Sup. Ct. # 89830

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

CARMAN DECK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Jefferson County, Missouri,
23rd Judicial Circuit, Division II
The Honorable Gary P. Kramer, Judge

APPELLANT'S BRIEF AND APPENDIX

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JURISDICTIONAL STATEMENT

In 1996, the State charged Appellant Carman Deck with two counts of first-degree murder, §565.020, for killing James and Zelma Long. In the direct appeal, this Court affirmed Deck's convictions and sentences. *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999). In the appeal from the denial of postconviction relief, however, this Court remanded for a new sentencing trial. *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002). On retrial, the jury again recommended death, and Judge Kramer imposed two death sentences. On appeal, this Court affirmed Deck's sentences. *State v. Deck*, 136 S.W.3d 481 (Mo.banc 2004). The Supreme Court, however, found constitutional error and remanded, *Deck v. Missouri*, 544 U.S. 622 (2005), and this Court ordered a new sentencing trial. After the retrial, the jury again recommended death, and Judge Kramer imposed two death sentences. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

STATEMENT OF FACTS[1]

On July 8, 1996, Jefferson County Sheriff Donna Thomas received a phone call from the Arnold Police Department, relaying information about a possible robbery and homicide in rural Jefferson County (Tr.506-507). The alleged perpetrators were Carman Deck and his sister Tonia Cummings (Tr.508). They were said to be driving an early 80's model, gold, two-door car (Tr.508).

In response to this tip, St. Louis County Police Officer Vincent Wood staked out the parking lot of the apartment complex where Deck and/or Cummings lived (Tr.547-48). Between 11:00 and 11:30, he saw a car matching the information provided to him (Tr.549). The car passed him and pulled into a parking spot (Tr.549). The car's lights were on but were turned off before coming to a full stop (Tr.550,569). Wood pulled behind the car and then approached on foot (Tr.551-52). From twenty feet away, Wood shone his flashlight into the car (Tr.553,570). The driver, later identified as Deck, turned and looked at the flashlight shining in his face, turned back, and then leaned across to the front floorboard (Tr.553,570). Wood yelled for Deck to show his hands, and Deck complied, putting his hands out the window (Tr.553-54).

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[1] The Record on Appeal consists of a transcript (Tr.), legal file (L.F.), deposition of Mary Banks (Banks Depo.), and trial exhibits. This Court has taken judicial notice of the transcript and legal file from the prior two direct appeals: SC#80821 (referenced as "1st Tr." and "1st L.F.") and SC#85443 (referenced as "2nd Tr." and "2nd L.F.").

Wood then ordered Deck to exit the car (Tr.554-55,571). At Wood's command, Deck retrieved his identification from a fanny pack around his waist (Tr.555). A loaded gun was found under the front passenger seat (Tr.557-58).

Deck was arrested for carrying a concealed weapon (Tr.558). He stated he bought the gun in Oklahoma at a flea market and had fired it during target practice earlier that day (Tr.565,649). His fanny pack contained $242 in dollar bills (Tr.581). A decorative tin containing coins was seized from the car (Tr.560-61,586).

Deck was taken to a police station in St. Louis County and willingly spoke with police (Tr.627,629). At first, he denied any involvement in a crime (Tr.631). After being questioned for about four hours, Deck stated that he and Cummings had gone to DeSoto looking for a car to buy (Tr.631). Cummings had gotten sick, so he took her to the hospital and then returned home, where he was arrested (Tr.632).

Later, Deck stated his mother's boyfriend, James Bolliek, had committed the crimes (Tr.636-37). He explained that Bolliek told Deck and Cummings to follow him to DeSoto (Tr.636). Bolliek had them park their car on a side road, and he left (Tr.636). After 10-15 minutes, Bolliek returned (Tr.636). He handed Deck a gun and a tin of money through the car window (Tr.636). They planned to meet back in St. Louis (Tr.636). Deck gave the police the location of the house involved (Tr.637).

An officer went to that location and found the front door open (Tr.524). Inside, he found James and Zelma Long lying face down on their bed (Tr.526). Both had died from contact gunshot wounds to the head (Tr.526,602,604). The bedroom closet contained an

open safe, and papers were scattered in front (Tr.516-17). Three shell casings were found on the floor (Tr.533).

At 7:30 that morning, a detective transported Deck to Jefferson County (Tr.618). On the way, after being advised of his rights, Deck told the detective that he and Cummings went to a house in DeSoto, where they met a man named Jim (Tr.619). Jim went into the house (Tr.619). When he returned, he handed Deck a tin of coins and a gun (Tr.619-29).

When they arrived in Jefferson County, the detective inventoried Deck's property (Tr.621). While the detective counted the money from the fanny pack, Deck commented that some of the money was already his (Tr.622-23).

Meanwhile, the police investigated Bolliek and determined that he had an alibi (Tr.641). At 11:45 that morning, the police questioned Deck again (Tr.642). Confronted with Bolliek's alibi, Deck confessed to the crimes (Tr.644-48;Ex.54). He admitted that he and Bolliek planned to burglarize the Longs' house while they were at church (Tr.644; Ex.54). Deck knew that the Longs kept money in their house, because fifteen years earlier, he and the Longs' grandson took large amounts of money from their bedroom safe (Tr.644;Ex.54).

Deck and Bolliek drove down and canvassed the Longs' house three or four times (Tr.644;Ex.54). Weeks went by, but the two could not get to the house on any Sunday at church time (Tr.644;Ex.54). Bolliek told Deck he needed the money, gave him a gun, and told Deck to get him the money (Tr.645;Ex.54). The plan changed from a burglary

to a burglary or a robbery (Ex.54). The two agreed that Bolliek would let Deck use one of his guns in the burglary or robbery for a cut of the proceeds (Ex.54).

From 7:00 to 9:00, Deck and Cummings drove back roads in DeSoto before arriving at the Longs' house (Tr.646;Ex.54). They knocked on the front door, and Deck asked for directions (Ex.54). Mrs. Long let them in and told them the directions, while Mr. Long wrote them down (Tr.646; Ex.54). Deck used the bathroom (Tr.646-47;Ex.54). He took the paper with directions and headed to the door (Ex.54). He was nervous and scared (Ex.54). He pulled the gun from where it had been hidden in his pants, pointed it at the Longs, and ordered them to lie on their bed (Tr.647; Ex.54). Deck told Mr. Long to open the safe, but Mr. Long did not know the combination (Tr.646;Ex.54). Mrs. Long said she knew it, so she opened the safe and pulled out papers and jewelry (Tr.647; Ex.54). She offered that there was $200 in her purse, and Mr. Long stated that there was money in the tin atop the television (Tr.647;Ex.54). Deck let Mrs. Long get the money from her purse in the kitchen, while he retrieved the cash from the tin (Tr.647;Ex.54). Mr. Long offered to write a check (Tr.648).

Mr. and Mrs. Long lay on the bed with their heads to the side (Ex.54). For ten minutes, Deck stood at the foot of the bed wondering what to do (Tr.648; Ex.54). He "was nervous [and] didn't know what to do. I knew they'd already seen me and if I walked out of there and let them lay there I was in trouble anyway" (Ex.54). He simply did not know what to do (Ex.54).

Cummings had been standing at the front door but ran back toward the bedroom and yelled that they needed to leave (Ex.54). Deck heard her run to the car and the screen

door slam shut (Ex.54). He was left "standing in there not knowing what to do, knowing that they already seen me. If I left I was going to go to jail. If I shot them I was going to jail. And just, uh, nervousness and scaredness. I just shot them" (Ex.54).

Deck shot Mr. Long twice in the head, and then immediately shot Mrs. Long twice in the head (Tr.648;Ex.54). With the tin and the money from Mrs. Long's purse, he ran out of the house (Tr.648;Ex.54).

Cummings' stomach had been bothering her all day and now really hurt (Ex.54). Deck drove her to the hospital, where she was admitted (Ex.54). He counted out the money – $410 – and gave his sister $250 (Ex.54).

About a week after his arrest, Deck asked to speak an investigator (Tr.588). He stated that some of his own money was co-mingled with the victims' money when he was arrested (Tr.590). He wanted to know how to retrieve his money so he could use it in the jail commissary (Tr.590-91).

Deck was charged with two counts of first-degree murder, two counts of armed criminal action, one count of first-degree burglary, and one count of first-degree robbery (L.F.55-56). He was tried in 1998, convicted, and sentenced to death (1st Tr.951-52;1st L.F.290-93). This Court affirmed Deck's convictions and sentences. *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999). In the appeal from the denial of postconviction relief, however, this Court remanded for a new sentencing trial. *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002).

On retrial in 2003, Deck was again sentenced to death (Tr.563). On appeal, this Court affirmed Deck's convictions and sentences. *State v. Deck*, 136 S.W.3d 481 (Mo.

banc 2004). The Supreme Court, however, found a presumptively prejudicial constitutional error and remanded. *Deck v. Missouri*, 544 U.S. 622 (2005). This Court vacated the sentences and ordered a third penalty phase trial.

Before trial, defense counsel moved for a sentence of life without parole, under Section 565.040.2, RSMo 2000 (L.F.106-109). The court overruled the motion (L.F.55). Deck subsequently filed, in the appellate court and this Court, a Petition for Writ of Mandamus, or in the Alternative, Petition for Writ of Prohibition, with Suggestions in Support and Exhibits (L.F.44-45). Both were summarily denied (L.F.45).

Evidence presented at the retrial was as set forth above. The State also presented certified copies of Deck's prior convictions for multiple burglary and stealing related offenses and one conviction for aiding an escape (Tr.677-81). The State presented victim impact testimony from three of the Longs' adult children (Tr.493-96,682-708).

Evidence in Mitigation[2]

As mitigation evidence, defense counsel presented the testimony of Wanda Draper, a child development expert; Eleatha Suratt, a psychiatrist; Carman's brother Michael; his aunt Beverly; his aunt Mary; and a foster father, the Reverend Major Puckett (Tr.721-887; Banks Depo.;Def.Ex.D). The following evidence was elicited:

[2] During this portion of the Statement of Facts, the brief will refer to members of the Deck family by first name to avoid confusion.

Carman's mother, Kathy, was seventeen and unwed when Carman was born (Tr.732). Kathy had no option but to remain with the baby's father, Pete Deck (Tr.732). Kathy had a dysfunctional childhood, having been kidnapped by her father when she was seven (Tr.806,877). They moved repeatedly to avoid the authorities and were very poor (Tr.806,878).

In the first months of his life, Carman lived with his grandmother Josie, mother Kathy, father Pete, Aunt Wilma, and Uncle Gene (Banks Depo.7,14). When Carman was three weeks old, Josie called Carman's Aunt Mary to report that something was wrong (Banks Depo.8). Carman was taking very hard breaths and was not very responsive (Banks Depo.8,10). Meanwhile, Kathy and Pete were at a bar drinking (Banks Depo.8-9,12).

Mary arrived to find no air conditioning, although it was August, no food, and not even a refrigerator (Banks Depo.8). Josie admitted she had been feeding Carman powdered milk, even though he was too young, because she had nothing else to give him (Banks Depo.10). Mary sent her husband, Dorman, to get Carman some formula and a new bottle (Banks Depo.11). Once it arrived, Carman nursed so hard that Mary needed Dorman's help to get the bottle out of his mouth (Banks Depo.11). Later, Mary and Dorman bought an ice chest for the house (Banks Depo. 14). Mary bought canned cream and the syrup for the formula and mixed it up herself, lest the adults at the house use the cream for their coffee, and leave Carman with nothing (Banks Depo.14). Once, as an infant, Carman was so dehydrated from lack of food and liquids that hospitalization was required (Tr.733).

Kathy lacked even basic parenting skills (Tr.807-808). She never picked Carman up and hugged him; rather, it seemed she was always trying to get rid of him (Banks Depo.16-17). She liked to spend her time in bars (Banks Depo.13). Pete too never showed interest in Carman (Banks Depo.17).

When Carman was three, his sister Tonia was born (Tr.734). Kathy got very frustrated, trying to handle a baby and a toddler (Tr. 734). She had an explosive temper and beat and slapped Carman (Tr.734,808). Two years later, Latisha was born mentally retarded (Tr.736). When Carman was seven, Michael was born (Tr.737). Kathy beat the children with shoes, a flyswatter, a coathanger, and her hands (Tr.740).

Kathy sang in bars and night clubs (Tr.734). Sometimes, she left the children alone to go sing (Tr.736). Sometimes she brought them with her to the bars, where they stayed in the bar or in the car, or ran through the parking lot (Tr.737). Sometimes, various babysitters watched the children (Tr.734,742). Uncle Gene, epileptic and mentally retarded, often kept them (Tr.738; Banks Depo.9). Gene could barely care for himself, let alone children (Banks Depo.9). He molested Tonia, and another babysitter molested Carman (Tr.744).

Pete was a truck driver and was gone for days (Tr.738). While he was away, Kathy had sex with other men (Tr.738). She had sex with them in her car with the children present, or while they played in the parking lot (Tr.738). Kathy also had sex with men at the house (Tr.745).

Neither Kathy nor Pete was around, so, by age eight, Carman was caring for his three younger siblings (Tr.739,744,856). He did his best to feed and bathe them and took

on the role of mother (Tr.857). He changed Michael's diapers; often, there were no clean diapers, so Michael had to stay in dirty ones (Tr.739). Carman learned to go door-to-door begging or stealing food (Tr.739,744; Banks Depo.32). Sometimes, bar patrons gave the children food (Tr.739).

Carman's Aunt Beverly occasionally went to the apartment, only to find Kathy gone (Tr.880). The children did not know where she was (Tr.880). They were dirty, half-dressed, and hungry (Tr.880). There was no food in the refrigerator, and Beverly bought them food and diapers (Tr.880).

When Carman was eight, Pete discovered Kathy's cheating and they separated (Tr.741). Pete gave Kathy an ultimatum – choose between her singing career, or him and the children (Tr.741). She stayed with Pete for a while, but then moved in with a guitarist, D.L. Hood (Tr.741). Because D.L. wanted nothing to do with the children, Kathy placed them with Family Services (Tr.742).

When Carman was nine, Pete got a call from the Sheriff's Office, notifying him that his children had been left alone for days without food (Tr.742-43,858,881). Pete picked up the children and brought them to his brother Norman's house (Tr.743). It was Thanksgiving, so they joined Norman and his wife for dinner (Tr.743). Starving, Michael ate so fast that he vomited onto his plate and then tried to eat the vomit (Tr.743,810,858).

Carman loved to be with his Aunt Mary and Uncle Dorman (Banks Depo.22). He thought they were rich, because they always had food (Banks Depo.22). He was with them, "every step we made, talking to us, sitting on the couch and talking and just

laughing and having a good time" (Banks Depo.22). They wanted to adopt Carman (Banks Depo.17). Pete did not care, but Kathy received $125 a month from the government for Carman's care (Banks Depo.17). She told them that if they gave her $125 a month, they could adopt him (Banks Depo.17). Since Mary and Dorman could not afford the payment and care for Carman and their own children, they could not adopt him (Banks Depo.18).

Pete married Marietta, an alcoholic who drank until she passed out (Tr.747-48). She had her own children and considered Pete's children "extra baggage" (Tr.748,862). Marietta was "very, very, very mean" (Tr.861). Marietta fed her children normal meals but gave Pete's children cold hotdogs or bologna, sometimes without bread (Tr.748,861). As punishment, or just because she could, she made them kneel on broomsticks, and she slapped and spanked them and pulled their hair (Tr.861-62).

When Carman was 11, Marietta was in the car with the children (Tr.750). Carman told her he needed to use the bathroom, but she told him he would have to wait (Tr.750). He could not wait and defecated in his pants (Tr.750,861;Banks Depo.21). Marietta was livid (Tr.750). She took him into the bathroom and smeared the feces on his face (Tr.751,861; Banks Depo.21). She made him keep it there until it dried (Tr.751; Banks Depo.22). She photographed him so she could show others and try to shame him into never doing it again (Tr.751,812; Banks Depo.21). The photograph showed Carman kneeling in front of the toilet; his face was solid black, with nothing but his eyes and the slight red of his lips showing (Banks Depo.20-21).

One day, Marietta just put all four kids in the car and told Pete she was taking them to Family Services (Banks Depo.23;Tr.751). Pete merely waved as they drove away (Banks Depo.24;Tr.862). Marietta left them at the door of Family Services and drove off (Banks Depo.24;Tr.751). The three youngest children were sent to live with Uncle Norman (Tr.745,751,863; Banks Depo.34). Life there was much better than what they were used to (Tr.863). Uncle Norman kept Michael out of trouble and taught him right from wrong (Tr.863).

Meanwhile, Carman was sent to a string of foster families (Tr.751,754-55). Each time, as Carman started to get established in a stable family setting, Kathy suddenly appeared and took him back (Tr.752-53). She then tired of him and left him with other people or returned him to Family Services (Tr.753).

At age 14 or 15, Carman spent about a year in the foster home of Reverend Major Puckett (Def.Ex.D;Tr.757). It was a very structured environment, with chores and established rules (Def.Ex.D; Tr.758). Reverend Puckett described Carman as a wonderful teenager, and a “likeable, lovable and sociable” boy who did well in school, got along well with other children, and never caused him problems (Def.Ex.D). Carman was a lonely boy with no parents he could call mom and dad and no future (Def.Ex.D).

Carman was especially close with Puckett’s wife, Linnie (Def.Ex.D). He loved to spend time with her in the kitchen helping her cook and clean (Def.Ex.D). Because Linnie was visually impaired, Carman read recipes and labels on cans for her (Tr.759). He was very caring and called her mom (Tr.759).

But one day, Kathy arrived and pulled Carman away (Tr.759). Carman cried and begged her not to take him, pleading, "you are killing me inside" (Tr.767;Def.Ex.D).

Kathy married Ron Wurst, who did not like children and was very abusive (Tr.760,883). He once threw Kathy through a plate glass window, severely cutting her arm (Tr.760). Another time he almost tore her ear off (Tr.760). By the time he was 17, Carman had his own apartment (Tr.761). He asked Kathy to move in so she would be away from Ron's abuse (Tr.761).

Eventually, Kathy decided to reunite the family to make amends for what she had done wrong (Tr.863). The four children lived together for the first time in seven years (Tr.863). Michael "really enjoyed" being with Carman, whom he had seen only at birthdays and holidays during the past seven years (Tr.864).

Carman dropped out of high school in eleventh grade (Tr.761). By age 18, he had lived in 21 different homes (Tr.820). He started getting in trouble with the law (Tr.761). When Carman was out of prison, he spent "quality time" with his young niece, Michael's daughter, Amber (Tr.864-65). Carman always bought her things, took her places, and generally treated her "like a princess" (Tr.864-65). Carman lived across the street from Michael and Amber and was very accessible (Tr.868). Despite Carman's convictions, Michael loves him and always will (Tr.865).

Additional Procedural Issues

During voir dire, Venireperson Coleman indicated that she could consider both sentences, but was unsure whether she could sign a death verdict (Tr.278-80).

Venireperson Ladyman stated that he had no problem with either punishment, but just could not sign the verdict form (Tr.335-36,343-45,360-62). Over objections, the court struck them for cause (Tr.447,449-51).

Counsel moved to suppress the items seized as a result of the search (the handgun, a decorative tin and money seized from Deck's fanny pack) and objected to the admission of and testimony about those items and all statements Deck made (Tr.491-92,545,564, 583-84,587-88,615-16,618,622-23,628-29,631,643,650-52,654). The court overruled each objection (Tr.491-92,545,564,583-84,587-88,615-16,618,622-23,628-29,631,643, 650-52,654).

Before trial, the State had provided Deck notice that it would offer evidence of his prior convictions, including a 1985 conviction for aiding an escape (2nd L.F.117; L.F.155; St.Ex.57). That conviction stemmed from a charge that Deck obtained a saw blade and used it to help two other inmates cut through the county jail bars (Tr.677;St.Ex.57). At trial, defense counsel objected to State's Exhibit 57, a certified copy of the information and sentence/judgment, because the State had not given notice that it would try to prove Deck had bad jail behavior (Tr.678-79). The court admitted the exhibit as a prior conviction (Tr.677-79). The State presented no further evidence regarding this conviction or any other escape-related offense or conviction.

In closing argument, the prosecutor urged jurors to believe that they would be accountable to the victims' grandchildren if they did not return death verdicts (Tr.969-70). The prosecutor also urged jurors, in determining whether the crimes involved depravity of mind, to think about themselves lying on the bed for ten minutes at gunpoint

(Tr.949). The prosecutor urged them to believe that Deck had helped people who were serving sentences of life without parole to escape; that death sentences were needed to keep Deck from harming guards and other inmates; and that Deck had many prior escapes (Tr.949,968-69). He told jurors that, unless they imposed death sentences, they would be responsible for any of Deck's future victims (Tr.969). Deck objected that the State failed to provide notice of future dangerousness or bad prison behavior as an aggravating circumstance, but the court overruled the objection (Tr.968-69).

The court instructed the jury on some elements of a mandatory instruction modeled on MAI-CR3d 300.03A, but failed to read the whole instruction (as modified for the penalty phase retrial) (L.F.588; Tr.93,97).

Defense counsel objected that Instruction 3 and Instructions 7 and 12 (step two: determining whether the death penalty was warranted) and Instructions 8 and 13 (step three: weighing of the evidence in aggravation and mitigation) failed to inform the jury properly regarding the burden of proof and shifted the burden of proof to the defense (L.F.231-33,599-600,607-608,709-12;Tr.906-909;L.F.231-33). Counsel also objected that since the State did not list the aggravators in the charging documents, Deck was not charged with a crime to which the death penalty applied (Tr.87-88;L.F.704-705).

The jury returned verdicts recommending death (Tr.973). The court overruled the motion for new trial and imposed death (Tr.982,989-90). Notice of Appeal was timely filed (L.F.722-23).

POINT I

The trial court erred in overruling Deck's motion to impose upon him two sentences of life imprisonment without eligibility for parole and in imposing two death sentences, because Section 565.040.2, RSMo 2000, mandates life sentences under the facts of this case and the death sentences violate Section 565.040.2 and Deck's rights to due process, equal protection, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,§§2,10,21, in that the death sentences imposed upon Deck in 2003 were unconstitutional and thus, under the plain and ordinary language of Section 565.040.2, Deck should have been re-sentenced to life imprisonment without eligibility for parole.

Deck v. Missouri, 544 U.S. 622 (2005);

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

*United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmac*y, 208 S.W.3d 907 (Mo.banc 2006);

Woods v. State, 176 S.W.3d 711 (Mo.banc 2005);

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

Mo.Const.,Art.I,§§2,10,21;

§§559.011, 559.013, RSMo Cum. Supp. 1975;

§565.016, RSMo Cum. Supp. 1977;

§565.035, RSMo 1994;

§565.040, RSMo 1984; and

§565.040, RSMo 2000.

POINT II

The trial court abused its discretion in overruling Deck's objections and sustaining the State's motions to strike Venirepersons Michele Coleman (#16) and Brian Ladyman (#50) for cause based solely on their reluctance to serve as foreperson, in violation of Deck's rights to due process, trial by a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, because the court followed the wrong standard for considering the State's motions to strike and these venirepersons were fully qualified to serve as jurors, in that each unequivocally stated that they could consider both punishments; their only "fault" was a reluctance to serve as foreperson and sign the verdict form for death.

Adams v. Texas, 448 U.S. 38 (1980);

Gray v. Mississippi, 481 U.S. 648 (1987);

Wainwright v. Witt, 469 U.S. 412 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

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

Mo.Const.,Art.I,§§10,18(a),21.

POINT III

The trial court erred and abused its discretion in overruling defense counsel's objections and letting the State argue that Deck's 23-year-old prior conviction for aiding an escape from a county jail could be considered evidence of bad prison conduct and/or future dangerousness and thereby violated Deck's right to due process, a fair trial, confrontation, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, §565.005.1;Rule 25.03, because Deck was sentenced to die based on aggravating "evidence" of which he had no notice and no opportunity to rebut, in that while the State provided notice that it would present evidence of the conviction, it failed to provide notice that it would use the fact of the conviction to argue that Deck had bad prison behavior and would be a danger to others in the future.

Gardner v. Florida, 430 U.S. 349 (1977);

Simmons v. South Carolina, 512 U.S. 154 (1994);

State v. Debler, 856 S.W.2d 641 (Mo.banc 1993);

State v. Thompson, 985 S.W.2d 779 (Mo.banc 1999);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.005; and

Rule 25.03.

POINT IV

The trial court abused its discretion in overruling defense counsel's objections and allowing the prosecutor to urge the jurors to believe that they had a duty to the victims' grandchildren to return sentences of death, and plainly erred in failing to intercede *sua sponte* when the prosecutor urged the jurors to think about themselves lying on the bed for ten minutes at gunpoint in determining whether the crimes involved depravity of mind; argued that Deck had helped people who were serving sentences of life without parole to escape, that Deck had escaped multiple times, and that death sentences were needed to keep Deck from harming guards and other inmates; and that the jurors owed a responsibility to Deck's future victims to give death, in violation of Deck's rights to due process, a trial before a fair and impartial jury, and a fair and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo. Const.,Art.I,§§10,18(a),21, because the prosecutor's arguments were improper and highly prejudicial, in that he improperly appealed to sympathy, engaged in improper personification, and misstated and reached beyond the evidence presented to obtain death verdicts.

Berger v. United States, 295 U.S. 78 (1935);

Sheppard v. State, 777 So.2d 659 (Miss.2000);

State v. Rhodes, 988 S.W.2d 521 (Mo.banc 1999);

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

Mo.Const.,Art.I,§§10,18(a),21; and

Rule 30.20.

POINT V

The trial court erred in overruling (1) Deck's motion to suppress physical evidence (a gun, a decorative tin, and a fanny pack) and all statements he made as the result of his illegal search and seizure and (2) Deck's objections at trial to the admission of this evidence and his statements, and in admitting the evidence and statements, because the evidence and statements were obtained in violation of Deck's right to be free from unreasonable searches and seizures, and their use at the penalty phase re-trial violated his rights to be free from unreasonable searches and seizures, due process, and a fair and reliable sentencing, as guaranteed by U.S.Const.,Amends.IV,V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,14,15,18(a),21, in that Officer Wood testified that Deck did not turn off his car lights until he pulled into the parking spot, and the anonymous tip and Deck's action of leaning toward the passenger seat did not amount to reasonable suspicion that Deck was engaged in criminal activity.

Florida v. J.L., 529 U.S. 266 (2000);

State v. Roark, 229 S.W.3d 216 (Mo.App.W.D.2007);

Taylor v. Alabama, 457 U.S. 687 (1982);

Terry v. Ohio, 392 U.S. 1 (1968);

U.S.Const.,Amends.IV,V,VI,VIII,XIV; and

Mo.Const.,Art.I,§§10,14,15,18(a),21.

POINT VI

The trial court plainly erred when it failed to read to the venirepanel before death qualification a mandatory instruction, under MAI-CR3d 300.03A, and thereby denied Deck due process, a fair and impartial jury, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by U.S.Const., Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,14,18(a),21, because the instruction was mandatory and essential to the jury's ability to respond appropriately to questioning during death qualification, in that most lay people are unfamiliar with the steps jurors must follow before a death sentence may be imposed and yet must be able to follow these steps to be qualified to serve.

State v. Ervin, 979 S.W.2d 149 (Mo.banc 1998);

State v. Gray, 887 S.W.2d 369 (Mo.banc 1994);

State v. McClure, 632 S.W.2d 314 (Mo.App.S.D.1982);

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

Mo.Const.,Art.I,§§10,14,18(a),21;

MAI-CR3d 300.03A; and

Rule 30.20.

POINT VII

By requiring that the jury unanimously find the evidence in mitigation outweighs the evidence in aggravation, Section 565.030.4(3) prevents the jury from giving meaningful consideration and effect to mitigating evidence, thereby violating *Mills v. Maryland*, 486 U.S. 367 (1988), *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and the Sixth, Eighth and Fourteenth Amendments; and the trial court erred in submitting Instructions 8 and 13, patterned on MAI-CR3d-313.44A, and denied Deck due process, a fair jury trial, and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I., Secs.10, 18(a),21, because the instructions failed to tell the jurors the State's proper burden of proof regarding the third step of the death penalty procedure, in that they failed to inform the jury that the State must prove, beyond a reasonable doubt, that aggravation outweighs mitigation or mitigation weighs less than aggravation; they prevented the jury from giving meaningful consideration and effect to mitigating evidence; and by instructing that Deck must prove to a unanimous jury that mitigation outweighs aggravation, they erroneously required Deck to establish eligibility for a life sentence and relieved the State of its burden.

Kansas v. Marsh, 548 U.S. 163 (2006);

Mills v. Maryland, 486 U.S. 367 (1988);

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

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

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

Mo.Const.,Art.I,§§10,18(a),21;

Section 565.030; and

MAI-CR3d-313.44A.

POINT VIII

The trial court erred in submitting Instructions 3, 7, 8, 12, and 13, thereby violating Deck's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I.,Secs.10, 18(a),21, because the instructions failed to instruct the jury as to the proper burden of proof, in that they failed to inform the jurors that the State bore the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was insufficient to outweigh the evidence in aggravation.

Kansas v. Marsh, 548 U.S. 163 (2006);

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

State v. Carson, 941 S.W.2d 518 (Mo.banc 1997);

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

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.030, RSMo 1994;

MAI-CR3d 313.41A; and

MAI-CR3d 313.44A.

POINT IX

The trial court erred in sentencing Deck to death for a crime never pled in the indictment, thereby violating his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, because the State never charged Deck with the only offense punishable by death in Missouri – *aggravated* first degree murder – in that the State failed to plead in the indictment those facts the jury had to find beyond a reasonable doubt before Deck could be sentenced to death.

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

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

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

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.030, RSMo 1994.

POINT X

The trial court erred in accepting the jury's death penalty verdicts and in sentencing Deck to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21; §565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Deck's sentences to life imprisonment without parole, based on the substantial evidence in mitigation, the nature of the crimes, and the number of similar cases where death was not imposed.

Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424 (2001);

Gregg v. Georgia, 428 U.S. 153 (1976);

State v. Black, 50 S.W.3d 778 (Mo.banc 2001);

Walker v. Georgia, 2008 WL 2847268 (2008);

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

Mo.Const.,Art.I,§§10,18(a),21; and

§565.035, RSMo 2000.

ARGUMENT I

The trial court erred in overruling Deck's motion to impose upon him two sentences of life imprisonment without eligibility for parole and in imposing two death sentences, because Section 565.040.2, RSMo 2000, mandates life sentences under the facts of this case and the death sentences violate Section 565.040.2 and Deck's rights to due process, equal protection, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,§§2,10,21, in that the death sentences imposed upon Deck in 2003 were unconstitutional and thus, under the plain and ordinary language of Section 565.040.2, Deck should have been re-sentenced to life imprisonment without eligibility for parole.

The plain and ordinary language of Section 565.040.2, RSMo 2000, provides that, if any death sentence is held to be unconstitutional, the trial court must resentence the defendant to life without parole. Its only exception provides that, if an aggravating circumstance is held to be inapplicable, unconstitutional or otherwise invalid, the case may be remanded for a new penalty trial. Here, the United States Supreme Court held that the State failed to show that Deck's 2003 death sentences were not the product of an unconstitutional procedure, his visible shackling before the jury. Because Deck's death sentences were held to be unconstitutional, he must be resentenced to life without parole. Otherwise, Deck will be denied due process, equal protection, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,§§2,10,21.

Section 565.040.2 gave Deck the expectation that if his death sentences were held to be unconstitutional, he would be resentenced to life without parole. The statute created a liberty interest that is entitled to procedural due process protection under the Fourteenth Amendment. *Vitek v. Jones*, 445 U.S. 480, 488 (1980). Although one may not have a "constitutional or inherent right" to a particular liberty interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

I. Preservation and Standard of Review

At Deck's 2003 penalty phase retrial, he was forced to appear in visible physical restraints. *Deck v. Missouri*, 544 U.S. 622, 634 (2005). The jury recommended death, and the court followed the jury's recommendation (2nd L.F.563,565,570-71). This Court upheld the death sentence. *State v. Deck*, 136 S.W.3d 481 (Mo.banc 2004).

The United States Supreme Court granted Deck's petition for a writ of certiorari to consider "whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution." *Deck v. Missouri*, 544 U.S. at 624. It reversed, holding that visibly shackling a defendant in penalty phase without first finding a specialized need for shackling violates the Due Process clause of the Fifth and Fourteenth Amendments. *Id.* at 624, 630-33. This Court remanded the case to the Circuit Court of Jefferson County for a new penalty phase trial (L.F.40).

Deck filed a Motion under Section 565.040.2, RSMo 2000, for a Sentence of Life Without Parole (L.F.106-109). The trial court overruled the motion (L.F.55). Deck subsequently filed, in the Court of Appeals, a Petition for Writ of Mandamus, or in the Alternative, Petition for Writ of Prohibition, with Suggestions in Support and Exhibits (L.F.44). After its denial, he filed a similar petition in this Court, which was summarily denied (L.F.45).[3]

After trial, Deck included the issue in his motion for new trial, fully preserving the issue (L.F.697). As the Court's interpretation of Section 565.040.2 is a question of law, review is *de novo*. *Steinman v. Davenport*, 248 S.W.3d 8, 17 (Mo.App.E.D.2008).

II. The Plain and Ordinary Language of Section 565.040.2 Supports a Broad Interpretation

The fundamental rule of statutory interpretation is to give effect to legislative intent as it is reflected in the statute's plain and ordinary language. *Gash v. Lafayette County*, 245 S.W.3d 229, 231 (Mo.banc 2008); *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmac*y, 208 S.W.3d 907, 909-10 (Mo.banc 2006). Courts cannot "read into a statute a legislative intent that is contrary to its plain and ordinary meaning."

[3] The doctrine of res judicata does not bar consideration of this claim, since the Court's summary denial of the writ petition did not address the merits of the claim. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo.banc 1999); *Johnson v. Missouri Bd. of Probation and Parole*, 92 S.W.3d 107, 112 (Mo.App.W.D.2002).

State v. Rowe, 63 S.W.3d 647, 650 (Mo.banc 2002). If the statute's language is clear, the Court must give effect to the language as written. *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo.banc 1993). Although a court may prefer a policy different from the policy set forth in the statute, "[c]ourts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language." *Id*., citing *City of St. Louis v. Crowe*, 376 S.W.2d 185, 190 (Mo.1964). When interpreting statutes, a court must remember that "it is the function of the courts to construe and apply the law and not to make it." *Renner v. Director of Revenue*, --- S.W.3d ----, 2009 WL 1444637, at *2 (Mo.App.E.D.,5/26/09).

Statutory language is clear and unambiguous if the statute's terms are plain and clear to one of ordinary intelligence. *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988). "The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes." *Donaldson v. Crawford*, 230 S.W.3d 340, 342 (Mo.banc 2007). Furthermore, "the plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." *Wolff Shoe*, 762 S.W.2d at 31.

Section 565.040.2 provides:

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

parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.[4]

The Legislature chose the word "any" to describe which unconstitutional death sentences mandated re-sentencing to life without parole. "Any" must be given its ordinary and usual meaning, as set forth in the dictionary. *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo.banc 2007); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo.banc 1998). The American Heritage Dictionary of the English Language (3rd ed.1996) defines "any" as "one, some, every, or all without specification." Merriam-Webster's New Collegiate Dictionary (9th ed.1987) defines "any" as "one or some indiscriminately of whatever kind." By choosing the term "any," the legislature intended the statute to be broad and inclusive.

The Legislature also chose the term "unconstitutional." In interpreting this term, the Court should consider what is ordinarily meant when a death sentence is unconstitutional. *Wolff Shoe*, 762 S.W.2d at 31. A good source of reference is how this Court and others have used the term "unconstitutional" regarding death sentences. In *State v. McFadden*, 216 S.W.3d 673, 678 (Mo.banc 2007), this Court quoted the Supreme Court regarding a due process violation that would make the death sentence

[4] Section 565.040 has not been amended since it was enacted in 1984.

unconstitutional "by reason of its adding an improper element to the aggravation scale."[5] *McFadden*, 216 S.W.3d at 678, *quoting Brown v. Sanders*, 546 U.S. 212, 220-21 (2006)(invalidated aggravator will make the death sentence unconstitutional unless another aggravator allows jury to give aggravating weight to the same facts). In *State v. McMillin*, 783 S.W.2d 82, 103 (Mo.banc 1990), this Court described how the Eighth Circuit found another defendant's death "sentence to be unconstitutional" because of the trial court's "arbitrary and capricious application of [§ 565.032]." *Id*., *discussing Newlon v. Armontrout*, 885 F.2d 1328, 1335 (8th Cir.1989) (death sentence was based on an aggravator that did not guide the jury's discretion in imposing death). See also *United States ex rel. Madej v. Schomig*, 223 F.Supp.2d 968 (N.D.Ill.2002) (**"**unconstitutional death sentence" cannot stand because defendant was denied his Sixth Amendment right to effective assistance of counsel,); *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir.1998) (discussing Supreme Court cases where "an unconstitutional death sentence" resulted from unanimity requirement for mitigating circumstances).

The United States Supreme Court has used the term "unconstitutional" to describe a range of violations. A death sentence can be unconstitutional if racial biases affected the sentencing determination. *McCleskey v. Kemp*, 481 U.S. 279, 282-83 (1987). A death sentence can be unconstitutional when the defendant may have been sentenced to death despite his lack of intent to kill the victim. *Stewart v. Texas*, 474 U.S. 866, 871

[5] This places a thumb "on death's side of the scale," *Brown*, 546 U.S. at 522, as does the use of visible shackles. *Deck*, 544 U.S. at 633.

(1985)(Marshall, J., and Brennan, J., dissenting from denial of cert). A death sentence may be unconstitutional if the jury had been led to believe that responsibility for the death sentence rested with the court, not the jurors. *Dugger v. Adams*, 489 U.S. 401, 413 (1989)(Blackman, J., joined by Brennan, Marshall and Stevens, JJ., dissenting)(arguing majority was allowing "unconstitutional death sentence" to stand) .

Because death sentences have been decreed "unconstitutional" on many grounds, and the Legislature did not tie the finding of unconstitutionality to any given constitutional amendment or provision, it is reasonable to believe that the Legislature did not intend to limit the statute's application to any one type of constitutional violation.

III. Under *Whitfield*, Deck Should Be Resentenced to Life Without Parole

In *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), this Court held that the defendant's right to a jury trial under the Sixth and Fourteenth Amendments was violated because the judge, not the jury, made the factual determinations on which the death sentence was predicated. Because Whitfield's death sentence was held to violate "his right under the Sixth and Fourteenth Amendments to a jury determination of the facts rendering him eligible for death, section 565.040.2 clearly applies." *Id.* at 271. The Court stressed that the statute:

> expressly states that a defendant whose sentence is vacated on constitutional grounds shall be resentenced to life in prison. It does not … state that a defendant shall be sentenced to life imprisonment only if his death sentence is held unconstitutional on the basis that the defendant was never really eligible for the

> death penalty in the first place, such as defendants who are mentally retarded or as to whom no statutory aggravator applies, and that defendants whose sentences are overturned on procedural grounds shall receive new trials. Rather, it states that "[i]n the event that *any death sentence imposed pursuant to this chapter is held to be unconstitutional*, the trial court ... shall sentence the defendant to life imprisonment."

Id. at 271, quoting Section 565.040.2 (emphasis added by this Court). Thus, the statute required that Whitfield be re-sentenced to life without parole. *Id.* at 271-72. *See also State v. Thompson*, 134 S.W.2d 32, 33 (Mo.banc 2004) (defendant must be re-sentenced to life imprisonment without parole, because he was sentenced to death by a judge in violation of his Sixth Amendment right to jury fact-finding); *State ex rel. Baker v. Kendrick*, 136 S.W.3d 491, 495 (Mo.banc 2004) (Limbaugh, J., dissenting) (*Whitfield* held that when a death sentence is held to be unconstitutional, the proper remedy was "the mandatory and ministerial imposition of a life sentence").

Whitfield's holding correctly applied the statute. Deck, too, should be sentenced to life without parole. The *Whitfield* Court emphatically stressed the statutory mandate that, "[i]n the event that *any death sentence imposed pursuant to this chapter is held to be unconstitutional*, the trial court ... shall sentence the defendant to life imprisonment." *Id.* The statute does not offer a choice. It does not provide that "defendants whose sentences are overturned on procedural grounds shall receive new trials" instead of being re-sentenced to life without parole. *Id.* at 271.

A. The Footnote

In a footnote, the Court attempted to limit the statute's application, positing that a defendant whose case is remanded based on "unrelated trial error of constitutional dimension" is not entitled to resentencing. *Id*. In contrast, the Court reasoned, Whitfield was entitled to resentencing, because he was denied the "right to be sentenced on determinations made by a jury." *Id*. at 271. Relief was warranted because "the very entry of the death sentence" was held to be unconstitutional. *Id.* at 271, fn.23. The sentence was imposed without "the very jury findings required for imposition of the death penalty under Missouri law." *Id.*

Deck is entitled to resentencing even under the footnote. The constitutional error Deck suffered in his 2003 penalty retrial was not "unrelated trial error." By "unrelated," the footnote apparently means that the trial error was unrelated to the defendant's sentence. But the error in Deck's case was related to the imposition of his sentence – the court's due process violation of forcing Deck to proceed to trial while visibly shackled presumptively prejudiced the jury's determination of his sentence. The Supreme Court rejected this Court's finding that Deck suffered no prejudice. *Deck*, 544 U.S. at 634. The visible shackling affected the reliability of the sentencing determination, by communicating to the jury that Deck posed a risk of future dangerousness. *Id*. at 633. It "inevitably undermine[d] the jury's ability to weigh accurately all relevant considerations-considerations that are often unquantifiable and elusive-when it determines whether a defendant deserves death." *Id*. It affected the sentence by placing a "thumb [on] death's side of the scale." *Id*.

The Legislature did not limit Section 565.040.2's applicability to death sentences that were unconstitutional because they were imposed in violation of the Sixth Amendment right to jury trial. Rather, under the statute's plain language, where <u>any</u> death sentence is held to be unconstitutional – regardless of which Amendment was violated – the defendant must be re-sentenced to life without parole. The statute does not state that resentencing is warranted for Sixth Amendment violations but not for Fifth Amendment violations.

Deck was denied a "basic element of the due process of law" protected by the Fifth and Fourteenth Amendments. *Deck*, 544 U.S. at 629. While Whitfield was denied jury determination of the facts making him eligible for the death penalty, *Whitfield*, 107 S.W.3d at 271, Deck was denied sentencing by a jury with the "ability to weigh accurately all relevant considerations" in making the death determination. *Deck*, 544 U.S. at 633. Both situations require resentencing to life without parole under Section 565.040.2.

<u>B. The Dissent</u>[6]

The dissent also draws distinctions that the Legislature did not. The dissent adds language in brackets to show what it <u>thinks</u> the Legislature intended. *Whitfield*, 107 S.W.3d at 274. It postulates that Section 565.040.2 applies only where a death sentence cannot constitutionally be imposed upon a particular offender, such as where the defendant is mentally retarded or incompetent; where insufficient evidence was presented to support the sole aggravating circumstance found by the jury; or where the sole

[6] This refers to the dissent by Judge Price, not Judge Limbaugh.

aggravating circumstance was unconstitutionally vague. *Id*.

If the Legislature had wanted to impose those limitations, it would have done so. The statute's plain and ordinary language mandates that where <u>any</u> death sentence imposed pursuant to chapter 565 is held unconstitutional, resentencing is mandated. As this Court acknowledged in *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 192 (Mo.banc 2006), "[t]his Court must enforce statutes as written, not as they might have been written."

Section 565.040.2 included one exception to the requirement that the defendant be re-sentenced to life without parole. If an aggravating circumstance was held to be inapplicable, unconstitutional, or invalid for another reason, this Court was authorized to remand for a new penalty phase trial. If the Legislature had wanted to include other exceptions or limitations, it would have done so. See *Jantz v. Brewer*, 30 S.W.3d 915, 918 (Mo.App.S.D.2000) (Legislature is presumed "to act intentionally when it includes language in one section of a statute but omits it from another").

<u>IV. The Rules of Statutory Construction Support Deck's Position</u>

Because Section 565.040.2 is not ambiguous, statutory construction is unnecessary. Only when the statute's language is ambiguous do the rules of statutory construction come into play. *United Pharmacal*, 208 S.W.3d at 909-10. But even if this Court applied the rules of statutory construction, Deck must prevail.

In discerning legislative intent to clarify an ambiguity, "the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or

consider the problem that the statute was enacted to remedy." *Id.* at 911-12. The provisions of the Act should be construed together and harmonized if possible. *Martinez v. State*, 24 S.W.3d 10, 18 (Mo.App.E.D.2000). Every word of the statute should be given meaning and effect and no words treated as surplus. *Spradlin v. City of Fulton*, 982 S.W.2d 25, 262 (Mo.banc 1998). The Legislature is presumed not to have inserted "idle verbiage or superfluous language in a statute." *Civil Service Com'n of City of St. Louis v. Members of Bd. of Aldermen*, 92 S.W.3d 785, 788 (Mo.banc 2003).

A. The Legislative History of Section 565.040.2 Shows an Intentional, Major Amendment of the Prior Statute[7]

In the early 1970's, Missouri had separate statutes for capital murder and first degree murder. *State v. Duren*, 547 S.W.2d 476, 477 (Mo.banc 1977). When the United States Supreme Court held that discretionary death sentencing procedures violated the Eighth Amendment, *Furman v. Georgia*, 408 U.S. 238 (1972), Missouri's death penalty procedure was deemed unconstitutional. *Duren*, 547 S.W.2d at 578. In 1975, to deal with the resulting confusion, Missouri's Legislature enacted Sections 559.011 and 559.013, RSMo Cum. Supp. 1975. *Id.* at 480 (Appendix at A2).

Section 559.011 apparently addressed the situation where capital murder was charged, but before trial and/or sentencing, the death penalty was declared unconstitutional. If the category of capital murder or the death penalty were declared to be unconstitutional, crimes that would have been capital murder would be deemed to be

[7] See Appendix for prior versions of the applicable statutes.

first-degree murder. The defendant would be punished as for first-degree murder but would not be eligible for parole for fifty years. *See e.g.*, *State ex rel. Douglas v. Keet*, 547 S.W.2d 481, 482 (Mo.banc 1977).

Section 559.013 apparently addressed cases where the defendant had already been found guilty of capital murder and sentenced to death (Appendix at A2). If a defendant were convicted of capital murder and sentenced to death, and later, either capital murder or the death penalty was declared unconstitutional, the defendant would be returned to the trial court for re-sentencing to life imprisonment, with eligibility for parole after fifty years imprisonment.

In 1977, Sections 559.011 and 559.013 were repealed and replaced with Section 565.016, RSMo Cum. Supp. 1977 (Appendix at A3). With slight changes, subsection 1 of Section 565.016 mirrored Section 559.011, while subsection 2 mirrored Section 559.013.

But in 1984, the Legislature replaced Section 556.016 with Section 565.040, RSMo Cum. Supp. 1984, and made dramatic changes (Appendix at A4). First, under the old statute, both subsections considered the situation where either capital murder or the death penalty was declared unconstitutional. The new statute, however, differentiated between the procedure to be followed if the death penalty was held to be unconstitutional (subsection one), and the procedure if any death sentence was held to be unconstitutional (subsection two). Second, subsection two of the old statute mandated resentencing to life imprisonment if a person was convicted of capital murder and given the death penalty, but later, either capital murder or the death penalty was declared unconstitutional. The

Legislature could have kept that language, but instead chose to mandate resentencing to life without parole when "any death sentence imposed pursuant to this chapter is held to be unconstitutional." Third, in the new statute, the Legislature included in each subsection one exception to the provision mandating automatic resentencing to life without parole. If any particular aggravating circumstance was held unconstitutional or invalid for another reason, the court should remand for resentencing or a new penalty phase (subsection one) or remand for a new penalty phase (subsection two).

"When the legislature amends a statute, it is presumed to have intended the amendment to have some effect." *Woods v. State*, 176 S.W.3d 711, 712 (Mo.banc 2005), citing *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo.banc 2003). This Court must presume that the Legislature intended the major changes to the statute. By choosing the words "any death sentence" and including just one exception to its mandate, the Legislature intended a broad application. If the Legislature had intended to limit the application to only certain types of constitutional violations, it would have so indicated.

Deck's interpretation of the statute is consistent with other provisions of chapter 565, most notably Section 565.035. Under Section 565.035, this Court can (1) affirm the death sentence; (2) resentence the defendant to life imprisonment without eligibility for parole; or (3) remand for a new penalty phase trial. Under Section 565.040.2, the Court would remand for a new penalty phase trial (as per §565.035.3) if a specific aggravating circumstance were held to be inapplicable, unconstitutional, or invalid for another reason. The Court would resentence to life imprisonment without parole (as per §565.035.2) if the death sentence were found to be unconstitutional.

B. The Rule of Lenity Mandates a Sentence of Life Without Parole

The rule of lenity dictates that any ambiguity in a criminal statute must be resolved against the State. *United Pharmacal*, 208 S.W.3d at 913; *Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906, 908 (Mo.banc 1999) (criminal statutes must be "construed strictly against the State and liberally in favor of the defendant"). It "gives a criminal defendant the benefit of a lesser penalty where there is an ambiguity in the statute allowing for more than one interpretation." *Id.* at 914 (Stith, J., concurring), quoting *Woods*, 176 S.W.3d at 712. "Under the rule of lenity, criminal statutes may not be extended by judicial interpretation so as to embrace persons and acts not specifically and unambiguously brought within their terms." *State v. Johnson*, 244 S.W.3d 144, 168 (Mo.banc 2008)(Wolfe, J., dissenting).

A statute is ambiguous if its language is subject to more than one reasonable interpretation. *State v. Graham*, 204 S.W.3d 655, 656 (Mo.banc 2006). Section 565.040.2, considered by its plain and ordinary language, is not ambiguous. Deck, however recognizes that *Whitfield* presented three differing interpretations of the statute. The first is the straightforward reading of the statute advanced by Deck, which was also advanced in the body of the majority opinion. *Whitfield*, 107 S.W.3d at 271-72. The second interpretation, suggesting that the statute applies only to Sixth Amendment violations, was advanced by the majority in a footnote. *Id.* at 271, fn. 23. The third interpretation, that the statute only applies if the defendant was ineligible for the death penalty, was set forth by the dissent. *Id.* at 273-74. Because there are differing interpretations, this Court must apply the rule of lenity, construe the statute liberally in

Deck's favor, and order that he be resentenced to life imprisonment without eligibility for parole.

This Court may believe it would be best if only certain types of constitutional violations warranted relief under Section 565.040.2. It may believe it would be an unwise policy to allow resentencing to life without parole whenever "any death sentence" is held to be unconstitutional. But as mentioned above, although a court may prefer a policy different from the policy set forth in the statute, "[c]ourts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language." *Kearney Special Road Dist.*, 863 S.W.2d at 842, citing *City of St. Louis*, 376 S.W.2d at 190. This Court must follow the clear and unambiguous language of Section 565.040.2 and order that Deck be resentenced to life imprisonment without parole. If the Legislature did in fact mean something other than what the statute's language plainly communicates, the Legislature is free to amend that statute anew. But until then, the Court must give effect to the language as written. *Spradlin*, 982 S.W.2d at 261.

ARGUMENT II

The trial court abused its discretion in overruling Deck's objections and sustaining the State's motions to strike Venirepersons Michele Coleman (#16) and Brian Ladyman (#50) for cause based solely on their reluctance to serve as foreperson, in violation of Deck's rights to due process, trial by a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, because the court followed the wrong standard for considering the State's motions to strike and these venirepersons were fully qualified to serve as jurors, in that each unequivocally stated that they could consider both punishments; their only "fault" was a reluctance to serve as foreperson and sign the verdict form for death.

This Court has held that a venireperson's reluctance to serve as foreperson, by itself, can justify a strike for cause. *State v. Smith*, 32 S.W.3d 532, 545 (Mo.banc 2000). It should reconsider this holding. Missouri is among the handful of states that exclude venirepersons based solely on their reluctance to sign the verdict form. The other states that routinely exclude venirepersons on this basis are Arkansas, Illinois, Ohio, South Carolina, and Tennessee. In those states, however, each juror is required to sign the verdict form, whereas, in Missouri, only the foreperson must sign it. In Missouri, where only the foreperson signs the verdict form and neither the jury's oath nor the instructions require that any given juror serve as foreperson, no sound reason supports exclusion on this basis. Excluding Venirepersons Coleman and Ladyman reached well beyond the

ambit of *Wainwright v. Witt*, 469 U.S. 412 (1985) and created a jury "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968) (violation of Sixth and Fourteenth Amendments).

I. Preservation and Standard of Review

Defense counsel objected when the State moved to strike Venirepersons Coleman and Ladyman for cause (Tr.447,449-51). Counsel included the issue in the motion for new trial (L.F.684-85,714-15). The issue is fully preserved.

Although the trial court has broad discretion in determining a prospective juror's qualifications, the trial court's ruling should be reversed when it is clearly against the evidence and is a clear abuse of discretion. *State v. Rousan*, 961 S.W.2d 831, 839 (Mo.banc 1998).

II. Venirepersons Coleman and Ladyman Were Qualified to Serve

A defendant facing a penalty phase retrial, like any other criminal defendant, is entitled to a fair and impartial jury. U.S.Const.,Amends.VI,XIV. The Sixth Amendment forbids the State to exclude venirepersons "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon*, 391 U.S. at 522. While the State has a legitimate interest in excluding jurors whose opposition to the death penalty would not allow them to follow their oath, a juror's mere opposition to the death penalty does not render him *per se* ineligible to serve. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). After all,

> …not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Id., *quoting Lockhart v. McCree*, 476 U.S. 162, 176 (1986). A juror may be excluded only when his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." *Witt*, 469 U.S. at 424; *see also Gray*, 481 U.S. at 658 (State may exclude only "those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths'").

> To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.

Gray, 481 U.S. at 658-59, citing *Witherspoon*, 391 U.S. at 523.

"The burden of proving bias rests on the party seeking to excuse the venire member for cause." *Witt*, 469 U.S. at 423; *McCree*, 476 U.S. at 170, fn.7. When the State wishes to exclude prospective jurors for cause because of their views on the death penalty, it must question them to make a record of the bias. *Gray*, 481 U.S. at 652, fn.3. The State's motion "must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve." *Id*.

Excluding Venirepersons Coleman and Ladyman violated Deck's right to trial by a fair and impartial jury, and the resulting death sentences would deprive him of his life without due process. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. Ms. Coleman and Mr. Ladyman stated that they could consider both punishments. Their only "fault" was their reluctance to serve as jury foreperson. The court's error in striking these venirepersons for cause warrants reversal. *Gray*, 481 U.S. at 659.

A. Michele Coleman

Ms. Coleman indicated that she could consider both sentences, but was unsure whether she could sign a death verdict (Tr.278-80). She did not want to be individually responsible for any death verdict:

Prosecutor: Ms. Coleman, if you're that juror in that situation, could you give meaningful, realistic, honest consideration to a sentence of death?

Ms. Coleman: Yes.

Prosecutor: Could you give that same sort of consideration to life imprisonment without the possibility of probation or parole?

Ms. Coleman: Yes.

Prosecutor: Could you, if you were the foreperson, sign a verdict?

Ms. Coleman: I don't know.

Prosecutor: Well, you rolled your eyes first, so I kinda thought in my experience, you might say I don't know. Because that can be the weight to your issue. I mean, some people feel sometimes that by signing that, I'm the only one

responsible for that. And is it fair to say that's kind of what's going through your mind?

Ms. Coleman: Yes.

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

Ms. Coleman: No.

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

Ms. Coleman: I understand.

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

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

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

Ms. Coleman: No, I can't.

(Tr.278-80). No further questions were asked of Ms. Coleman. The State moved to strike her for cause due to her reluctance to sign the verdict form (Tr.447). The court allowed the strike over defense counsel's objection (Tr.447).

B. Brian Ladyman

As the prosecutor later acknowledged, Mr. Ladyman "had no problem with either punishment" (Tr.450) but just could not sign the verdict form:

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

Mr. Ladyman: Yes, I could.

Prosecutor: Would you be able to, also consider or sign the verdict form, sentencing someone - or sentencing someone to die?

Mr. Ladyman: No.

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

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

Prosecutor: So while you might be able to deliberate and decide--

Mr. Ladyman: Yeah, I can decide.

Prosecutor: And you view that part as playing God?

Mr. Ladyman: Yes.

(Tr.335-36). Defense counsel then questioned Mr. Ladyman:

Defense counsel: Let me just start with the aggravating circumstances. Can you consider whether or not an aggravating circumstance exists or does not exist?

Mr. Ladyman: Uh-huh.

Defense counsel: Could you take that a step further and determine whether or not the aggravating circumstance could warrant the death penalty?

Mr. Ladyman: Yes.

Defense counsel: Could you then also take into account mitigating evidence that's been presented?

Mr. Ladyman: Yes.

Defense counsel: And again, a mitigator is a reason for life?

Mr. Ladyman: Yes.

Defense counsel: Would you then take it to the next step and weigh or consider the aggravating circumstances with the mitigating circumstances?

Mr. Ladyman: Yes.

Defense counsel: If you believe that the aggravating circumstance outweighed the mitigating circumstance could you consider the death penalty?

Mr. Ladyman: Yes.

Defense counsel: And again, like I stated to [another venireperson], under the law in the State of Missouri a jury is never, ever compelled – they're never forced to give the death penalty. But the weighing process that I described, your consideration, could you follow the instructions as they're given by Judge Kramer?

Mr. Ladyman: Yes.

Defense counsel: And again, could you consider the death penalty as a possible punishment in this case?

Mr. Ladyman: Yep.

Defense counsel: And could you consider life imprisonment as a possible punishment in this case?

Mr. Ladyman: Yeah.

(Tr.343-45). Later, defense counsel returned to Mr. Ladyman:

Defense Counsel: Mr. Ladyman, we also went through the process together. Unless there's something else that you want to mention to me or state that you believe would be helpful in our consideration to consider whether or not you would be appropriate for the jury?

Mr. Ladyman: [Shakes head.]

Defense Counsel: You're shaking your head. I'll take that as a no.

Mr. Ladyman: I'm just saying I ain't signing it. I don't want to be the-

Defense Counsel: Let me ask you about that. You talked about that you would not sign the verdict form.

Mr. Ladyman: Right.

Defense Counsel: Does the fact that you do not want to sign the verdict form, or that you don't want to serve as the foreman of the jury, does that prevent you from being a jury - a juror in this case, in the sense that - my question is in your mind, I can't be a part of that. I can't be a part of that? You are

there. But does that prevent you from giving a realistic consideration to the death penalty?

Mr. Ladyman: That's all the time.

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

Mr. Ladyman: No.

Defense Counsel: You could be one of the jurors?

Mr. Ladyman: Yeah.

Defense Counsel: You would just defer, as I understand it correctly, and have somebody else serve as a foreperson?

Mr. Ladyman: Right.

Defense Counsel: Correct me if I'm wrong, but you could realistically consider the death penalty?

Mr. Ladyman: Yeah.

Defense Counsel: And you could realistically consider the life in prison?

Mr. Ladyman: Yeah.

(Tr.360-62). The prosecutor admitted that Mr. Ladyman "had no problem with either punishment" but moved to strike him for cause because he could not sign the verdict form (Tr.450-51). The court overruled defense counsel's objection to the strike (Tr.451).

III. The Trial Court's Ruling Should Not Be Accorded Deference

Typically, the trial court's rulings in death qualification are granted great deference because of that court's "superior ability to interpret and evaluate a venireman's answers and demeanor." *State v. Simmons*, 944 S.W.2d 165, 171 (Mo.banc 1997). Here, these rulings should not be accorded such deference, because the judge: (1) incorrectly believed that, as long as he had enough other jurors who were qualified to serve, he could strike these jurors "without addressing the issue"; and (2) did not exercise his discretion, but rather believed the strikes for cause were mandated by Missouri Supreme Court precedent.

After death qualification questioning, the parties discussed whether a venireperson's inability to sign the verdict form, by itself, justified a strike for cause (Tr.446-47).[8] Defense counsel argued that the venireperson could only be removed by a peremptory, not a cause strike (Tr.446). When the court asked the parties for caselaw, the prosecutor advised that Missouri Supreme Court precedent supported the strike for cause (Tr.446). The court replied, "I think we will have enough without addressing that issue that are fully qualified, so I'm going to go ahead and sustain that Strike for Cause" (Tr.446-47). Later, the court summarily overruled defense counsel's similar objections to the cause strikes of Venirepersons Coleman and Ladyman (Tr.447,451).

The trial court's ruling should not be accorded deference, because the court followed the wrong standard. The court believed that, if there were enough other jurors

[8] The conversation first related to Venireperson 3, Christopher Hermann (Tr.446-47).

whose belief in the death penalty was not challenged, the court should err on the side of caution and allow the strike: "I think we will have enough without addressing that issue that are fully qualified, so I'm going to go ahead and sustain that Strike for Cause" (Tr.446-47). The court may have recalled this Court's admonition in *State v. Stewart*, 692 S.W.2d 295, 298-99 (Mo.banc 1985), that a defendant's right to a fair and impartial jury in guilt phase be protected by liberally removing jurors who were potentially biased against the defendant. The Court stressed "the wisdom of trial judges erring on the side of caution in ruling on challenges for cause in criminal cases where a replacement can easily be obtained for a prospective juror of doubtful qualifications." *Id*. at 299.

But the standard is radically different for death qualification. Excluding a capital juror who is qualified to serve mandates reversal. *Davis v. Georgia*, 429 U.S. 122, 123 (1976); see also *Gray*, 481 U.S. at 668; *Adams v. Texas*, 448 U.S. 38, 48 (1980). The trial court cannot remove venirepersons who have some qualms about the death penalty but are willing to follow the oath and instructions, just because other jurors are available without such qualms. Rather, the State may exclude only "those jurors who would frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Gray*, 481 U.S. at 658 (internal quotations omitted). To strike others for cause on any broader basis "unnecessarily narrows the cross section of venire members. It stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." *Id*. at 658-59, citing *Witherspoon*, 391 U.S. at 523.

Assuming the court actually addressed the issue, contrary to its statement (Tr.446-47), the trial court's rulings still should not be accorded deference, because the court exercised no discretion. The rulings were based solely on the court's belief that either (a) it could remove these venirepersons because there were other qualified jurors; or (b) under the law, a venireperson's refusal to sign the verdict form *per se* justified a strike for cause (Tr.446). Those rulings did not involve interpretation and evaluation of the venirepersons' answers and demeanor so as to warrant deference. The trial court believed it was ruling on matters of law. Thus, this Court must conduct its own *de novo* review. *State v. Yeager*, 95 S.W.3d 176 (Mo.App.W.D.2003); see also *In re Smythe*, 254 S.W.3d 895, 897 (Mo.App.S.D.2008) ("No deference is to be accorded to a trial court's rulings on matters of law").

IV. Refusal to Sign the Verdict Form, Standing Alone, Does Not Justify a Strike for Cause

This Court has repeatedly held that a venireperson's inability to sign the verdict form, coupled with other equivocation about his ability to serve, can justify a strike for cause. *See, e.g.*, *State v. Johnson*, 244 S.W.3d 144, 158 (Mo.banc 2008); *State v. Taylor*, 134 S.W.3d 21, 29-20 (Mo.banc 2004); *State v. Christeson*, 50 S.W.3d 251, 264-65 (Mo.banc 2001). But, in *State v. Smith*, 32 S.W.3d 532, 545 (Mo.banc 2000), this Court held that a venireperson's inability to sign a death verdict by itself was enough to justify a strike for cause. It provided two rationales. First, the Court held that a juror's refusal to sign the death verdict "hints at an uncertainty underlying the juror's determination to

consider the full range of punishment." *Id*. Second, the Court reasoned that, "No panel of twelve jurors, all of whom decided that he or she could not sign a verdict form assessing the death penalty against the defendant, could be said to have the unimpaired ability to consider the appropriateness of the death penalty." *Id*.

A. First Justification: Hints at Uncertainty

Although Ms. Coleman and Mr. Ladyman did not want to sign the verdict form, none of their answers suggested any uncertainty about their ability to impose a death sentence. Ms. Coleman affirmatively stated that she could "give meaningful, realistic, honest consideration to a sentence of death" (Tr.278). Mr. Ladyman stated six times that he could consider death as a possible punishment, and the prosecutor agreed that Mr. Ladyman could consider both punishments (Tr.335-36,344-45,361-62,450). The venirepersons' only uncertainty was in signing the verdict form, not in following the court's instructions or voting for a death sentence.

Striking venirepersons for cause based on reluctance to sign the verdict form is analogous to the type of strike condemned by the Supreme Court in *Adams v. Texas*, 448 U.S. 38 (1980). The *Adams* Court held that the trial court improperly excluded jurors by the "possibility" they would be affected by the death penalty. *Id*. at 49. "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths." *Id*. at 50. It was error to "exclude

jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." *Id*. at 50-51.

The responses by Venirepersons Coleman and Ladyman did not hint at uncertainty about imposing the death penalty. But, even if there were a hint of uncertainty, that would not be enough. Mere hints of bias are insufficient to justify a strike for cause – the bias must be demonstrable. In *Witt*, 469 U.S. at 424-25, the Court held that, while bias need not be proven with "unmistakable clarity" to excuse a juror for cause based on his views on the death penalty, the trial court should be "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id*. at 426.

A venireperson who merely hints at bias is removable by a peremptory strike, not one for cause. "Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). *See also Smith v. State*, --- So.2d ----, 2000 WL 1868419, at *4 (Ala.App.2000)(overturned on other grounds)("Even if there were a hint of bias, we would agree with the defense counsel's assessment: it would not be ground for a challenge for cause, but would more properly be a reason for a peremptory challenge"); *State v. Scher*, 650 A.2d 1012, 1019 (N.J.App. Div.1994) ("Responses to questions on *voir dire* that indicate bias may result in a juror being excused for cause. Hints of bias short of that required for a challenge for cause may be combatted by exercise of a peremptory challenge").

B. Second Justification: If All the Jurors Refused to Sign the Verdict Form, There Could Be No Verdict

The Court's second rationale is that, if all twelve jurors refused to serve as foreperson and sign the verdict form for death, the jury would not have an "unimpaired ability to consider the appropriateness of the death penalty." *Smith*, 32 S.W.3d at 545. It is true that if all twelve members of the jury refused to sign the verdict form for death, the State's interest in seeking a death sentence would be frustrated. But it is manifestly unfair to exclude the small minority of jurors who feel that way but are otherwise fully capable of serving, because of some hypothetical, highly improbable possibility.

It certainly cannot be a justification here, since the court knew when it removed these venirepersons that this hypothetical situation would not be a problem. Of the 55 venirepersons questioned in death qualification, 46 indicated they would have no problem signing the verdict form (Tr.269-86,314-30,336-37,378-91,415-29). Five venirepersons had views on capital punishment that obviously excluded them from serving (Tr.281-82,284-85,327,416-18,427-29,431-32). Two venirepersons indicated unwillingness to serve as foreperson, coupled with other potential issues (Tr.270-72,293-94,330-35,339-43). Two others – Ms. Coleman and Mr. Ladyman – indicated just an unwillingness to serve as foreperson (Tr.278-80,335-36,343-45,360-62). Clearly, had the court seated Ms. Coleman and Mr. Ladyman as jurors, one of the other ten jurors could have signed the verdict form, and the State's interest in administering the death penalty scheme would not have been frustrated.

In any given criminal jury, some jurors, if asked, might refuse to serve as foreperson. This could stem from any number of factors, like shyness, unwillingness to lead, or resistance to placing one's name on a verdict which would send someone to prison. That unwillingness does not render those jurors ineligible from jury service. That question typically is not even asked in guilt phase. It is only asked in penalty phase to improperly cull jurors fully capable of serving but who lean toward imposing life sentences or those who, understanding the magnitude of the life-or-death decision they will undertake, "would invest their deliberations with greater seriousness and gravity." *Adams*, 448 U.S. at 49.

IV. Missouri Stands Alone

Undersigned counsel could find no other state that allows strikes for cause of venirepersons solely because the venirepersons will not sign the verdict form as foreperson, where neither the jurors' oath nor instructions require any given juror to serve as foreperson. Some jurisdictions expressly reject this view. Others allow strikes for cause when the venireperson's inability to sign the verdict form is coupled with other indications that he could not follow his oath or instructions. Others allow strikes for cause on this ground, but only because in those states, every juror must sign the verdict form. But none, except Missouri, allows strikes for cause of venirepersons whose only "fault" is their reluctance to sign the verdict form as foreperson and no law, oath, or instruction requires them, individually, to do so.

The Court of Appeals for the Fifth Circuit has expressly rejected Missouri's view, holding that a venireperson's reluctance to sign the death verdict, by itself, does not justify a strike for cause. In *Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir.1981), several venirepersons stated that they could consider both punishments, but could not write out the death verdict, and each was struck for cause solely on that basis. Reversing, the appellate court rejected the State's argument that the venirepersons were ineligible since "any juror potentially could be named as foreman and be required to sign the verdict form." *Id*. It also rejected the notion that "service as foreman is among every juror's duties." *Id*. There was no Georgia law "requiring any juror to serve, against his will, as foreman of the jury in any case." *Id*. The venirepersons affirmatively responded that they could vote for a death sentence, and nothing indicated that they were unable to decide punishment after viewing the evidence or to follow the court's instructions. *Id*.[9] *See also Martini v. Hendricks*, 348 F.3d 360, 367-68 (3rd Cir.2003) (assuming that "a juror has no obligation to serve as foreperson" but holding that venireperson's inability to do so or announce verdict in open court can justify strike <u>if coupled with</u> other factors); *Isaacs v. State*, 386 S.E.2d 316, 328-29 (Ga.1989)("service as foreperson is not among every juror's duties").

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[9] Although *Alderman* was decided before the *Witt* standard was enunciated, the Fifth Circuit had the benefit of *Adams*, 448 U.S. at 45, from which the *Witt* standard originated. *See Witt*, 469 U.S. at 424 (acknowledging standard set forth in *Adams* was proper).

In *People v. Chacon*, 447 P.2d 106, 110 (Cal.1968), the court struck three venirepersons for cause because they stated they would be unable to sign the verdict form as foreperson. Reversing, the California Supreme Court held that the responses "indicated that they would not undertake what they regarded as the greater moral burden of the jury foreman, but it did not show that they would have refused to vote for the death penalty." *Id*.

That court reiterated the principle more recently, in *People v. Bramit*, --- Cal.Rptr.3d ---, 2009 WL 2046168, at *7 (Cal.7/16/09). There, on her questionnaire, a venireperson gave equivocal answers about the death penalty and stated she could not sign the verdict form as foreperson. *Id*. The prosecutor asked if she could vote for death and then affirm that vote in open court. *Id*. When the venireperson stated that she did not know, the court granted the State's motion to strike her for cause. *Id*. The California Supreme Court reiterated that refusal to sign the verdict form merely revealed that venirepersons "would not undertake what they regarded as the greater moral burden of the jury foreman, but it did not show that they would have refused to vote for the death penalty." *Id*., quoting *Chacon*, 447 P.2d at 110. But it held that the State's strike was permissible, because it was not based solely on the venireperson's inability to sign the verdict form, but rather her inability to vote for death and then affirm that vote in open court, as state law required. *Id*. at *7, fn.6. Although the defendant complained that the venireperson should have been told that she would not be required to serve as the foreperson, the court rejected the argument, faulting defense counsel for not raising the issue at trial. *Id*. at *8.

Five other states – Arkansas, Illinois, Ohio, South Carolina, and Tennessee – routinely disqualify venirepersons from service if they cannot sign the verdict form.[10] But in those states, every juror must sign the verdict form.[11] Thus, in those states, if even one juror were unable to sign the verdict form, no death verdict can be returned, frustrating the State's interest in seeking a death sentence.

In contrast, Missouri requires only the foreperson to sign the verdict form. The instructions tell the jurors that, once they retire to deliberate, they will select one of their number to act as foreperson (L.F.602). If the jurors decide to return a death verdict, that foreperson will sign the verdict form (L.F.602). Nothing in the juror's oath or instructions requires any given juror to serve as foreperson. No Missouri law requires every juror to be able to sign the verdict form.

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[10] *See, e.g.*, *Anderson v. State*, 163 S.W.3d 333, 347 (Ark.2004); *People v. Ganus*, 594 N.E.2d 211, 215 (Ill.1992); *State v. Davis*, 880 N.E.2d 31, 51 (Ohio 2008); *State v. Holmes*, 464 S.E.2d 334, 336-37 (S.C.1995); *State v. Austin*, 87 S.W.3d 447, 473 (Tenn. 2002).

[11] *Anderson v. State*, 163 S.W.3d 333, 347 (Ark.2004); *People v. Williams*, 736 N.E.2d 1001, 1022 (Ill.2000); *State v. Cassano*, 772 N.E.2d 81, 99 (Ohio 2002); *State v. Woods*, 676 S.E.2d 128, 132 (S.C.2009); *State v. Bennett*, 493 S.E.2d 845, 847 (S.C.1997); *State v. Keen*, 31 S.W.3d 196, 223 (Tenn.2000).

V. Reversal is Warranted

"[A] criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." *Uttecht v. Brown*, 551 U.S. 1, 127 S.Ct. 2218, 2224 (2007), *citing Witherspoon*, 391 U.S. at 521. The State used reluctance to sign the death verdict as a pretext to strike for cause venirepersons who were fully qualified to serve but merely recognized the gravity of imposing a death sentence on another human being. Meanwhile, the court misunderstood the standard by which it should evaluate the State's motions to strike. It did not address whether these venirepersons could properly be removed for cause, because it believed other jurors – without conscientious scruples – could be swapped for Ms. Coleman and Mr. Ladyman. As a result, Deck was sentenced to die by a "tribunal organized to return a verdict of death." *Gray*, 481 U.S. at 668.

This Court must vacate the sentences and resentence Deck to life without parole under §565.040.2; if this Court rejects Argument I, *supra*, he requests a new sentencing trial.

ARGUMENT III

The trial court erred and abused its discretion in overruling defense counsel's objections and letting the State argue that Deck's 23-year-old prior conviction for aiding an escape from a county jail could be considered evidence of bad prison conduct and/or future dangerousness and thereby violated Deck's right to due process, a fair trial, confrontation, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, §565.005.1;Rule 25.03, because Deck was sentenced to die based on aggravating "evidence" of which he had no notice and no opportunity to rebut, in that while the State provided notice that it would present evidence of the conviction, it failed to provide notice that it would use the fact of the conviction to argue that Deck had bad prison behavior and would be a danger to others in the future.

Section 565.005.1, RSMo 1994, requires that the State, upon request, provide the defense "a list of all aggravating or mitigating circumstances … which the party intends to prove at the second stage of the trial." It must provide this notice "[a]t a reasonable time before the commencement of the first stage" of any capital trial. *Id*.; see also Rule 25.03.

> The defendant is entitled, at some point, to require the State to indicate the aggravating circumstances as permitted by law, which the State intends to submit to the jury for its consideration. In this case, that point was the

instruction conference before the penalty phase when the trial court required the State to offer its instructions.

State v. Debler, 856 S.W.2d 641,656-58 (Mo.banc 1993); *State v. Thompson*, 985 S.W.2d 779, 792 (Mo.banc 1999); *State v. Ervin*, 979 S.W.2d 149, 158 (Mo.banc 1998). After that point, evidence is "no longer relevant or admissible" and its admission is error. *Id*.

Before trial, the State provided Deck notice that it would offer evidence of his prior convictions, including a 1985 conviction for aiding an escape (2nd L.F.117; L.F.155; St.Ex.57). That conviction stemmed from a charge that Deck obtained a saw blade and used it to help two other inmates cut through the county jail bars (Tr.677; St.Ex.57). At trial, defense counsel objected to State's Exhibit 57, a certified copy of the information and sentence/judgment, because the State had not given notice that it would try to prove Deck had bad jail behavior (Tr.678-79). The court admitted the exhibit as a prior conviction (Tr.677-79). The State presented no further evidence regarding this conviction or any other escape-related offense or conviction. The jury never viewed the exhibit. Thus, the jury knew Deck was convicted of aiding an escape, but none of the crime's details.

Although the State gave no notice that it would use the 1985 conviction to argue future dangerousness or bad prison behavior, the prosecutor argued in closing that the jury should consider Deck's prior conviction as evidence that Deck would try to escape, would be a danger to guards or other inmates, and that death sentences were necessary to protect the rest of society:

> Prosecutor: You're our sheepdogs, that by your verdict, can protect the rest of society. While he's going to be in prison for the rest of his life if you let

him live, remember, he knows how to escape. He aided and abetted others trying to.

Defense Counsel: Objection; not a noticed aggravator.

The Court: Overruled.

Defense Counsel: Irrelevant.

The Court: Overruled.

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

(Tr.968-69). He also urged the jurors to consider "all [Deck's] prior escapes" (Tr.949). The issue was raised in the motion for new trial (L.F.691,696).

A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence, and in controlling the scope of closing arguments. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005); *State v. Edwards*, 116 S.W.3d 511, 537 (Mo. banc 2003). Its rulings will not be overturned absent a clear abuse of discretion. *Id*. A trial court abuses its discretion regarding the admission of evidence when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882,883-84 (Mo.banc1997). The court abuses its discretion if it allows argument that is plainly unwarranted and that has a decisive effect on the jury,

that is, "when it is reasonably probable that, absent the argument, the verdict would have been different." *State v. Baumruk*, 280 S.W.3d 600, 618 (Mo.banc. 2009).

The State should have been required to provide notice that it would use Deck's 1985 conviction to prove future dangerousness and bad prison conduct. In neither of the prior two trials had the State used the conviction this way. In the first trial, the State stressed Deck's prior convictions to argue that Deck could not stay out of trouble when he was out of prison and that he was "incorrigible" (1st Tr.949). At the second trial , it argued Deck's criminal history and that he committed these crimes shortly after his prison release (2nd Tr.547-48).

Had defense counsel known that the State would use the prior conviction to argue Deck's future dangerousness if sentenced to life without parole, counsel could have presented rebuttal evidence. Perhaps, although he pled guilty, there were mitigating factors. Deck also could have presented evidence regarding the difference in security measures employed by the county jail and the maximum security prison where he would be incarcerated if sentenced to life without parole. Deck could have presented evidence that he would not pose a future danger.

This case is distinguishable from *State v. Bucklew*, 973 S.W.2d 83, 96 (Mo.banc 1998). Bucklew claimed that the State did not give notice that it would argue his risk of future dangerousness. *Id*. More than nine months before trial, the State listed the statutory aggravators it would pursue. *Id*. It also indicated it would present the testimony of the endorsed witnesses regarding the circumstances of the crime and "the anti-social and criminal history of the defendant" to prove the aggravating circumstances. *Id*. The

State also provided a list of non-statutory aggravating circumstances, including prior convictions and charges, like Bucklew's escape from a county jail while awaiting trial for first-degree murder. *Id*. This Court held that "[i]t is reasonable to infer that a person who escaped from jail while awaiting a first-degree murder trial and who has a long criminal record would not suffer confinement well." *Id*. The State alleged sufficient facts and used the terms "anti-social and criminal history," giving Bucklew notice of its intent to argue future dangerousness. *Id*.

Here, in contrast, the State's notice merely incorporated by reference "all prior discovery, endorsements, notice of aggravating circumstances and notice to seek the death penalty" filed and disclosed to Deck through prior counsel (L.F.155). Deck knew the State would move to admit certified copies of his prior convictions (2nd L.F.117; L.F.155). But he had no clue that it would use his 1985 conviction for aiding an escape to argue that he must be executed or he would escape and/or hurt guards or other inmates. The State never made this argument in the prior two trials. The argument is not a reasonable inference from the evidence presented. *See* Arg. IV, *infra*.

The State's failure to notify Deck that it would use the conviction to argue future dangerousness and bad prison conduct violated §565.005.1 and Rule 25.03 and denied Deck due process, a fair trial, confrontation, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. In *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994), the defendant was denied due process by the trial court's refusal to advise the jury that he would never be eligible for parole, after the State argued his future dangerousness as the basis for a death sentence.

The plurality stressed that the defendant was prevented from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death." *Id*. at 165. By refusing him the "ability to meet the State's case against him," the State denied Simmons "one of the hallmarks of due process in our adversary system." *Id*. at 175 (O'Connor, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.); *Gardner v. Florida*, 430 U.S. 349 (1977)(due process violation by court's use, in sentencing defendant, of portions of a pre-sentence investigation report never disclosed to the defense). Here, the State was permitted to argue future dangerousness in prison, yet, because the defense was given no notice, Deck was unable to rebut this information that the jury undoubtedly considered, in violation of the Fifth and Fourteenth Amendments.

In the capital context, the need for reliable sentencing is paramount. The Eighth Amendment "requires provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.'" *Simmons*, 512 U.S. at 172 (Souter and Stevens, J.J., concurring), quoting *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). "Because the death penalty is unique 'in both its severity and its finality,' . . . we have recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998). The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Deck was prejudiced by the State's use of his prior conviction to argue future dangerousness. The issue of future dangerousness is vitally important for capital

sentencing juries. "[P]robably the *bulk* of what most sentencing is all about" is a determination of the defendant's "acceptance of responsibility, repentance, character, and future dangerousness." *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting). In *Jurek v. Texas*, 428 U.S. 262, 275 (1976), Justice Stevens recognized that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." In some states, future dangerousness is an aggravating circumstance that must be found by the jury beyond a reasonable doubt. *Bland v. State*, 4 P.3d 702, 724 (Okla.Crim.App.2000) ("continuing threat" aggravator); *Porter v. Com.*, 661 S.E.2d 415, 436 (Va.2008); *see also* Tex.Code Crim.Proc.Ann.,Arts.37.071(b)(2).

Social science studies have confirmed that the defendant's future dangerousness is a crucial aspect of capital sentencing deliberations. *See* Bowers, Sandys & Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L.Rev. 1497, 1503 (2004) (jurors in multi-state Capital Jury Project study reported that a "great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness"); Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum.L.Rev. 1538, 1560 (1998) (analyzing South Carolina Capital Jury Project data and concluding "[f]uture dangerousness appears to be one of the primary determinants of capital-sentencing outcomes"); Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L.Rev. 1, 6 (1993) (South Carolina study data reveals that "[o]ther than facts about the crime, questions related to the defendant's

dangerousness if ever back in society are the issues jurors discuss most. Discussion of dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it.").

Here, the State received a free pass on this crucial issue. It argued that the jury should consider Deck's prior conviction as evidence that Deck would try to escape, would be a danger to the guards or other inmates, and that death sentences were necessary to protect the rest of society (Tr.968-69). Deck had no notice that the State would use a twenty-three year-old conviction – when he procured a saw blade and helped other inmates saw through the county jail bars – to argue that he would try to escape from a maximum security prison and harm other inmates or guards. Deck was convicted based on information of which he had no notice and no opportunity to rebut.

This Court must vacate the sentences and resentence Deck to life without parole under §565.040.2; if this Court rejects Argument I, *supra*, he requests a new sentencing trial.

ARGUMENT IV

The trial court abused its discretion in overruling defense counsel's objections and allowing the prosecutor to urge the jurors to believe that they had a duty to the victims' grandchildren to return sentences of death, and plainly erred in failing to intercede *sua sponte* when the prosecutor urged the jurors to think about themselves lying on the bed for ten minutes at gunpoint in determining whether the crimes involved depravity of mind; argued that Deck had helped people who were serving sentences of life without parole to escape, that Deck had escaped multiple times, and that death sentences were needed to keep Deck from harming guards and other inmates; and that the jurors owed a responsibility to Deck's future victims to give death, in violation of Deck's rights to due process, a trial before a fair and impartial jury, and a fair and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo. Const.,Art.I,§§10,18(a),21, because the prosecutor's arguments were improper and highly prejudicial, in that he improperly appealed to sympathy, engaged in improper personification, and misstated and reached beyond the evidence presented to obtain death verdicts.

The State intentionally and repeatedly engaged in improper closing arguments. Over objection, the prosecutor – in his last words to the jury – urged the jurors to believe that they would be accountable to the victims' grandchildren if they did not return death verdicts. The prosecutor also urged the jurors, in determining whether the crimes involved depravity of mind, to think about themselves lying on the bed for ten minutes at

gunpoint. The prosecutor also misstated the evidence presented, urging the jurors to believe that Deck had helped people who were serving sentences of life without parole to escape, that Deck had multiple escapes, and that death sentences were needed to keep Deck from harming guards and other inmates. It argued that the jurors owed a responsibility to Deck's future victims to give death. These arguments were plainly unwarranted and must have had a decisive effect on the jury. They deprived Deck of due process, a fair sentencing trial, and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21.

I. Preservation and Standard of Review

Defense counsel objected, based on vouching, personalization and lack of relevance, to the prosecutor's argument urging jurors to believe that they would be accountable to the victim's grandchildren (Tr.969-70). Counsel included the issue in the motion for new trial, fully preserving the issue for appeal (L.F.695-96). Counsel did not object to the remaining arguments, so as to those arguments, Deck requests plain error review.[12] Rule 30.20.

The trial court maintains broad discretion in controlling the scope of closing arguments. *State v. Edwards*, 116 S.W.3d 511, 537 (Mo.banc 2003). It abuses its

[12] Counsel objected to the State's argument that Deck knew how to escape and had helped others escape, on the ground that it was not a noticed aggravator, but not that it misstated the evidence and misled the jurors (Tr.968).

discretion if it allows argument that is plainly unwarranted and has a decisive effect on the jury, that is, "when it is reasonably probable that, absent the argument, the verdict would have been different." *State v. Baumruk*, 280 S.W.3d 600, 618 (Mo.banc 2009); *State v. Newlon*, 627 S.W.2d 606, 616 (Mo.banc 1982). If counsel fails to object, the conviction will be reversed if the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. *Baumruk*, 280 S.W.3d at 618.

The trial judge must maintain decorum in the courtroom. *United States v. Young*, 470 U.S. 1, 10 (1985). He is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States*, 289 U.S. 466, 469 (1933). He must exercise his discretion to control prosecutorial misconduct *sua sponte*, if need be, to ensure that every defendant receives a fair trial. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App.E.D.1992).

Closing arguments in capital cases must receive a "greater degree of scrutiny" than in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). They are "particularly important in capital cases, where there are unique threats to life and liberty." *State v. Barton*, 936 S.W.2d 781,783 (Mo.banc 1996).

II. The Closing Arguments Violated Deck's Constitutional Rights

The Fifth Amendment mandates that no person shall be deprived of life, liberty or property without due process of law. Under the Sixth Amendment, the defendant is entitled to an impartial jury and to confront the witnesses against him. These rights are applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395

U.S. 784, 795 (1969) (Fifth Amendment); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment); *see also* Mo.Const.,Art.I,Secs.10,18(a).

Improper closing arguments can affect a trial's fairness, *United States v. Young*, 470 U.S. 1, 20 (1985), and thus deny the defendant due process. Arguments that reach beyond or misstate the evidence also deny due process, because they urge the jury to consider facts not presented in court that the defendant had no opportunity to rebut. *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994)(due process violation because defendant was prevented from rebutting information that jury "considered, and upon which it may have relied, in imposing the sentence of death"). They also deny the defendant his Sixth Amendment right to confront evidence the jury will consider in reaching its verdict.

A. Holding Jurors Accountable to Victims' Grandchildren

The final words of the prosecutor's rebuttal argument urged the jurors to believe they would be accountable to the victims' grandchildren through their death verdicts:

Prosecutor: The last thing I'm gonna tell you and say to you is this: I - I've done this job long enough, and this isn't about me - but I've done this long enough that on occasion, five years after a case like this has gone--

Defense Counsel: Objection; vouching, personalization.

The Court: Sustained.

Prosecutor: Often times, I'll get a phone call later on from a family member, and they'll say--

Defense Counsel: Objection; relevance, same objection.

The Court: Overruled.

Prosecutor: And they'll say to me, to my granddaughter, I've told them about my loved one that was murdered. They want - they want to know what happened. Can you explain it to them.

There are 19 grandchildren, 19 great-grandchildren, and I don't know how many more there'll be. And some day these people are going to be told about James and Zelma Long. And they're gonna be told about what wonderful parents they were, how they liked to fish. How their Grandmother got her masters and taught. They're gonna be told about these wonderful people. And you know the question they're gonna ask, is they're gonna say well, where are they now? They're gonna have to be told about this.

And then they're gonna ask another question, and that question I get to some - unfortunately sometimes explain is was justice done? When you go up there, you'll tell us if justice is done.

Now, I'm gonna sit down and wait for your answer, so I can tell them. (Tr.969-70).

This argument improperly appealed to sympathy and urged jurors to consider matters outside the evidence in reaching their verdicts. Prosecutors must "refrain from argument which would divert the jury from its duty to decide the case on the evidence." Standards for Criminal Justice, Standard 3-5.8(d) (A.B.A.2000). "[T]he jury's decision

must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *State v. Boyd*, 319 N.E.2d 189, 197 (N.C.1984). "Any effort by the prosecutor in his closing argument to shame jurors or attempt to put community pressure on jurors' decisions is strictly prohibited." *Cantrell v. Com.*, --- S.W.3d ----, 2009 WL 1819475, at *7 (Ky.6/25/09).

"[T]he jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged…. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Considering the consequences of a verdict "invites [the jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id.*

The prosecutor's argument here is just like an argument that created reversible error in *Sheppard v. State*, 777 So.2d 659, 661 (Miss.2000). The prosecutor there told the jury that if they voted to acquit, he wanted them to call him and explain why they found defense witnesses credible, so he could explain it to the victim's family. *Id*. The Mississippi Supreme Court condemned the argument:

> [T]he only legitimate purpose of the statements by the prosecutor was to suggest to the jury that it would be accountable to the prosecution and the victim's family for its decision and that the jurors could be required to justify a verdict of not guilty…. The prosecutor's remarks … had nothing to do with

> the evidence presented during the trial, nor with any reasonable conclusions or inferences to be drawn from the evidence presented in the case.

Id. at 661-62. Finding reversible error, the court concluded, "[t]he natural and probable effect of the prosecutor's improper statements was the creation in the minds of the jurors of an extra-legal burden of accountability to the State prejudicial to the rights of the accused." *Id*. at 662.

Similarly, in *Commonwealth v. Torres*, 772 N.E.2d 1046, 1050-51 (Mass.2002), the prosecutor argued, "She called out, 'Daddy help me.' But her father was dead. You could answer the call for justice and hold [the defendant] accountable for what he did." The argument "managed to combine an improper exhortation that the jurors vindicate the victim with an improper appeal to sympathy through the suggestion that, although the victim's father could not help her, the jurors could." *Id*. at 1051; see also *Commonwealth v. Cobb*, 526 N.E.2d 1081 (Mass.1988) (arguments should not suggest that jury use guilty verdict to vindicate victim).

B. Improper Personification

The prosecutor improperly personalized, urging the jurors to place themselves in the victims' shoes:

> Fourth - or three, depravity of mind. Is this the act of a depraved mind? And the instruction goes a little bit further than this. But it tells you what depraved mind in this situation means. But he rendered these people helpless before he

> killed them. And I would ask you to think about this: laying on a bed for ten minutes at gunpoint, rendered you helpless.

(Tr.949).

Encouraging the jury to consider their helplessness if lying on a bed for ten minutes at gunpoint was improper personalization. It was designed solely to arouse personal animosity toward Deck and attain death sentences based on fear and anger, not reason. Asking the jurors to place themselves in the victims' shoes is improper personalization that "can only arouse fear in the jury." *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc 1995). Inflammatory arguments like this "are always improper if they do not in any way help the jury to make a reasoned and deliberate decision to impose the death penalty." *State v. Rhodes*, 988 S.W.2d 521, 528 (Mo.banc 1999), *citing State v. Taylor*, 944 S.W.2d 925, 937 (Mo.banc 1997).

In *Storey*, 901 S.W.2d at 901 (Mo.banc 1995), the State urged jurors to imagine having their heads yanked back by the hair and feel a knife severing their throats. *Id*. This Court found that argument grossly improper, with prejudice "undeniable." *Id*.

So, too, in *Rhodes*, 988 S.W.2d at 528, the State suggested that the jurors, while deliberating, act out what the victim experienced when she was killed. It urged each juror to feel what it is like to be beaten on the floor, hands tied behind your back, nose broken, and to have your head pulled back so hard that it snaps your neck. *Id*. The prosecutor acted out the scene as he spoke. *Id*. This Court recognized the argument was "condemned and uniformly branded improper" since a juror placing herself in the victim's shoes "would be no fairer judge of the case than the … victim herself." *Id*.,

citing Faught v. Washam, 329 S.W.2d 588, 602 (Mo.1959). The argument, "designed to cause the jury to abandon reason in favor of passion," was improper, warranting a new sentencing trial. *Rhodes*, 988 S.W.2d at 528-29.

C. Prejudicial Misstatements of the Facts

The prosecutor analogized the jurors to sheepdogs, the victims and the rest of society to sheep, and Deck to a wolf (Tr.966-68). He then misstated the evidence, arguing that Deck had helped people serving life without parole sentences to escape (Tr.968-69). While the court, at the State's request, admitted a sentence and judgment showing Deck's 1985 conviction for aiding an escape, the State introduced no further evidence detailing that crime (Tr.679-80;St.Ex.57). The prosecutor advised the court that Deck was charged with procuring a sawblade and helping two inmates cut through the bars in the county jail (Tr.678), but the jury did not hear those facts, and no evidence was presented that the other inmates were serving life without parole or that they actually escaped. Also, although no evidence was presented that Deck ever hurt anyone in prison, the prosecutor argued that a death sentence was necessary to prevent Deck from hurting guards and other inmates:

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

(Tr.969). The prosecutor also urged the jurors to consider "all [Deck's] prior escapes" (Tr.949), knowing that the jury heard evidence of only one aiding an escape conviction.

Although counsel has wide latitude in closing argument, the argument must not go beyond the evidence presented, misstate the evidence, or introduce irrelevant and prejudicial matters. *State v. Rush*, 949 S.W.2d 251, 256 (Mo.App.S.D.1997). Closing argument must conform to the evidence and the reasonable inferences fairly drawn from the evidence. *State v. Hill*, 866 S.W.2d 160, 164 (Mo.App.S.D.1993). A prosecutor's attempts to "inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct." *State v. Burnfin*, 771 S.W.2d 908, 912 (Mo.App.W.D.1989).

It is highly prejudicial for a prosecutor to argue facts outside the record, because the jury is likely to give those assertions much weight when they should carry none. *Storey*, 901 S.W.2d at 900. Argument outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes - properly - that the prosecutor has a duty to serve justice, not merely to win the case." *Id*.

The prosecutor unfairly led the jurors to believe Deck helped people escape who were serving sentences of life without parole and, because he once aided in an escape, he "knows how to escape." He falsely led the jurors to believe that Deck aided an escape from a prison, when in fact, it was the St. Genevieve County Jail (St.Ex.57). He argued that jurors should consider "all Deck's escapes," implying there were more escapes than the one "aiding an escape" that the jury heard about. Jurors were led to believe that,

unless sentenced to death, Deck would be a great escape risk and would hurt guards and other inmates, even though no evidence suggested that he had ever hurt anyone in prison. Without any evidence in the record, the jurors were led to believe Deck posed a great risk for future dangerousness in prison.

D. Holding Jurors Responsible for Future Victims

The prosecutor also told the jurors that, unless they imposed death, they would be responsible for any of Deck's future victims:

> I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates.

(Tr.969). The Nevada Supreme Court condemned a similar argument, that the jurors needed to impose death to prevent the defendant from killing others in the future, thereby saving innocent victims so that "no one else has to die at his hands." *Schoels v. State*, 966 P.2d 735, 739-40 (Nev.1998). The prosecutor may argue that the defendant, unless executed, may be a danger to others, but may not "place responsibility on the jury for the deaths of unknown future victims." *Id*. at 740; see also *Blake v. State*, 121 P.3d 567, 579 (Nev.2005).

III. The Improper Arguments Had a Decisive Effect on the Jurors' Verdicts

Penalty phase is intended to provide the jury with accurate information so it can make an individualized sentencing determination based on the defendant's character and

record and the circumstances of the offense. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Here, the prosecutor infused the jurors' deliberations with misstatements of facts, fear and emotion rather than reason, and false issues. As this Court recognized in *Deck v. State*, 68 S.W.3d 418, 430-31 (Mo.banc 2002), Deck presented "substantial mitigating evidence" regarding the abuse and neglect he suffered as a child, his love and caring for his siblings, and how his foster family wished to adopt him and give him a chance to live in a loving family but instead he was returned to his abusive mother.

The prosecutor's outside-the-record argument that Deck posed a great risk of future dangerousness was exceedingly prejudicial. As discussed in Argument III, *supra*, the issue of future dangerousness is a vitally important concern for capital sentencing juries. *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting); *Jurek v. Texas*, 428 U.S. 262, 275 (1976)(Stevens, J.). The jurors were led to believe things that simply were not true and used those beliefs to impose death sentences. The prosecutor's repeated arguments unfairly tipped the scales toward death.

IV. The Sentences Cannot Stand

By its arguments, the State violated its sacred obligation "not merely to win a case, but to see that justice is done, that guilt shall not escape nor innocence suffer." *Burnfin*, 771 S.W.2d at 914, *citing Berger v. United States*, 295 U.S. 78, 88 (1935); see also *Storey*, 901 S.W.2d at 901. The State's repeated arguments were intended solely to arouse the jury's passion and prejudices. This was especially detrimental in this capital

case, "where there are unique threats to life and liberty." *State v. Barton*, 936 S.W.2d 781, 783 (Mo.banc 1996).

This Court must vacate the sentences and resentence Deck to life without parole under §565.040.2; if this Court rejects Argument I, *supra*, he requests a new sentencing trial.

ARGUMENT V

The trial court erred in overruling (1) Deck's motion to suppress physical evidence (a gun, a decorative tin, and a fanny pack) and all statements he made as the result of his illegal search and seizure and (2) Deck's objections at trial to the admission of this evidence and his statements, and in admitting the evidence and statements, because the evidence and statements were obtained in violation of Deck's right to be free from unreasonable searches and seizures, and their use at the penalty phase re-trial violated his rights to be free from unreasonable searches and seizures, due process, and a fair and reliable sentencing, as guaranteed by U.S.Const.,Amends.IV,V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,14,15,18(a),21, in that Officer Wood testified that Deck did not turn off his car lights until he pulled into the parking spot, and the anonymous tip and Deck's action of leaning toward the passenger seat did not amount to reasonable suspicion that Deck was engaged in criminal activity.

At this penalty phase retrial, the State presented evidence radically different from what it had previously presented as the basis for Officer Wood's suspicion that Deck was involved in criminal activity. Officer Wood now testified that Deck drove through the parking lot with his lights on and only turned them off as he pulled into his parking spot (Tr.550,569). Thus, Deck did not engage in the suspicious act of driving late at night with no lights on. Because this Court had relied on that suspicious act to find that Wood had reasonable suspicion, and Wood now testified that it did not happen, this Court

should apply its discretion to refuse to apply the law of the case doctrine and should reconsider this issue.

I. Standard of Review and Preservation

"At a suppression hearing the state bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled." *State v. Franklin*, 841 S.W.2d 639, 644 (Mo.banc 1992). The trial court's ruling denying a motion to suppress will be reversed if it is clearly erroneous. *State v. Johnson*, 207 S.W.3d 24, 44 (Mo.banc 2006). The trial court's ruling is clearly erroneous when the reviewing court has the "definite and firm belief that a mistake has been made." *State v. Cain*, --- S.W.3d ----, 2009 WL 1361525, at *5 (Mo.App.S.D.2009). The reviewing court should consider the evidence presented at the hearing on the motion to suppress and the evidence presented at trial to determine if there was substantial evidence to support the trial court's ruling. *State v. Pike*, 162 S.W.3d 464, 472 (Mo.banc 2005); *State v. Rousan*, 961 S.W.2d 831, 845 (Mo.banc 1998). "[T]he facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded." *State v. Galazin*, 58 S.W.3d 500, 507 (Mo.banc 2001). Because the trial court has superior opportunity to assess the witnesses' credibility, deference is given to the trial court's credibility determinations and factual findings. *Rousan*, 961 S.W.2d at 845. The reviewing court, however, reviews questions of law *de novo*. *Id*.

Defense counsel fully preserved this issue for review. Counsel moved to suppress the items seized as a result of the search (the handgun, a decorative tin, money seized from Deck's fanny pack) and objected to the admission of and testimony about the items seized during the search and all statements Deck made (Tr.491-92,545,564,583-84,587-88,615-16,618,622-23,628-29,631,643,650-52,654). This issue was included in the motion for new trial (L.F.687-91).

II. Law of the Case

A suppression issue was raised in Deck's first appeal and decided adversely to him. *State v. Deck*, 994 S.W.2d 527, 534-36 (Mo.banc 1999). Under the "law of the case" doctrine, "a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo.banc 2007). As this Court has recognized, however, the "law of the case" doctrine is not absolute but is a **"**rule of policy and convenience; a concept that involves discretion." *Id*. at 130. "An appellate court has discretion to refuse to apply the doctrine where the first decision was based on a mistaken fact or resulted in manifest injustice or where a change in the law intervened between the appeals." *Id*. The rule also may not apply where the facts in evidence on remand are "substantially different from those vital to the first adjudication and judgment." *Id*.

As will be discussed below, the evidence on remand differed substantially from the evidence that the Court considered in the first appeal. In particular, at this retrial, Officer Wood vouched that Deck had his lights on as he drove through the parking lot

and only turned them off when he pulled into his parking spot (Tr.550,569). Previously, Wood testified that Deck drove all the way through the parking lot late at night with his lights off (1st Tr.101-102). That act, this Court held, was in itself, "some indication that criminal activity was afoot." *Deck*, 994 S.W.2d at 535. That Deck drove without lights late at night was a main consideration in the Court's determination that Wood had reasonable suspicion to detain Deck. *Id*. at 535-36. Without that fact, Officer Wood lacked reasonable suspicion to detain Deck.

III. Procedural History

Prior to Deck's first trial, defense counsel filed a motion to suppress (1st L.F.36-38). At the hearing on the motion to suppress, Officer Wood testified that shortly before 11:00 p.m., he was notified by his sergeant that the Jefferson County Sheriff's Office was trying to locate Deck and his sister. They were believed to be in a gold, two-door car (1st Tr.100). Wood was told that the two were possibly involved in a robbery/homicide, had a gun, and were considered armed and dangerous (1st Tr.101). Wood waited in the parking lot of Deck's apartment complex (1st Tr.100).

Wood testified that at 11:10 that evening, Deck drove through the parking lot with no lights on (1st Tr.101-102). He drove 30 feet past Wood and pulled into a parking spot (1st Tr.102). Wood approached Deck on foot and shone his flashlight into the car (1st Tr.102). Deck then leaned to his right in the seat, disappearing from view (1st Tr.102). Wood ordered Deck to put his hands up and exit the car (1st Tr.103). Wood patted Deck down for weapons and found none (1st Tr.103). Wood then went to the passenger side of

the car, looked under the front passenger's seat, and found a loaded gun (1st Tr.104). He arrested Deck for unlawful use of a weapon (1st Tr.104).

The court overruled the suppression motion (1st L.F.38).

At the first trial, Officer Wood again testified that Deck drove past him without his lights on (1st Tr.566). Wood exited his car and approached Deck on foot (1st Tr.566). As Wood approached Deck's car, he turned on his flashlight and spoke to Deck through the open driver's window (1st Tr.567). Deck turned away from him and leaned toward the passenger side floorboard (1st Tr.567). Wood then ordered Deck to exit the car (1st Tr.568). He found a handgun under the front passenger seat (1st Tr.568).

On appeal, Deck challenged the trial court's ruling on the motion to suppress. This Court held that Deck was not seized until he complied with Wood's order to sit up and show his hands. *Id*. By that point, Wood had reasonable suspicion that Deck was engaged in criminal activity. *Id*. at 536. The facts supporting this reasonable suspicion were that (1) Deck was driving without lights late at night in a residential parking lot; (2) Officer Wood learned from the dispatcher that Deck and his sister would be driving a two-door gold car and should be considered armed and dangerous; and (3) when Officer Wood approached Deck, Deck turned away and reached down toward the passenger side of the vehicle as if he were reaching for something or trying to conceal something. *Id*. at 535.

At the first penalty phase retrial, Wood testified that Deck drove past him, turned off his lights, and then pulled into a parking spot (2nd Tr.290).[13] Wood got out off his car and approached Deck on foot (2nd Tr.290). Deck could not open his door, so Wood asked him to crawl out the window so he could speak with him (2nd Tr.291). Wood searched the car and found a gun under the front passenger seat (2nd Tr.300). The suppression issue was not raised on appeal.

Finally, at this penalty phase retrial, Wood testified that Deck initially was driving through the parking lot with his lights on (Tr.550). He passed Wood with the lights on but turned off his lights before he pulled into a parking spot (Tr.550). Wood clarified:

> Q: But as it passes your car, and as it's pulling into the parking spot, that's when it turns off the headlights?
>
> A: Before coming to a complete stop, yes.

(Tr.569). Wood testified that he then pulled up 20-30 feet behind Deck's car (Tr.551-52, 569). He approached the driver's side of the car on foot (Tr.553). Deck turned to look at Wood, turned back, and leaned across to the front floorboard (Tr.553). Concerned that Deck might be reaching for a weapon, Wood yelled for him to show his hands (Tr.553). Deck placed his hands out the window and then got out of the car (Tr.554). Wood's partner patted Deck down for weapons and found none (Tr.557). Wood opened the passenger door of Deck's car and saw a handgun (Tr.558). Deck was arrested (Tr.558).

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[13] Wood did not testify as to how far Deck was from the parking spot when he turned off his lights.

Defense counsel objected at trial to testimony and evidence of the items seized as a result of the search – the handgun, a decorative tin seized from the floor of the car, and a fanny pack Deck had been wearing at the time of his arrest (Tr.491-92,545,564,583-84,586-88,615-16). Counsel also objected to testimony and evidence regarding Deck's statements after his arrest, as a product of the illegal seizure and search (Tr.583-84,587-88,618,622-23,628-29,631,643,650-52,654).

IV. Officer Wood Lacked Reasonable Suspicion

The Fourth Amendment of the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." It applies to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968). Missouri's constitutional protection under Article I, Section 15, is coextensive with that provided by the Fourth Amendment. *State v. Rushing*, 935 S.W.2d 30, 34 (Mo.banc 1996).

Without violating the Fourth Amendment, a police officer may make a limited investigatory stop when he has a reasonable suspicion, based on a specific articulable set of facts, that the person has engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Deck*, 994 S.W.2d at 534. The existence of reasonable suspicion is determined objectively: "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?' " *Terry*, 392 U.S. at 21-22. An officer's subjective reasoning is irrelevant;

the reviewing court must determine if the circumstances, viewed objectively, rose to the level of reasonable suspicion. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *State v Jackson*, 186 S.W.3d 873, 882 (Mo.App.W.D.2006).

Generally, evidence procured in violation of the Fourth Amendment cannot be used against the defendant at trial. *Mapp*, 367 U.S. at 649. This exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Evidence is excludable as fruit of the poisonous tree where it is obtained as a direct result of an illegal search or seizure. *State v. Miller*, 894 S.W.2d 649, 654 (Mo.banc 1995); *Weeks v. United States*, 232 U.S. 383 (1914).

In the first appeal, this Court cited three bases for Officer Wood's reasonable suspicion that Deck had been engaged in criminal activity: (1) Deck was driving without lights late at night in a residential parking lot; (2) Officer Wood learned from the dispatcher that Deck and his sister would be driving a two-door gold car and should be considered armed and dangerous; and (3) when Officer Wood approached Deck, Deck turned away and reached down toward the passenger side of the vehicle as if he were reaching for something or trying to conceal something. *Deck*, 994 S.W.2d at 535.

A. Driving with No Lights On

The first basis was that Deck had driven through the parking lot, late at night, with no headlights on. *Id*. At this trial, Officer Wood changed his testimony. He now testified that Deck had his lights on until he pulled into the parking spot (Tr.550,569).

There is nothing suspicious about turning off one's headlights while pulling into a parking spot. This is a fairly common occurrence and does not reasonably raise any suspicion of criminal activity. This basis fails.

B. Anonymous Tip

The second basis was that Officer Wood received a dispatch that Deck and his sister would be driving a two-door gold car and should be considered armed and dangerous. *Id*. Wood testified that his sergeant told him that the Jefferson County Sheriff's Office was looking for Deck and his sister, who were believed to have been involved in a robbery and/or homicide, may have a gun in the car, and were considered armed and dangerous (1st Tr.100-101). The information originated from an informant named Charles Hill (2nd Tr.281). Because the State failed to present evidence showing that the police had a basis to believe Hill's information was reliable, the information is considered as an anonymous tip. *Deck*, 994 S.W.2d at 536.

In *State v. Roark*, 229 S.W.3d 216, 217 (Mo.App.W.D.2007), a police officer received a dispatch that a possibly-intoxicated driver was headed eastbound on 50 Highway toward Sedalia. The information, originating from an anonymous tip, provided the car description and license plate number, which matched the defendant's car. *Id*. The officer waited by 50 Highway until he saw a car that matched the description. *Id*. As he followed the car, he saw the tires on the car's passenger side twice pass over the fog line. *Id*. The officer allowed the defendant to continue driving, only detaining him after the defendant left the highway and entered a bar. *Id*.

The Court of Appeals stressed that the truthfulness of a person giving an anonymous tip is "unknown, and unknowable." *Id*. at 221, quoting *Illinois v. Gates*, 462 U.S. 213, 237 (1983). To determine if the police acted reasonably in responding to the tip, courts should assess whether the information provided was "supplemented by independent police investigation." *Roark*,229 S.W.3d at 221. When a tip contains details relating, not just to easily obtained facts, but also to future acts that would not be easily predicted, its "credibility is significantly enhanced by independent confirmation." *Id*.

The Court of Appeals stressed that the tip included no such future details. *Id*. It held that even though the anonymous tipster was able to describe the car and knew it was headed east on 50 Highway, and the officer was able to confirm those facts, "[t]his is not … the sort of confirmation that provides 'reason to believe not only that the caller was honest but also that he was well informed.' " *Id*., citing *Alabama v. White*, 496 U.S. 325, 332 (1990). Because the anonymous tip added nothing to what the officer observed, the court considered whether the officer's observations themselves amounted to reasonable suspicion. *Roark*, 229 S.W.3d at 221. The court held that the defendant's conduct in twice crossing the fog line would not "warrant a man of reasonable caution in the belief" that an offense has been committed so as to amount to reasonable suspicion. *Id*. at 222. See also *Florida v. J.L.*, 529 U.S. 266 (2000)(anonymous tip did not provide reasonable suspicion to justify stop, because it provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility); *Franklin*, 841 S.W.2d at 640; *State v. Weddle*, 18 S.W.3d 389, 393 (Mo.App.E.D.2000).

The anonymous tip that Deck would be driving a certain car, may be armed, and may have been involved in a crime did not give Officer Wood reasonable suspicion to stop him. The tip included no predictive information by which Officer Wood could test the reliability of the tip. If an anonymous tip like this could give rise to reasonable suspicion, "any person seeking to harass another [could] set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful [alleged activity]." *J.L.*, 529 U.S. at 272. The tip here did not give rise to reasonable suspicion that Deck was involved in criminal activity.

C. Deck Leaning Toward the Passenger Seat

Deck acknowledges that Missouri courts have held that movements suggesting that a driver may be trying to hide something can support a finding of reasonable suspicion. See, e.g., *State v. McFall*, 991 S.W.2d 671, 674 (Mo.App.W.D.1999) (affirming suppression because trial court found defendant credible in denying he made furtive gesture); *State v. Stillman*, 938 S.W.2d 287, 290-91 (Mo.App.W.D.1997) (defendant moved his right arm and hand up and down between the front seats of car); *State v. Shinn*, 921 S.W.2d 70, 73 (Mo.App.E.D.1996)(driver and passenger bent over as officer approached car); *State v. Hunter*, 783 S.W.2d 493, 495-96 (Mo.App.W.D.1990) (when officer shone light on car, driver and passenger popped up and then ducked again).

Here, Deck had just pulled into his parking spot as someone approached his car (Tr.552-53). He turned to look at the person and then reached into the passenger side of the car (Tr.553). His action was consistent with the innocent actions of any driver

collecting items from his car before exiting. *State v. Abeln*, 136 S.W.3d 803, 809 fn. 5 (Mo.App.W.D.2004)("furtive motion" is phrase often "used in an attempt to attribute something sinister to otherwise innocent or unsuspicious conduct"). Deck's reaching did not give Officer Wood reasonable suspicion to believe that Deck had been involved in criminal activity. The only way it could be considered suspicious is by viewing it in light of what was found in the car later, the handgun. But, "[i]t is a well-worn principle of law that the successes of a search cannot be used to justify its legality." *Miller*, 894 S.W.2d at 653; *United States v. Di Re*, 332 U.S. 581, 595 (1948). Deck's act of reaching toward the passenger seat did not give rise to reasonable suspicion.

V. Fruit of the Poisonous Tree

Evidence obtained subsequent to a constitutional violation must be suppressed as "fruit of the poisonous tree" unless "intervening events break the causal connection." *Taylor v. Alabama*, 457 U.S. 687, 690 (1982). This exclusionary rule covers "tangible material seized during an unlawful search, testimony concerning knowledge acquired during an unlawful search, and derivative evidence acquired as an indirect result of the unlawful search. *Murray v. United States*, 487 U.S. 533, 536-37 (1988); *Wong Sun v. United States*, 371 U.S. 471, 485-87 (1968). A defendant's statements, if the direct result of an illegal arrest, are considered "forbidden fruit" and are also subject to exclusion. *Taylor*, 457 U.S. at 690.

The trial court clearly erred in overruling Deck's motion to suppress evidence and statements. Evidence seized from Deck's car and his person, and the statements he gave

to the police, should have been excluded at trial. Use of this evidence and trial testimony about it violated Deck's right to be free from unreasonable search and seizure, due process, a fair trial, and reliable sentencing. U.S.Const.,Amends.IV,V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,14,15,18(a),21.

Because Wood's testimony casts significant doubt on the propriety of the convictions themselves, this Court must vacate both the convictions and the sentences and remand for a new trial.

ARGUMENT VI

The trial court plainly erred when it failed to read to the venirepanel before death qualification a mandatory instruction, under MAI-CR3d 300.03A, and thereby denied Deck due process, a fair and impartial jury, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by U.S.Const., Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,14,18(a),21, because the instruction was mandatory and essential to the jury's ability to respond appropriately to questioning during death qualification, in that most lay people are unfamiliar with the steps jurors must follow before a death sentence may be imposed and yet must be able to follow these steps to be qualified to serve.

The trial court plainly erred in failing to provide the jury with a mandatory instruction modeled on MAI-CR3d 300.03A. Because this was a penalty phase retrial, the model instruction would have needed modification, to remove the sections applying to guilt phase. The full model instruction follows, with the unnecessary guilt phase portions stricken. The jury should have heard the rest:

> At this stage of the jury selection process, the attorneys are permitted to question you concerning your views on punishment. ~~The fact that questions are being asked about punishment at this time should not be taken by you as any indication that the defendant(s) in the case before you (is) (are) guilty of the crime(s) charged.~~ Nothing that is said by the attorneys or by another

prospective juror during this process is evidence, and you should not let any such statements influence you in any way.

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

~~A case in which the death penalty is a possible punishment is tried in two stages. In the first stage, the jury must decide whether the defendant is guilty or not guilty. If the defendant is found guilty of murder in the first degree, a second stage is held in which the jury must decide upon the appropriate punishment.~~

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

Before the jury may consider imposing the death penalty, it must ~~also~~ find, unanimously and beyond a reasonable doubt, that the evidence before it

establishes the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance. If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death.

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

Counsel for the State may proceed.

The Notes on Use to MAI-CR3d 300.03A indicate that this instruction "should be given only in cases in which a sentence of death is being sought and shall be read to the jury panel immediately before the commencement of the 'death-qualification' phase of voir dire." MAI-CR3d 300.03A, Notes on Use 2, citing *Wainwright v. Witt*, 469 U.S. 412 (1985) and *State v. McMillin*, 783 S.W.2d 82 (Mo.banc 1990).

"Whenever there is an MAI-CR instruction applicable under the law..., the MAI-CR instruction is to be given to the exclusion of any other instruction." *State v. Ervin*, 979 S.W.2d 149,158 (Mo.banc 1998). Error results when the trial court fails to give a mandatory instruction. *State v. Gilmore*, 797 S.W.2d 802,805 (Mo.App.W.D.1990). The prejudicial effect of that error must be judicially determined. *State v. Storey*, 901 S.W.2d 886,892 (Mo.banc 1995); Rule 28.02(f). Errors are presumed prejudicial unless the State clearly establishes that no prejudice resulted. *State v. White*, 622 S.W.2d 939,943 (Mo.banc 1981).

Defense counsel did not object when the court failed to read this instruction. Counsel erroneously believed the instruction had been read as Instruction No. 2 (Tr.913-14). Deck therefore requests plain error review. Rule 30.20. For instructional error to warrant reversal under plain error review, the trial court must have so misdirected or failed to instruct the jury that it is apparent the instructional error affected the jury's verdict. *State v. Deck*, 994 S.W.2d 527, 540 (Mo.banc 1999); *State v. Hibler*, 21 S.W.3d 87, 96 (Mo.App.W.D.2000).

Deck was prejudiced by the lack of an instruction modeled on MAI-CR3d 300.03A. The court failed to make up for the defect even though it inserted similar language into another instruction and other parts into the court's impromptu discussions with the jury. As part of the first oral instruction, modeled on MAI-CR3d 300.02, the court added, "in order to consider the death penalty, you must find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the state." (L.F. 588; Tr.93). But this was an improper, incomplete substitute for the correct language of the model instruction, that:

> Before the jury may consider imposing the death penalty, it must find, unanimously and beyond a reasonable doubt, that the evidence before it establishes the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance.

MAI-CR3d 300.03A. The court's impromptu instruction failed to instruct the jury that its finding of an aggravating circumstance had to be unanimous.

Elsewhere, the court told jurors, "[p]ossible punishments for the offense of Murder in the First Degree are imprisonment for life by the Department of Corrections without eligibility for probation or parole, or death" (Tr.97). It also told them, "the attorneys will be permitted to question you concerning your views on punishment. Nothing that is said by the attorneys or by another prospective juror in this process is evidence, and you should not let any such statements influence you in any way" (Tr. 97). But it altogether failed to instruct them that "you should be aware that a conviction of murder in the first degree does not automatically make the defendant eligible for the death penalty" or that:

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

MAI-CR3d 300.03A. By failing to instruct the jury on steps 2 and 3 before voir dire, the court gave the jury the false impression that these steps were not as important as step 1.

Deck acknowledges that the prosecutor explained to the venire the four-step process jurors must follow in assessing Deck's sentence, and defense counsel questioned them about the steps (Tr.262-66,291,295,306-12,343,354,370-77). The parties' explanation of or questioning about the statutory procedure was not a substitute for the pattern instruction. In adopting MAI-CR3d 300.03A, this Court must have believed such an instruction was necessary even though the parties undoubtedly would discuss the four-step process. *See, e.g.*, *State v. McClure*, 632 S.W.2d 314, 317 (Mo.App.S.D.1982) ("We

assume that in adopting MAI-CR2d the supreme court felt that such a cross-reference was necessary …”). An instruction from the court would carry more weight than the attorneys’ discussion, and jurors would be more likely to pay attention to absorb the court’s instruction.

This Court has warned that impromptu explanations of the law by the court or the attorneys should be avoided. *State v. Gray*, 887 S.W.2d 369, 379 (Mo.banc 1994). **“**The purpose of the Approved Jury Instructions is to avoid confusion among jurors. That purpose is undermined when a judge or lawyer, under the guise of voir dire, makes what seem to be comments on the law or facts in the case.” *Id*. “[D]uring delivery of the approved instructions, a trial court’s ‘lengthy oral explanations, talks, comments, chats, homilies or whatever they may be called, invite[ ] confusion and disagreement later among the jurors as to exactly what the judge did say and whether his oral remarks prevail over the written instructions or vice-versa.’ ” *Id*., *citing State v. Cross*, 594 S.W.2d 609, 610 (Mo.banc 1990). This may result in “incomplete or inaccurate statements and may conceivably lead to confusion.” *Gray*, 887 S.W.2d at 379.

While the court later provided model instructions covering each step of the process for jurors to use while deliberating (L.F.594-612), this does not cure the defect during jury selection. Model instruction 300.03A was vital to inform the death qualification process. Without the full and complete model instruction before death qualification, jurors were given the false impression that the first step of the process was the only one that really counted. It encouraged them to discount steps two and three. It also gave the prosecution an unfair advantage – as a rule, the court instructs the jurors, and the parties

are then on equal footing to discuss those instructions. But here, the prosecution instructed the jury, lending the prosecutor a heightened voice of authority.

The goal of MAI-CR3d is to ensure the selection of a fair and impartial death qualified jury. A criminal defendant is entitled to a fair and impartial jury. *Ristaino v. Ross*, 424 U.S. 589, 595, fn.6 (1976); *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc 1998); U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a). The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors and denial violates due process under the Fifth Amendment. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "[A] deviation from an approved MAI instruction is potentially a violation of both substantive and procedural due process." *Gumpanberger v. Jakob*, 241 S.W.3d 843, 846 (Mo.App. E.D.2007).

The Eighth Amendment forbids the arbitrary and capricious imposition of death sentences. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Proper penalty phase instructions are essential in avoiding arbitrary, capricious death sentences. *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc 2002). Pattern instructions guide the jury in the "critical determinations" of assessing aggravating and mitigating circumstances and thereby help channel the jury's discretion in determining the sentence. *Id*. The correct use of the MAI instructions is also critical because the "significant constitutional difference between the death penalty and lesser punishments" mandates greater "need for reliability in the determination that death is the appropriate punishment in a specific case." *Id*. citing *Beck v. Alabama*, 447 U.S. 625, 637-38, n.13 (1980).

The court's failure to provide the jury with a mandatory instruction directly affecting death qualification denied Deck due process, a fair and impartial jury, a fair sentencing trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V, VI,VIII,XIV; Mo.Const.,Art.I,§§10,14,18(a),21. This Court must vacate the sentences and resentence Deck to life without parole under §565.040.2; if this Court rejects Argument I, *supra*, he requests a new sentencing trial.

ARGUMENT VII[14]

By requiring that the jury unanimously find the evidence in mitigation outweighs the evidence in aggravation, Section 565.030.4(3) prevents the jury from giving meaningful consideration and effect to mitigating evidence, thereby violating *Mills v. Maryland*, 486 U.S. 367 (1988), *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and the Sixth, Eighth and Fourteenth Amendments; and the trial court erred in submitting Instructions 8 and 13, patterned on MAI-CR3d-313.44A, and denied Deck due process, a fair jury trial, and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I., Secs.10, 18(a),21, because the instructions failed to tell the jurors the State's proper burden of proof regarding the third step of the death penalty procedure, in that they failed to inform the jury that the State must prove, beyond a reasonable doubt, that aggravation outweighs mitigation or mitigation weighs less than aggravation; they prevented the jury from giving meaningful consideration and effect to mitigating evidence; and by instructing that Deck must prove to a unanimous jury that mitigation outweighs aggravation, they erroneously required Deck to establish eligibility for a life sentence and relieved the State of its burden.

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[14] Deck recognizes that this Court has rejected similar claims, *e.g.*, *State v. Zink*, 181 S.W.3d 66, 74 (Mo.banc 2005), but raises it here to preserve for federal review.

Instructions 8 and 13 were patterned on MAI-CR3d 313.44A and relate to the third step of Missouri's death penalty procedure, where the jury must weigh mitigating and aggravating circumstances. *See* §565.030.4(3). The instructions stated, in pertinent part:

> You must … determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment....
>
> If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life....

(L.F.600,608)(Appendix at A24,A26). Deck objected to these instructions (Tr.906-909;L.F.231-33) and included his objections in the motion for new trial (L.F.709-12).

Reversal is warranted when an instruction is erroneously submitted and prejudice results. *State v. Taylor*, 944 S.W.2d 925, 936 (Mo.banc 1997). Prejudice results when the jury may have been adversely influenced, as when there exists the potential for misleading or confusing the jury. *State v. Caldwell*, 956 S.W.2d 265, 267 (Mo.banc 1997); *State v. Green*, 812 S.W.2d 779, 787 (Mo.App.W.D.1991).

These instructions unconstitutionally shifted the burden of proof from the State to Deck. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that any factors that the State must prove in order to enhance punishment are the equivalent of separate elements and must be proven to the jury unanimously, beyond a reasonable doubt. This Court, in applying the principles announced in *Ring*, concluded that the first three steps of

Missouri's death penalty procedure are factual findings to be "determined against defendant before a death sentence can be imposed." *State v. Whitfield*, 107 S.W.3d 253, 258 (Mo.banc 2003). The State bears the burden of proving step three beyond a reasonable doubt.

The instructions should have told the jurors that the State must prove aggravation outweighs mitigation or mitigation weighs less than aggravation. By instructing that Deck must prove to a unanimous jury that mitigation outweighs aggravation, they erroneously required Deck to establish eligibility for a life sentence and relieved the State of its burden. *Kansas v. Marsh*, 548 U.S. 163, 178-79 (2006). They eliminated the defendant's existing sentence of life imprisonment – established by the jury having convicted him of first-degree murder – and, instead, imposed on him the burden of proving his eligibility for a life sentence.

The statute and instructions violate *Mills v. Maryland*, 486 U.S. 367 (1988), *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and the Sixth, Eighth and Fourteenth Amendments. By requiring that the jury unanimously find the evidence in mitigation outweighs the evidence in aggravation, Section 565.030.4(3) prevents the jury from giving meaningful consideration and effect to mitigating evidence. This problem is carried over to Instructions 8 and 13 – they lead a reasonable juror to conclude that the only way to impose life is if the jury unanimously finds the aggravators do not outweigh the mitigators. They prevent the jury from giving meaningful consideration and effect to mitigating evidence.

This Court must vacate the sentences, since "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Boyde v. Calif*ornia, 494 U.S. 370, 380 (1990).

ARGUMENT VIII

The trial court erred in submitting Instructions 3, 7, 8, 12, and 13, thereby violating Deck's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I.,Secs.10, 18(a),21, because the instructions failed to instruct the jury as to the proper burden of proof, in that they failed to inform the jurors that the State bore the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was insufficient to outweigh the evidence in aggravation. [15]

Because the offenses were committed in 1996, the relevant sentencing statute is Section 565.030.4, RSMo 1994. It provides in pertinent part:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor…
>
> (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating

[15] Deck recognizes that this Court has rejected this argument previously, *see*, *e.g.*, *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004), but raises it here to preserve for federal review.

> circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier….

(Appendix at A6).

In *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003), this Court held that the findings required by subsections (1), (2), and (3) of Section 565.030.4 are death-eligibility factual findings that a jury must make. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it must be found by a jury beyond a reasonable doubt." *Id.* at 257, *citing Ring v. Arizona*, 536 U.S. 584, 602 (2002). Moreover, the *State* bears the burden of proving, beyond a reasonable doubt, the existence of the facts required to prove a defendant eligible for death. *Ring*, 536 U.S. at 589; *Bullington v. Missouri*, 451 U.S. 430 (1981).

Despite the mandate of the Sixth Amendment, instructions 7 and 12, addressing §565.030.4(2), failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted death (L.F.599, 607, modeled on MAI-Cr3d 313.41A; *See* Appendix at 23,25). Instructions 8 and 13, addressing §565.030.4(3), also violated the Sixth Amendment, by failing to

instruct the jury that the State had the burden of proving beyond a reasonable doubt that that the evidence in mitigation of punishment did not outweigh the evidence in aggravation of punishment (L.F.600,608, modeled on MAI-Cr3d 313.44A; *See* Appendix at A24,26). The trial court failed to instruct the jury in accordance with the substantive law. *State v. Carson*, 941 S.W.2d 518 (Mo.banc 1997).

Counsel fully preserved this issue by raising it at or before trial and including it in the motion for new trial (Tr.60,905-906; L.F.231-34,698-99). Reversal is warranted when an instruction is erroneously submitted and prejudice results. *State v. Taylor*, 944 S.W.2d 925, 936 (Mo.banc 1997). Prejudice results when the jury may have been adversely influenced, as when there exists the potential for misleading or confusing the jury. *State v. Caldwell*, 956 S.W.2d 265, 267 (Mo.banc 1997); *State v. Green*, 812 S.W.2d 779, 787 (Mo.App.W.D.1991).

While Instructions 7, 8, 12, and 13 failed to direct the jury that it must apply the reasonable doubt standard and that the State bore the burden of proof, the preceding instructions 6 and 11, regarding the <u>first</u> step of the procedure, clearly advised that, in determining whether aggravating circumstances existed, the State bore the burden of proving the aggravating circumstance beyond a reasonable doubt (L.F.597-98,605-606).

Instruction 3 reiterated that, as regards the <u>first</u> step, the State bore the burden of proof beyond a reasonable doubt (L.F. 594; *see* Appendix at A22). By instructing that the State bears the burden of proof beyond a reasonable doubt on step one, but not two and three, Instruction 3 clearly communicated that such a burden of proof did not apply to those steps (L.F. 325). The jurors must have inferred from the stark absence of this

language in Instructions 3, 7, 8, 12, and 13 that the burden of proof was not beyond a reasonable doubt, and/or that the State did not carry the burden of proof. No instruction cures this defect.

A substantial risk exists that Deck's death sentences resulted from the jurors' incorrect belief that steps two and three were met if Deck did not prove otherwise, or if the State met those burdens only by a preponderance of the evidence. Jury instructions that implicitly relieve the State of its burden of proof violate the Due Process Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment. *State v. Erwin*, 848 S.W.2d 476, 483-84 (Mo.banc 1993). As the Court cautioned in *Kansas v. Marsh*, 548 U.S. 163, 178-79 (2006), "although the defendant appropriately bears the burden of proffering mitigating circumstances – a burden of production – he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence." The Supreme Court has recognized that failure to correctly instruct the jury that the State's burden of proof is "beyond a reasonable doubt" is structural, per se, reversible error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993).

Deck's death sentences are unreliable and cannot stand. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Deck was denied his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII, XIV;Mo.Const.,Art.I,§§10,18(a),21. This Court must vacate the sentences and

resentence Deck to life without parole under §565.040.2; if this Court rejects Argument I, *supra*, he requests a new sentencing trial.

ARGUMENT IX

The trial court erred in sentencing Deck to death for a crime never pled in the indictment, thereby violating his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, because the State never charged Deck with the only offense punishable by death in Missouri – *aggravated* first degree murder – in that the State failed to plead in the indictment those facts the jury had to find beyond a reasonable doubt before Deck could be sentenced to death.[16]

In *Apprendi v. New Jersey*, 530 U.S. 466,484 (2000), the Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. The Fifth, Sixth, and Fourteenth Amendments demand that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id.* at 476,490; *Ring v. Arizona*, 536 U.S. 584,609 (2002); *United States v. Booker*, 543 U.S. 232 (2005).

Missouri's Legislature has expressly provided that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds the State has proven certain facts beyond a

[16]Deck recognizes that this Court has rejected this argument previously but raises it here to preserve for federal review.

reasonable doubt. §565.030.4(2),(3); *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003). To make the defendant "death-eligible," the State must plead and prove at least one statutory aggravating circumstance; prove that the evidence in aggravation warrants a death sentence;[17] and prove that the evidence in aggravation outweighs the evidence in mitigation. § 565.030.4(2),(3); *Whitfield*, 107 S.W.3d at 258-61.

While the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime – first-degree murder punishable by either LWOP or death – the statute's "effect" is quite different. In reality, there exist in Missouri both the offense of "unaggravated" first-degree murder, for which the only authorized punishment is LWOP; and the offense of "aggravated" first-degree murder, for which the authorized punishments include both LWOP and death.

Steps one, two, and three of Missouri's death penalty procedure are, in function and effect, elements of the greater offense of aggravated first-degree murder. Thus, to pass constitutional muster, these facts must be pled in the charging document and proven beyond a reasonable doubt. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005); *State v. Fortin*, 843 A.2d 974 (N.J. 2004). The State failed to plead in the amended information those facts that the jury must find beyond a reasonable doubt before Deck could be sentenced to death (1st L.F.56-58). It thus never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. *Jackson v. Virginia*,

[17] Because the offenses occurred in 1996, the 1994 version of §565.030 applies (1st L.F. 56-58)(Appendix at A7).

443 U.S. 307, 314 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978). Counsel fully preserved this issue (Tr.87-88; L.F.334-56,704-705). The trial court's error in sentencing Deck to death for a crime never pled in the indictment violated Deck's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. This Court must vacate the death sentences and impose sentences of life without parole.

ARGUMENT X

The trial court erred in accepting the jury's death penalty verdicts and in sentencing Deck to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21; §565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Deck's sentences to life imprisonment without parole, based on the substantial evidence in mitigation, the nature of the crimes, and the number of similar cases where death was not imposed.

Section 565.035 allows this Court to set aside a death sentence when it believes that (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) the evidence does not support the aggravating factors; or (3) the sentence is disproportionate to the sentences imposed in similar cases, considering the crime, the strength of the evidence, and the defendant. The purpose of proportionality review is to provide "an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences." *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo.banc 1993). It safeguards against "freakish and wanton application of the death penalty." *Id.*

I. The Court Should Apply *De Novo* Review and Consider All Factually Similar Cases

De novo review is appropriate in death cases. In *Cooper Industries v. Leatherman Tool Group Inc*., 532 U.S. 424, 436 (2001), the Supreme Court held that appellate courts should apply *de novo* review to awards of punitive damages. Appellate courts should consider: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Id*., at 435.

The Supreme Court justified *de novo* review of these awards based on the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment. *Id*. at 433-34. The Court found that a jury's award of punitive damages is analogous to cases "involving deprivations of life," where a jury has found that death is an appropriate sentence. *Id*. at 434. *De novo* review "helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id*. at 436; *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 584 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

Certainly, if this type of independent review is warranted in cases where only money is at stake, it must also apply when a human life is at stake. Unlike pecuniary awards, the loss of a human life cannot be reversed. *See State v. Black*, 50 S.W.3d 778, 793-99 (Mo.banc 2001)(Wolfe, J., dissenting). In capital cases, the Eighth Amendment requires comparative proportionality review that will consider similar cases with "similar" determined by the facts of the case – regardless of sentence – including but not

limited to the circumstances of the crime, the defendant, the mitigating evidence, and the aggravating evidence. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (Court did not look at whether a particular sentence was "proportionate" with regard to "a particular crime or category of crime" but instead considered whether the death sentence was excessive with regard to a particular defendant).

This Court must "compare[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978). This Court's proportionality review, as it is currently conducted, is fatally flawed. Its definition of "similar cases" includes only those cases in which death was imposed, not all factually similar cases. *State v. Gray*, 887 S.W.2d 369, 389 (Mo.banc 1994).

Consideration of whether there were "similarly situated defendants" who were not sentenced to death "is an essential part of any meaningful proportionality review." *Walker v. Georgia*, 2008 WL 2847268 (2008)(Stevens, J., respecting denial of cert.).

> [F]ailure to acknowledge … cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that [the reviewing court] will overlook a sentence infected by impermissible considerations.

Id. at 5.

Deck's death sentences are disproportionate, because other defendants who committed similar or worse crimes, did not receive the death penalty. Ann Marie Dulany and Ronald Conn were convicted of two counts of capital murder after they robbed an elderly couple, beat the wife to death, and beat the husband, before setting both on fire. *State v. Dulany*, 781 S.W.2d 52, 53 (Mo.banc 1989); *Conn v. State*, 769 S.W.2d 822, 823 (Mo.App.S.D.1989). Antoine Owens was convicted of two counts of first-degree murder for shooting two women during the course of a burglary, yet he is serving a sentence of life without parole. *State v. Owens*, 827 S.W.2d 226 (Mo.App.E.D.1991). Emory Futo stabbed his father, bludgeoned his mother, and shot his two brothers, yet was sentenced to life without parole. *State v. Futo*, 932 S.W.2d 808, 812 (Mo.App.E.D.1996). Barry Holcomb beat and strangled his girlfriend, killing her and her six-month-old fetus, resulting in two sentences of life without parole. *State v. Holcomb*, 956 S.W.2d 286, 288 (Mo.App.W.D.1997). *See also State v. Clark***,** 859 S.W.2d 782, 784 (Mo.App.E.D.1993) (two counts of first degree murder; victims shot during robbery; life sentence); *State v. Merrill*, 990 S.W.2d 166, 168-69 (Mo.App.W.D.1999) (double homicide committed before 4-year-old girl; one victim was her father; life sentence).

II. The Facts of the Crime Don't Warrant Death

Deck confessed and gave a full, candid and accurate account of the events (Ex.54). This Court has recognized that confessing and cooperating with the police can be grounds for granting proportionality relief. *State v. McIlvoy*, 629 S.W.2d 333 (Mo.1982)

(telephoning police 3 days after crime, turning himself in, and waiting for police to arrive were factors in favor of proportionality relief).

Deck did not go to the house planning to kill the Longs (Ex.54). He went to the house only to rob them, using the gun to force them to hand over the contents of the safe (Ex.54). Deck was not a cold-blooded killer who went to the house with a design to rob and kill – he was a robber who placed himself in a bad situation and then, under pressure, made an abysmal decision.

III. Deck Presented a Wealth of Evidence in Mitigation

As this Court has previously acknowledged, Deck presented substantial evidence in mitigation:

> The defense presented substantial evidence concerning the abuse Mr. Deck suffered as a child, the lack of parental love and his continual move from one foster home to another. It presented evidence that, despite all this, he continued to love and care for his younger siblings, scrounging for food for them and bathing them while his mother was out at clubs or with boyfriends. It showed how the Pucketts wanted to adopt him and give him a chance to grow up in a loving family, but he was instead returned to his mother and further abuse.

Deck v. State, 68 S.W.3d 418, 430 (Mo.banc 2002). Just as much, if not more, mitigating evidence was presented at this retrial (Tr.721-887; Banks Depo.;Def.Ex.D).

Upholding a death sentence under these circumstances violates the Eighth Amendment's requirement of heightened scrutiny of a capital sentence. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). It also violates Deck's rights to due process and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution. This Court must set aside the death sentences previously imposed and resentence Deck to life without parole.

CONCLUSION

Based on Arguments I-IV and VI-VIII, Deck respectfully requests that the Court vacate the sentences and resentence him to life without parole under §565.040.2; if this Court rejects Argument I, *supra*, he requests a new sentencing trial. Based on Argument V, he requests that the Court vacate the convictions and sentences and remand for a new trial. Based on Arguments IX and X, he requests that the Court vacate his death sentences and resentence him to life without parole.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were delivered to: Evan Buchheim, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the ____ day of August, 2009.

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Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,549 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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