improperly sustained the state’s objection to the defense final argument. *State v. Barton*, 936 S.W.2d 781 (Mo. banc 1996).

which they had. The only time the jury got to hear a fair crack and then the jury was hung. So it is almost unarguably [sic] that the Defendant has been prejudiced. The defendant has been prejudiced.

Trial Tr. Vol. I, p. 45.

The Court then indicated that it was not inclined to dismiss, but would take the motion as a whole, and particularly the issue of the death penalty, under advisement during the trial. Trial Tr. Vol. I, p. 45. Ultimately, the Court denied the motion as to both dismissal and the death penalty preclusion. Trial Tr. Vol. VI, pp. 1068, 1178,

***Standard of review.*** This Court reviews the circuit court's legal conclusion that dismissal was not required by the Double Jeopardy Clause *de novo*. *State v Barriner*, 210 S.W.3d 285, 307 (2006). Any factual findings will be reviewed for clear error. The circuit court's decision not to preclude the death penalty should be reviewed for abuse of discretion.

*Argument.*

A. The conviction should be vacated and Mr. Barton should be discharged from further prosecution for this offense.

The Double Jeopardy Clause of U.S. Const. amend. V, made applicable to trials in state court by U.S. Const. amend. XIV, provides, “. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .” Until 1982, courts had held uniformly that where a defendant sought and obtained a mistrial or reversal of his conviction on appeal, the clause did not prevent his retrial. In 1982, however, in the case of *Oregon v. Kennedy*, 456 U.S. 667 (1982), a plurality of the United States Supreme Court found that the Double Jeopardy Clause of the Fifth Amendment is implicated when the prosecutor deliberately engages in misconduct for the purpose of goading the defendant into moving for a mistrial. The Court observed that “one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury empaneled to try him. . .” *Id.*, 456 U.S. at 672.

The holding in *Kennedy* recognized that under some circumstances, seeking a mistrial will be the only way a defendant can

enforce his right to a fair trial. When the prosecutor creates those circumstances, fairness demands that the state not be rewarded with a second chance to convict the defendant:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*Green v. United States*, 355 U.S. 184, 187-88 (1957).

Several other federal courts have held that under the umbrella of *Kennedy*, the Double Jeopardy Clause may protect “a defendant from retrial . . . where prosecutorial misconduct is undertaken with the intention of denying the defendant an opportunity to win an acquittal,” and the misconduct is not discovered during trial. *United States v. Wallach*, 979 F.2d 912, 916 (2<sup>nd</sup> Cir. 1992).

As Judge Posner put it in *United States v. Catton*, 130 F.3d 805, 807 (7<sup>th</sup> Cir. 1997):

Confined to cases in which the defendant is goaded into moving for a mistrial, whether the motion is granted or denied, *Kennedy* would leave a prosecutor with an unimpaired incentive to commit an error that would not be discovered until after the trial and hence could not provide the basis for a motion for a mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial. *Suborning perjury would be a good example.* It can be argued that if the prosecutor commits a covert error for the same purpose that he might have committed an open error calculated to evoke a motion for a mistrial (before *Kennedy* made this tactic unprofitable)—namely, to prevent an acquittal and so preserve the possibility of retrying the defendant even if the error is sure to be discovered and result in a reversal of the conviction either on direct appeal or on collateral attack—the double jeopardy clause should protect the defendant against being retried.

(emphasis added).

While the court in *United States v. Pavloyianis*, 996 F.2d 1467, 1469 (2<sup>nd</sup> Cir. 1993) refused to bar retrial, it set out a standard that clearly applies in this case:

The question on this appeal is whether the discovery after a defendant's trial that a government witness perjured herself bars his retrial on double jeopardy grounds. The issue for us is a subtle one: whether the government's conduct in connection with its witness' perjury was merely a legal error or amounted to an impropriety or injustice against the defendant. While any impropriety in a defendant's case disserves the fair administration of criminal justice, such behavior, standing alone, will not suffice to invoke protection from prosecution on double jeopardy grounds. To claim that constitutional bulwark the misconduct must have been undertaken with the deliberate purpose of depriving the defendant of double jeopardy's shield, that is to say, only a high-handed wrong intentionally directed against defendant's constitutional right will trigger his right not to be twice put in jeopardy for the same offense.

See also *United States v. Gary*, 74 F.3d 304, 315 (1<sup>st</sup> Cir. 1996) (rejecting double jeopardy bar to retrial where evidence concerning witness perjury did not suggest prosecutorial misconduct and the perjury pertained to a collateral matter, but holding that egregious prosecutorial misconduct precludes retrial).

These cases, as did *Kennedy*, focus on the nature of the prosecution's intent as reflected by the improper conduct. Under this principle, an error by the prosecutor which results in reversal should not necessarily bar retrial. For example, if the error was inadvertent, or was based on a good faith belief that the legal issue involved should be resolved differently than the appellate court ultimately determined, the proper remedy is simply to order a new trial. However, intentional prosecutorial misconduct which is directed at weakening the defendant's chances for an acquittal requires a different result. And that is what happened here.

In this case, the PCR judge found, first, that the prosecutor failed to disclose to the defense information in his possession concerning the prior convictions of his jailhouse snitch, "Katherine Allen." The prosecutor testified at the PCR hearing that he believed he *had*

disclosed the information. Defense counsel testified that he never received it. The judge credited defense counsel, finding:

The state did not produce credible evidence showing that the criminal history of “Katherine Allen” had been disclosed to the defense. . . Although Mr. Ahsens, the trial prosecutor, testified at the evidentiary hearing and at an earlier deposition that he believed he had disclosed the criminal history. . . the court finds that the criminal history of “Katherine Allen” was not disclosed to the defense prior to trial.

L.F. Vol. I, pp. 97-98.

In addition to failing to disclose the record of Ms. “Allen’s” convictions, the PCR court also found that the prosecutor failed to disclose the fact that a Missouri forgery charge against Ms. “Allen” had been dismissed at this request. The defense discovered this fact after the post-conviction hearing, when another attorney representing the state found a letter confirming the dismissal in the trial prosecutor’s files and provided a copy to the defense. L.F. Vol. I, p. 100.

The letter, written to the prosecutor by an assistant prosecuting attorney in Cass County, reflected that the charge had been dismissed

in exchange for Ms. “Allen’s” testimony in a murder case. Although the prosecutor testified at the post-conviction hearing that he did not disclose the letter because he had not, in fact, made such an agreement, the PCR court found otherwise. The court noted that Mr. Barton, in the PCR proceedings, had presented the deposition testimony of Robert Craven, Ms. “Allen’s” Indiana counsel, that he had been told by the prosecutor’s investigator, Mr. Dresselhaus, that the Missouri charge would be dismissed if Ms. “Allen” agreed to come to Missouri to testify against Mr. Barton. The PCR court found, “The court infers from the fact that the state did not call Mr. Dresselhaus, an employee of the Attorney General, to testify at the evidentiary hearing that Mr. Dresselhaus would have testified in conformance with the testimony of Mr. Craven.” L.F. Vol. I, p. 100.

These findings that the prosecutor failed to make required disclosures before trial and lied to the post-conviction court are disturbing enough. But the PCR judge went on to find that the prosecutor suborned perjury. Specifically, the prosecutor was aware of Ms. “Allen’s” numerous prior convictions for offenses involving dishonesty and nonetheless allowed her to testify, without

contradiction, that she had only six prior hot check convictions and a conviction for escape.

The court found, “The difference between the ‘six bad checks’ to which Ms. Allen testified and her actual record is material.” L.F. Vol. I, pp. 102-103. The court’s order included a chart showing that at the time of the 1998 trial, Ms. Allen had, in fact, been convicted of six bad check charges and one count of escape. She had *also* been convicted of ten counts of forgery, ten counts of theft, one count of conversion, and one count of credit card fraud. She had been sentenced a total of twelve times in Indiana, Missouri and Kansas. The court further noted that had the defense received proper disclosure, they would have been aware of numerous aliases used by Ms. “Allen” at the time of her convictions. L.F. Vol. I, pp. 98-99).

Apparently, the PCR court’s findings did not mean much to the attorneys who prosecuted Mr. Barton in his current trial. Ms. “Allen” again testified, without any correction by the prosecutor, that she was in prison now for forgery and fraud and had six other convictions. She also mentioned that she had a check charge in Missouri dismissed “last year.” Trial Tr. Vol. VI, p. 930. Of course, in this trial, the defense was

able to cross-examine her to some extent concerning her other convictions.<sup>4</sup>

The PCR court found that, had proper disclosure been made, “the defense would have been able to conduct a far more effective cross-examination of Ms. Allen.” Moreover, the court found that Ms. “Allen’s” testimony concerning Mr. Barton’s statements to her was “critical” to the prosecution’s case. L.F. Vol. I, p. 101. As a result, the PCR court reversed Mr. Barton’s conviction and sentence and ordered a new trial.

Missouri law supports the extension of the rule of *Oregon v. Kennedy* to the situation in which reversal is required by intentional prosecutorial misconduct. In *State v. Barriner*, 210 S.W.3d 285 (Mo. App. 2006), the Western District Court of Appeals considered the issue of whether the federal constitutional right against double jeopardy could prevent a retrial when a reversal was based on prosecutorial misconduct. The court noted that

There are “[t]hree distinct abuses. . . prevented by the Double Jeopardy Clause [of the Fifth Amendment]: (1) a subsequent

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<sup>4</sup> See Point VII below for a discussion of the improper limitations on the cross-examination of Ms. “Allen”.

prosecution for the same offense after acquittal; (2) a subsequent prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.” *State v. Angle*, 146 S.W.3d 4, 10 (Mo. App. 2004).

*State v. Barriner*, 210 S.W.3d 285, 307 (Mo. App. 2006).

In *Barriner*, the appellant claimed that because his case had previously been reversed for a discovery violation which he characterized as prosecutorial misconduct, he was entitled to discharge. The court considered cases from other jurisdictions in determining whether the rule of *Oregon v. Kennedy*, supra, covered the situation where the prosecutorial misconduct was discovered after trial, and said,

[T]he court in *State v. Minnitt*, [203 Ariz. 431, 55 P.3d 774, 782-83 (Ariz. 2002)] did an excellent job of discussing why the double jeopardy protection afforded a defendant for prosecutorial misconduct in cases of mistrial should be extended to cases where the misconduct is discovered after trial. The court reasoned that: “Concealment of a prosecutor’s serious misdeeds throughout the trial should not expose the defendant to multiple trials. This is exactly what the double jeopardy provision was intended to

prevent.” *State v. Minnitt*, 55 P.3d at 782 (quotation marks and citation omitted).

The court of appeals then noted that not just any prosecutorial misconduct should trigger double jeopardy protection. It cited with approval the formulation in *Minnitt* that the type of conduct which will bar retrial is conduct which the prosecutor “knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal and the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.’ *Id.* (citations omitted).” *State v. Barriner*, 210 S.W.3d 285, 309 (Mo. App. 2006). In *Barriner*, however, the court held that the appellant never presented any evidence that the discovery violation was intentional, and therefore denied relief.

In Mr. Barton’s case, however, evidence, in the form of the PCR judge’s factual findings, *was* introduced to support the double jeopardy claim.<sup>5</sup> The PCR judge’s findings, which were not appealed by the state,

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<sup>5</sup> Concurrently with this brief, Mr. Barton is filing a motion to expand the record on appeal with the transcript of the hearing, as well as a request to transfer the appellate records of his prior appeals.

certainly constitute evidence of the facts recited therein. And the evidence is conclusive that intentional misconduct occurred. The judge found that the prosecutor had access to and possession of Ms. “Allen’s” criminal record before the prior trial, failed to disclose it, also intentionally failed to disclose the fact that he had arranged for Ms. “Allen’s” Missouri charge to be dismissed, and, finally, with that knowledge, suborned perjury by allowing her to testify unchallenged to a much less serious criminal record. The PCR judge found that these acts were material and so prejudicial to Mr. Barton that they could not be cured without a new trial. L.F. Vol. I, pp. 123-124.

In determining the extent to which Mr. Barton’s present predicament is the result of state action, it should be noted that his initial mistrial was the result of the prosecution’s failure to endorse witnesses on the indictment, and his first reversal occurred because the trial judge improperly sustained the state’s objection to defense argument. Moreover, one of the state’s jailhouse snitch witnesses, Lawrence Arnold, testified out of the presence of the jury before this trial that he had been persuaded by the state’s agents to lie about Mr. Barton’s admissions to him. Trial Tr. Vol. IV, p. 720. While this witness did not testify at the present trial, his testimony was presented at each

of the previous trials in which Mr. Barton was convicted and sentenced to death.<sup>6</sup> The trial court specifically noted that one of the ways the State was able to improve its case by trying it over and over was by finding new jailhouse snitches. Trial Tr. Vol. I, p. 45.

Beyond the specific finding by the trial court, prejudice to Mr. Barton is further evidenced by the fact that during the repeated trials, the state had added several jailhouse snitch witnesses, added blood spatter evidence, and DNA evidence. Moreover, several state's witnesses have died, and the jury at this trial did not have the opportunity to observe their demeanor. One of those witnesses, Sharon Strahan, made a highly questionable identification of Mr. Barton. See Point VI, below. After fifteen years, witnesses' protestations that they do not remember prior inconsistent statements had much more inherent credibility than when such explanations were given years ago. As a result, Mr. Barton was unable effectively to impeach those statements.

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<sup>6</sup> Two other jailhouse snitch witnesses who had testified previously, Ricky Ellis and Craig Dorser, suffered mysterious memory loss when questioned before trial. The State did not attempt to present their prior testimony. Trial Tr. Vol. IV, pp. 710-716, 732-734.

Further, one of Mr. Barton's alibi witnesses, Brenda Montiel, died before this trial, and only her prior testimony was available to him. Trial Tr. Vol. VI, p. 970. Moreover, four prospective jurors stated that since the state was prosecuting Mr. Barton, after such a long time, they had trouble presuming that he was innocent. Trial Tr. Vol. III, pp. 377-380. While these prospective jurors did not serve on the jury, it is certainly possible that other prospective jurors were less candid but held the same opinion. This difficulties caused by the long history of this case clearly illustrate the fairness of the double jeopardy principle that trials should, whenever possible, be completed the first time they begin.

The *Barriner* court noted that *State v. Minnit*, cited above, involved subornation of perjury, just as Mr. Barton's case does. The opinion in *United States v. Catton*, 130 F.3d 805, 807 (7<sup>th</sup> Cir. 1997), also mentions subornation of perjury as the sort of prosecutorial misconduct which should bar retrial on double jeopardy grounds. See also *State v. Beck*, 849 S.W.2d 668, 670 (Mo. App. 1993), where the court, reviewing an unpreserved double jeopardy claim for plain error, noted in denying the claim, "We do not find evidence of intentional prosecutorial misconduct. . . that would preclude a retrial." The *Beck*

court thus implicitly recognized that a retrial after reversal for intentional prosecutorial misconduct violates the Double Jeopardy Clause.

Other states also support this application of the double jeopardy principle. In addition to *Minnit*, the Arizona Supreme Court also held, in *Pool v. Superior Court in and for Pima Co.*, 139 Ariz. 98, 108-09 (1984), that prosecutorial misconduct will bar a retrial where

[S]uch conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal.

While the Arizona courts were interpreting a provision of the Arizona Constitution, that provision was identical to the U.S. Constitution.

In New Mexico, the rule barring retrial applies in those situations in which “the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment

and inconvenience of successive trials.” *State v. Day*, 94 N.M. 753, 757 (1980).<sup>7</sup> That rule has been interpreted to bar retrial in cases of “misconduct in which the prosecutor acts in willful disregard of the resulting mistrial, retrial, or reversal on appeal.” *State v. Breit*, 122 N.M. 655, 658, 930 P.2d 792, 795 (1996) (emphasis added). Thus, “when a defendant’s mistrial motion or request for reversal on appeal is necessitated by prosecutorial misconduct, reprosecution may be barred.” *Id.*, at 660, 797 (emphasis added). The New Mexico Supreme Court relied on authority from across the country in articulating the rationale behind applying the double jeopardy bar to appellate reversals based on prosecutorial misconduct:

We emphasize that when a trial is severely prejudiced by prosecutorial misconduct, the double-jeopardy analysis is identical, whether the defendant requests a mistrial, a new trial, or, on appeal, a reversal. See *United States v. Medina-Herrera*, 606 F.2d 770, 775 n.5 (7<sup>th</sup> Cir. 1979), *cert. denied*,

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<sup>7</sup> The New Mexico constitutional provision, N.M. Const. art. II, §15, like the Arizona constitution, has double jeopardy language identical to the U.S. Constitution.

446 U.S. 964 (1980) (In the case of prosecutorial overreaching, there is no difference between a defense motion for new trial and for a mistrial since ruling granting new trial was essentially a reserved ruling on the mistrial motion); *Petrucelli v. Smith*, 544 F. Supp. 627, 632 (W.D.N.Y. 1982), reconsidered on other grounds, 569 F. Supp. 1523 (W.D.N.Y. 1983), vacated on other grounds, 735 F.2d 684 (2d Cir. 1984). (“Reversal of a conviction for deliberately offensive prosecutorial misconduct warrants the same relief as a mistrial granted on that ground.”)

Factually, this case is closely analogous to *Commonwealth v. Smith*, 532 Pa. 177 (1992). There, as here, the prosecution withheld evidence. As in this case, the withheld evidence was uncovered by happenstance after Smith’s conviction, and subsequent investigation revealed that the state had taken affirmative measures to mislead the defense, and consequently the court and the jury, about the evidence. (Here, the “affirmative measure” taken by the state was the subornation of perjury by “Katherine Allen.”) The Pennsylvania Supreme Court found that the *Oregon v. Kennedy* standard was incapable of addressing the double jeopardy principles that arise in such

a situation because “where the Commonwealth conceals its efforts to subvert the truth-determining process. . . [there is] no intent to goad the defendant into moving for a mistrial. Quite the opposite, the intent would be that the defendant should never know how his wrongful conviction came about.” *Commonwealth v. Smith*, 532 Pa. 177, 180-81, 615 A.2d 321, 322 (1992). The existence of a second category of prosecutorial misconduct, not accommodated by the *Oregon v. Kennedy* test, requires the application of a different standard:

The United States Supreme Court has enunciated principally two types of prosecutorial overreaching. First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against.

*Commonwealth v. Smith*, 532 Pa. 177, 184. (1992).

The Pennsylvania Supreme Court therefore held that “[T]he double jeopardy clause of the Pennsylvania Constitution<sup>8</sup> prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.” 532 Pa. at 185, 615 A.2d at 325. Here, the PCR judge expressly found that the prosecutor intentionally engaged in conduct undertaken to prejudice Mr. Barton to the point that he was denied a fair trial.

In another Pennsylvania case, the court held that retrial was prohibited when reversal was required because the state repeatedly portrayed the defendant as a member of organized crime and attempted to argue that a fingerprint belonged to the defendant despite evidence to the contrary. *Com. v. Daidone*, 453 Pa. Super. 550, 559, 684 A.2d 179 (Pa. Super. 1997). Holding that “where the prosecutor's conduct changes

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<sup>8</sup> Pa. Const. art. I, §10: “No person shall, for the same offense, be twice put in jeopardy of life or limb.”

from mere error to intentionally subverting the court process, then a fair trial is denied,” the court held that retrial was barred.

Also instructive is the analysis of the primary and dissenting opinions of the Texas Court of Criminal Appeals in *Cook v. State*, 940 S.W.2d 623 (Tex. Crim. App. 1996). In that case, the court reversed the conviction and death sentence of Mr. Cook because of prosecutorial misconduct. Like Mr. Barton, Mr. Cook had endured a previous mistrial due to a hung jury and a previous reversal of a conviction and sentence for trial error. Based in part on findings of lower courts that Mr. Cook had not been unduly prejudiced, the court then determined that retrial was permissible after a careful analysis of the fairness of such a result. In a thoughtful dissent, Judge Baird began by stating,

This case presents a question of first impression, namely whether prosecutorial misconduct, magnified by the passage of fourteen years and the death of a key witness, can so degrade the normal workings of justice that a fair trial becomes impossible, and thus, retrial is forbidden under double jeopardy and due process principles.

*Cook v. State*, 940 S.W.2d 623, 629 (Tex. Crim. App. 1996) (Baird, J., dissenting.) Judge Baird noted that Mr. Cook did not contend that

prosecutorial misconduct alone would not bar retrial, but that in a proper case, the combination of prosecutorial misconduct and other circumstances might make a fair retrial impossible. Judge Baird discussed in detail the responsibilities of prosecutors to act fairly and with integrity, and said it was necessary to “review the State's misconduct on appellant’s rights and society’s rights under the rule of constitutional order and on the State’s ability to obtain a verdict worthy of confidence.” *Cook v. State*, 940 S.W.2d 623, 631 (Tex. Crim. App. 1996) (Baird, J., dissenting.)

Judge Baird went on to note that, like the prosecutor in Mr. Barton’s case, the prosecution in Mr. Cook’s case had withheld exculpatory evidence (including a promise of leniency to a jailhouse snitch witness) and had allowed misleading testimony from another state’s witness. Focusing on how the state’s misconduct prejudiced Mr. Cook’s ability to receive a fair trial, Judge Baird found that some of the state’s misconduct did not harm him. However, he asserted, “I must simultaneously assess whether, under the totality of the circumstances, the State’s misconduct has impacted its own ability to ensure that the proceedings are fundamentally fair.” *Cook v. State*, 940 S.W.2d 623, 634 (Tex. Crim. App. 1996) (Baird, J., dissenting.)

Judge Baird observed that the passage of time, and repeated exposure of the state's witnesses to cross-examination, had allowed the state to tailor the testimony of its witnesses to meet prior cross-examination by the defense. On the other hand, since the defense had no access to the suppressed evidence until it was discovered after his third trial, the defense had no corresponding opportunity to improve its case: "The point is that the State's willful misconduct has denied appellant the opportunity to investigate and develop his case in the same manner as the State has developed its evidence against appellant." *Cook v. State*, 940 S.W.2d 623, 636 (Tex. Crim. App. 1996) (Baird, J., dissenting.)

Judge Baird noted that, like the prosecutors in Mr. Barton's most recent trial, the prosecutors in Mr. Cook's third trial used evidence which had been shown in earlier trials to be tainted. This, Judge Baird found, "support[s] a conclusion that the State's own misconduct has rendered the prosecution incapable of obtaining a verdict worthy of confidence." Judge Baird concluded

Under these circumstances appellant's retrial serves no purpose but to subject him to continuing mental, emotional and financial hardships. Retrial under these circumstances

would violate the most fundamental and compelling notions of fundamental fairness essential to the rule of law embodied in both the Texas Constitution and the United States Constitution. Having irreparably crippled appellant's ability to defend himself, and its own ability to uncover the truth, I do not believe the State should be permitted to abuse its power by again forcing appellant to defend himself against these accusations.

*Cook v. State*, 940 S.W.2d 623, 639 (Tex. Crim. App. 1996) (Baird, J., dissenting.)

As the *Barriner* court noted, this Court has regularly held, see, e.g., *State ex rel. Kemper v. Vincent*, 191 S.W.3d 45, 50 (2006), that the Missouri Constitution does not protect a defendant from retrial after conviction. This narrow interpretation of the Missouri Constitution is not strictly necessary.

Mo. Const. art. I §19 provides:

That no person shall. . . be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if . . . judgment on a verdict of guilty be reversed

for error in law, the prisoner may be tried anew. . . *according to the law.*

(Emphasis added.) The emphasized phrase appears to give this Court the responsibility and latitude to determine what “law” will permit retrial. Thus, just as the Pennsylvania, Arizona, and New Mexico courts did, this Court may—and should—hold that the state constitution requires that flagrant, intentional prosecutorial misconduct which results in reversal, in addition to that which provokes a mistrial motion, precludes retrial after reversal. In the alternative, in an area such as this where the U.S. Supreme Court has not recently spoken, this Court is free to interpret U.S. Constitutional law. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003).

Mr. Barton’s fifth trial was barred by the Double Jeopardy Clause of the Federal and State Constitutions. The prosecutor in this case deliberately engaged in misconduct in order to avoid acquittal at both of Mr. Barton’s first two complete trials. *Oregon v. Kennedy*, 456 U.S. 667 (1982); *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), *cert. denied*, 508 U.S. 939 (1993). The prosecutor unquestionably acted with “willful disregard of the resulting mistrial, retrial, or reversal.” *State v. Breit*, 122 N.M. at 669 (1996). The prosecutor’s misconduct had the

foreseeable effect of “subjecting the defendant to the harassment and inconvenience of successive trials,” *State v. Day*, 94 N.M. 753, 757, *cert. denied*, 449 U.S. 860 (1980), and the circuit court found that Mr. Barton, like Mr. Breit, was “severely prejudiced” by the state’s misconduct. *State v. Breit*, 122 N.M. 655, 930 P.2d 792 (1996). Like the New Mexico Supreme Court, this Court should agree that “[t]he reprehensible conduct of the prosecutor in this case forces us to conclude that double-jeopardy interests are not adequately protected when prosecutorial intent to cause a mistrial is the only consideration.” *State v. Breit*, 122 N.M. at 666, 930 P.2d at 803 (1996). Further, “The strictest scrutiny is appropriate when . . . there is reason to believe that the prosecutor is using the superior resources of the state to harass or to achieve a tactical advantage over the accused.” *State v. Tiger*, 972 S.W.2d 385, 392 (Mo. App. 1998), quoting *Arizona v. Washington*, 434 U.S. 497, 508 (1978).

Therefore, this Court should vacate Mr. Barton’s conviction and sentence and order that he not be further prosecuted for this offense.

**B. In the alternative, the trial court should have precluded the state from seeking the death penalty.**

Even if this Court finds that double jeopardy did not bar Mr. Barton's fifth trial, the death penalty should still have been unavailable to the State at Mr. Barton's fifth trial.

Following the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which attached the jury trial right to penalty phase fact-finding, there can no longer be any doubt that the penalty phase trial is a separate "trial" bringing with it the constitutionally guaranteed substantive and procedural protections that characterize criminal trials. Thus, this Court must make a separate and distinct inquiry as to whether the state and federal protections against double jeopardy, and the interests they represent, prevented the state from seeking, for a third time, a verdict of death. Such an analysis compels the conclusion that barring the penalty phase – both as a sanction for egregious conduct, and a remedy for the irreparable harm caused – is required.

As noted earlier, the Double Jeopardy Clause is intended to protect the defendant from being "subject[ed] to embarrassment, expense and ordeal and compel[ed] to live in a continuing state of

anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” *Green v. United States*, 355 U.S. 184, 187-88 (1957). The anxiety experienced over possible conviction and punishment is of a different nature and far more destructive to the individual defendant when the potential punishment is death. Because death is different, it is appropriate to afford the capital defendant certain procedural safeguards that may not be available to the non-capital defendant. “In capital cases the finality of sentence imposed warrants protections that may or may not be required in other cases.” *Ake v. Oklahoma*, 470 U.S. 68, 86 (1985), Burger, J., concurring.

The “protection” which Mr. Barton urges this Court to adopt is a double jeopardy protection. He has already undergone, wrongfully and illegally, the anxiety and stress of three death penalty trials and a death row existence for fifteen years, and thus it is necessary and proper to preclude the state from inflicting death in a case involving the scope and degree of overreaching as occurred here. See generally *United States v. Harper*, 729 F.2d 1216 (9<sup>th</sup> Cir. 1984) (“Enduring a trial that entails the possibility of a death penalty imposes a hardship “different in kind” from enduring the discomfiture of any other trial. The

emotional stress and strain of a trial in a capital case are extreme in character and sui generis. We consider the ordeal of undergoing such a trial truly a substantial hardship.”); *Lackey v. Texas*, 514 U.S. 1045 (1995) (“Over a century ago, this Court recognized that ‘when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.’ *In Re Medley*, 134 U.S. 160 (1890)”) See also *People v. Anderson*, 6 Cal. 3rd 628 (Ca. 1972) .

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

*Furman v. Georgia*, 408 U.S. 238 (1972)(Brennan, J., concurring).

Further, the passage of time erodes the reliability of the death sentence. As the United States Supreme Court noted in *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976):

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

The passage of time has clearly eroded Mr. Barton's ability to present mitigating evidence. The penalty phase portion of this trial comprised three short witnesses and only 17 pages of transcript, including the defense opening statement. Moreover, vacating the death sentence is an appropriate sanction to prevent similar prosecutorial misconduct in future cases. In the event that this Court holds that the trial court was not required to grant dismissal, it should nonetheless remand with instructions to enter a sentence of life imprisonment without eligibility for probation or parole.

### POINT III

**THE TRIAL COURT ERRED IN DENYING MR. BARTON'S MOTION FOR MISTRIAL WHEN A LAW ENFORCEMENT WITNESS TESTIFIED THAT MR. BARTON HAD REFUSED TO ANSWER QUESTIONS AFTER BEING GIVEN HIS *MIRANDA* WARNINGS. THE COMMENT VIOLATED MR. BARTON'S CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS OF LAW.**

Mr. Barton was arrested after Ms. Kuehler's body was found and taken to the Christian County Courthouse. He was advised of his *Miranda* rights. Trial Tr. Vol. IV, p. 667. While Mr. Barton was in custody in Christian County, he was interviewed by Sgt. Jack Merritt of the Missouri State Highway Patrol. (At the time of trial, Mr. Merritt was Greene County Sheriff.) Trial Tr. Vol. IV, p. 662. During Mr. Barton's trial, Sheriff Merritt was asked, "Did you ask Mr. Barton anything concerning the stain on his shirt?" He responded, "Well, yes. At that point, he said he wasn't answering questions." Trial Tr. Vol. IV, p. 668.

Trial counsel approached the bench and objected. Trial Tr. Vol. IV, p. 668. At his request, the jury was instructed to disregard the statement. Specifically, the judge told the jury, “[Y]ou are to disregard the last comment of the witness, the comment being, ‘Well, yes. At that point, he said he wasn’t answering questions.’ You are instructed to disregard that. . .” Trial Tr. Vol. IV, p. 671. Defense counsel moved for a mistrial, and the trial court took the request under advisement. Trial Tr. Vol. IV, p. 671.<sup>9</sup> Sheriff Merritt then testified that Mr. Barton had told him that he got blood on his shirt when he was helping to pull either Ms. Horton or Ms. Selvidge (Sheriff Merritt did not remember which) away from Ms. Kuehler. Trial Tr. Vol. IV, p. 672.

***Standard of review.*** The refusal of the trial judge to order a mistrial is reviewed for abuse of discretion. *State v. Rayborn*, 179 S.W.3d 298 (Mo. App. 2005). Harm from the error is reviewed under the standard of *Chapman v. California*, 386 U.S. 18, 24 (1967)

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<sup>9</sup> After the jury returned a verdict on guilt, the judge informed counsel that the motion was deemed denied by his acceptance of the jury’s verdict. Trial Tr. Vol. VI, p. 1068.

*Argument.* Since *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), it has been clear that references to a defendant's silence, request for an attorney, or refusal to answer questions, after the defendant has been given his warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), is error. *Miranda* warnings, *Doyle* held, carry an implicit "assurance that silence will carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

In this case, an experienced law enforcement officer responded to a question by the prosecutor with a direct reference to Mr. Barton's refusal to answer questions. The same officer made a similar statement in Mr. Barton's 1994 (3<sup>rd</sup>) trial without objection. SC77147 Tr., p. 657. Prior to Mr. Barton's 1998 (4<sup>th</sup>) trial, the defense made a motion in limine to prevent this testimony. SC80931, Tr., p. 331. Thereafter, the state did not elicit it.

In the current (5<sup>th</sup>) trial, the trial judge, after a rather protracted colloquy with counsel out of the presence of the jury, quoted the comment directly while instructing the jury to disregard it. Trial Tr. Vol. IV, pp. 668-671. However, he denied a mistrial. Under these circumstances, a mistrial was required.

In *State v. Dexter*, 954 S.W.2d 332 (Mo. banc 1997), this Court found plain error where the arresting officer testified that after his

arrest and *Miranda* warnings, Mr. Dexter said that he would not answer questions without an attorney. Like Mr. Barton, Mr. Dexter had answered other questions from the officers. In so holding, this Court observed, “Relying on the *Doyle* notion of fundamental unfairness, Missouri cases have held that post-Miranda silence cannot be used as evidence to incriminate the defendant. See *State v. Zindel*, 918 S.W.2d 239 (Mo. banc 1996); *State v. Frazier*, 927 S.W.2d 378, 379 (Mo.App.1996).”

In *Dexter*, this Court held that in cases like that of Mr. Barton, where there was a trial objection and the error was properly preserved, the standard for determining whether *Doyle* error is harmless is that of *Chapman v. California*, 386 U.S. 18, 24 (1967), which requires reversal unless the error is harmless beyond a reasonable doubt. In making this determination, the court is to consider :

- (1) whether the government made repeated *Doyle* violations,
- (2) whether any curative effort was made by the trial court,
- (3) whether the defendant's exculpatory evidence is ‘transparently frivolous,’ and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming.

*State v. Dexter*, 954 S.W.2d 340, FN 1 (Mo. banc 1997).

The first two of these factors suggest that reversal may not be required here. There was only a single reference, and the trial court gave an instruction to disregard. However, it is worth noting that the state was on notice, based on the objection at Mr. Barton's 1998 trial, that this testimony was objectionable. Nonetheless, the state's experienced law enforcement witness chose to repeat it. Moreover, the court's instruction to disregard unnecessarily served to emphasize the testimony to the jury. In formulating an instruction to disregard, there was no need to quote verbatim the objectionable testimony. And, as this Court noted in *Dexter*, despite the instruction to disregard, "The prosecutor's mere asking of the questions. . . had already created an inference of guilt. . ." *State v. Dexter*, 954 S.W.2d 341 (Mo. banc 1997).

The third and fourth factors strongly support reversal here. As in *Dexter*, the evidence of guilt here was far from overwhelming. In evaluating this issue, the *Dexter* opinion holds,

The question is not, however, whether the state made a submissible case. The question is whether there was overwhelming evidence of guilt. There is no confession in this case. There are no eyewitnesses.

*State v. Dexter*, 954 S.W.2d 342 (Mo. banc 1997). The situation here is similar. There were no eyewitnesses. And, apart from an inconclusive statement to a highly questionable jailhouse snitch, there is no confession. From the evidence presented at trial, it is unlikely that Mr. Barton could have gone to Ms. Kuehler's trailer, committed the murder and cleaned himself of the copious amounts of blood that must have splattered the murderer, cleaned or changed his clothing, and disposed of the murder weapon and the check between the time he left Ms. Horton's trailer and the time he reappeared there, clean, dry, and unstained.

Ms. Horton testified at the 1993 trial that Mr. Barton left her trailer at 3:00 and returned about thirty minutes later. SC77147, Tr., p. 442. During this trial, she testified that Mr. Barton returned to her trailer at approximately 4:00 p.m. on the day of Ms. Kuehler's death. Trial Tr. Vol. III, p. 459. She was not confronted with this prior testimony. Ms. Selvidge's testimony about the last time she talked to her grandmother has also varied. In both the 1994 and the 1998 trials, she testified that she had talked to her grandmother for about 20 minutes *after 3:00 p.m.* SC77147, Tr. , p. 520; SC80921, Tr., pp. 473, 476. In the most recent trial, she testified that she had last talked to

Ms. Kuehler at 2:30 p.m. Trial Tr. Vol. III, p. 505. Again, she was not confronted at this trial with her prior testimony.

It is clear that the period when Mr. Barton was absent from Ms. Horton's trailer was the only window of time during which he could have committed this murder. He could not have committed the murder until after Mr. Bartlett had left Ms. Kuehler's trailer shortly before 3:00 p.m., and Ms. Horton has consistently testified that Mr. Barton did not leave her trailer until 3:00 p.m. His whereabouts after 4:00 p.m. at the latest were accounted for by Ms. Horton, Ms. Selvidge and Brenda Montiel. (Ms. Montiel's testimony that Mr. Barton left her trailer when Debbie Selvidge honked for him was corroborated by Ms. Horton. Trial Tr. Vol. III, p. 457.) Moreover, shortly after 4:00 p.m., Ms. Selvidge was unable to reach Ms. Kuehler, so it is likely she was dead by then. Trial Tr. Vol. III, p. 505. Earlier that day, Mr. Barton told Ms. Horton he had been sleeping in his car. Trial Tr. Vol. III, p. 457. He did not have a place to do laundry, or take a shower. So, in a period of less than an hour, he would have had to commit the murder, dispose of the murder weapon, find a change of clothes (no evidence was offered as to whether Mr. Barton wore the same clothing all day), wash off the blood, and return to Ms. Horton's with dry clothing and hair.

The defense evidence, then, was not “transparently frivolous” and the evidence of guilt was certainly *not* “otherwise overwhelming.” In a dissenting opinion after the 1998 trial, Judge Wolfe stated, “Perhaps the evidence of guilt may be subject to nonfrivolous debate. . .” *State v. Barton*, 998 S.W.2d 19, 32 (1999), Wolfe, J., dissenting. As in *State v. Benfield*, 522 S.W.2d 830, 835 (Mo. App. 1975), where the conviction was reversed for comment on the defendant’s failure to offer an exculpatory statement after *Miranda* warnings, “The trial court’s instruction to the jury, ‘to disregard the last question asked of this witness and the last answer given,’ was not a sufficient antidote for the damaging evidence improperly injected.” Under these circumstances, particularly where the trial judge’s instruction served to emphasize the error to the jury, reversal is required.

POINT IV

**THE TRIAL COURT ERRED IN PREVENTING TRIAL COUNSEL FROM QUESTIONING JURORS DURING VOIR DIRE CONCERNING WHETHER THEY WOULD BE ABLE TO CONSIDER MITIGATING CIRCUMSTANCES AFTER FINDING THAT THE EVIDENCE IN AGGRAVATION WARRANTED THE DEATH PENALTY. THIS DECISION WAS REQUIRED BY THE COURT'S INSTRUCTIONS TO THE JURY, AND THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO ASK THE JURY ABOUT IT DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHTS TO AN UNBIASED JURY AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

During jury selection, defense counsel sought to question prospective jurors about whether they could follow the directions of the court and consider mitigating evidence after they found that the evidence in aggravation warranted the death penalty. Instruction 15, L.F. Vol. II, p. 183. Specifically, counsel for Mr. Barton asked Juror No. 33,

Juror Number 33, same set of circumstances. The State has found you as a juror. You have found someone guilty of murder in the first degree. You have found aggravating circumstance. You have found, as a juror, that all the evidence warrants the death penalty. Could you go to the next stage and give meaningful consideration to a life verdict, a life imprisonment without parole verdict?

Trial Tr. Vol. I, p. 182.

At that point in the proceedings, without an objection from the state, the trial court summoned the attorneys to the bench and said, outside the presence of the jury:

It is not an accurate statement of the law for you to get them to make that sort of commitment. You can't get them to say you already decided that the evidence warrants the death penalty and then say would you vote for the death penalty. Of course, they would. If they decided it warrants it, then they vote for it. . . You cannot ask this jury if they have already decided that everything that they have heard warrants—and that's what you said—warrants, meaning

automatically, gets you death or it entitles you to death.

Using the word “warrants” is too far.

Trial Tr. Vol. I, p. 183 See also Trial Tr. Vol. I, p. 198.

***Standard of review.*** Limitations on voir dire are reviewed for abuse of discretion.

***Argument.*** Of course, this Court’s instructions require exactly the process about which trial counsel sought to question the prospective jurors. In Instruction 15, the trial court instructed this jury: “If you decide that one or more aggravating circumstances exist to *warrant* the imposition of death, as submitted in Instruction No. 14, each of you must then determine whether one or more mitigating circumstances exist. . .” L.F. Vol. II, p. 183, emphasis added.<sup>10</sup> MAI-CR3d 313.44B. By preventing Mr. Barton from questioning jurors about their ability to consider fully mitigating evidence, the trial court violated his rights to due process of law under the United States Constitution, Amend. XIV

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<sup>10</sup> By objecting to the limitation on voir dire, Mr. Barton does not intend to waive his contention, discussed at Point VIII below, that the trial court plainly erred in giving Instruction 15.

and the Missouri Constitution, Art. 1, §10, and his right against cruel and unusual punishment, U.S. Const., amend. VIII.

A defendant is entitled to jurors who will fairly and impartially consider the evidence and follow the instructions of the trial court. See *State v. Grondman*, 190 S.W.3d 496 (Mo. App. 2006) (Error to refuse challenge for cause of prospective jurors who could not follow instruction not to consider the defendant's failure to testify as evidence of guilt); *State v. Clark-Ramsey*, 88 S.W.3d 484 (Mo. App. 2002) (Error to refuse challenge for cause of prospective juror who would require defendant to prove innocence). The method used to insure that this right is enforced is the jury selection process, or voir dire.

The purpose of voir dire is to enable each party to participate in selection of a fair and impartial jury and to that end, wide latitude is allowed in examination of the panel. *State v. Lumsden*, 589 S.W.2d 226, 229 (Mo. banc 1979). During voir dire the defendant should be permitted to develop not only facts which might manifest bias and form the basis of a challenge for cause, but also such facts as might be useful to him in detecting the possibility of bias and intelligently utilizing his peremptory challenges. *State v. Brown*, 547

S.W.2d 797, 799 (Mo. banc 1977); *State v. Thompson*, 541

S.W.2d 16, 17 (Mo. App. 1976)

*State v. Smith*, 649 S.W.2d 417 428 (Mo. banc 1983) In fact, “The only legitimate limitation would be at that point where the inquiry tended to create prejudice.” *State v. Finch*, 746 S.W.2d 607 612 (Mo. App. 1988), citing *State v. Granberry*, 484 S.W.2d 295, 299 (Mo. banc 1972).

In *State v. Brown*, 547 S.W.2d 797 (Mo. banc 1977), the court held that the defense has the right to question the jurors about their bias concerning the law which they will be asked to apply. This right is relevant not only to the right to challenge jurors for cause, but also to the right to exercise peremptory challenges intelligently. In *Brown*, the question held proper concerned the jurors’ ability to follow the law of self-defense. Reversals have also occurred for undue restrictions on asking prospective jurors their opinions about the credibility of police officers, *State v. Hyzer*, 729 S.W.2d 576 (Mo. App. 1987); *State v. McCormack*, 700 S.W.2d 520 (Mo. App. 1985); whether the prospective jurors in a non-support case had personal experience with non-support in their families, *State v. Coleman*, 553 S.W.2d 885 (Mo. App. 1977); and whether prospective jurors would automatically believe the

testimony of a rape victim, *State v. Finch*, 746 S.W.2d 607 (Mo. App. 1988).

In *Morgan v. Illinois*, 504 U.S. 719, 729-730 (1992), the U.S. Supreme Court held that a defendant was entitled to ask if jurors would automatically impose the death penalty. This is because “part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors.” U.S. Const. amends VI, XIV. Here, the improper restriction on the questioning of prospective jurors restricted Mr. Barton’s ability to obtain a jury which was not predisposed to impose the death penalty under the court’s instructions. As this Court held in *State v. Kreutzer*, 928 S.W.2d 854, 864-865 (1996), the trial court must permit voir dire questions which will allow counsel and the Court to determine “whether each venireperson could fairly and impartially follow the court’s instructions during deliberations.”

In *State v. Johnson*, 968 S.W.2d 686, 691 (Mo. banc 1998), this Court upheld the right of the state to ask, during jury selection,

[Is] there any member of this panel, just based on that, [who] would refuse to listen to and consider the testimony of these two witnesses because of feelings that the State should never make such agreements in return for testimony?

(Emphasis added)

In so holding the court noted,

Voir dire is the ‘most practical method for probing the minds of the prospective jurors to ascertain those who are fair and impartial and those who are biased and prejudiced.’ [*State v. Hobby*, 706 S.W.2d 232,233 (Mo. App. 1986)] The State is entitled to elicit from prospective jurors any preconceived notions that they might have concerning the law.”

*State v. Johnson*, 968 S.W.2d 686, 691 (Mo. banc 1998).

Mr. Barton agrees, as more fully discussed under Point VIII below, that the Missouri instructions tend to predispose the jurors to death. That, however, makes it all the more important that defense counsel be able to ask the jurors whether, confronted with the instructions to be given by the court, they can give full consideration to mitigating circumstances. Such consideration is necessary for the constitutional imposition of the death penalty.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court held that in order for the death penalty to be constitutional, the jury must “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.” In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court clarified that *Lockett* requires more than the mere opportunity to *present* mitigating evidence. Rather, the jury must be permitted to *consider* that evidence in imposing punishment. Thus, the death sentence in *Eddings* was reversed where the judge ruled that evidence presented at trial concerning Mr. Eddings’s background could not be considered in deciding whether the death penalty should be imposed. The Court has reinforced this holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*).

Since Mr. Barton was sentenced to death, it is clear that this error was not harmless. After the trial court made its ruling, the defense was limited in questioning prospective jurors Tutor (38), Rupard (42), Bartlett (43), Canada (45), Flanery (47), Todd (5), Bauernfiend (54), Hunt (60), Evans (66), and Anderson (68). All of these persons served on the jury Trial Tr. Vol. III, p. 410. Any or all of these jurors might have had the same problem with following the court’s instructions that caused prospective jurors 26, 27 and 33 to be stricken for cause. And if they did, Mr. Barton did not have the fair jury guaranteed to him by the

United States and Missouri Constitutions. This Court cannot conclude, beyond a reasonable doubt, that Mr. Barton was not prejudiced by this error. *Chapman v. California*, 386 U.S. 18, 24 (1967). Reversal is therefore required.

#### POINT V

**THE TRIAL COURT PLAINLY ERRED IN ALLOWING WILLIAM NEWHOUSE TO PROVIDE AN “EXPERT” OPINION ON BLOOD SPATTER EVIDENCE IN THIS CASE. MR. NEWHOUSE WAS NOT SHOWN TO POSSESS EXPERTISE SUFFICIENT TO OFFER THE OPINIONS TO WHICH HE TESTIFIED NOR TO HAVE USED PROPER SCIENTIFIC METHODS TO FORM HIS OPINIONS. THIS ERROR DENIED MR. BARTON HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND CAUSED MANIFEST INJUSTICE IN THAT MR. NEWHOUSE’S TESTIMONY WAS CRITICAL CIRCUMSTANTIAL EVIDENCE OF MR. BARTON’S GUILT.**

William Newhouse was called by the state to testify concerning the origin of bloodstains found on Mr. Barton’s shirt and jeans. He

stated that both the shirt and jeans had small stains on them that were caused by impact, rather than contact. Specifically, he said, “

The small grouping of tiny bloodstains on that T-shirt would not have been created by contact. . . . Something had to break the blood up into these tiny little drops to create these tiny little stains and that requires the energy be applied to the source of the blood. In other words, a blow had to have been struck to the victim or to something that was bloody, something already bloody, and created that blood spatter pattern.

Trial Tr. Vol. V, pp. 891-892.

On cross-examination, Mr. Newhouse was asked, “So if somebody were to hit their hand down on a . . . blood-drenched bed spread, they don’t have to hit a body with a knife to recreate the splattering that you saw; correct?” He responded, “That would not create the size of stains that I see here.” Trial Tr. Vol. V, p. 892.

On voir dire examination, Mr. Newhouse testified that his only formal training in determining characteristics of blood spatter evidence was a one week course. He has never published any articles on blood spatter evidence, and has never taught it except in in-house crime lab

training sessions. Although he was able to name some persons who he considered experts on blood spatter, he could name no treatises on the subject, and said that he had not checked his work against any treatise. Nor had he performed any experiments to verify his opinion in this case. He was unable to give any probability statistics to support his opinion that the stains on Mr. Barton's clothing could not have occurred in the way Mr. Barton and Ms. Selvidge said they did. Mr. Newhouse testified that he had been previously accepted as a blood spatter expert, but he did not mention any particular cases in which he had so testified. Trial Tr. Vol. V, p. 879. He indicated that his results were "peer reviewed," but this was done by other crime lab personnel, not outside scientists. Trial Tr. Vol. V, p. 877.

It is clear that Mr. Newhouse's expertise, both in Missouri and in Wisconsin, where he now works, is in the area of firearms and tool marks. See, e.g., in Missouri, *State v. Yole*, 136 S.W.3d 175, 179 (Mo. App. 2004) ("William Newhouse, a firearms expert"); *State v. Smith*, 90 S.W.3d 132, 137 (Mo. App. 2002) ("William Newhouse, a firearms and tool mark examiner. . ."); *State v. Samuels*, 965 S.W.2d 915, 922 (Mo. App. 1998) ("William Newhouse (Regional Crime Lab) testified that the gun was a semi-automatic pistol. . ."); *State v. Tracy*, 918 S.W.2d 847,

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850 (Mo. App. 1996) (“William Newhouse, a State expert from Kansas City, had testified as to. . . the shell casing ejection pattern tests”); *State v. Cornelius*, 701 N.W.2d 653 (Wis. App. 2005) (unpublished opinion; “William Newhouse, a firearms expert”). Counsel for Mr. Barton has been unable to find any published case other than that of Mr. Barton in which Mr. Newhouse has testified as a blood spatter expert.<sup>11</sup>

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<sup>11</sup> A Westlaw search for Mr. Newhouse’s name reveals that William Newhouse has also testified as a firearms expert in *State v. Morton*, 2007 WL 776890, Kan., March 16, 2007 (No. 94,815.); *State v. Jones*, 273 Kan. 756, 47 P.3d 783, (Kan. 2002); *Brown v. State*, 277 Mont. 430, 922 P.2d 1146 (Mont. 1996); *State v. Smith*, 220 Mont. 364, 715 P.2d 1301 (Mont.1986); He has also given testimony in Montana, and once in Missouri, on blood alcohol testing, and once in Montana on shoe print evidence. (In one Montana case in which Mr. Newhouse testified about blood alcohol, Judge Sheehy, dissenting, remarked, “If his testimony here is an example, he is more of a paid gun than a scientist.” *State v. O’Brian*, 236 Mont. 227, 235, 770 P.2d 507 (Mont. 1989)).

*Standard of review.* The admission of this testimony is reviewed for abuse of discretion.

*Argument.* Missouri courts use the test of *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), to determine the admissibility of scientific evidence in criminal cases. “Under *Frye*, in order ‘for an expert witness’ testimony to be admissible, the testimony must be based on scientific principles that are generally accepted in the relevant scientific community.’ *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860 (Mo. banc 1993).” *Butler v. State*, 108 S.W.3d 18, 23 (Mo. App. 2003). Mr. Newhouse testified conclusively that the stains on Mr. Barton’s clothing were impact stains. He also testified, equally conclusively, that they could not have been caused by an impact with Ms. Kuehler’s bloodstained bed. He cited no experiments, treatises, or other scientific evidence to support this conclusion. His testimony was the functional equivalent of the testimony held subject to objection in *Butler*:

Despite testifying the scientific community does not accept use of hair comparison evidence to identify a particular person, Ms. Duvenci went on to state that she felt there was a “very strong probability” that the two unidentified hairs collected from J.L. came from Mr. Butler. And, when asked

by the prosecutor whether she believed “within a reasonable degree of certainty” that the unidentified hairs were in fact from Mr. Butler, Ms. Duvenci answered in the affirmative.

*Butler v. State*, 108 S.W.3d 18, 22 (Mo. App. 2003).

The error here was also similar to that in *State v. Rose*, 86 S.W.3d 90 (Mo. App. 2002). There, the court found that the officer’s testimony that he had never seen a person who scored six points on a horizontal gaze nystagmus (HGN) test whose blood alcohol content (BAC) was less than .10 was inadmissible. The court found that this testimony “created a remarkable inference” that Mr. Rose’s BAC was .10 or over, and was therefore inadmissible because HGN tests cannot be used to estimate BAC. The error was harmless only because there was other overwhelming evidence of Mr. Rose’s intoxication.

Mr. Newhouse’s testimony was also similar to the anecdotal evidence held inadmissible by this Court in *State v. Smulls*, 71 S.W.3d 138, 150 (Mo. banc 2002). Like the proffered defense expert in that case, who stated that based on his review of the trial judge’s cases, the trial judge exhibited racial bias, Mr. Newhouse was unable to explain how he applied a scientific principle to conclude that the “impact” stains on Mr.

Barton's shirt could not have been caused by a splash of wet blood from Ms. Kuehler's bed.

Based on this record, the trial court should have excluded Mr. Newhouse's opinion testimony despite the lack of a defense objection, and this Court should reverse. Plain error review is particularly broad in capital cases. *State v. Ervin*, 805 S.W.2d 905, 932 (Mo. banc 1992). As to this Point, it is particularly appropriate since Mr. Newhouse's testimony goes directly to the issue of whether or not Mr. Barton committed this crime. Moreover, prejudice was increased because of the trial court's *sua sponte* admonition of trial counsel to limit his cross-examination:

[F]or the last 20 minutes, this has been argument and not cross-examination. It's totally argumentative. You continue to ask this witness and others about experiments that were not done, which is not permissible. . . It's time to stop arguing at this time with the witness. It's argumentative. Ask him questions if you have questions about his testimony. This is just argument.

Trial Tr. Vol. V, pp. 911-912.

Shortly after this admonition, trial counsel ended his cross-examination.

The state emphasized this evidence in final argument. Trial Tr. Vol. VI, p. 1022, 1081. And, unlike the situation in *State v. Rose*, 86 S.W.3d 90 (Mo. App. 2002), the evidence of Mr. Barton's guilt was far from overwhelming. Reversal for a new trial is required.

#### POINT VI

**THE TRIAL COURT PLAINLY ERRED IN ADMITTING THE FORMER TESTIMONY OF SHARON STRAHAN IN WHICH SHE IDENTIFIED MR. BARTON AND REFERRED TO A LINEUP AS TO WHICH AN OBJECTION HAD BEEN SUSTAINED. THIS ERROR DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND TO DUE PROCESS OF LAW.**

During Mr. Barton's trial, part of the transcript of the former testimony of Sharon Strahan, who had died since the 1998 trial, was read into evidence. Trial Tr. Vol. IV, pp. 629-634. Before the reading, the defense objected that Ms. Strahan had testified to a lineup procedure which had not been disclosed to the defense before her

testimony. Trial Tr. Vol. IV, pp. 624-628. Trial counsel told the court and prosecutors that they had searched their file, which included the files of prior counsel, and could not find either a copy of the photo lineup or any record that the lineup had been disclosed. Therefore, defense counsel stated, “We would object to the identification of the Defendant that’s contained in this transcript at this time.” Trial Tr. Vol. IV, p. 624.

The state was unable to provide evidence that the lineup photographs had been disclosed. The trial court then directed the prosecutor to redact the prior testimony to omit the reference to the lineup, and the defense, inexplicably, agreed that such a redaction was an adequate remedy. Trial Tr. Vol. VI, p. 628. Thus, the prosecutor read only the testimony involving the witness’s in-court identification of Mr. Barton. However, the jury then heard the following exchange from the cross-examination of Ms. Strahan:

QUESTION: At the time that you say you saw Mr. Barton standing out at this truck, did he have his back to you?

ANSWER: Yes, ma’am.

QUESTION: *So when you made your identification, did you make it based on the clothing?*

ANSWER: Yes, ma’am.

QUESTION: You didn't see his face?

ANSWER: No.

Trial Tr. Vol. IV, p. 634, emphasis added.

***Standard of review.*** The admission of this evidence is reviewed for plain error. Sup. Ct. R. 30.20.

***Argument.*** There are two problems with the admission of this prior testimony. First, since the prior lineup had not been disclosed, the defense had no way of determining whether Ms. Strahan's in-court identification was tainted by an impermissibly suggestive lineup. Simply removing references to the *lineup* did not solve this problem. Had the lineup been impermissibly suggestive, not only could the state not have presented evidence of the lineup itself, but Ms. Strahan's in-court identification testimony would likely have been inadmissible.

“The Fifth Amendment affords accused individuals due process protection against evidence derived from unreliable identifications which are based on impermissibly suggestive identification.” *Livingston v. Johnson*, 107 F.2d 297 (5<sup>th</sup> Cir. 1997), citing *United States v. Sanchez*, 988 F.2d 1384, 1389 (5<sup>th</sup> Cir. 1993); U.S. Const. amends. V, XIV. When an identification procedure is so suggestive as to give rise to a “very substantial likelihood of irreparable misidentification,” due

process is violated and suppression of the evidence is required. *Kirby v. Illinois*, 406 U.S. 682 (1972); *State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989); *United States v. Ramsey*, 999 F.2d 348, 349 (8<sup>th</sup> Cir. 1993); *United States v. Triplett*, 104 F.3d 1074 (8<sup>th</sup> Cir. 1997). Thus, had Mr. Barton established that Ms. Strahan’s identification at trial was based on suggestive pretrial identification procedures, he would have been entitled to have Ms. Strahan’s identification testimony suppressed. *State v. Vinson*, 800 S.W.2d 444, 446 (Mo. banc 1990); *State v. Anthony*, 857 S.W.2d 861,866 (Mo. App. 1993).

Because there was no disclosure of the lineup before Ms. Strahan’s death, prior counsel were unable properly to cross-examine Ms. Strahan regarding her identification of Mr. Barton. Thus, Mr. Barton was harmed by the non-disclosure. That harm cannot now be cured other than by the suppression of Ms. Strahan’s testimony. See *State v. Whitfield*, 837 S.W.2d 503, 507 (Mo. banc 1992) “The trial court. . . is required to tailor the remedy to alleviate harm to the defense from the failure to disclose.”

The second problem with the evidence as presented here is that, if the purpose of redaction was to exclude evidence of the pretrial lineup, the incomplete redaction failed to achieve that purpose. The question,

“So when you made your identification, did you make it based on the clothing?” clearly informed this jury that Ms. Strahan had previously identified Mr. Barton. It is highly unlikely that the jury thought that Mr. Barton, in court, was wearing the same clothing in which he had been seen by Ms. Strahan on the day of Ms. Kuehler’s murder.

As noted in connection with the previous Point, plain error review is particularly broad in capital cases. *State v. Ervin*, 805 S.W.2d 905, 932 (Mo. banc 1992). In *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000), a capital case, this Court found plain error in the erroneous admission of evidence. The Court based its conclusion that Mr. Barriner was prejudiced in part upon the fact that the improperly admitted evidence related to the charged crime. Thus, even though Mr. Barriner confessed, the court found manifest injustice. In *State v. Williams*, 858 S.W.2d 796, 799-800 (Mo. App. 1993), the court found plain error in the admission of improper expert testimony because it was central to the state’s case.

Like the improperly admitted testimony in *Barriner* and *Williams*, Ms. Strahan’s testimony was important to the state’s case against Mr. Barton. She visited Ms. Kuehler with her husband, Teddy Bartlett, on the afternoon of Ms. Kuehler’s death. Unlike Mr. Bartlett, who did not

mention seeing Mr. Barton in the area, she placed Mr. Barton near Ms. Kuehler's home near 3:00 p.m., when Ms. Kuehler likely died. No other witness testified to seeing Mr. Barton near the home before the body was found by him, Carol Horton, and Debbie Selvidge. The jury heard that Ms. Strahan had identified Mr. Barton both before and during trial. Had Ms. Strahan's identification been excluded or successfully impeached, there is a reasonable probability of a different outcome. Reversal is therefore required.

## POINT VII

**THE TRIAL COURT PLAINLY ERRED IN PREVENTING TRIAL COUNSEL FROM CROSS-EXAMINING “KATHERINE ALLEN” CONCERNING THE NATURE OF THE CRIMES OF WHICH SHE HAD BEEN CONVICTED. TRIAL COUNSEL SOUGHT TO ELICIT TESTIMONY THAT THESE CRIMES INVOLVED UNTRUTHFULNESS, WHICH WAS RELEVANT TO MS. “ALLEN’S” CREDIBILITY. THIS ERROR DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.**

On cross-examination, counsel for Mr. Barton established that the state’s jailhouse snitch witness, “Katherine Allen,” had been convicted thirteen times. Trial Tr. Vol. VI, p. 943. Counsel then asked, concerning Ms. Allen’s fraud charge, “So you lie about who you are in order to get something of value?” Trial Tr. Vol. p. VI, p. 946. The prosecutor objected. Trial counsel explained that he believed that he was entitled to show the *nature* of the crime of which Ms. Allen had been convicted because that nature was relevant to her credibility. However, the objection was sustained. Trial Tr. Vol. VI, pp. 947-948.

***Standard of review.*** The limitation on cross-examination should be reviewed for plain error. Sup. Ct. R. 30.20.

***Argument.*** Confrontation of adverse witnesses is an important constitutional right, primarily enforced through cross-examination. U.S. Const. amend VI. *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

“The right to cross-examination is essential and indispensable,” *State v. Jaynes*, 949 S.W.2d 633 (Mo. App. E.D. 1997), and “[t]he right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege.” *Pettus v. Casey*, 358 S.W.2d 41, 44 (Mo. 1962); *Doe v. Alpha Therapeutic Corporation*, 3 S.W.3d 404, 423 (Mo. App. 1999).

*Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004).

A primary purpose of cross-examination is to attack the witness’s credibility. One way this may be done is to show that the witness has previously lied. “Specific acts of prior conduct may be the subject of cross-examination if relevant to the truth and veracity of the testifying witness.” *Miller v. SSM Health Care Corp.*, 193 S.W.3d 416, 422 (Mo. App. 2006). See, e.g. *State v. Lampley*, 859 S.W.2d 909 (Mo. App. 1993)

(Reversed for failure to allow defense to cross-examine complainant about prior accusations to show how the complainant benefited from those accusations).

Prior convictions are also admissible to show lack of credibility, and the adverse party is permitted to show not only the fact but the nature of such a conviction. *Hacker v. Quinn Concrete Co., Inc.*, 857 S.W.2d 402, 414 (1993). To protect a criminal *defendant* from being convicted of uncharged crimes, limitations are imposed on the use of prior convictions to impeach a defendant's credibility.

The state may prove the fact of conviction, *the nature of the charge*, place and date of the occurrence, and sentence imposed. *State v. Applewhite*, 771 S.W.2d 865, 869 (Mo. App. 1989). The state may not, however, unduly emphasize a conviction, go into the details of the crime so as to aggravate it, or use the conviction to suggest guilt of the offense for which defendant is standing trial.

*State v. Hill*, 823 S.W.2d 93, 102 (Mo. App. 1991), emphasis added. The need to protect a witness other than the defendant by limiting cross-examination on prior convictions is much less clear. Moreover, the question at issue here did not delve into the exact activity

which resulted in Ms. “Allen’s” fraud conviction. Rather, it simply sought to elicit the *nature* of the offense of which she had been convicted. Since the offense of fraud concerns dishonesty, it is relevant to a witness’s credibility in a way that, for example, an assault conviction would not be.

The limitation on cross-examination effectively prevented trial counsel from emphasizing to the jury that Ms. “Allen” had committed numerous criminal acts involving dishonesty. She understood very well how to lie to improve her situation. And Mr. Barton was entitled to make sure the jury knew that.

As discussed in connection with earlier Points, Ms. “Allen”’s testimony was critical to the state’s case. In this trial, it represented the only evidence of an admission by Mr. Barton. After Mr. Barton’s 1998 trial, the previous trial judge wrote a letter to an Indiana judge who had jurisdiction over a case involving Ms. “Allen.” In the letter, the trial judge characterized Ms. “Allen’s” testimony as “crucial” to the state’s case and suggested that she receive consideration in her pending Indiana case for her testimony in Mr. Barton’s case. SC83615, Supp. L.F. At that trial, the state presented the testimony of several other jailhouse snitch witnesses, yet the trial judge singled out Ms. “Allen” for

special attention. Impeaching her credibility was critical to Mr. Barton's defense.

At this trial, Ms. "Allen" was the only witness who testified to any admissions by Mr. Barton that he committed this crime. The denial of Mr. Barton's right to cross-examine Ms. "Allen" regarding the nature of her prior convictions was manifestly unjust, and reversal is required.

#### POINT VIII

**THE TRIAL COURT PLAINLY ERRED IN GIVING INSTRUCTIONS 14 AND 15. THESE INSTRUCTIONS IMPROPERLY PREVENTED THE JURY FROM GIVING FULL CONSIDERATION TO MITIGATING EVIDENCE, AND THEREFORE VIOLATED THE DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS.**

The trial court gave Instructions 14 and 15, as follows:

#### INSTRUCTION 14

If you find and believe from the evidence beyond a reasonable doubt that one or more of the aggravating

circumstances submitted in Instruction No. 13 exist, it will then become your duty to decide whether the aggravating circumstances are sufficient to warrant the imposition of death as punishment of the defendant. In deciding that question, you may consider:

1. All of the evidence relating to the murder of Gladys Kuehler.
2. Any of the aggravating circumstances referred to in Instruction No. 13 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that those aggravating circumstances you have found warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 182.

## INSTRUCTION 15

If you decide that one or more aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 14, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Gladys Kuehler.

You may also consider other circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 183.

Trial counsel objected at trial that Instruction 15 did not mention that the finding regarding the aggravating circumstances had to be

beyond a reasonable doubt. The trial court overruled the objection. The objection was not renewed in the motion for new trial.

***Standard of review.*** The issue will be reviewed for plain error. Sup. Ct. R. 30.20.

***Argument.*** Because Missouri’s capital punishment instruction scheme requires the jury to focus exclusively on evidence in aggravation before turning to mitigating evidence, including a finding that the aggravating evidence “warrants” the death penalty, it creates an impermissible risk that the jury will not consider and give effect to mitigating evidence. This violates Mr. Barton’s right, under the Eighth Amendment to the United States Constitution, to be free from cruel and unusual punishment.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court held that in order for the death penalty to be constitutional, the jury must “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.” In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court clarified that *Lockett* requires more than the mere opportunity to present mitigating evidence. Rather, the jury must

be permitted to *consider* that evidence in imposing punishment. Thus, the death sentence in *Eddings* was reversed where the judge ruled that evidence presented at trial concerning Mr. Eddings’s background could not be considered in deciding whether the death penalty should be imposed.

The Court has reinforced this holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry I*, the court held that Texas’s death penalty scheme, which required findings on “special issues” in order to impose the death penalty, violated *Lockett* and U.S. Const. amend. VIII because it did not give the jury a way to consider Mr. Penry’s mental retardation as a mitigating factor. The Court distinguished between the *Furman* principle that in order to be constitutional, a statute must narrow the range of cases in which the death penalty may be *imposed* and the *Lockett-Eddings* principle that in deciding *not* to impose the death penalty, the jury should be given broad discretion. The Court concluded,

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry’s mental retardation and abused

background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its “reasoned moral response” to that evidence in rendering its sentencing decision.

*Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

In *Penry II*, the Court examined Texas’s response to *Penry I* and determined that it was inadequate. Texas did not change its special issues or verdict forms. Rather, in Mr. Penry’s retrial, the jury was given an instruction that it could consider any mitigating evidence. The instruction concluded,

If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

*Penry v. Johnson*, 532 U.S. 782, 790 (2001) (internal quotations omitted). The Court held that the instructions and verdict forms did not comply with *Penry I* because:

[T]he key under *Penry I* is that the jury be able to “consider and *give effect* to [a defendant’s mitigating] evidence in imposing sentence.” 492 U.S., at 319. . . (emphasis added). See also *Johnson v. Texas*, 509 U.S. 350, 381. . . (1993) (O’CONNOR, J., dissenting) (“[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances” (emphasis in original)). For it is only when the jury is given a “vehicle for expressing its ‘reasoned moral response’ to that evidence in rendering its sentencing decision,” *Penry I*, 492 U.S., at 328. . . , that we can be sure that the jury “has treated the defendant as a ‘uniquely individual human bein[g]’ and has made a reliable determination that death is the appropriate sentence. . . *id.*, at 319. . . (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305 (1976)).

*Penry v. Johnson*, 532 U.S. 782, 797 (2001).

Here, the jury were instructed to focus exclusively on aggravating evidence during the first two steps of their process. First, they were instructed to determine whether any statutory aggravating circumstances had been found beyond a reasonable doubt. Inst. 13, L.F.

Vol. II, p. 181. At the second step, the jury was instructed to consider whether the evidence in aggravation “warranted” the death penalty. Inst. 14, L.F. Vol. II, p. 182. They were specifically instructed that in doing this, they could consider all of the evidence regarding the murder.

Only after these two determinations had been made was the jury instructed to consider mitigating evidence and to decide whether it outweighed the aggravating evidence. Inst. 15, L.F. Vol. II, p. 183. However, the defense in this case presented no evidence on any of the statutory mitigating circumstances, and the instruction does not permit the jury to be informed concerning specific non-statutory mitigators. Therefore, the only specific factor that the jury was instructed about in the *mitigation* instruction was they could, once again, consider the circumstances of the murder.

It is clear that the Missouri statutory scheme, as well as the United States Constitution, requires that the jury must consider first whether a statutory aggravator has been proved in order to go further along the road to a death sentence. But the second, or “warrant,” step is not required by the constitution and is in fact harmful to the defendant. As the Court put it in *Penry I*, “Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal

culpability of the criminal defendant.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). In this case, the circumstances of the crime were horrific. Yet, the Constitution still requires the jury to consider not only Walter Barton, murderer, but Walter Barton, the man, who has married and who, despite years in prison, has faithful friends. The court’s instructions so weakened the jury’s ability to do this that they do not satisfy the requirements of *Eddings*, *Lockett*, and *Penry I and II*.

The instructional error was highly prejudicial to Mr. Barton. While the defense penalty phase evidence was admittedly sparse, the jury instructions did not refer to it at all. This Court cannot say, beyond a reasonable doubt as required by *Chapman v. California*, 386 U.S. 18 (1967), that the outcome would not have changed had Mr. Barton’s jury had a proper vehicle for considering this evidence. Therefore, if other relief is not granted, reversal for a new penalty phase is required.

POINT IX

**THE TRIAL COURT PLAINLY ERRED IN NOT SUA SPONTE INSTRUCTING THE JURY TO DISREGARD THE PROSECUTION'S STATEMENT THAT A TRANSCRIPT OF AN INTERVIEW WITH MR. BARTON CONCERNING A PREVIOUS CRIME HAD BEEN REDACTED PRIOR TO BEING READ TO THE JURY. THIS STATEMENT IMPROPERLY ALLOWED AND ENCOURAGED THE JURY TO SPECULATE ON WHAT WAS MISSING. THIS ERROR DEPRIVED MR. BARTON OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.**

As part of its penalty phase evidence, the state presented a statement made by Mr. Barton concerning one of his prior assault convictions. Outside the presence of the jury, the prosecutor informed the court that he was aware that parts of the statement had previously been found inadmissible because they referred to an uncharged crime. SC80931 Tr. pp. 949-951. He told the court that he had bracketed the parts of the statement that had been found inadmissible, and proposed to have the witness read the un-bracketed parts. Trial Tr. Vol. VI, p.

1094. Then, *in the presence of the jury*, the prosecutor said to the witness:

Q. (By Mr. Bradley) Mr. Franklin, I am going to hand to you Exhibit 71 again, and we have talked about before we came in here about the possibility of you reading here.

A. Yes.

Q. And there are certain portions that we are not going to read because they are not relevant to what we are here about today.

A. Yes.

Q. And do you recall that?

A. I do.

Q. At this point, I am going to ask you to read the portions that are not bracketed?

Trial Tr. Vol. VI, pp. 1094-1095.

This emphasis on the redaction of Mr. Barton's statement was almost worse than reading the statement itself. It begged the jury to speculate on what other horror the bracketed portion might contain. Although there was no objection, the Court should have granted a mistrial at that point.

An analogous situation occurs when the statement of a non-testifying co-defendant is redacted to avoid the problem of *Bruton v. United States*, 391 U.S. 123 (1968), which holds that the confession of one co-defendant may not be considered against another co-defendant unless the confessing co-defendant testifies. When the non-testifier's statement is redacted to remove the second defendant's name, but it is obvious to whom the statement refers, even an instruction to the jury not to consider the statement as evidence of guilt of the second defendant is insufficient to cure the error. See *United States v. Payne*, 923 F.2d 595, 597 (8<sup>th</sup> Cir. 1991) (reference to "someone" in redacted statement violated *Bruton* where "everyone at the trial knew who the 'someone' was"); *United States v. Long*, 900 F.2d 1270, 1280 (8<sup>th</sup> Cir.1990) (reference to "someone" violated *Bruton* because the reference "led the jury straight to" the defendant).

There was no need, in this case, to inform the jury that the statement had been redacted. Indeed, from the reading, it is impossible to tell where the missing parts are. Gratuitously telling the jury that the statement had been redacted was highly prejudicial, and violated Mr. Barton's right to due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10.

Given the sparse defense evidence in this case, and the fact that Mr. Barton had previously been convicted of two assaults against women in addition to the murder of Ms. Kuehler, the jury was extremely likely to speculate about additional uncharged crimes. This is particularly true in light of the prosecutor's improper argument, discussed in Point X below. If other relief is not granted, Mr. Barton is entitled to a new penalty phase.

#### POINT X

**THE TRIAL COURT PLAINLY ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE SUGGESTED, IN FINAL ARGUMENT AT THE PENALTY PHASE, THAT MR. BARTON SHOULD BE SENTENCED TO DEATH AS PUNISHMENT FOR HIS PAST CRIMES. THIS ERROR VIOLATED MR. BARTON'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

At the penalty phase, the state presented testimony that Mr. Barton had previously been convicted of an assault on Buella Libby in 1976. Reba McGuffe Williams testified that Mr. Barton had assaulted

her in 1984, and evidence that he had been convicted of assault as a result. Finally, Debbie Selvidge testified about the impact of Ms. Kuehler's death on her family.

During penalty phase argument, the prosecutor said,  
[W]hen someone commits a crime, no matter what happens  
to that individual, that's not the only one that's punished.  
Actually, the people that are punished are these three ladies  
back here who have walked up here and testified and told  
you their feelings. . .

Trial Tr. Vol. VII, p. 1162. Trial counsel objected that the prosecutor was suggesting that Mr. Barton should receive the death penalty as punishment for his prior offenses. The objection was sustained, and the jury was instructed to "disregard the last statement of the prosecutor." Trial Tr. Vol. VII, p. 1163. No mistrial motion was made, and no mistrial was ordered.

***Standard of review.*** The issue will be reviewed for plain error.  
Sup. Ct. R. 30.20.

***Argument.*** While a jury is permitted to consider the facts of the defendant's criminal history in deciding whether to impose a death sentence for the *charged* offense, the prosecutor's argument here

crossed the line and asked the jury to punish Mr. Barton not just for the murder of Ms. Kuehler but for the assaults on the other two women. This argument violated Mr. Barton's right to due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10 and to be free from cruel and unusual punishment under U.S. Const. amend. VIII.

As this Court recently held in a different context, the consideration of an invalid factor in a capital penalty phase renders the sentence improper. *State v. McFadden*, 2007 WL 827422 (Mo. banc March 20, 2007). And improper prosecution argument which sways the jury into abandoning reason for passion is reversible error. *State v. Storey*, 901 S.W.2d 886, 902 (1995); *Newlon v. Armontrout*, 885 F.2d 1328 (8<sup>th</sup> Cir.1989); *Shurn v. Delo*, 177 F.3d 662, 667 (8<sup>th</sup> Cir. 1999). Because Mr. Barton was entitled to be sentenced for *this* crime and no other, reversal for a new penalty phase is required if other relief is not given.

## POINT XI

**THE TRIAL COURT ERRED IN SENTENCING MR. BARTON TO DEATH BASED ON HIS REJECTION OF A PLEA BARGAIN AGREEMENT, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, TO TRIAL BY JURY, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

Before sentencing Mr. Barton to death, the trial judge stated, [Y]ou know, Mr. Barton, that you on the record were given an opportunity to take care of that yourself before the trial started, and that the State, in fact, did say to you: You know what? We will waive death if you will take a plea of guilty to a sentence of life without parole, and you made the decision to reject the State's offer and take your chances with the jury and go to trial. . . [I]t is a difficult day. One that no judge I know ever wants to have to face, and I am sure you don't either. But to the extent that you made the decision before we picked a jury, it was an opportunity at least that you had to make this go away, and you chose to take your chance with a jury, and the job I have then, as far as I'm concerned,

is to see to it that the trial is conducted fairly. I made my rulings pretrial. I have no concerns about, as far as I am concerned, the conduct of this trial, the way that it went, the way the evidence went, the way the jury selection process went, and the way the jury was permitted to consider the evidence, and then to consider what they believed to be appropriate.

So the Court, after considering the alternatives, sentences the Defendant to death by lethal injection.

Trial Tr. Vol. VII, pp. 1183-1185.

Thus, the trial court explicitly based its acceptance of the jury's sentencing recommendation on the fact that Mr. Barton had refused a plea bargain offer.

***Standard of review.*** Sentencing decisions are normally reviewed for abuse of discretion. Where a death sentence is concerned, the right to be free from cruel and unusual punishment under U.S. Const. amend. VIII must be considered in determining whether discretion was properly exercised.

***Argument.*** In *United States v. Jackson*, 390 U.S. 570 (1968), the United States Supreme Court held that a federal statute authorizing

the death penalty only for those defendants who pleaded not guilty and exercised their right to jury trial was unconstitutional because it violated the rights to trial by jury, due process of law and to be free from cruel and unusual punishment. The Court found that “the death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise of a constitutional right. . .” The Court held, “One fact at least is obvious from the face of the statute itself: In an interstate kidnapping case where the victim has not been liberated unharmed, the defendant's assertion of the right to jury trial may cost him his life. . .” *Id.* at 572.

Despite the fact that the jury recommended a sentence of death to Mr. Barton, the trial judge was under no obligation to impose one. Rather, his obligation was to impose a fair sentence. However, he cited one—and only one—reason for accepting the jury’s recommendation. That reason was Mr. Barton’s rejection of the offer of the state to permit him to plead guilty in exchange for a life sentence. In fact, the court indicated that once Mr. Barton had rejected the plea offer, the court had no obligation to consider any sentence other than death.

This was improper, and requires either the vacation of the death sentence or remand for sentencing before another judge. As the Eighth

Circuit Court of Appeals put it, “A court may not use the sentencing process to punish a defendant, notwithstanding his guilt, for exercising his right to receive a full and fair trial.” *United States v. Sales*, 725 F.2d 458, 460 (8<sup>th</sup> Cir. 1984). Another Eighth Circuit case put the matter even more strongly: “[W]hether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed.” *Hess v. United States*, 496 F.2d 936, 938 (8<sup>th</sup> Cir.1974).

Relying on these authorities, as well as authorities from many states, the court in *State v. Thurston*, 791 S.W.2d 893, 897 (Mo. App. 1990), found that the trial judge acted improperly when he imposed the maximum sentence because the defendant had rejected a plea bargain. While the court in *Thurston* based its ruling in part on a pattern of conduct by the trial judge, it was not provided with such a clear statement of the reason for the sentence as occurred here. Whether or not this trial judge invariably sentences defendants to death when they have refused plea bargains, it is clear that he did so here, to Mr. Barton’s prejudice.

More recently, in *State v. Wright*, 998 S.W.2d 78, 84 (Mo. App. 1999), the court reversed a sentence which the judge said was increased

because the defendant went to trial and required the child witnesses to testify. The court held that “the exercise by a defendant of his constitutional right to a jury trial can have no bearing on his sentence.” The *Wright* court also held that the defendant need not show a consistent sentencing pattern by the trial judge in order to show a violation of his right to jury trial by an increased sentence.

Like those charged under the statute invalidated in *United States v. Jackson*, 390 U.S. 570 (1968), Mr. Barton’s exercise of his right to jury trial may cost him his life. It is difficult to imagine a scenario in which a defendant’s exercise of his constitutional rights could be more seriously chilled. As a result of this error, if other relief is not granted, this Court should remand for resentencing without regard to Mr. Barton’s exercise of his right to a jury trial. In light of the trial judge’s emphasis on this factor, it is suggested that it would be appropriate to assign a different judge for resentencing.

POINT XII

**THE DEATH SENTENCE IN THIS CASE IS  
UNCONSTITUTIONAL AND MUST BE VACATED  
BECAUSE THIS COURT’S SCHEME OF  
PROPORTIONALITY REVIEW DOES NOT COMPLY  
WITH THE REQUIREMENT OF MO. REV. STAT.  
§565.035.3(3) THAT THIS COURT DETERMINE  
WHETHER THE DEATH SENTENCE IN EACH CASE IS  
“EXCESSIVE OR DISPROPORTIONATE TO THE  
PENALTY IMPOSED IN SIMILAR CASES” IN  
VIOLATION OF APPELLANT’S RIGHT TO DUE  
PROCESS OF LAW.**

For nearly a century, the United States Supreme Court has recognized “that punishment for crime should be graduated and proportioned to the offense,” *Weems v. United States*, 217 U.S. 349, 367 (1910). To insure against the “wanton” and “freakish” imposition of the death penalty condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), the Missouri legislature required proportionality review in all cases in which the death sentence is imposed, and directed the compiling of a database of cases to facilitate such review. Mo. Rev. Stat. §565.035.3,

requires this Court to consider each death sentence and determine whether it was “excessive or disproportionate to the penalty imposed in similar cases”. This statute created a due process and equal protection right in Mr. Barton and other defendants sentenced to death because “in integrating an appellate process into Missouri's criminal justice system, the state’s appellate procedures must comply with the Due Process Clause. . .” *Branch v. Turner*, 37 F.3d 371, 375 (8th Cir. 1994), *rev’d on other grounds sub nom. Goeke v. Branch*, 514 U.S. 115 (1995). See also *Evitts v. Lucey*, 469 U.S. 387, 400 (1985); *Easter v. Endell*, 37 F.3d 1343, 1345 (8<sup>th</sup> Cir. 1994); *Rust v. Hopkins*, 984 F.2d 1486, 1493 (8<sup>th</sup> Cir. 1993); *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1982).

This Court’s approach is flawed in three ways. First, the pool of cases which this court reviews to determine proportionality is selected in such a way as to skew the analysis. According to this court's decisions, the pool includes either: 1) Only appealed cases - *State v. Bolder*, 635 S.W.2d 673, 685 (Mo. banc 1982); 2) only cases in which the state sought death - *State v. Sloan*, 756 S.W.2d 503 (Mo. banc 1988); *State v. White*, 813 S.W.2d 862 (Mo. banc 1991); 3) only cases with jury sentencing - *State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984), *State v.*

*Zeitvogel*, 707 S.W.2d 365 (Mo. banc 1986); or 4) only cases in which death was imposed, *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993).

Apart from the possible confusion caused by this approach, even a superficial analysis of *all* of these criteria for selection shows that many cases in which a defendant was sentenced to life imprisonment are eliminated. For example, a case in which the sentence was life is less likely to be appealed than a death sentence, which is appealed automatically. None of the first degree murder cases in which the death penalty was waived by the prosecutor will be considered in the proportionality analysis. And, by comparing the case at issue only with those cases in which death was imposed, the court turns the concept of “proportionality” on its head. Such a comparison may allow the court to find similar cases in which death has been imposed, but that is not the same as proportionality. A previous mistake in the imposition of the death sentence should not pave the way for a repetition of the same mistake.

The second flaw in this court’s analysis has to do with the selection of cases for comparison from the pool of cases considered. This court has never articulated its approach to this process. See, e.g., *State v. Bannister*, 680 S.W.2d 141 (Mo. banc 1984). At most, there is a

citation to cases with similar statutory aggravating circumstances, excluding non-statutory aggravators and mitigators. See *State v. Davis*, 814 S.W.2d 593, 607 (Mo. banc 1991), Blackmar, J. dissenting. This denies the defendant any meaningful ability to articulate for the Court an argument that his sentence is disproportionate in comparison with other similar cases, in violation of his rights under the Sixth Amendment to the United States Constitution to present a defense and to the effective assistance of counsel.

Finally, the court fails to use adequate methods to compare the cases. Wallace and Sorensen suggest, in “*The Missouri Capital Punishment Process: Appellate Review of Proportionality and Racial Discrimination*”, unpublished article, at p. 30, the use of a “frequency” approach:

where the reviewing court determines the elements which led to a death sentence in the case and identif[ies] the comparison cases using a case selection method. Using the identified relevant factors, the court estimates the number of death sentences which have been imposed in this identified pool of cases. Then a determination is made as to whether

the death penalty is being imposed sufficiently often to justify affirming the sentence under review.

The article states, “This type of review would appear necessary to meet the concerns regarding comparative excessiveness expressed in the plurality opinion in *Gregg v. Georgia*.” *The Missouri Capital Punishment Process: Appellate Review of Proportionality and Racial Discrimination*, unpublished article, at p. 31. Almost ten years earlier, looking more broadly at proportionality review, another team of writers came to the same conclusion.

In Acker and Lanier, *Statutory Measures for More Effective Appellate Review of Capital Cases*, 8 State Court Journal 211, 238 (1984), the authors suggest that the lack of standards in proportionality review statutes “helps explain why, in practice, comparative proportionality review has been an empty promise.” This Court has reversed only three death sentences under the authority of Mo. Rev. Stat. §565.035.3. In *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982), this Court found that because of the defendant’s limited record and the fact that he turned himself in, his sentence was excessive and disproportionate. In *State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998), this Court reversed because of concerns about the sufficiency of

the evidence. And in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc. 2003), this Court reversed three death sentences as “excessive” and remanded for a new penalty phase trial due to concerns about whether the issue of mental retardation was adequately determined. By contrast, this Court has affirmed approximately 100 death sentences under §565.035.3.

Acker and Lanier suggest that the best way to clarify proportionality review is to have legislatively enacted standards requiring the frequency method described above. Although this Court does not control the action of the legislature, it does control its own procedures. By adopting a method of proportionality review which considers all cases eligible for the death penalty, extracts relevant factors, and determines the frequency of death sentences in the relevant group, this court could obviate the need for further legislation on the issue while protecting the rights of persons sentenced to death to due process and equal protection of the laws.

In the absence of such a judicially or legislatively adopted standard, Missouri’s proportionality review statute is unconstitutional. Among the fundamental prerequisites of due process is the right to notice and an opportunity to be heard in a meaningful manner.

*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380

U.S. 545 (1965). Because neither this court's decisions nor the statute itself provide any guidance as to how proportionality review is to be conducted, persons condemned to death are denied due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10 and the right to effective assistance of counsel guaranteed by U.S. Const. amend. VI and Mo. Const. art. 2, §22. See *Harris v. Blodgett*, 853 F.Supp. 1239, 1286 (W.D. Wash 1994), *affirmed* 64 F.3d 1432 (9<sup>th</sup> Cir. 1995).

The Court has used a variety of proportionality analyses. These include the consideration of various “pools” of cases and various criteria for determining similarity. Some of these approaches are described above. Such a multiplicity of methodology makes it impossible for Mr. Barton and his counsel to demonstrate to the court that his sentence is disproportionate. To solve this problem, this court should articulate standards for review which comport with due process. Then, to provide for adequate notice to Mr. Barton prior to this Court’s application of those new procedures, the death sentences must be reversed.

### POINT XIII

**THE DEATH SENTENCE MUST BE VACATED BECAUSE IT IS EXCESSIVE AND DISPROPORTIONATE TO THOSE IMPOSED IN OTHER SIMILAR CASES, IN VIOLATION OF MO. REV. STAT. §565.035 AND THE UNITED STATES CONSTITUTION, IN THAT THE EVIDENCE OF GUILT IS NOT SUFFICIENT TO SUPPORT A DEATH SENTENCE, AND MR. BARTON HAS BEEN PREJUDICED BY PROSECUTORIAL MISCONDUCT.**

In the previous point of error, Mr. Barton explained why the Missouri practice of conducting proportionality review denies him the due process protection created by the Missouri statute. Without waiving his claims that his counsel is unable to discharge her duty to provide effective assistance of appellate counsel in regard to this issue, or that this Court's proportionality review is constitutionally inadequate, Mr. Barton contends that in his case, a sentence of death is excessive and disproportionate.

*Standard of review.* The standard of review is provided in Mo. Rev. Stat. §565.035.2 and §565.035.3, discussed in greater detail below.

*Argument.* In death penalty cases, Mo. Rev. Stat. §565.035..2 requires this Court, in addition to “any errors enumerated by way of appeal,” to “consider the punishment.” The statute then goes on to set out certain determinations to be made by this Court in reviewing death sentences:

3. With regard to the sentence, the supreme court shall determine:

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

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

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

The statute then sets out additional options for this Court in reviewing death sentences:

5. . . . In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. . .

While this court's early decisions under this statute were limited to a review of similar cases where death was assessed to determine proportionality, its more recent jurisprudence reflects an appreciation that the legislature intended to give this Court considerable discretion to do justice in cases in which a death sentence has been imposed. In *State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998), reversing a death sentence, this court noted, "This independent statutory review 'is designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences.'" (Citing *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993)).

This Court is commanded by the legislature to consider the strength of the evidence. The evidence offered at *this* trial has been adequately discussed in connection with prior Points. It shows that the window of time in which Mr. Barton would have had to commit this crime and remove almost all trace of it from his body and clothing was extremely small. The testimony of the witnesses concerning that timeframe has varied over the years. Under one scenario, Debbie Selvidge talked to Ms. Kuehler until 3:30, and Mr. Barton returned to Ms. Horton's trailer at the same time. At best, he had less than an hour to commit the crime, escape covered with blood and in broad daylight, change his clothes, clean up, and reappear at Ms. Horton's trailer completely dry.

No evidence connects Mr. Barton to the murder weapon, which was never found. No credible confession exists. From trial to trial, the state's jailhouse snitch witnesses have ebbed and flowed, until only "Katherine Allen," who can't even tell the truth about her own name, remains. And the state's evidence presents troubling loose ends. Why did Ms. Kuehler take the key from Ms. Selvidge the day before she died? Why was Ms. Selvidge worried that Ms. Kuehler would think she was breaking in? Perhaps the idyllic relationship between the two painted

by Ms. Selvidge had its cracks. And perhaps those cracks had something to do with Ms. Kuehler's murder. Why did Mr. Barton kill Ms. Kuehler after she had written him a check? And why, having obtained the check, did he discard it rather than cashing it and leaving the area?

The record at the last post-conviction case before this Court indicates even stronger evidence of Mr. Barton's innocence. In that proceeding, Mr. Barton presented the depositions of Richard Ausmus and Richard Morriset. Mr. Ausmus could account for Mr. Barton's whereabouts during a portion of the afternoon of the crime. He testified that during that afternoon, he, Mr. Barton, and another man went to the place where Mr. Barton was working to try to get his paycheck. (SC83615, MX.50, Ausmus depo., p. 6).

Mr. Ausmus also testified that he, Mr. Barton and several other people were moving around the area of the crime scene after the discovery of the body. (SC83615 MX.50, Ausmus depo., p. 26). This fact demonstrates that Mr. Barton could have acquired the stains on his clothing from contact with another person after the discovery of the body.

Mr. Morriset saw Mr. Barton three times on the day of Gladys Kuehler's death. He saw him first at 1:00 p.m. when Mr. Barton asked to use his telephone. (SC83615 MX.50, Morriset depo. p. 7.) He next saw him in the trailer park at around 4:00 p.m. (SC83615 MX.50, Morriset depo., p. 8.) He then saw him around 7:00 p.m. with Carol Horton and Debbie Selvidge. (SC83615 MX.50, Morriset depo., p. 10.) Mr. Barton never changed his clothing that day. (SC83615 MX.50, Morriset depo., pp. 10, 22-23.)

Mr. Morriset saw Ms. Selvidge, Mr. Barton, and Ms. Horton enter Ms. Kuehler's trailer in that order. (SC83615 MX.50, Morriset depo., p. 14.) When they came out of the trailer, Mr. Morriset saw blood on Debbie Selvidge's coat. (SC83615 MX.50, Morriset depo., pp. 17-18,28.) Ms. Selvidge told Mr. Morriset that she had gotten that from kneeling next to the body. (SC83615 MX.50, Morriset depo., pp. 17,18.)

Even if this Court does not find that Mr. Barton is entitled to acquittal, the weak evidence of guilt in this case is insufficient to support a death sentence.

This Court is also mandated to consider "the defendant." As noted earlier, the evidence from Mr. Dorser about Mr. Barton's alleged bizarre and callous behavior after the murder was absent from this trial. On

the other hand, the sparse penalty phase evidence presented here is puzzling. In previous cases, additional evidence has been presented. Specifically, in Mr. Barton's 1998 trial, Dr. James Merikangas testified that Mr Barton had organic brain damage as a result of birth defects and a head injury in early adulthood which affected his impulse control and judgment. SC80931 Tr. pp.1049,1058-1064,1067,1073. In the post-conviction proceedings after that trial, Dr. Merikangas provided additional testimony.

He testified that medication exists to treat Mr. Barton's symptoms and that if Mr. Barton were to become aggressive in prison, with proper treatment his impulsive behavior would become much less frequent. SC83615, MX.50, Merikangas depo. pp. 50-51. He also testified that Mr. Barton, despite his brain impairment, would be expected to function safely and competently in a prison setting. This is consistent with Mr. Barton's prison record. SC83615, MX.50, Merikangas depo., pp. 48-49.

The post-conviction proceeding also included evidence from Mr. Barton's aunt, Mary Reese, and his brother, Ralph Barton, Jr. Mrs. Reese testified that Walter's mother Anne Barton whipped Walter and his brother, Ralph, leaving welts. Walter was self-conscious about letting anyone see the welts his mother left on him. Walter and his

siblings did not have any freedom. They were not allowed to go to ball games, or events after school. Mrs. Reese was aware of two of Anne Barton's extra-marital relationships, and knew that the Barton children knew what their mother was doing. Ralph Barton, Sr. was gone most of the day. He tried not to see what his wife was doing. SC83615, MX.30.

Ralph Barton indicated that Walter had difficulty with his schoolwork, that the Barton parents whipped their children regularly, that Mrs. Barton had a number of affairs of which the children were aware, and that the Barton parents fought at times. Ralph could also have testified that each of the Barton siblings have been in trouble with the law; his younger sister Diane is currently in prison in Texas.

SC83615, MX42.

The confusion and abuse in the Barton home were confirmed by Robert Hardy and Lynwood Mills, for whom Ralph Barton, Sr. worked. Mr. Hardy was the owner of Hardy Construction. He employed Ralph Barton, Sr., Walter Barton's father, from 1971-1982. Mr. Hardy was familiar with Walter Barton's mother. Ms. Barton was very selfish and controlling. Although Ralph Barton, Sr., was well paid, Anne Barton had control of his money and did not spend it on necessities for the

family. Walter's sister ran around barefoot because she had no shoes.

SC83615 MX.48.

Lynwood Mills has known the Barton family since 1972. He was Ralph Barton, Sr.'s direct supervisor at Hardy Construction. Ralph, Sr. "lacked initiative, but was totally reliable." He was totally dominated by his wife Anne. On one occasion, when Mr. Mills's wife and daughter and Ralph's wife and daughter were visiting a construction site, Mrs. Barton gave Mr. Mills's wife a "terrible tongue lashing", calling her "a whore and a number of other foul names." When Mr. Mills reported this to Ralph, Sr., he said that he could not control Anne. Anne attempted to have Mr. Mills give her Ralph's paycheck. Although she controlled the family's money, she never provided a comfortable home or adequate clothing or food.

Mr. Barton's brothers Ralph, Jr. and Robert worked for Mr. Mills at Hardy Construction. Neither was a good worker. Mr. Mills got to know Walter during a period when Walter used to come to work with his father; he remembers him as more likeable than his brothers.

SC83615, MX.51.

Like that of Mr. Chaney, because of Mr. Barton's background and the weak evidence against him,

[T]his case falls within a narrow band where the evidence is sufficient to support a conviction, but not of the compelling nature usually found in cases where the sentence is death . . . The combination of the strength of the evidence and the defendant's background makes this case unlike other cases involving similar crimes in which the death penalty was imposed.

*State v. Chaney*, 967 S.W.2d 47, 60 (Mo. banc 1998)

For that reason, as in *Chaney*, if other relief is not granted, this Court should order that Mr. Barton's sentence be vacated and that he be resentenced to life in prison without eligibility for probation or parole.

#### POINT XIV

**THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CASE AFTER A MISTRIAL WAS GRANTED WHEN THE STATE WAS UNABLE TO PROCEED BECAUSE NO WITNESSES HAD BEEN ENDORSED ON THE INDICTMENT, IN VIOLATION OF MR. BARTON'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.**

On April 5, 1993, a jury had been selected and sworn in Mr. Barton's case. Prior to that time, Mr. Barton's then defense counsel were aware that no witnesses had been endorsed by the prosecution in the court's file as required by Mo. Sup. Ct. R. 23.01(f). After the jury had been sworn, defense counsel pointed this fact out to the trial court. The trial judge indicated that he believed the case could not go forward.

Defense counsel then moved for a mistrial. The motion was granted. After the mistrial was declared, defense counsel moved for discharge of the defendant. The trial court ruled that the defendant had requested the mistrial and had therefore waived any double jeopardy claim. SC77147 Supp Tr., p.107. On appeal, the issue of double jeopardy because of the mistrial was raised in the briefs but not

addressed by this Court. Appellate brief, No. SC77147, pp. 27-30; *State v. Barton*, 936 S.W.2d 781,782 (Mo. banc 1996).

In post-conviction proceedings after Mr. Barton's 1998 trial, he raised as ineffective assistance of counsel the ineffective assistance of the first trial counsel in moving for the mistrial, the ineffective assistance of second trial counsel in not moving for dismissal due to double jeopardy, and the ineffective assistance of appellate counsel for not re-raising the mistrial issue.

It seems likely, since this Court reversed Mr. Barton's case and remanded for a new trial, that it implicitly overruled Mr. Barton's claim of double jeopardy. *State v. Barton*, 936 S.W.2d 781,782 (Mo. banc 1996). Otherwise, the court would have had to grant Mr. Barton a discharge rather than a new trial. However, in light of the holding of *State v. Nunley*, 923 S.W.2d 911, 922 (1996) that when this Court vacates a judgment, that judgment is not a final judgment for the purposes of collateral estoppel, Mr. Barton re-raises the issue here to allow this Court the opportunity to address it.

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), as previously discussed under Point II above, a plurality of the United States Supreme Court found that the Double Jeopardy Clause of the Fifth

Amendment is implicated when the prosecutor deliberately engages in misconduct for the purpose of goading the defendant into moving for a mistrial. While no testimony was presented as to the state's reason for not endorsing witnesses, it is hard to see how the prosecutor could inadvertently omit a requirement so basic to Missouri practice as the endorsement of witnesses on the indictment. As the prosecutor was surely aware, the trial court, with its broad discretion in permitting or forbidding late endorsement, could have prevented the state from presenting any witnesses. See *State v. Destefano*, 211 S.W.3d 173 (Mo. App. 2007) (Court did not err in refusing late endorsement of defense witnesses).

Moreover, since *no* witnesses were endorsed, it is likely that had the trial court permitted late endorsement, this Court would have reversed. This Court would have found that the bare indictment was insufficient to give Mr. Barton and his counsel notice of the witnesses to be called, and that since the state must have known it would need to call *some* witnesses at trial, there was no excuse for the late endorsement. See, e.g., *State v. Hendrix*, 883 S.W.2d 935, 938-939 (Mo. App. 1994) (Late endorsement permissible where need for witness did not arise until shortly before trial).

Thus, it would appear that the failure to endorse was intended to compel the defendant to request a mistrial. Indeed, the trial court itself participated in the goading, indicating to trial counsel that the case could not go forward absent endorsement of witnesses. April 5, 1993 Tr. pp. 96, 104.

Mr. Barton was entitled to have his trial completed before the first jury sworn to try him. This, as the *Kennedy* court reiterated, is one of the primary rights guaranteed by the Double Jeopardy Clause. Because this right was violated, and Mr. Barton has been tried four more times with resulting prejudice, he is entitled to discharge.

POINT XV

THE TRIAL COURT PLAINLY ERRED IN IMPOSING A SENTENCE OF DEATH BECAUSE THE METHOD OF EXECUTION PRESCRIBED BY MISSOURI LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, IN THAT THERE IS A REASONABLE PROBABILITY THAT MR. BARTON WILL SUFFER UNREASONABLY WHILE BEING PUT TO DEATH.

In an abundance of caution to preclude any later contention that Mr. Barton has waived his right to assert this issue because he did not pursue it soon enough, the ground is included in this appeal

*Standard of review.* The legal conclusion that the motion is premature is reviewed *de novo*.

*Argument.* Pursuant to Mo. Rev. Stat. §546.720, “The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.” Since 1989, when executions resumed in Missouri, the State of Missouri has exclusively used lethal injection as the method of execution.

The method currently used involves poisoning the victim with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (pavulon), and potassium chloride (KCl). As administered in recent executions, there is a reasonable likelihood and an unjustifiable risk that this particular combination of chemicals will cause Mr. Barton to consciously suffer an excruciating, painful and protracted death.

In *Taylor v. Crawford*, 05-CV-4173-FJG, W.D. Mo. (June 26, 2006), the Hon. Fernando Gaitan entered an order that Missouri's customary method of execution presents an unreasonable risk of pain and suffering. Doc. 195, June 26, 2006. The court directed the Missouri Department of Corrections to prepare a protocol for future executions addressing the issues discussed in the order, and stayed all executions pending the preparation of a proper protocol. The state presented a protocol, but it was rejected by the district court as not sufficient to comply with the June 26 order. Doc. 213, Sept. 12, 2006. The state declined to present a revised protocol and appealed Judge Gaitan's decision. The case is now awaiting a decision by the United States Court of Appeals for the Eighth Circuit. *Taylor v. Crawford*, 06-3651, Eighth Circuit Court of Appeals.

Because Judge Gaitan's order is not final, Mr. Barton may still be subjected to the pain and suffering at issue in *Taylor v. Crawford*. He therefore requests this Court either to remand the case for a hearing in the circuit court concerning Missouri's execution practices, or, in the alternative, fix the event which triggers a duty on the part of a death-sentenced inmate to make any complaint concerning the method of execution.

## CONCLUSION

For the foregoing reasons, Mr. Barton prays the court:

a) For the reasons discussed in Points I, II and XIV, to vacate his conviction and sentenced and order that he be discharged; or, in the alternative,

b) For the reasons discussed in Points III, V, VI, and VII, to vacate his conviction and sentence and remand for a new trial as to both guilt and penalty; or, in the alternative,

c) For the reasons discussed in Points II XII, and XIII, to vacate his sentence of death and enter a sentence of life imprisonment without eligibility for probation or parole; or, in the alternative;

d) For the reasons discussed in Points IV, VIII, IX, and X to vacate his sentence of death and remand for a new penalty phase; or, in the alternative,

e) For the reason discussed in Point XI, to vacate his sentence of death and remand for resentencing before a different judge; or, in the alternative;

f) For the reasons discussed in Point XV, either to remand for a hearing on Missouri's execution method or to fix a time when a death-sentenced person must raise the issue of cruel and unusual methods of execution.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 28,840 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

ELIZABETH UNGER CARLYLE

I hereby certify that a copy of the foregoing brief was served upon Shaun Mackelprang, Asst. Atty. Gen., Attorney for Respondent, at P.O. Box 899, Jefferson City, MO 65102, by U.S. Mail on April 2, 2007.

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