IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC86518**
	)	
EARL M. FORREST,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI
SIXTH JUDICIAL CIRCUIT, DIVISION THREE
THE HONORABLE OWENS LEE HULL, JR., JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Earl was jury-tried and convicted in Platte County Circuit Court, on change of venue from Dent County, of three counts of first-degree murder. §565.020RSMo. The trial court imposed death on all counts, in accordance with the jury's verdicts.

This Court has exclusive appellate jurisdiction. Mo.Const.,Art.V,§3(as amended 1982).

STATEMENT OF FACTS

Earl grew up in California's San Francisco-area in the 1960's, his family moving to Livermore when he was in the fourth grade.(T1358). His alcoholic father, who daily drank beer, wine and vodka and became angrier the more he drank, changed jobs often.(T1359,1365-66). Earl and his brother, Bill, also alcoholics, started drinking and using drugs around age 11.(T1366, 1380). They began sniffing glue and paint thinner and first injected methamphetamine around age 13.(T1381-82). They smoked pot with their father when Earl was in his teens.(T1373). Their father, obsessed with getting revenge for any perceived slight or disrespect, encouraged them to challenge others to fights and, if they didn't, called them "weak."(T1368-72). Their father was much harder on Earl than Bill, calling Earl stupid if he got in trouble but blaming others if Bill did.(T1362-63).

Earl's two biggest problems growing up were methamphetamine and alcohol.(T1367). As a youngster, he drank whatever he could find, later drinking a bottle of 100-proof Peppermint Schnapps daily.(T1366). He then combined methamphetamine with alcohol.(T1367). Earl and Bill often used drugs together, injecting methamphetamine into their arms.(T1382).

As an adult, Earl continued to use drugs and alcohol. Nancy Young, with whom Earl lived for several years and to whose children Earl was a father figure, had known Earl since the second grade and recalled drugs were readily available, the drug culture being the norm.(T1472). Although she knew that Earl drank—

often 1-2 pints of Schnapps daily—and took drugs—including methamphetamine—he didn't use them in front of the children and it didn't affect how he treated her or them—they loved him.(T1489-90).

Nancy knew Harriett "Toddy" Smith, through Harriett's bar in Livermore, "Hot Toddy's."(T1491-92). From June, 2000, when Earl moved back into Nancy's home, until December, 2000, Harriett, then living in Missouri and dealing drugs, called Earl frequently.(T840,1492-93). That December, Harriett drove to California and Earl left Nancy's to move to Missouri.(T1493-94).

In March, 2002, Earl met Angelia Gamblin and they became romantically involved.(T1062). Earl worked for a lumber company and, when he wasn't working, he daily drank Kessler 80-proof whiskey and used methamphetamine, often never sleeping.(T857,1083-84,1110). Earl bought Angelia a Ruger rifle and competition pistol for her to target-practice.(T1084-86,1106-08,1111).

On December 9, 2002, Earl awakened at 5:45 a.m. and began to drink Kessler 80-proof whiskey.(T1087). He drank more heavily than normal, finishing a fifth before 10 a.m.(T1088). Angelia, who left for work just before 8 a.m., returned around 10 to find Earl slurring, stumbling, and extremely intoxicated. (T1064-65,1088). They were supposed to go Christmas shopping but Earl, who was trying to dress, said they had to go somewhere.(T1065). Although Angelia thought Earl shouldn't be driving, she accompanied him as he drove to Harriett's. (T1065-67,1088). The ride was scary and erratic, with Earl swerving onto the shoulder and through the lanes.(T1089).

They reached Harriett's and Earl briefly went inside.(T1068). Harriett then came out, got in the driver's seat with Angelia and attempted unsuccessfully to back up.(T1069). Angelia got out, Harriett backed over a pole and finally got hung on a tree limb.(T1069). Earl then came out of the house, fired a shot in the air and walked toward the car, entering the passenger's side.(T1070). Harriett said, "I'm sorry. I'll make it right" and Earl responded, "don't worry, everything will be ok."(T1071-72). Harriett got the car un-stuck and she and Earl went back inside.(T1072). Angelia, who saw blood on the shoulder and leg areas of the driver's seat, got back in the car and waited until Earl came out, with a gun and lockbox.(T1073). He got in and told her to drive home.(T1073-75).

Eddie Starks, Harriett's boyfriend, was at her house that morning.(T872). While he knew Harriett dealt drugs and he habitually used them, he hadn't used yet that morning.(T870,872). Harriett, however, had, as she later tested positive for methamphetamine.(T970). Michael Wells arrived around 9:30 a.m.(T871-73). Eddie entered the computer room, Michael came in to borrow some DVD's and then returned to the living room.(T871-74). Eddie heard Harriett ask, "Earl, what are you doing here?" and Earl respond, "All I asked you for was a fucking lawnmower."(T874-75). Harriett promised Earl a lawnmower and, when Earl asked if anyone else was present, she said "Eddie."(T875-76).

Eddie heard two shots and hid in Harriett's bedroom closet.(T876). Hearing nothing more, he came out, he walked past the bed, and saw no blood or body.(T876). In the living room he saw Michael shot on the couch.(T876).

Michael, who used drugs purchased from Harriett, was later determined to have a blood alcohol content twice the legal limit. (T871-73,970).

Eddie searched for a gun in the basement, but, finding no ammunition, ran toward the neighbors'(T877-78). On the way, he believed he saw Earl get into a black pick-up and leave.(T878). Eddie told the neighbors Michael was dead and he called Harriett's friend, Karen Workman, whom he asked for help.(T878-79).

Karen and her daughter arrived shortly thereafter.(T879). Karen, who had bought and used Harriett's methamphetamine, knew Earl and Harriett had been good friends but fell out a year earlier because Harriett refused to buy him a lawnmower and trailer for putting her onto a California drug source.(T841,852,930,1060).

Earl, Karen, and her daughter went to Harriett's house where they found Michael dead on the couch and Harriett, dead, on the bedroom floor near the closet. (T843,845,879-80). They called 911.(T845). Although they looked for Harriett's stash of drugs and money,[1] they found neither.(T849,868). Karen retrieved her father's scales that Harriett used to weigh drugs.(T861). Harriett's and Michael's cause of death was multiple gunshot wounds.(T957,983).

When Angelia and Earl arrived at Earl's house, they got out of the car and Earl shot open the lockbox containing methamphetamine.(T1075). With

[1] Karen acknowledged they searched for the drugs but at trial Eddie initially denied doing so.(T880-81,892-94,896,901).

Angelia's help, Earl injected some highly-concentrated drug.(T1075-76,1092). About thirty minutes later, Sheriff Wofford and Deputy Barnes, who received a 911-call about the other shootings, arrived.(T1077,1173).

As they approached, Angelia came to the door.(T1174). She told Earl, who was on the phone, that they were there.(T1078). Earl came toward the door and Sheriff Wofford saw him pick up something and put it behind his thigh.(T1078-79,1175). Wofford told Barnes Earl might be armed.(T1176). Although Angelia stated Earl had not knelt, Wofford recalled differently, recalling Earl pulled his gun and fired, with Wofford returning fire.(T1095,1176). At trial, contrary to her deposition, Angelia stated Earl fired first.(T1078-79,1093-94) The shooting stopped and Wofford saw Barnes lying on the porch.(T1177). Wofford went to his patrol car and radioed for help.(T1178). While there, he shot at Earl on the sofa.(T1178-79). More shots came from the house as other officers arrived.(T1007,1010,1179).

Highway Patrolmen Folsom and Roark came through the woods behind the house, finally seeing Earl, whom they arrested, lying on the floor, arms outstretched, a gunshot wound to his face, unable to talk.(T906-08,924-25,1011,1019-23,1043). Angelia, who Wofford shot, was in the house.(T1024-25). They found the metal lockbox, containing large bags of white powder, and drug paraphernalia.(T1030-31). Barnes was transported to the hospital where she later died.(T909).

Over objection, the State was allowed to seek death on three counts of first degree murder that charged no statutory aggravators.(LF78-83,97-100,174-79,527-35;T5-6,13-15,77,145-46,1191-92). Counsel challenged the State's use of non-statutory aggravation,(T112-15), and the penalty phase instructions, which failed to place the burden of proof on the State on death-eligibility questions(LF180-83;T115) and gave no guidance on how to consider victim impact evidence.(LF210-15;T114).

Veniremembers Parrott and Giger were struck for cause, over objection, because they could not sign the death-verdict form.(T530,533,570,575,578-79).

Dr. Robert Smith, a clinical psychologist and certified addiction specialist, testified in guilt phase that Earl suffers from long-term Depression; alcohol and methamphetamine addiction and frontal lobe brain damage, creating difficulties in concentration, problem-solving, reasoning and decision-making.(T1199-1207). These three conditions interacted after Earl drank a fifth of whiskey, affecting his thoughts, actions and feelings.(T1208-10). Because Earl was a chronic drinker, his tolerance was higher than most, but even so, his reaction time, ability to process information and make decisions and respond appropriately were impaired. (T1212-13).

The jury returned guilty verdicts of first degree murder.(T1273-74). Defense counsel renewed their penalty phase motions.(T1287-88). Ahsens told the jury that he would prove, as statutory aggravators, that Earl killed Harriett Smith and Michael Wells during the commission of another homicide and to

obtain something of monetary value and he killed Harriett through excessive acts of physical abuse.(T1298). Ahsens also intended to show, as a statutory aggravator, that Deputy Barnes was a peace officer killed doing her official duties. (T1298). Finally, he intended to show, as non-statutory aggravation, that Earl was arrested in California with drugs and guns.(T1300-01).

Ahsens called two California police officers, who arrested Earl in 1994 and 1996 for drug and gun possession. In 1994, they arrested Earl in his driveway and found the items in his car and house, to both of which others had access and control.(T1311-18). In 1996, Earl and his girlfriend were in a hotel room that also contained drugs, money and stolen checks.(T1321-25). On cross, the officer conceded the checks weren't Earl's.(T1327-29).

Lois Lambiel, Deputy Barnes' sister, testified Barnes was close to her nieces and nephews, especially Lambiel's daughter Leeann, also a police officer, with whom Barnes talked "shop."(T1341,1344-46). Lambiel hadn't slept a full night since Barnes' death; her nieces and nephews always call and talk about Barnes; one of her brothers had five strokes right after Barnes' death and another died six months later.(T1349-50). She stated, "It's just one big nightmare."(T1350).

Trooper Mark Belawski testified that, when Earl initially was treated for his gunshot wound, he heard Earl ask how Deputy Barnes was and say he was sorry.(T1394-96).

Earl's younger brother, Bill, told of their youth in California. Bill, Earl and their father were alcoholics and Earl's two biggest problems were alcohol and methamphetamine.(T1366-67). Earl once gave Bill the quantity and concentration of methamphetamine he normally used.(T1382). Bill, who felt his head would explode, was surprised Earl routinely could survive that strong a dose.(T1382-83).

Nancy Young and her children, Heidi, Nancy, Clayton and Colton, testified about Earl's positive influence on them and how much they loved him, even though he wasn't their biological father.(T1399-1410,1453-60,1461-66,1467-97,1614-55). He required the children do their homework before play-time, and even helped Heidi to study for her nursing degree.(T1400-02,1621). Colton recalled Earl crying when his puppy died and Earl encouraging him to wear his prescription glasses.(T1465-66). Clayton, who called Earl "Dad," started exploring religion when he was eleven and Earl helped him find a church home, LDS, where he remains active today.(T1625,1629).

Earl's friends, Carl Cragholm, a disabled Vietnam veteran, and Bonnie Sharp, saw Earl interact with Nancy's and Patty—Earl's ex-wife's—children. (T1445-46,1451). Earl treated the children well and they loved him, seemingly better than their biological fathers.(T1446,1451). Susan and Doug Del Mastro, Earl's friends for many years, recalled he was good around their children and, despite Earl's drug use, they trusted him.(T1593-96,1608-09).

Angelia Gamblin recalled Earl was fun, with a good sense of humor. (T1504-05). Her mother, Linda, and Linda's friend, William Potsdam, found Earl

respectful, polite, quiet and funny.(T1514,1520-21). Despite the age difference, they approved of him.(T1517,1522).

Dr. Smith testified about Earl's diagnoses of Depression, frontal lobe brain damage and substance addiction.(T1418-19). Earl's addictions are powerful and, "no one chooses to become an addict."(T1422). Genetics influence who becomes an addict.(T1422). Similarly, nobody chooses to suffer from Depression, nor to have frontal lobe damage, whether resulting from chronic toxin-exposure or head injuries.(T1422). All of these diagnoses interacted in Earl on December 9, each causing more interference and impairment of his reasoning.(T1423-24). Earl was impaired but, as his tolerance to toxins increased, he wouldn't appear so because he had learned to compensate.(T1426-28). He was under the influence of an extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was substantially impaired.(T1429-30).

Dr. Michael Gelbort, a neuropsychologist, tested Earl and found Earl has impairment in the right frontal lobe, which controls the ability to process information in a goal-oriented way and inhibits impulsive behaviors.(T1542-44). This created difficulties with problem-solving and impulsivity.(T1550). The frontal lobe damage could be caused by his significant head injuries or 30 years of toxin-ingestion, with the alcohol causing temporal lobe and hippocampus damage and the methamphetamine, particularly its solvents, damaging the frontal lobe.(T1545,1547-48). Earl, without alcohol or methamphetamine, is in the third

percentile and, when intoxicated, has even more difficulties in demonstrating normal judgment and reasoning.(T1550-51).

Dr. Lee Evans, a psychiatric pharmacist, stated that long-term alcohol use changes the brain's cellular function, affecting memory and judgment.(T1575). Long-term use lets the user develop tolerance so psychomotor activity continues, but higher thinking, including decision-making and impulse-control, is affected. (T1575-76). Earl's blood-alcohol level at the time of the offense was at least 0.3%, and since he drank substantially more than usual and usually "nipped" rather than drinking so much at one time, he far exceeded his tolerance.(T1578-79). One who combines alcohol and methamphetamine doesn't sober up, but the toxicology becomes "the perfect storm."(T1581). Earl possessed psychomotor skills like walking, talking and driving, but his brain wasn't functioning normally.(T1583-84).

Following closing arguments, the jury retired and the next day rendered death verdicts on all three counts.(T1744). It found, as statutory aggravators, that Harriett Smith was killed during the commission of Michael Wells' homicide and for monetary gain; Michael Wells was killed for monetary gain, and Joann Barnes was an officer killed while acting as such.(T1744-46).

At sentencing, the defense called the jury foreperson, Lee Pitman, who stated, in an offer-of-proof, that post-trial he talked to Dwayne McClellan of the Salem News.(T1770,1775). Pitman acknowledged that, in making the penalty

phase decision, he put himself in the victims' families' shoes.(T1775-76). The court sustained Ahsens' objection to the offer.

As victim impact, Lois Lambiel spoke of her family's loss. "She was just doing her job. And we feel like that it's not right unless we get an eye for an eye." (T1780).

The court sentenced Earl to death.(T1784). This appeal follows. Further facts will be set forth as necessary.

POINTS RELIED ON

I."DEBLER" EVIDENCE IMPROPERLY ADMITTED

The trial court erred, plainly erred and abused its discretion in overruling Earl's pre-trial "other crimes evidence" motions, admitting extensive evidence of Earl's prior misconduct in California, not *sua sponte* declaring a mistrial and accepting the jury's death verdicts because this denied Earl due process, trial only for the charged offense, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,17,18(a),21;§565.030.4 RSMo;Arts. 9,14, International Covenant on Civil and Political Rights; Art.5, Universal Declaration of Human Rights, in that, although in penalty phase, the State presented extensive evidence of Earl's alleged drug possession and dealing in California in penalty phase and told the jury to consider it in sentencing him, failing to require the State to prove and the jury to find those facts beyond a reasonable doubt undermined the reliability of the proceedings and the resultant death verdict..

State v. Debler, 856 S.W.2d 641(Mo.banc1993);

State v. Hornbuckle, 769 S.W.2d 89(Mo.banc1989);

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

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

Mo.Const.,Art.I,§§10,17,18(a),21.

II. VICTIM IMPACT -- THE JURY RECEIVES NO GUIDANCE

The trial court abused its discretion and erred in overruling Earl's motions to exclude and limit victim impact evidence, overruling his objections to the testimony of Raymond Wells and Lois Lambiel, submitting Instruction Nos.28-30, refusing Instruction A, and accepting the jurors' penalty phase verdicts and plainly erred in not striking, considering while sentencing Earl to death that Joann Barnes' family wanted "an eye for an eye," and not considering that the jury foreman put himself into the victims' families' shoes because that denied Earl due process, confrontation, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21 in that the evidence the State adduced far exceeded the "brief glimpse" of the victims' lives authorized by *Payne v. Tennessee*; included hearsay and unsubstantiated alleged results of Earl's actions; requested Earl's execution; let the jurors weigh the value of the victims' lives against Earl's; and gave them no guidance on how to consider or weigh the evidence in reaching their verdict.

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

United States v. Mayhew,__F.Supp.2d__,2005WL1845171(S.D.Ohio2005);

State v. Whitfield, 107 S.W.3d 253(Mo.banc2003);

State v. Debler, 856 S.W.2d 641(Mo.banc1993);

U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21.

III.RIGHTS TO REBUT AND PRESENT A DEFENSE

The trial court erred and abused its discretion in sustaining the State's objection to the defense's penalty phase argument that sentencing Earl to death would make his family and friends "very, very, very distraught" because this denied Earl due process, a fair trial, individualized, reliable sentencing, freedom from cruel and unusual punishment, the rights to rebut the State's case and present a defense, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21 in that the State's repeated told the jurors in both penalty phase closings to consider the impact on the victims' families. Defense counsel was entitled to rebut the State's case by presenting and arguing as mitigation the impact of executing Earl on his family and friends. Since Earl's death sentences are based on evidence he was denied the opportunity to confront, rebut or challenge, they are unreliable.

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

Crane v. Kentucky, 476 U.S. 683(1986);

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

State v. Barton, 936 S.W.2d 781(Mo.banc1996);

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

Mo.Const.,Art.I,§§10,18(a),21.

IV.*Apprendi* Violations

The trial court erred in overruling Earl's pre-trial motions based on *Apprendi*; not quashing the information; proceeding to penalty phase; not striking or *sua sponte* declaring a mistrial when the State adduced evidence in penalty phase for which the jury had received no instruction on the burden and standard of proof; submitting Instructions 28-30; accepting the jury's death verdicts and sentencing Earl to death because this denied Earl due process, a jury trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21, in that statutory and non-statutory aggravators are facts that increase the range of punishment for first degree murder from life without parole to death. They must be pled in the charging document and found by the jury unanimously and beyond a reasonable doubt. These facts were not pled in Earl's charging document nor was the jury instructed that, as to the second step of the process, it must find them unanimously and beyond a reasonable doubt.

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

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

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

State v. Whitfield, 107 S.W.3d 253(Mo.banc2003);

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

Mo.Const.,Art.I,§§10,18(a),21.

V.INSTRUCTIONS PLACE BURDEN OF PROOF ON DEFENDANT

The trial court erred in denying Earl's pre-trial motions challenging the Approved Instructions, overruling his objections, giving Instructions based on MAI-Cr3d 314.44 and .48, failing to properly-instruct the jury, accepting their death verdicts, and sentencing Earl to death because this denied Earl due process, a jury trial, reliable sentencing and freedom from cruel and unusual punishment,

U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that the instructions, which do not require that the State bear the burden of proof beyond a reasonable doubt on all facts upon which Earl's death-eligibility rests, also misled the jury into placing the burden of proof on Earl.

State v. Whitfield, 107 S.W.3d 253(Mo.banc2003);

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

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

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

Mo.Const.,Art.I,§§10,18(a),21.

VI.PROSECUTOR ANNOUNCES HIS LEGAL CONCLUSIONS

The trial court plainly erred in failing sua sponte to admonish Ahsens and declare a mistrial when Ahsens announced to the jury that he did not concede Dr. Gelbort was a Neuropsychology expert and Dr. Evans was not an expert and cannot render an expert opinion in Psychiatric Pharmacy because this denied Earl due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that Ahsens' pronouncements were legal conclusions solely for the trial court; personalized and suggested facts outside the evidence, encouraging the jury to disregard the defense experts' testimony solely based on Ahsens' personal opinion.

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

State v. Storey, 901 S.W.2d 886(Mo.banc1995);

State v. Smith, 637 S.W.2d 232(Mo.App.,W.D.1982);

State v. Shurn, 866 S.W.2d 447(Mo.banc1993);

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

Mo.Const.,Art.I,§§10,18(a),21.

VII.INCONSISTENT VERDICTS

The trial court erred in accepting the jury's penalty phase verdicts on Counts I and II and sentencing Earl to death because those actions denied Earl due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const., Art.I,§§10,18(a),21, in that, although the State submitted, as a statutory aggravator, whether each homicide was committed while Earl was committing the other homicide, the jury found it only as to Harriett Smith. Because finding this aggravator on one of these homicides requires finding it on the other, the jury's verdicts were inconsistent and cannot stand. Alternatively, this finding on Count I violates Earl's above-stated constitutional rights because insufficient evidence exists to support it. No evidence exists upon which the jury could find Earl committed one "while" committing the other.

Sochor v. Florida, 504 U.S. 527(1992);

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

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

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

Mo.Const.,Art.I,§§10,18(a),21.

VIII.VENIREMEMBERS CAN'T SIGN DEATH VERDICT

The trial court abused its discretion in sustaining the State's cause challenges of Venirepersons Parrott(127) and Giger(131), because this denied Earl due process, a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const., Art.I,§§10,18(a),21, in that neither veniremember indicated they could not consider imposing the death penalty. They merely could not sign a death verdict. Since that is not a requirement for service and the State did not demonstrate that their hesitancy prevented or substantially impaired their ability to follow their oath and the court's instructions, their inability to sign the verdict was not a proper basis for cause strikes.

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

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

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

State v. Smith, 781 S.W.2d 761(Mo.banc1989);

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

Mo.Const.,Art.I,§§10,18(a),21.

IX.IMPROPER ARGUMENT

The trial court erred and plainly erred in overruling defense counsel's pre-trial motion, objections, not striking the venire, and not declaring a mistrial *sua sponte* based on Ahsens's arguments:

PENALTY PHASE

1. "I submit to you when you—when you get shot in the leg, and shot in the palm, and shot in the wrist, and shot in the torso, and then twice in the head, and again, there is no reason to keep shooting somebody if they're already dead."(T1696);

2. "Your second option is – the second thing is you must find that the statutory –that the aggravating circumstances, that is, all the facts in the case taken as a whole are not outweighed by the mitigating circumstances. And if you find unanimously that that is so, then you will have that final point of decision we talked about, with all options open"(T1700);

3. "Society, just like each one of us as an individual has the right to self-defense, even if that right of self-defense includes killing in order – against an unprovoked attack… Society has the right to defend itself…You are society. We look to you to defend us"(T1702, 1703);

4. "He says putting him in prison is enough, for life. You know, well, unfortunately, there are people in prison too: prisoners and staff and guards. It's not like he's going to be inside of a concrete box with no access to anybody so society is still at risk"(T1725);

5. "Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases…."(T1726);

6. "…the defense made a rather eloquent plea for mercy, but I want you to understand what mercy is. Mercy is something that is given by the powerful to the weak and the innocent. You have power. He's not innocent"(T1726);

7. "I'm tempted to say and I think I will. How many people do you get to kill before you stop them cold? If not now, when? If not here, where?"(T1732);

8. "I was struck when I read some of what Edmond Burke had to say, English philosopher … All that is necessary for evil to triumph is for good men to do nothing. You could send him to prison. He knows all about prison. I suggest to you that's tantamount to doing nothing"(T1732-33);

9. "Show me remorse in this case. Remember what Officer Belawski said? He said he simply asked how Joann was. Why? Because he knew that shooting a cop is one thing, killing a cop is something else altogether and he knew it"(T1728);

GUILT PHASE

10. "Did he deliberate—did he deliberate after the first shot? He had time. Did he deliberate after the second shot? He had time again. After the third? He had adequate time then. He kept shooting, didn't he?"(T1249);

11. "Now, is the fact that you knowingly shoot somebody enough to be deliberation? In and of itself, no. But certainly if you pull the trigger twice, was there time to deliberate? You bet there was. And he shot Harriet Smith

five or six times"(T1261-62) because these arguments denied Earl due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,AmendsVI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21; §565.030.4 in that Ahsens argued facts not in the record, misstated the law and facts, inserted an external source of law, created the false premise that a life without parole sentence wasn't punishment, converted a mitigator into an aggravator, and raised future dangerousness, rendering the verdicts unreliable.

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

State v. Storey, 901 S.W.2d 886(Mo.banc1995);

State v. Shurn, 866 S.W.2d 447(Mo.banc1993);

Tucker v. Francis, 723 F.2d 1504(11th Cir.1983);

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

Mo.Const.,Art.I,§§10,18(a),21.

X.MURDER FIRST OR SECOND?

The trial court erred and plainly erred in overruling Earl's motion for judgment of acquittal at the close of all the evidence; not declaring a mistrial *sua sponte* when Ahsens argued deliberation occurred because Earl had "time" to deliberate; accepting the jury's verdicts of guilty of first degree murder; sentencing Earl to death; submitting Instructions 7,10,13, and not dismissing the first degree murder charges because this denied Earl due process, a fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21 in that §565.020RSMo requires proof that the defendant deliberated, which means "cool reflection for any length of time no matter how brief." Ahsens argued because Earl had time to deliberate, he did. By submitting these charges and then convicting on them, the trial court eliminated the distinction between first and second degree murder and relieved the State of the burden of proof on that element, since the definition contains mutually inconsistent elements. Those elements create a statute so vague it leaves jurors free to decide, with no legally-fixed standards, what constitutes deliberation.

State v. O'Brien, 857 S.W.2d 212(Mo.banc1993);

State v. Brown, 836 S.W.2d 530(Tenn.1992);

State v. Thompson, 65 P.3d 420(Ariz.2003);

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

U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21.

XI.VOLUNTARY INTOXICATION INSTRUCTION RELIEVES STATE OF BURDEN OF PROOF

The trial court erred in overruling Earl's objections to Instruction 5, submitting that instruction, accepting the jury's verdicts and convicting Earl of first-degree murder because this denied Earl due process, the rights to present a defense, rebut the State's case and hold the State to proof beyond a reasonable doubt, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that the instruction's language ordering the jury not to consider a defendant's intoxication in determining mental state, creates a reasonable likelihood it will excuse the State from proving his mental state beyond a reasonable doubt and will shift that burden of proof to the defense. This likelihood is enhanced by the instruction's prefatory sentence since the diametrical opposition of the instruction's two propositions creates a conundrum about whether the State must prove the defendant's mental state beyond a reasonable doubt and whether the defense must prove that he did *not*.

State v. Erwin, 848 S.W.2d 476(Mo.banc 1993);

Sandstrom v. Montana, 442 U.S. 510(1979);

Montana v. Egelhoff, 518 U.S. 37(1996);

Crane v. Kentucky, 476 U.S. 683(1986);

U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21.

XII.JURY INSTRUCTIONS MIS-DEFINE REASONABLE DOUBT

The trial court erred in overruling Earl's pre-trial motions on reasonable doubt, overruling Earl's objections to Instructions 4 and 19 and the oral instruction based on MAI-Cr3d 300.02 because this denied Earl due process, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that these instructions, equating "reasonable doubt" with proof that leaves the jury "firmly convinced" of the defendant's guilt but does not "overcome every possible doubt," lowers the State's burden of proof and allows conviction on a quantum of proof less than that mandated by due process.

Victor v. Nebraska, 511 U.S. 1(1994);

Sullivan v. Louisiana, 508 U.S. 275(1993);

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

State v. Perez, 976 P.2d 427(Haw.App.1998);

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

Mo.Const.,Art.I,§§10,18(a),21.

XIII.TESTIMONY BOLSTERS CREDIBILITY

The trial court erred and abused its discretion in overruling Earl's objections to and admitting Sheriff Wofford's testimony about Officers' Sigman and Piatt's statements and Officer Roark's testimony about Angelia Gamblin's statements because this denied Earl due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that the out-of-court statements were hearsay, offered solely to bolster the in-court testimony of these witnesses. Earl was prejudiced since, by presenting the same testimony through multiple witnesses, the State established a drumbeat of violent, precipitous action in its attempt to establish deliberation.

State v. Seever, 733 S.W.2d 438(Mo.banc1987);

State v. Silvey, 894 S.W.2d 662(Mo.banc1995);

State v. Cole, 867 S.W.2d 685(Mo.App.,E.D.1993);

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

Mo.Const.,Art.I,§§10,18(a),21.

ARGUMENTS

I."DEBLER" EVIDENCE IMPROPERLY ADMITTED

The trial court erred, plainly erred and abused its discretion in overruling Earl's pre-trial "other crimes evidence" motions, admitting extensive evidence of Earl's prior misconduct in California, not *sua sponte* declaring a mistrial and accepting the jury's death verdicts because this denied Earl due process, trial only for the charged offense, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,17,18(a),21;§565.030.4 RSMo;Arts. 9,14, International Covenant on Civil and Political Rights; Art.5, Universal Declaration of Human Rights, in that, although in penalty phase the State presented extensive evidence of Earl's alleged drug possession and dealing in California in penalty phase and told the jury to consider it in sentencing him, failing to require the State to prove and the jury to find those facts beyond a reasonable doubt undermined the reliability of the proceedings and the resultant death verdict.

The State presented extensive evidence in penalty phase about Earl's drug-related activities in California and argued in closing that, since "running drugs and carrying guns … was a constant state with him,"(T1726), the jury should sentence him to death. The trial court erred, plainly erred and abused its discretion in overruling Earl's pre-trial motions, allowing that evidence and not *sua sponte*

declaring a mistrial upon its admission, and accepting the jury's death verdicts. These actions violated Earl's state and federal constitutional and international law rights to due process, a fair trial before a properly-instructed jury, a trial only for the crimes for which he was charged, reliable sentencing and freedom from cruel and unusual punishment.

Pre-trial, Earl unsuccessfully moved to exclude evidence of arrests not resulting in conviction because it would so prejudice the jury as to deny him due process. (LF357-58;T67). He also moved to exclude evidence of other crimes and bad acts, asserting that, unless it proved a statutory aggravator specifically authorized under the statute, its sole purpose was unduly to prejudice the jury and thus did not comply with the rules of evidence.(LF492-98). He challenged the penalty phase instructions,(LF136A-43), asserting the jury improperly considered that evidence because it would not know what burden of proof to apply or who bore that burden. He also argued that, as uncharged bad acts, it was highly prejudicial, violating due process. The court denied Earl's challenges.(T113-15).

In penalty phase opening, Ahsens emphasized the prior bad acts evidence, saying two California officers would testify about Earl's arrests and drugs and firearms possession (T1298,1300,1301).

Officer Trudeau testified that in November, 1994, he was looking for Earl on two outstanding warrants—a narcotics violation and a suspended driver's license.(T1309). With several other officers, he followed Earl and some friends, eventually arresting him in his driveway.(T1310-12). Earl had a four-inch gravity

knife and Earl's car contained a loaded .22 handgun.(T1313). Earl's girlfriend let the officers search the house, where they found "a substantial amount of methamphetamine," a loaded .44 Ruger handgun, and information bearing several names, including Earl's.(T1314).

The defense elicited that, while officers found Guadagna's and Earl's possessions in the house, they charged only Earl.(T1317). Trudeau stated charges were dropped but "the DA in our county did file on this case. The only reason it did not go to trial was the fact that he did have a second case shortly thereafter which caused it to be moved to that county…."(T1318).

In December, 1996, Officer Ridenour was dispatched to a local hotel to investigate a "kidnapping."(T1322). Although Earl was not holding Guadagna, against her will, Ridenour searched Earl's room because of Earl's parole status, and Guadagna told him marijuana and syringes were there.(T1323-24). Ridenour found several baggies of a white powdery substance, syringes filled with various colored substances, tote-bags, money, stolen checks and narcotics information.(T1324-25). Ridenour saw evidence that some of the checks had been washed and realized the powder and the substances in the syringes was methamphetamine.(T1325-26). Ridenour arrested Earl and Guadagna.(T1327). The defense elicited that the kidnapping charge had not "panned-out," and the washed checks were never connected to Earl.(T1327-28).

In Ahsens' final closing, he told the jury:

> Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases, arresting him with large amounts of drugs. You know, folks, the man was running drugs and carrying guns and that was a constant state with him….

(T1725-26).

Ahsens' argument and evidence were constitutionally-infirm and they violated §565.030, which provides that penalty phase evidence may only be presented "subject to the rules of evidence at criminal trials." Further, since the jury was never instructed that it must find that evidence beyond a reasonable doubt, some jurors may have taken it into account, while imposing a lesser standard of proof, in sentencing Earl to death.

Trial courts have broad discretion in determining the admissibility of penalty phase evidence.*State v. Storey*, 40 S.W.3d 898, 403 (Mo.banc2001); *State v. Clayton*, 995 S.W.2d 468, 478(Mo.banc1999). That discretion extends to admitting evidence helpful to the jury in assessing punishment. The appellate court reviews for an abuse of discretion. *Storey*, 40 S.W.3d at 403; *State v. Morrow*, 968 S.W.2d 100, 106(Mo.banc1998). If the evidentiary challenge is not preserved, plain error review may result.*Rule 30.20*.

Missouri's Legislature established procedures for first degree murder trials.§565.030RSMo. At the second phase, the only issue is punishment.§565.030.4RSMo. There, "Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the

aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented *subject to the rules of evidence at criminal trials*."§565.030.4 (emphasis added).

Missouri's Legislature has thus established the criminal rules of evidence as the benchmark for judging admissibility in penalty phase. One of those standards of measurement addresses the admissibility of other crimes or uncharged misconduct evidence.

This Court has stated that "criminal defendants have a right to be tried only for the offense for which they are charged."*State v. Hornbuckle*, 769 S.W.2d 89, 96(Mo.banc1989);Art.I,§17,Mo.Const. Due process is violated when the State introduces evidence that shows the defendant has committed, been accused, convicted of, or definitely associated with another crime or crimes.*Id.; State v. Clark*, 112 S.W.3d 95, 100 (Mo.App.,W.D.2003).

Proof that the defendant has committed other crimes is generally inadmissible unless that proof has a legitimate tendency to establish his guilt of the current offense.*State v. Williams*, 804 S.W.2d 408, 410(Mo.App.,S.D.1991). Such evidence may be admissible if it tends to establish motive, intent, absence of mistake or accident, common scheme or plan so inter-related that proof of one tends to establish the other, and identity.*Id., State v. Bernard*, 849 S.W.2d 10, 13(Mo.banc1993).

Evidence of other crimes may be admitted only if its probative value outweighs its prejudicial effect. *State v. Mallett*, 732 S.W.2d 527,

534(Mo.banc1987). Such evidence is "highly prejudicial and should be received only when there is strict necessity." *Williams*, 804 S.W.2d at 410, quoting *State v. Collins*, 669 S.W.2d 933, 936(Mo.banc1984). If adduced solely to show the defendant's propensity to commit the charged offense, it is inadmissible.*United States v. Mejia-Uribe*, 75 F.3d 395, 398-99 (8th Cir.1996).

The Legislature also has specified that, in penalty phase, in certain limited instances, evidence of other crimes is admissible. §§565.032.2(1)(2)(11)(12)(15)(16)(17). By including the caveat about "rules of evidence," §565.030.4 makes it clear, however, that, except as to these statutory exceptions, in penalty phase the State may not adduce any additional evidence of other crimes since the sole reason to adduce it would be to create undue prejudice. If that caveat is judicially-abrogated, defendants like Earl are denied due process.

Through §565.030.4, the State created an interest in the application of the rules of evidence in penalty phase. While that right may not otherwise have been inherent, once the State affords such protection, due process requires that it not be arbitrarily abrogated or denied. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1(1979); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonnell*, 418 U.S. 539(1974).

If this Court applies these legislatively-conferred protections, it will find that the trial court abused its discretion in letting the State adduce evidence, speculation, innuendo and argument that Earl was involved in extensive drug dealing and weapons possession, and unsupported suggestions that he was

involved in check-washing and kidnapping. None of the State's evidence falls within the statutory exceptions to the general rule that other crimes evidence is inadmissible. Rather, it involves incidents for which Earl was never convicted.

Additionally, once this evidence was adduced, constitutional error occurred because the jury was not given a mechanism through which to consider it. The death penalty is qualitatively different from any other criminal punishment, thus, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280,305(1976). That decision is "the most serious decision society makes about an individual…." *State v. Debler*, 856 S.W.2d 641, 656(Mo.banc1993).

This case is squarely controlled by *Debler*. There, this Court confronted whether plain error resulted from the admission in penalty phase of "extensive evidence of [Mr. Debler's] drug dealing in New Mexico."*Id.* at 657. The State "called Fisk to testify at length—and the prosecutor emphasized this evidence in both arguments—about criminal behavior for which Debler was never convicted."*Id.* Missouri courts routinely allowed, as nonstatutory aggravators, evidence of a defendant's serious unconvicted crimes. *Id.* As part of the solution, this Court decided, the State must give notice of its penalty phase evidence.*Id.; State v. Clay*, 975 S.W.2d 121, 132(Mo.banc 1998).

That did not end the inquiry. This Court found that admitting un-convicted crime evidence was plain error because it was "significantly less reliable" than

evidence related to a prior conviction and was highly prejudicial. *Debler*, 856 S.W.2d at 656. Only an instruction requiring unanimous findings beyond a reasonable doubt would cure some of the unreliability. *Id.* at 656-57.

This Court thus foresaw what the Supreme Court would hold some ten years later—that, in the weighing step of the jury's punishment determination, the jury must find the evidence in aggravation of punishment unanimously and beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *State v. Whitfield*, 107 S.W.3d 253, 261(Mo.banc2003).[2]

In *Debler*, the State presented evidence that Debler and Danny Fisk had planned to buy marijuana in Arizona and bring it back to Missouri to sell. Fisk was ultimately convicted of a misdemeanor, but Debler, also charged, was never convicted.[3] This Court's finding that the lack of an instruction on this highly prejudicial evidence violated due process is equally, if not more, applicable here.

Ahsens presented "extensive evidence of [Earl's] unconvicted drug dealing" but, distinct from *Debler*, much of what Ahsens presented couldn't even

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[2] Earl acknowledges that this Court has denied similar claims. *State v. Glass*, 136 S.W.3d 496, 621(Mo.banc2004); *State v. Deck*, 136 S.W.3d 481, 486(Mo.banc 2004); *State v. Taylor*, 134 S.W.3d 21, 30(Mo.banc2004). This claim is preserved for review and Earl requests reconsideration.

[3] Earl requests that this Court take judicial notice of its files in *State v. Debler*. The evidence the State presented appears at T1378-1420.

be tied to Earl. Trudeau testified about guns and drugs found in Earl's car and the house, but he acknowledged that others, including Earl's girlfriend had access to them. While Trudeau stated the charges were dismissed for unrelated reasons, it is likely the State couldn't tie the drugs to Earl. *State v. Morris*, 41 S.W.3d 494, 497(Mo.App.,E.D.2000).

Ridenour testified he was dispatched because Earl had kidnapped a woman, a charge that was false. The jury heard the poisonous word "kidnapping," and nothing un-rang that bell. *State v. Shepard*, 654 S.W.2d 97, 101 (Mo.App.,W.D.1983). Ridenour testified he found a lot of drugs and washed checks in the hotel room, but again, acknowledged the checks couldn't be tied to Earl. Nonetheless, the jury heard Earl was found with the drugs, checks and guns, whether or not he *legally* could be tied to them. Ahsens suggested they *could*, arguing in closing, also partially contrary to the evidence, that, "Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases, arresting him with large amounts of drugs…."(T1726).

Just as in *Debler*, the jurors were likely to consider "unconvicted criminal activity [] practically indistinguishable from criminal activity resulting in convictions…." *Debler*, 856 S.W.2d at 657. Further, since they weren't told how to consider it, "it is possible that some jurors took this evidence into account while applying a lesser standard of proof."*Id.*

Because the jurors heard extensive evidence of Earl's alleged prior un-connected, un-convicted criminal activities and they were not instructed that, to consider that

evidence in determining whether to sentence Earl to death, they had to find it unanimously and beyond a reasonable doubt, their penalty phase verdicts were unreliable. This Court must reverse and remand for a new penalty phase or reverse and order Earl re-sentenced to life without parole.

II. VICTIM IMPACT -- THE JURY RECEIVES NO GUIDANCE

The trial court abused its discretion and erred in overruling Earl's motions to exclude and limit victim impact evidence, overruling his objections to the testimony of Raymond Wells and Lois Lambiel, submitting Instruction Nos.28-30, refusing Instruction A, and accepting the jurors' penalty phase verdicts and plainly erred in not striking, considering while sentencing Earl to death that Joann Barnes' family wanted "an eye for an eye," and not considering that the jury foreman put himself into the victims' families' shoes because that denied Earl due process, confrontation, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21 in that the evidence the State adduced far exceeded the "brief glimpse" of the victims' lives authorized by *Payne v. Tennessee*; included hearsay and unsubstantiated alleged results of Earl's actions; requested Earl's execution; let the jurors weigh the value of the victims' lives against Earl's; and gave them no guidance on how to consider or weigh the evidence in reaching their verdict.

The Eighth Amendment erects no *per se* bar to victim impact evidence. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). However, that evidence must be limited to "'a quick glimpse of the life petitioner chose to extinguish,' … to remind the jury that the person whose life was taken was a unique human being."*Id.* at 830-31(O'Connor, J., concurring)(citation omitted). Nonetheless,

"opinions of the victim's family about the crime, the defendant, and the appropriate sentence" continued to be inadmissible. *Id.* at 833; *State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc 1997); see also §565.030.4 Cum.Supp.2004 (allowing admission "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.")

No Eighth Amendment violation would have occurred had Ahsens presented legitimate victim impact evidence. Instead, he elicited hearsay; evidence ascribing blame to Earl but not proved to be connected to him, and evidence of Joann Barnes' family's desire for his death. This far exceeded *Payne's* boundaries and violated the rules of evidence. Further, the jury's instructions didn't explain what they were to consider, how they were to consider it or who bore the burden of proof. The trial court abused its discretion, erred and plainly erred in denying Earl's motions to limit victim impact evidence, submitting Instructions 28-30, refusing Instruction A, accepting the penalty phase verdicts, not striking Lois Lambiel's comments that her family wanted Earl to die and considering those comments in sentencing Earl to death.[4] This denied Earl state and federal constitutional due process, a fair trial, a properly-instructed jury,

[4] Counsel preserved these challenges by timely objection and inclusion in the new trial motion, except to Lambiel's comments during sentencing. As to that claim, Earl requests plain error review. *Rule 30.20*.

confrontation, reliable sentencing and freedom from cruel and unusual punishment.

Before trial, defense counsel filed motions to limit and exclude victim impact evidence and to instruct the jury consonant with *Ring* and *Apprendi*(LF210-22,500-09), which the court denied(LF29-30). Immediately before penalty phase, they renewed the motions, which the court again denied(T1287-88).

Section 565.030.4 provides for the admission of victim impact evidence "*subject to the rules of evidence at criminal trials*." The trial court has discretion to determine the admissibility of evidence in penalty phase and its decisions will not be reversed absent an abuse of discretion.*State v. Storey*, 40 S.W.3d 898, 403 (Mo.banc2001).

That discretion is limited in two fundamental respects. First, the statute requires that penalty phase evidence, including victim impact, conform to the rules of evidence. Second, because of Eighth Amendment and due process concerns, *Payne*, 501 U.S. at 836 (Souter, J., concurring),*citing Darden v. Wainwright*, 477 U.S. 168(1986), when error in admitting evidence is of constitutional dimension, the reviewing court must reverse unless it can say with confidence that the State has proved beyond a reasonable doubt the error was harmless.*State v. Driscoll*, 55 S.W.3d 350, 356 (Mo.banc2001).

In jury selection, Ahsens stated that, once the jury found a statutory aggravator, it was to "look at everything that aggravates the situation. That could

be the statutory aggravating circumstances, could be the nature of the crime, the nature of the defendant, **the nature of the victim**, all of those things and you weigh it against any mitigating circumstances."(T331-32)(emphasis added).

Lois Lambiel, Joann Barnes' older sister, testified Barnes was childless, her husband died seven years earlier, and she "adopted" her nieces and nephews.(T1340-41). Lambiel talked about Barnes' relationship with Lambiel's children, especially her daughter Leeann, a St. Louis police officer.(T1344-45). Lambiel had not encouraged her daughter's choice of professions but Barnes encouraged Leeann throughout training.(T1345). They always talked police work at family gatherings and Barnes taught Leeann to shoot two-handed.(T1345-46).

Since Barnes's death, Lambiel hadn't slept a night through and didn't believe life would ever be the same for her family.(T1349). She stated "One of my brothers has had five strokes just right afterwards."(T1349). Her nieces and nephews talk about Barnes's death, they call and want to talk about it and "just can't believe it."(T1349). Leeann "talked about if she could call Aunt Joann, you know, Aunt Joann would know what to do and think."(T1349). Lambiel stated, "then one brother died about six months after Joann did."(T1349-50). Ahsens asked, "are the things that have happened to your family because of Joann's death, do they go on even now?"(T1350). "[T]hey go on. It's just one big nightmare. We can't believe in a small town things like this happened. Can't believe it."(T1350).

At sentencing, Lambiel stated, "And we feel like it's not fair that she doesn't get some kind of a justice. It's not fair that her life was taken. She wasn't asked for nothing else. She was just doing her job. And we feel like that it's not right unless we get an eye for an eye."(T1780).

The jury was instructed, in weighing the evidence, to "consider all of the evidence presented in both the guilt and the punishment phases of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 25[5], and evidence presented in support of mitigating circumstances submitted in this instruction."(LF606).

While Lambiel's testimony about her family and the impact on them of their loss was permissible under *Payne*, much of it far exceeded *Payne's* parameters and violated the rules of evidence. Her testimony about other family members' conversations recounting the impact of the death upon them (T1333,1336,1349-50)[6] was hearsay, violating Earl's constitutional right to confrontation.

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[5] Instruction 25 referred to Count I. Instructions 28-30, referring to Instructions 25-27, contain identical language.(LF603-08).

[6] Counsel objected following Mr. Wells' comments about Michael's influences on his wife and Michael's cousin (T1337) but didn't object to the other testimony. Plain error review is requested.*Rule 30.20*.

The Sixth Amendment's Confrontation Clause mandates that, in criminal prosecutions, the accused have the right to confront the witnesses against him.*Pointer v. Texas*, 380 U.S. 400, 406(1965). "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). Moreover, §565.030.4 specifically provides penalty phase evidence is "**subject to the rules of evidence at criminal trials**." Testimony about others' accounts of conversations and feelings were inadmissible and rendered Earl's death sentences unreliable.

Lambiel also testified about one brother's multiple strokes and another's death, implying Earl also caused those events.(T1349-50). Ahsens reinforced this concept, calling them occurrences that were due to Earl's actions.(T1350). While it was uncontested that Earl caused Barnes' death, for him to be blamed for her brothers' ill-health and death is unwarranted speculation, rendering the death verdicts unreliable.

Section 565.030.4 mandates that penalty phase evidence comport with the rules of evidence. One such rule restricts the admissibility of other crimes evidence. "Criminal defendants have a right to be tried only for the offense for which they are charged."*State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo.banc1989). The State violates due process by presenting evidence that the defendant has committed, been accused or convicted of, or definitely associated with another

crime or crimes.*Id*.;*State v. Clark*, 112 S.W.3d 95, 100 (Mo.App.,W.D.2003). When it suggests the defendant caused other fatal harm, with only speculation in support, the error is compounded.*See*, *State v. Shepard*, 654 S.W.2d 97, 100-01 (Mo.App.,W.D.1983);*State v. Cuckovich*, 485 S.W.2d 16(Mo.banc1972);*Tucker v. Kemp*, 762 F.2d 1496, 1507(11th Cir.1985). Especially since it was unrelated to any harm Earl may have caused, this testimony carried a substantial risk of prejudicing the jury. *United States v. Mayhew*, __F.Supp.2d__, 2005 WL1845171 (S.D.Ohio 2005); *United States v. Fell*, 360 F.3d 135,145 (2nd Cir.2004). Demonstrating the prejudice caused by this type of evidence, Lee Pitman, the jury foreperson, acknowledged having put himself in the victims' families' position in making the penalty phase decision.(T1775-76).

Lambiel stated at sentencing that she and her family wanted an "eye for an eye."(T1780). The victim's family's preference about sentence are categorically inadmissible.*Payne*, 501 U.S. at 833 (O'Connor, J., concurring). Although the jury did not hear this inflammatory and impermissible comment, the trial court, who was about to sentence Earl, did. Confidence in the outcome is undermined because of the risk that Lambiel's request impacted that decision. Moreover, Lee Pitman, the jury foreman, put himself into the families' shoes in making his decision on Earl's fate. ((LF734;T1775-76).

Earl's sentences were also rendered unreliable because the jury received no guidance about the victim impact evidence—what and how to consider it, or what standard of proof to apply.

Instructions 28-30 instructed:

> As to Count I,[7] if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No.25 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
>
> In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No.25, and evidence presented in support of mitigating circumstances submitted in this instruction.

(LF606-08). Significantly, while the jury is told that it must find any statutory aggravators unanimously and beyond a reasonable doubt, it is never told under what standard it is to consider the non-statutory aggravators, including victim impact evidence. Attempting to rectify those problems, Earl submitted Instruction A:

> You have been instructed in Instructions Nos. __ that you are to determine whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon

[7] Instructions 28-30 each referred to one of the three Counts and referred internally to Instructions 25-27. Reference to one refers to all.

the defendant and there are facts and circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

In deciding these questions as to the existence of facts and circumstances in aggravation of punishment, you may consider all of the evidence presented in both phases of trial but the evidence that you consider in support of these questions you must find unanimously beyond a reasonable doubt.

Among the evidence that the State has presented for your consideration as evidence in aggravation of punishment is evidence concerning Harriett Smith, Michael Wells and Joann Barnes and the impact of the murder upon their families and others. Only if you find this evidence unanimously beyond a reasonable doubt may you consider this in making your decisions in Instructions Nos. ___. Before you may consider this evidence as you weigh aggravating facts and circumstances against mitigating facts and circumstances, you must make the following findings unanimously beyond a reasonable doubt.

We hereby certify that we have found unanimously beyond a reasonable doubt that:

1. The following facts occurred:
2. The facts set forth in 1. above are related to this homicide:
3. The facts set forth in 1. above demonstrate an impact by this homicide upon a friend or family member of the homicide victim:

4. the facts set forth in 1. and their impact are aggravating:

(LF625-26).

Capital defendants are entitled, under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial rights, to have a jury find beyond a reasonable doubt all facts upon which an increase in punishment is contingent.*State v. Whitfield*, 107 S.W.3d 253, 257(Mo.banc2003); *Jones v. United States*, 526 U.S. 227, 243, n. 6(1999);*Ring v. Arizona*, 536 U.S. 584, 600(2002);Arts.9§2,14§3(a) International Covenant on Civil and Political Rights; Principle 10, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

A fact increases the maximum sentence when its absence renders the higher sentence unavailable.*Ring*, 536 U.S. at 600-01. *Id*. at 610(Scalia, J., concurring)(emphasis added). In *Whitfield*, this Court held that, under the then-in-effect §565.030, the first three of the four steps that the jury undertook in deciding punishment were steps requiring jury findings of fact. *Whitfield*, 107 S.W.3d at 261. Although Missouri's Legislature has eliminated the "warrant" requirement, §565.030.4(1-4), this analysis applies with full force to the remaining factual determinations.

Due process and jury trial constitutional guarantees are not satisfied merely with a jury's factual finding. Rather, as *Ring* held and *Whitfield* affirmed, that finding must be "beyond a reasonable doubt."*Id.* at 257;*citing Ring*, 536 U.S. at 602;*Apprendi v. New Jersey*, 530 U.S. 466, 494(2000).

This concept is not new. In *State v. Debler*, 856 S.W.2d 641 (Mo.banc1993), this Court addressed whether admitting extensive evidence of Debler's prior unconvicted drug dealing was plainly erroneous.*Id*. at 657. Because Debler had never been convicted of any offense involving that conduct, the evidence was "significantly less reliable than evidence related to prior convictions."*Id.* To the average juror, such evidence was practically indistinguishable from evidence of prior convictions.*Id.* The Court held that, without an instruction requiring a unanimous and beyond-a-reasonable-doubt finding on that evidence, "it is possible that some jurors took this evidence into account while applying a lesser standard of proof. Such consideration would clearly violate the statutory standards governing the death penalty."*Id.*

Just as *Whitfield, Ring* and *Apprendi* require that the jury make factual findings beyond a reasonable doubt on non-statutory aggravators, so, too, do they require that the jury be given guidance so they can make similar findings about victim impact evidence. No functional distinction exists between victim impact and any other non-statutory aggravating evidence.§565.030.4. ("Such evidence [in aggravation … of punishment] may include…evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.").

Under *Ring, Whitfield* and *Debler*, Instructions 28-30, based on MAI-Cr3d314.44, require jury fact-finding. Since the facts that the jury was to weigh against mitigation included victim impact evidence, Earl's jury should have been

required to find them beyond a reasonable doubt. Otherwise, *Ring* and *Whitfield* would be stood on their heads and rendered a hollow shell.

Since the jury must make these findings beyond a reasonable doubt, it must be given a mechanism to implement that constitutional mandate.*Penry v. Lynaugh*, 492 U.S. 302, 319(1989). Since the trial court rejected Earl's proposed instruction to provide that mechanism,(LF508-09,625-26), the jury received no guidance. It could well have considered the non-statutory aggravators, including the victim impact evidence, in a constitutionally-impermissible fashion. As Justice Stevens recently stated, admitting "victim impact evidence that sheds absolutely no light on either the issue of guilt or innocence, or the moral culpability of the defendant, serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason." Hon. John Paul Stevens, "Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva,"
http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

Because the victim impact evidence far exceeded *Payne's* parameters and violated the rules of evidence and because the jury received no guidance on how to consider it, Earl's death sentences cannot stand. This Court must reverse and remand for a new penalty phase or reverse and order Earl re-sentenced to life without parole.

III.RIGHTS TO REBUT AND PRESENT A DEFENSE

The trial court erred and abused its discretion in sustaining the State's objection to the defense's penalty phase argument that sentencing Earl to death would make his family and friends "very, very, very distraught" because this denied Earl due process, a fair trial, individualized, reliable sentencing, freedom from cruel and unusual punishment, the rights to rebut the State's case and present a defense, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21 in that the State told the jurors in both penalty phase closings to consider the impact on the victims' families. Defense counsel was entitled to rebut the State's case by presenting and arguing as mitigation the impact of executing Earl on his family and friends. Since Earl's death sentences are based on evidence he was denied the opportunity to confront, rebut or challenge, they are unreliable.

"The most important testimony might have come from family members of Barnes and Wells."(LF734). The State told the jury to consider and weigh the impact of the deaths of Joann Barnes and Michael Wells on their families. But, when defense counsel urged the jury to consider the impact of executing Earl upon Earl's family and friends, the court sustained the State's objection, precluding the jury's consideration of that evidence. That ruling denied Earl's state and federal constitutional rights to due process, indivi dualized sentencing, a fair trial, freedom from cruel and unusual punishment, to present a defense and rebut the State's case.

This Court must determine whether, in sustaining the State's objection and telling the jury to disregard defense evidence that would have rebutted the State's case, the arguments had a decisive effect on the jury's decision-making process. *State v. Storey*, 40 S.W.3d 898, 910(Mo.banc2001); *State v. Armentrout*, 8 S.W.3d 99, 111(Mo.banc1999). That occurred if a reasonable probability exists that, without the error, the verdict would have been different.*Storey*, 40 S.W.3d at 910; *State v. Deck*, 994 S.W.2d 527, 543(Mo.banc1999). The trial court has broad discretion in controlling closing argument and reversal will result only if it is abused.*Id.* Although the court has discretion, it is not unlimited. *State v. Barton*, 936 S.W.2d 781, 784(Mo.banc1996). Defense counsel "has the right to make any argument to the jury that is essential to the defense of the accused and is justified by the evidence… It is an abuse of discretion for the trial judge to preclude any such argument."*Id.* Here, since the court's ruling told the jury to ignore defense evidence that would have rebutted the State's case and tipped the scales toward a life verdict, the verdict would have been different.

The rights to present a defense and rebut the State's case are fundamental. *Washington v. Texas*, 388 U.S. 14, 19(1967);*California v. Trombetta*, 467 U.S. 479, 485(1986); *Gardner v. Florida*, 430 U.S. 349(1977). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"*Crane v. Kentucky*, 476 U.S. 683, 690-91(1986), quoting

Trombetta, 467 U.S. at 485(internal citations omitted). Due process is violated if a death sentence is based, even partially, on information the defense has been denied the opportunity to explain or deny.*Gardner*, 430 U.S. at 362.

In *Simmons v. South Carolina*, 512 U.S. 154(1994), the defendant was denied due process when the trial court refused to instruct the penalty phase jury about the defendant's parole-ineligibility after the State raised his future dangerousness. The jury reasonably may have believed he would not be incarcerated forever but could be released on parole if they did not sentence him to death.*Id*. at 161. The trial court's repeated refusal accurately to inform the jury of his parole ineligibility exacerbated that misunderstanding.*Id.* at 162. "The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process."*Id.* Future dangerousness was a relevant consideration in penalty phase and how long the defendant would be incarcerated was "indisputably relevant."*Id.* at 163. Since a sentencing jury could reasonably view someone who was parole-eligible as a greater potential threat to society than one who was not, "The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled

with our well-established precedents interpreting the Due Process Clause."*Id.* at 163-64.

"The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment."*Id*. at 163. Nonstatutory mitigation also can include evidence like the defendant's drug and alcohol abuse, long-term and at the time of the offense; co-defendants' sentences; the defendant's background and character, including his difficult childhood and his alcoholic and abusive parents; and his positive adult relationships with his children and neighbors. *Parker v. Dugger*, 498 U.S. 308, 314(1991). Also mitigating is the impact of his execution on family and friends.*Richmond v. Lewis*, 506 U.S. 40, 44 (1992); *People v. Smith*, 107 P.3d 229, 248(Cal.2005); *People v. Fierro*, 821 P.2d 1302, 1337-38(Cal.1991); *Capano v. State*, 781 A.2d 556, 676(Del.Super.2001); *State v. Ortiz*, 2003 WL 22383294 *7(Del.Super.2003); *Olsen v. State*, 67 P.3d 536, 600-02(Wyo.2003); *State v. Stevens*, 879 P.2d 162, 167-68(Or.1994); *contra*, *Williams v. State*, No.SC86095 (Mo.banc, 6/21/05). Key is that the jury make an individualized sentencing determination. *Tuilaepa v. California*, 512 U.S. 967,972-73(1994); *Woodson v. North Carolina*, 428 U.S. 280,304-05(1976).

In penalty phase, Ahsens adduced from Raymond Wells, Michael Wells' father, that Michael participated in family reunions, antiqued with his mother, and woodworked.(T1332-33). Michael and his cousin, Tanya, were very close, talking

daily.(T1333). Michael had influenced his mother and his cousin.(T1336). Mr. Wells closed, saying, "there's an empty spot there for everybody… There's no Christmas no more."(T1337).

Lois Lambiel, Joann Barnes' older sister, testified that Joann, who was childless, "adopted" her nieces and nephews when her husband died.(T1340-41). She celebrated birthdays with the family and she and Lois daily talked by phone and ate together every weekend.(T1343). She loved people and, because she didn't cook, often ate out so everyone knew her.(T1344). She was a risk-taker, riding bicycles, flying glider planes and joining the sheriff's department.(T1344). She was close to Lois's daughter, Leeann, who she encouraged to become a police officer despite Lois's wishes, and they often spoke of their work.(T1344-46). She was also close to their brother, Lloyd, with whom she compared pickups.(T1347).

Since Barnes's death, Lambiel hadn't slept a full night.(T1349). One of her brothers had five strokes immediately thereafter and another died six months later.(T1349-50). Since her death, the nieces and nephews always call and talk.(T1349). Life since her death is "one big nightmare."(T1350).

The defense called Earl's younger brother, Bill, who testified their family moved to Livermore, California, near San Francisco, when Earl was in the fourth grade.(T1356-58). Bill was expelled from high school for injecting methamphetamine and, instead of being angry with Bill, their parents were angry at the police.(T1361-62). Their parents neither punished nor tried to get him to stop using drugs.(T1362). Their father always blamed others when Bill got in

trouble but, when Earl got in trouble, their father said it was because Earl was stupid.(T1362-63).

Their father was an alcoholic, daily drinking beer, wine and vodka.(T1365-66). Bill and Earl are also alcoholics.(T1366). Earl started drinking at an early age, drinking anything he could find, graduating to 100-proof peppermint schnapps and methamphetamine.(T1366-67). Earl and Bill started using drugs, including glue, paint thinner and methamphetamine in their early teens.(T1380-82). Earl once shared his normal dosage of methamphetamine with Bill, who felt his head would explode, everything going black and white.(T1382-83). Bill was surprised Earl daily survived that strong a dosage.(T1383).

Their father's "tough guy" philosophy encouraged his children to believe nobody should "disrespect" them and, if that occurred, they were to fight.(T1367-70). Their father forced them to fight other children, which often meant Bill and Earl got beaten.(T1369-70). When their father was drunk, he called them "weak little sob's," and told them to get revenge on anyone who challenged or disrespected them.(T1370-71).

Bill remembered Earl was a "typical big brother," popular in school, personable, outgoing, nice, fun, big-hearted.(T1363-64).

Nancy Young, who has known Earl since the second grade, lived with Earl for many years.(T1467-70, 1474, 1497). Although none of her children were biologically Earl's, he treated them as such.(T1476). Even when the romantic relationship ended and Earl moved, he remained an integral part of family life,

doing yard and housework, washing dishes, cooking breakfast, helping the children with their homework.(T1475-76,1478). Nancy still loves Earl and would remain in contact with him were he sentenced to life without parole.(T1491,1497). Nancy's oldest child, Heidi, recalled Earl was their father figure, cooking breakfast daily, helping with homework, giving meaningful presents and even helping with her college homework as she prepared for her nursing career.(T1400-08).

Earl had helped another daughter, Nancy Priscilla, care for animals, taught her to ride horses, always cooked breakfast, and entered her in a Halloween costume party.(T1453-60). She loves Earl.(T1460).

When Earl lived with them, he brought home an abandoned puppy, "Jack," who had a lion toy.(T1464). After the puppy died, Colton, Nancy's son, saw Earl find the toy and cry because he missed Jack.(T1464-65). Earl encouraged Colton to wear his glasses.(T1466).

Clayton, another son, considers Earl his father.(T1614). Clayton's earliest memories are of Earl, who took the family fishing, swimming, hiking and camping.(T1617-19). Earl was also his Scout leader and the parent-chaperone for school outings.(T1620). Earl prepared breakfast daily and Earl required that, when they got home from school, they first nap, then do homework and only thereafter could they play.(T1621-22). Earl loved animals, especially his Great Dane and the puppy.(T1627-28). Clayton, a child care worker in a group-home for abused children, started exploring religions at age 11 and Earl introduced him

to the LDS church, where Clayton was later baptized and remains active.(T1628-30).

Earl's friend, Carl Craghold, who received a Purple Heart and Bronze Star from Vietnam, remembered Earl loved animals, and recounted they fished, played horseshoes and rode bikes together.(T1444-45). He watched Earl with Clayton and knew they loved each other.(T1445). Bonnie Sharp knew Patty, Earl's ex-wife, and said he treated Patty's daughters better than their biological father.(T1450-51). Doug and Susan Del Mastro recounted Earl was great with their children and Nancy's.(T1591-1609). Although Earl used drugs and drank, they had no reservations about him being around their offspring and never saw him violent.(T1596-99,1612).

Angelia Gamblin described Earl as fun, easy to be around, with a good sense of humor.(T1504). She cares for him.(T1510). Angelia first brought Earl to her mother's house for Easter dinner.(T1512-13). Earl seemed quiet, nice, respectful, clean and neat, and always acted appropriately.(T1512-18). William Potsman, who was living with Angelia's mother, thought Earl was quiet, polite, funny and respectful.(T1520-21). He thought Earl was fine, although a bit old for Angelia.(T1522).

Ahsens' initial closing advised:

> In considering your verdict, look at everything, but look mostly at what the defendant did because that tells the tale. Talk is cheap; actions count. And unfortunately, they count very heavily against who? Harriett Smith and

Michael Wells and Sharon Joann Barnes. Their loved ones will never see them again. There's no way to write and no way to call. You are society. We look to you to defend us.

(T1703).

Kenyon then argued:

You should be mad at him for what happened on December the 9th of 2002, but please, look beyond that day. Please look beyond that day. Look at his whole life and look at those people out in the audience, ladies and gentlemen. Look at those people out in the audience who are going to be very, very, very distraught if you kill him. That's a mitigating circumstance.

(T1723-24). The court sustained Ahsens' objection.(T1724).

In final closing, Ahsens argued:

You know, why do we talk about character and all this at all instead of concentrating just on the act? Because it's good to know something about the person involved. It's also good to know something about the effect of what that person does. Because you throw a rock in a pond and the ripples go in all directions, and they washed over these families like a tidal wave. Don't make any mistake. Knowing what the impact on those families is, is something you're also entitled to know.

(T1729-30). The jury foreman took Ahsens' directive to heart as he put himself in the families' position in deciding Earl's fate. (LF734;T1776-77).

Ahsens got it at least partially right—the jury **was** entitled to know the effect on the families—but "families" includes **Earl's**. As Kenyon attempted to argue, because it tells the jurors something about Earl's character, they should have considered the impact of the impending loss of **their** loved one also.*People v. Smith*, 107 P.3d at 248. Further, if jurors are not allowed to hear the defendant's family and friends love him and desire mercy, they will believe the opposite is true. *Olsen*, 67 P.3d at 600-02.

Especially here, where Ahsens argued death was the only appropriate punishment because of the impact on the victims' families, Earl was entitled to counter that evidence with evidence demonstrating the impact a death sentence would have on his family and friends. The trial court's action sustaining Ahsens' objection to Kenyon's argument foreclosed that possibility. This Court must reverse and remand for a new penalty phase or to impose life without parole sentences.

IV.*Apprendi* Violations

The trial court erred in overruling Earl's pre-trial motions based on *Apprendi*; not quashing the information; proceeding to penalty phase; not striking or *sua sponte* declaring a mistrial when the State adduced evidence in penalty phase for which the jury had received no instruction on the burden and standard of proof; submitting Instructions 28-30; accepting the jury's death verdicts and sentencing Earl to death because this denied Earl due process, a jury trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21, in that statutory and non-statutory aggravators are facts that increase the range of punishment for first degree murder from life without parole to death. They must be pled in the charging document and found by the jury unanimously and beyond a reasonable doubt. These facts were not pled in Earl's charging document nor was the jury instructed that, as to the second step of the process, it must find them unanimously and beyond a reasonable doubt.

A jury must find any fact that increases the maximum penalty for a crime. *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). In particular, the first three steps in then-§565.030.4(1-3) required the jury's factual findings as prerequisites for finding a defendant death-eligible.*Id.* at 261. Not just statutory aggravators, but "every fact that the legislature requires be found before death may be imposed must be found by the jury."*Id.* at 257.

While this Court has acknowledged these requirements, it has not implemented them through Approved Instructions, nor has it mandated that trial courts implement them by instruction, pleading requirements, and evidentiary rulings. Thus, over two years post-*Whitfield*, Earl's state and federal constitutional rights to due process, a jury trial and freedom from cruel and unusual punishment were still violated.

Before trial, Earl challenged Missouri's statutory, instructional and evidentiary schemes, moving to preclude the State from seeking death, to require jury findings, to quash the information, and to submit instructions that comply with *Ring* and *Apprendi*.(LF133-36,136A-40,141-43,174-79, 180-83,387-91,394-427,500-09,527-34). The trial court rejected his challenges out-of-hand.(T13-15,28,77-78,114,145-46,152,1191-92,1287-88,1330,1663-73). Earl preserved his challenges in his new trial motion, thus the claims are properly before this Court.

When ambiguity in an instruction creates "a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence," the instruction violates the Eighth Amendment. *Boyde v. California*, 494 U.S. 370, 380(1990). Instructional error is harmless "'only when the court can declare its belief that it was harmless beyond a reasonable doubt.'" *State v. Ferguson*, 887 S.W.2d 585, 587(Mo.banc1994), citing *State v. Erwin*, 848 S.W.2d 476, 484(Mo.banc1993). Under this test, "the 'beneficiary of a constitutional error,' the State, must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"

Whitfield, 107 S.W.3d at 262, citing *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Driscoll*, 55 S.W.3d 350, 356(Mo.banc2001). When "instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings," the error is "structural" and harmless error analysis is inapplicable. *Sullivan v. Louisiana*, 508 U.S. 275, 281(1993).

The State charged Earl by information with three counts of first degree murder.(LF78-83). It did not charge the statutory and non-statutory aggravators that would make Earl death-eligible. It later filed Notice of Intent to Seek the Death Penalty, including the statutory aggravators. (LF97-99). Eight months thereafter, Ahsens assured defense counsel that he wasn't "going to play 'hide the ball'"(T82) and would disclose who he intended to call for victim impact and what non-statutory aggravators he intended to use.(T79-82). At the close of his case, Ahsens filed, over objection, an amended information that again didn't charge aggravators.(T1191-92).

In penalty phase, Ahsens called two California police officers who testified about Earl's arrests for drug and weapons possession in 1994 and 1996.(T1309-16,1321-27). In closing, Ahsens argued, "Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases, arresting him with large amounts of drugs. You know, folks, the man was running drugs and carrying guns and that was a constant state with him,…"(T1726).

Ahsens also called Raymond Wells, Michael's father, and Lois Lambiel, Joann Barnes' sister, to describe in detail their lives and their families' losses.

(T1331-33,1336-37,1340-47). Lambiel particularly recounted that she hadn't slept a full night since Barnes's death and her children, nieces and nephews also felt the loss, calling Lambiel to tell her their feelings.(T1349-50). One of her brothers sustained five strokes immediately after Barnes's death and another died six months later.(T1349-50). In closing, Ahsens argued, "it's good to know something about the person involved. It's also good to know something about the effect of what that person does. Because you throw a rock in a pond and the ripples go in all directions, and they washed over these families like a tidal wave."(T1729).

As to statutory aggravators, the jury was instructed, in Instructions 25-27, based on MAI-Cr3d314.40, that, on each count, "the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance."(LF603-05).[8]

The jury was then instructed, pursuant to MAI-Cr3d314.44, that

> As to Count I,[9] if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances

[8] As these instructions are not challenged, they are not set forth in full.

[9] The entirety of the instruction is not set forth since the problematic portion is the first two paragraphs. Only the text of Instruction 28 is set forth, but Earl

submitted in Instruction No.25 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No.25, and evidence presented in support of mitigating circumstances submitted in this instruction.

(LF606-08). This instruction forms the heart of the constitutional error. It reflects the State's evidence and argument upon which the jury rendered its penalty phase verdicts. The instruction let the jury elevate Earl's punishment to death based on facts not found unanimously and beyond a reasonable doubt.

The Due Process Clause and the notice and jury trial guarantees of the Sixth Amendment require 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." *Jones v. United States*, 526 U.S. 227, 243 n.6(1999). Thereafter, the Court re-affirmed:

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challenges Instructions 29-30, which only differ as to the Count to which they refer. Earl does not intend any waiver by the failure to set forth each.

> [I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 490(2000). The critical inquiry is "one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"*Id*. at 494.

Subsequently, in *Ring v. Arizona*, 536 U.S. 584(2002), the Court emphasized that the effect of the statutory aggravator was determinative:

> The dispositive question, we said, "is one not of form, but of effect." 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. A defendant may not be "expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone...."

Id. at 602(citations omitted). Because the aggravators were "'the functional equivalent of an element of a greater offense,'… the Sixth Amendment requires that they be found by a jury."*Ring*, 536 U.S. at 609, citing *Apprendi*, 530 U.S. at 494,n.19.

In *Whitfield*, this Court applied *Ring* to Missouri's statutory death penalty provisions, holding that a defendant is entitled constitutionally to have a jury make

"the factual determinations on which his eligibility for the death sentence [is] predicated."*Whitfield*, 107 S.W.3d at 256. This Court expressly noted that, in *Ring*, the "Supreme Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury."*Id.* at 257.

The three steps of §565.030.4(1-3),[10] "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible."*Id*. at 261. Only after the jury has made these death-eligibility findings, is it "given discretion to make the final determination whether to give a life sentence even if he or she has already found that the aggravators and mitigators would qualify defendant for imposition of the death penalty."*Id*.

The State must prove, beyond a reasonable doubt, the existence of facts rendering a defendant death-eligible.*Schlup v. Delo*, 513 U.S. 298, 328(1995); *Bullington v. Missouri*, 451 U.S. 430(1981);*see also Sullivan v. Louisiana*, 508 U.S. 275, 278(1993) ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). In Missouri, the death-eligibility facts a jury must find are encompassed by §565.030.4(1),(2)(3).*Whitfield*, 107 S.W.3d at 257-61.

Instructions based upon MAI-Cr3d314.40 require that the jury find the statutory aggravators unanimously and beyond a reasonable doubt. Thus, as to

[10] The statute has since been amended. The warrant step has been eliminated.

step one,[11] the instructions are constitutional. The next step, which requires that the jury "determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment," is still problematic. It does not require that the jury find the existence of the additional evidence in aggravation—including statutory aggravators that the jury did not find unanimously and beyond a reasonable doubt in the first step; non-statutory aggravators, and victim impact evidence—unanimously and beyond a reasonable doubt. Because the jury is instructed that it may consider that evidence in the weighing step, and because this Court has deemed this step subject to the *Ring/Apprendi* requirements, the instruction is constitutionally-infirm.[12]

This Court's decision in *State v. Debler*, 856 S.W.2d 641,657 (Mo.banc1993), is consistent with these principles. This Court found evidence of the defendant's prior drug dealings not resulting in convictions highly prejudicial and only an instruction placing the burden of proof on the State—unanimous and beyond a reasonable doubt—would comport with due process. *Id.*

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[11] Since mental retardation is not at issue, §565.030.4(1) is irrelevant.

[12] This Court has denied similar claims, *State v. Glass*, 136 S.W.3d 496, 521 (Mo.banc2004); *State v. Deck*, 136 S.W.3d 481, 486(Mo.banc2004); *State v. Taylor*, 134 S.W.3d 21, 30 (Mo.banc 2004), but Earl presents it for reconsideration.

Here, Ahsens introduced "extensive evidence of unconvicted drug dealing," alleged kidnappings, high-speed chases and victim impact evidence as non-statutory aggravators. The jury was never instructed **how** to consider it—what standard of proof to apply and on whom fell the burden of proof.

Ring, Apprendi and *Whitfield* require that the jury's factual findings on the weighing step be beyond a reasonable doubt and that the State bear the burden of proof. For these cases to have effect, the factual findings contained within the weighing step must be accorded the same requirements of proof as the step itself. Further, for the jury to make these findings, it must have a mechanism to implement that constitutional mandate.*Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Earl's jury had no such mechanism.*See* (LF508-09).

Instructional error, which compounded the evidentiary and argument errors, require that this Court vacate Earl's death sentences. These errors co-exist upon the foundation of a flawed information.

The Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that "any fact (other than prior conviction) that increases the maximum penalty for a crime **must be charged in an indictmen**t, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6(emphasis added). Only the jury can find the aggravators that make the crime charged death-eligible since they "operate as 'the functional equivalent of an element of a greater offense.'" *Ring*, 536 U.S. at 602,609(citation omitted).

This Court, in *Whitfield*, applied *Ring* to Missouri's death penalty statutes. It held that "every fact that the legislature requires be found before death may be imposed," must be found by the jury beyond a reasonable doubt.*Id.* at 261.

The teachings of these cases compel the conclusion that, although §565.020 ostensibly creates a single crime labeled first degree murder, for which the punishment is either life without parole or death, the combination of §§565.020 and 565.030.4 establishes two distinct offenses—un-enhanced first degree murder, a killing done knowingly and with deliberation, for which the available punishment is life without parole, and aggravated, enhanced, first degree murder, which also requires proof beyond a reasonable doubt of at least one statutory aggravator, and for which the available punishments are either life without parole or death.[13]

Since a jury's finding beyond a reasonable doubt of at least one statutory aggravator is the threshold requirement to a jury's ability to recommend death, *State v. Shaw*, 636 S.W.2d 667, 675(Mo.banc1982), statutory aggravators are elements of the enhanced offense. "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense…." *Harris v. United States*, 536 U.S. 545, 563(2002), citing *Apprendi*, 530 U.S. at 483, n.10.

[13] This Court rejected this argument most recently in *State v. Gill*, SC85955 (Mo.banc,7/12/05). Earl requests reconsideration of that holding.

Jones, *Ring*, *Apprendi* and *Whitfield* teach that, unless the charging document pleads these additional elements that create the defendant's death-eligibility, the State has only charged the lesser offense of un-enhanced first degree murder, and the maximum available punishment is life without parole.

"[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."*Jackson v. Virginia*, 443 U.S. 307, 314 (1979), citing *Cole v. Arkansas*, 333 U.S. 196, 201(1948); *Presnell v. Georgia*, 439 U.S. 14(1978). The charging document must actually charge the crime being prosecuted. The test for sufficiency of that document is "'whether it contains all the essential elements of the offense as set out in the statute creating the offense.'" *State v. Stringer*, 36 S.W.3d 821, 822(Mo.App.,S.D.2001), quoting *State v. Haynes*, 17 S.W.3d 617, 619(Mo.App.,W.D.2000); *State v. Pride*, 1 S.W.3d 494, 502(Mo.App.,W.D.1999).

In *State v. Nolan*, 418 S.W.2d 51(Mo.1967), this Court held that the trial court lacked jurisdiction to impose an enhanced sentence for first degree robbery "by means of a dangerous and deadly weapon." "The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and the "trial court was without power or jurisdiction to impose that sentence."*Id.* at 54.

Since the State failed to plead any of the facts that would make Earl death-eligible, the only authorized punishment was life without parole. The trial court erred in holding otherwise.(T1191-92). This argument often is rejected because of

the inaccurate view that this pleading requirement only extends to cases arising under the federal Indictment Clause.

Missouri's 1875 Constitution originally required, like the Fifth Amendment's Indictment Clause, that all prosecutions for capital crimes or any felony offenses be prosecuted by indictment. Missouri's 1900 Constitution subsequently allowed prosecution either by indictment or information. *State v. Kyle*, 65 S.W. 763(Mo.1901); *State v. Cooper*, 344 S.W.2d 72(Mo.1961).

When charges were preferred by information, "the Legislature … intended … to accord the accused the security of a preliminary examination before he should be charged by information for a capital offense." *State v. Gieseke*, 108 S.W. 525(Mo.1980). A primary "purpose of a preliminary examination is 'to safeguard them (the accused) from the groundless and vindictive prosecutions.'" *State ex rel. McCutchan v. Cooley*, 12 S.W.2d 466, 468(Mo.1928), citing *State v. Sassaman*, 114 S.W. 590(Mo.1908).

The Fifth Amendment's Indictment Clause provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This ensures that a defendant's jeopardy is limited "to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218(1960). It further "serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power." *United States v. Cotton*, 535 U.S. 625, 631, 634(2002); *United States v. Miller*, 471 U.S. 130, 142-

43, n.7(1985). "The grand and petit juries thus form a 'strong and two-fold barrier … between the liberties of the people and the prerogative of the [government].'" *United States v. Harris*, 536 U.S. 545, 564 (2002)(Kennedy, J., concurring), quoting *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

In *Smith v. United States*, 360 U.S. 1,9(1959), the Court recognized the indictment's important role. "The Fifth Amendment made the [grand jury indictment] rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings … [T]o permit the use of informations where … the charge states a capital offense, would … make vulnerable to summary treatment those accused of … our most serious crimes."*See also United States v. Green*, 372 F.Supp.2d 168(D.Mass.2005).

The Indictment Clause protects the accused by making an independent group of citizens act as a check on prosecutorial authority and by giving him notice of the charges so that he can prepare his defense. *United States v. Duncan*, 598 F.2d 839, 848(4th Cir.1979). The demands of the Fifth Amendment's Indictment Clause and the Sixth Amendment's Notice Clause are thus met. *United States v. Wheeler*, 2003WL1562100 (D.Md. 2003) at *1; *United States v. Higgs*, 353 F.3d 281, 296(4th Cir.2003).

In a state prosecution, whether commenced by indictment or information, what is required? "The federal constitution provides the floor, not the ceiling, for protecting individual rights." Hon. William J. Brennan, Jr., *The Bill of Rights and*

the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U.L. Rev. 535(1986). If the federal constitution provides the floor, the state constitution can go no lower. It must, at least, protect the individual's rights in a manner co-extensive with the federal constitution. *Oregon v. Haas*, 420 U.S. 714, 719(1975).

That the Fourteenth Amendment's Due Process Clause did not incorporate the Fifth Amendment's right to be charged by indictment, *Hurtado v. California*, 110 U.S. 516, 534-35(1884), does not resolve the question. Missouri may not deny to its citizens those protections—the floor—the federal constitution affords. While Missouri can choose how to charge a criminal defendant, it cannot deny him the "safeguard against oppressive and arbitrary proceedings" afforded by some check on prosecutorial authority. Only with that check and the notice the Sixth Amendment mandates can a defendant be afforded the full panoply of rights the federal constitution guarantees. *Green*, *supra*.

In trying to avoid the State's constitutional obligations, it is often argued that the Fifth Amendment's Indictment Clause does not apply to the States. *See, Apprendi*, 530 U.S. at 477, n.3. Similarly, it is often argued that the only federal constitutional limitation on state charging documents derives from the Sixth Amendment's notice requirement. *Blair v. Armontrout*, 916 F.2d 1310, 1329(8th Cir.1990). That argument is based on a flawed and materially incomplete reading of *Hurtado*.

While *Hurtado* did not require, under the Fourteenth Amendment's Due Process Clause, that state court prosecutions proceed by indictment, it did not discount the States' constitutional obligations. "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information—**after examination and commitment by a magistrate, certifying to the probable guilt of the defendant**, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."*Id.* at 538, n.6(emphasis added).

Thus, whether a defendant is prosecuted by indictment or information, key to ensuring his rights is that an independent third party—a magistrate or a grand jury—review the charges against him.*See, McCutchan*, 12 S.W.3d at 468. And, in a capital case, in which aggravators are death-eligibility elements of the offense, they, too, must be presented to that third party.

Earl's jury heard and considered evidence of non-statutory aggravators. But, it wasn't instructed it had to find that evidence beyond a reasonable doubt. The amended information upon which Earl was tried did not include the aggravators that made him death-eligible. Earl was denied due process, notice, trial by jury, reliable sentencing and freedom from cruel and unusual punishment. This Court must reverse and order Earl re-sentenced to life without parole.

V.INSTRUCTIONS PLACE BURDEN OF PROOF ON DEFENDANT

The trial court erred in denying Earl's pre-trial motions challenging the Approved Instructions, overruling his objections, giving Instructions based on MAI-Cr3d 314.44 and .48, failing to properly-instruct the jury, accepting their death verdicts, and sentencing Earl to death because this denied Earl due process, a jury trial, reliable sentencing and freedom from cruel and unusual punishment,

U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that the instructions, which do not require that the State bear the burden of proof beyond a reasonable doubt on all facts upon which Earl's death-eligibility rests, also misled the jury into placing the burden of proof on Earl.

Pre-trial, Earl filed objections to the penalty phase instructions that didn't correctly allocate or define the burden of proof, which the court denied.(LF141-43,387-91;T77,144-45). At the penalty phase instruction conference, he renewed the motions, requesting, as to instructions based on MAI-Cr3d314.44, that they not be considered since they failed to instruct the jury that the State had the burden of proof beyond a reasonable doubt and they improperly shifted the burden of proof to the defense.(T1668-69). The court again overruled the objection.(T1670). As to instructions based on MAI-Cr3d314.48, the defense unsuccessfully reiterated that they failed to place the burden of proof on the State.(T1670,1672).

Both instructions are constitutionally infirm. A reasonable juror could read them to place the burden of proof on the defense, not the State. They thus violated

Earl's state and federal constitutional rights to due process, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment.

When an instruction's ambiguity creates a "reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence," the instruction violates the Eighth Amendment.*Boyde v. California*, 494 U.S. 370, 380(1990). Instructional error "'will be held harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt.'"*State v. Ferguson*, 887 S.W.2d 585, 587 (Mo.banc1994), citing *State v. Erwin*, 848 S.W.2d 476, 484(Mo.banc1993). The burden is on the beneficiary of the error, the State, to prove beyond a reasonable doubt that it did not contribute to the verdict.*State v. Whitfield*, 107 S.W.3d 253, 262(Mo.banc2003),citing *Chapman v. California*, 386 U.S. 18, 24(1967); *State v. Driscoll*, 55 S.W.3d 350, 356(Mo.banc2001). When instructional error mis-describes the burden of proof, vitiating the jury's findings, the error is structural and harmless error analysis is inapplicable.*Sullivan v. Louisiana*, 508 U.S. 275, 281(1993).

The question here is whether the instructions mis-directed the jury to believe that Earl bore the burden of proof on an element of the offense that made

him death-eligible.*Whitfield*, 107 S.W.3d at 256.[14] Since the instructions address death-eligibility, the State bears the burden of proof.*In re Winship*, 397 U.S. 358, 364(1970); *Schlup v. Delo*, 513 U.S. 298, 328(1995); *Bullington v. Missouri*, 451 U.S. 430(1981); *Sullivan*, 508 U.S. at 278.

> Instructions 28-30, based on MAI-Cr3d314.44, stated, on each Count, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 25 (26/27) exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.(LF606-08).

After enumerating the statutory mitigators, they stated,

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[14] These steps must be made by a jury, as facts upon which a defendant's death-eligibility is predicated. "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury **beyond a reasonable doubt**." *Ring v. Arizona*, 536 U.S. 584,610 (2002)(Scalia, J., concurring)(emphasis added). *Contra, State v. Glass*, 136 S.W.2d 496, 521(Mo.banc2004); *State v. Deck*, 136 S.W.3d 481, 486(Mo.banc2004); *State v. Taylor*, 134 S.W.3d 21, 30(Mo.banc2004).

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.(LF606-08).

Instructions 34-36, based on MAI-Cr3d314.48, stated,

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Harriett S. Smith (Michael R. Wells/Sharon Joann Barnes) by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Harriett S. Smith (Michael R. Wells/Sharon Joann Barnes) by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.(LF612-17).

These instructions reiterated what the jury heard during *voir dire*, in the instruction based on MAI-Cr3d300.03AA. In that penultimate paragraph, which Earl unsuccessfully challenged, (T156-61), the jury was directed, "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 is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death."(LF561-62).

These instructions mis-directed and misled the jury into believing Earl bore the burden of proof in penalty phase, except as to Step One.(LF603-05). The instructional language suggests that the defendant bears the burden of proving that the mitigators[15] outweighed the aggravators and **not** that the State bore the burden of proving that the mitigators were insufficient to outweigh the aggravators or even that the aggravators outweighed the mitigators.

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[15] Increasing the unreliability of the penalty phase verdicts is that the jury receives no guidance about **who** bears the burden of proof and is not told **what** to consider. It may well convert that which is mitigating, like Earl's intoxication, into an aggravator.*See Egelhoff*, 518 U.S. at 44, citing 4W.Blackstone, Commentaries at 25-26 ("the law viewed intoxication 'as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour'"). This creates constitutional error. *Zant v. Stephens*, 462 U.S. 862(1983).

At best, the instructions are ambiguous. In that case, this Court must strictly construe the language against the State and resolve any ambiguities in the defendant's favor.*State v. Condict*, 65 S.W.3d 6, 12(Mo.App.,S.D.2001).

If the jury assumed that the defense bore the burden of proving that the mitigation outweighed the aggravation, even if it found the mitigating and aggravating evidence in equipoise, it would not have found Earl could sustain his burden of proof. Similarly, if the jury were equally divided, Earl would not sustain his burden. Even if 11 jurors thought the mitigators outweighed the aggravators, Earl would not have sustained his burden of proof. In each situation, the jury would be required to proceed to the final step of determining punishment, keeping death in play and not automatically sentencing Earl to life without parole. This would deny Earl due process and freedom from cruel and unusual punishment. *See State v. Marsh*, 102 P.3d 445, 457-64(Kan.2004), cert. granted, No.04-1170 (Kansas' statute is determined facially unconstitutional, and the Court reaffirms that, when death is at stake, ties "go to the defendant."*Id.; State v. Kleypas*, 40 P.3d 139(Kan.2001)).

Had the jury been correctly instructed that the State bore the burden of proving beyond a reasonable doubt that the mitigation was insufficient to outweigh the aggravation, the State would have needed to do more than just "tie." Although the State indisputably had substantial evidence in aggravation, Earl presented substantial evidence in mitigation, including his positive impact upon Nancy Young and her children. It cannot be said beyond a reasonable doubt that,

absent this error, the jury would have found the mitigation insufficient to outweigh the aggravation.

The jury's evaluation "of the aggravating and mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt."*State v. Mayes*, 63 S.W.3d 615, 637(Mo.banc2001); citing *State v. Storey*, 986 S.W.2d 462, 264(Mo.banc1999); *State v. Johnson*, 968 S.W.2d 686, 701(Mo.banc1998). A properly-instructed jury may well have opted for life-without-parole sentences, given the strength of Earl's mitigation case. This structural error requires reversal and remand for a new penalty phase.

VI.PROSECUTOR ANNOUNCES HIS LEGAL CONCLUSIONS

The trial court plainly erred in failing sua sponte to admonish Ahsens and declare a mistrial when Ahsens announced to the jury that he did not concede Dr. Gelbort was a Neuropsychology expert and Dr. Evans was not an expert and cannot render an expert opinion in Psychiatric Pharmacy because this denied Earl due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that Ahsens' pronouncements were legal conclusions solely for the trial court; personalized and suggested facts outside the evidence, encouraging the jury to disregard the defense experts' testimony solely based on Ahsens' personal opinion.

In penalty phase, Earl presented, as non-statutory mitigation, evidence about his caring relationships with others, including Nancy Young and her children.(T1356-1656). He also presented Drs. Robert Smith, Michael Gelbort and Lee Evans' testimony to support the "extreme mental or emotional disturbance" and "capacity substantially impaired" statutory mitigators.(LF606-08);§565.032.3(2)(6).

While he elicited that the Highway Patrol's Mr. Garrison had never "not been accepted" as an expert,(T1132), Ahsens announced that neither Gelbort nor Evans were experts and could not render expert opinions. This pronouncement encouraged the jury to disregard their opinions. Because the trial court did not correct it, it is reasonably likely it impacted the jury's penalty phase verdicts,

denying Earl's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. This Court must reverse and remand for a new penalty phase.

Dr. Gelbort, a neuropsychologist, described that neuropsychologists have "specialized training in how normal or abnormal brain functioning gives rise to normal and abnormal behavior" and "neuropsychologist[s] [are] trained to assess" for whether "certain parts of the brain [are] not functioning correctly."(T1525-26). Dr. Gelbort, a licensed clinical psychologist in Illinois, Indiana and Texas, has a clinical practice, with referrals from other physicians, in neuropsychology.(T1528-29). He has been qualified as an expert in Missouri, Illinois, Indiana, Ohio, Florida, Oklahoma, and Wisconsin. (T1529-30). But, when defense counsel asked that he be recognized as an expert in neuropsychology, Ahsens announced, "I do not concede that."(T1530). When the court asked if Ahsens wished to voir dire the witness, he responded, "I simply do not concede it and will not."(T1530). The court found Dr. Gelbort an expert. (T1530). Dr. Gelbort stated that Earl had frontal lobe brain damage, making him more impulsive, less inhibited, and more likely to have problem-solving difficulties.(T1548-50). Without drugs and alcohol, Earl functions in the third percentile, and, with them, he demonstrates even less normal judgment and reasoning.(T1551).

The defense also called Dr. Evans, a psychiatric pharmacist, who, teamed with psychiatrists and psychologists, helps treat psychiatric disorders, evaluate patients' behaviors and prescribe medications.(T1568-69). He "observ[es] the

effects of drugs on human behavior."(T1569). A board-certified psychiatric pharmacist, he has been qualified as an expert in Missouri, Kansas, Oklahoma, Florida and Alabama.(T1569-70). After Ahsens voir dired Dr. Evans, the court qualified him as an expert in psychiatric pharmacy.(T1572).

Speaking about December 9, Dr. Evans testified, "the combination of those two drugs [alcohol and methamphetamine] or even alcohol by itself, the impact on the high order of thinking, which is really kind of a frontal lobe cerebellum kind of function, would have been severely repressed."(T1583). Given how much alcohol and methamphetamine Earl ingested, his capacity to conform his conduct to the requirements of law was substantially impaired.(T1584).

On cross, Ahsens asked if Dr. Evans' opinions were "to a reasonable degree of medical certainty" or "a reasonable degree of psychiatric certainty."(T1588). When Dr. Evans acknowledged he was neither a psychiatrist nor a psychologist, Ahsens stated, "I would ask then, Your Honor, that the defendant's [sic] answers in all of these respects be stricken and the jury instructed not to consider them. **This man is not an expert and cannot render such opinion**."(T1589)(emphasis added). The court denied Ahsens' request but did not instruct the jury to disregard Ahsens' statements about either Evans' or Gelbort's qualifications as experts or *sua sponte* declare a mistrial. The court plainly erred since those actions resulted in a manifest injustice affecting Earl's substantial due process rights.*Rule 30.20.*

An accused is entitled to a fair trial and the prosecutor must not deprive him of it. *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27(banc1947); *State v.*

Long, 684 S.W.2d 361, 365(Mo.App.,E.D.1984). His duty is to serve justice, not just win the case. While he must vigorously defend the law, he may not gain a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 88(1935). Especially in penalty phase, where, because the death penalty is qualitatively different from any other punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment," *Woodson v. North Carolina*, 428 U.S. 280, 305(1976), his actions undergo heightened scrutiny.

Ahsens' pronouncements that **he** did not accept Earl's witnesses as experts and **he** did not believe they were experts were improper since he sought to have the jury disregard the source of testimony that supported Earl's statutory mitigators submitted in Instructions 28-30.(LF606-08). Ahsens' personal opinions about their qualifications as experts were irrelevant. The jurors should not have been allowed to let them color their views and weighing of the testimony.

Ahsens' statements are reminiscent of those condemned in *State v. Storey*, 901 S.W.2d 886(Mo.banc1995). There, this Court reversed and remanded for a new penalty phase because counsel failed to object to the prosecutor's improper closing argument.

As this Court held, prosecutors may not argue facts outside the record, asserting personal knowledge of facts, because they become the prosecutor's unsworn testimony.*Id.* at 900-01; *Rule 4.3.4; State v. Shurn*, 886 S.W.2d 447, 460 (Mo.banc1993). That argument is highly prejudicial because the jury is apt to give

"much weight" to it, although it should be given none, since the prosecutor's duty is to serve justice.*Berger*, 295 U.S. at 88; *Storey*, 901 S.W.2d at 901. Similarly, his statement of personal belief or opinion is improper and irrelevant, since it again converts him into an unsworn witness not subject to cross-examination.*Id.* at 901. Especially here, where Ahsens wanted the jury to disregard the experts' opinions, which formed the basis of Earl's statutory mitigators, his comments were critical.

What Ahsens believed was irrelevant. Whether a witness qualifies as an expert is within the trial court's discretion and is not for debate before the jury. *State v. Smith*, 637 S.W.2d 232, 235(Mo.App.,W.D.1982). Nonetheless, since Ahsens told the jurors that he, an officer of the court, did not believe Earl's witnesses were experts, it is reasonably likely that they did not afford those witnesses' testimony the weight they otherwise would.

Ahsens' statements created a manifest injustice or miscarriage of justice. This Court should reverse and remand for a new penalty phase.

VII.INCONSISTENT VERDICTS

The trial court erred in accepting the jury's penalty phase verdicts on Counts I and II and sentencing Earl to death because those actions denied Earl due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const., Art.I,§§10,18(a),21, in that, although the State submitted, as a statutory aggravator, whether each homicide was committed while Earl was committing the other homicide, the jury found it only as to Harriett Smith. Because finding this aggravator on one of these homicides requires finding it on the other, the jury's verdicts were inconsistent and cannot stand. Alternatively, this finding on Count I violates Earl's above-stated constitutional rights because insufficient evidence exists to support it. No evidence exists upon which the jury could find Earl committed one "while" committing the other.

The jury was instructed in penalty phase to find whether, as to Counts I and II, each homicide was committed "while" Earl committed the other homicide. (LF603-04). While the instructions mirrored each other, implicitly requiring a finding on both or neither, the jury instead found the statutory aggravator only on Count I(LF630-31). The inconsistency of these verdicts violated Earl's state and federal constitutional rights to due process, reliable sentencing, a fair trial and freedom from cruel and unusual punishment. Alternatively, insufficient evidence supports the jury's finding as to Count I, thus violating Earl's self-same rights.

INCONSISTENT VERDICTS

"If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428(1980), *citing Gregg v. Georgia*, 428 U.S. 153, 196 n.47(1976)(Stewart, Powell, Stevens, JJ.). If the sentencer has discretion to decide penalty, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. Since capital sentencing systems must adequately channel sentencing discretion, aggravators "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Death is qualitatively different than any other form of punishment. *Lockett v. Ohio*, 438 U.S. 586, 606(1978). If procedures "create[] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty, … that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* Because death is different, the "Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible,

that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982)(O'Connor,J., concurring).

Heightened reliability is required in death cases. *Woodson v. North Carolina,* 428 U.S. 280, 305(1976); *Beck v. Alabama*, 447 U.S. 625, 638(1980); *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc2002). Thus, a rule that may control in guilt phase must not be applied without regard to the special concerns governing penalty phase.

In *Dunn v. United States*, 284 U.S. 390(1932), the Court held that a criminal defendant who is convicted on one count but acquitted on another could not attack that conviction because of inconsistent verdicts. The Court rejected the defendant's assertion that he was entitled to discharge. *Id.* at 393, quoting *Steckler v. United States*, 7 F.2d 59, 60(2nd Cir.1925). The Court reiterated this rule in *United States v. Powell*, 469 U.S. 57(1984) where the jury rendered concededly inconsistent guilt phase verdicts.

Despite this seemingly hard-and-fast rule in guilt phase, different considerations control penalty phase analysis. As the *Powell* Court conceded, inconsistent verdicts "most certainly" demonstrate the jury has not followed the instructions.*Id.* at 65. Here, by finding that the murder of Harriett Smith occurred "while the defendant was engaged in the commission of another unlawful homicide of" Michael Wells but then not finding that the obverse also occurred, the jury clearly failed to follow the instructions. Since a finding that the one occurred necessarily means that the other occurred too, the jury's inconsistent

findings demonstrate they ignored the instructions. The question for this Court thus is not whether error occurred but whether it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). That burden is on the State.

The question thus becomes what impact the jury's action had upon its penalty phase verdicts. Section 565.030.4(3)RSMo requires that the jury render a life without parole verdict if it concludes the mitigation is sufficient "to outweigh the evidence in aggravation of punishment found by the trier."

The jury's decision on punishment was skewed because it considered this statutory aggravator. On Count I, the jury found the statutory aggravator, despite its diametrically-opposite finding in Count II that those facts did not exist. On Count II, while the jury did not unanimously find beyond a reasonable doubt those facts, jurors may well have considered those facts in determining the mitigation did not outweigh the aggravation.

In *Sochor v. Florida*, 504 U.S. 527,532(1992), Justice Souter, writing for the Court, stated, "Employing an invalid aggravating factor in the weighing process 'creates the possibility … of randomness, *Stringer v. Black*, 503 U.S. 222, 236 (1992), by placing a 'thumb [on] death's side of the scale,' *id*. at 232, thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'"

More than the possibility of randomness exists here. The risk is great because of the likelihood that this aggravator tipped the scales toward death on

both Counts. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."*Chapman*, 386 U.S. at 24. The "beneficiary of a constitutional error," the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."*Id;State v. Whitfield*, 107 S.W.3d 253, 262 (Mo.banc2003). That it cannot do.

INSUFFICIENT EVIDENCE

Should this Court not find the verdicts inconsistent, it must find that the jury's Count I finding is not supported by sufficient evidence. Its verdict therefore denies Earl state and federal constitutional due process and freedom from cruel and unusual punishment. When reviewing for sufficiency, accepting as true all evidence favorable to the verdict and disregarding the evidence and inferences to the contrary, this Court must determine whether sufficient evidence was admitted at trial from which a reasonable trier of fact could have found beyond a reasonable doubt each element of the offense.*State v. Clay*, 975 S.W.2d 121, 139 (Mo.banc1998); *State v. Grim*, 854 S.W.2d 403, 405(Mo.banc1993).

Due process is violated if a defendant is convicted in either phase on less than proof beyond a reasonable doubt.*In re Winship*, 397 U.S. 358, 364(1970); *See §565.030.4(2); Sochor*, 504 U.S. at 532.

The evidence shows Harriett Smith and Michael Wells were killed on the same morning. But, was Harriett Smith killed "while" Michael Wells was being killed? That is what the statute requires to make this finding.*§565.032.2(2).*

The appellate court's primary role is to ascertain the Legislature's intent from the statutory language and, if possible, give it effect.*Abrams v. Ohio Pacific Express,* 819 S.W.2d 338, 340(Mo.banc1991); *Martinez v. State*, 24 S.W.3d 10, 16 (Mo.App.,E.D.2000). In determining legislative intent, statutory language is to be construed in its plain, ordinary and usual sense.*Id.; Trailiner Corp. v. Director of Revenue*, 783 S.W.2d 917, 920(Mo.banc1990). Its meaning usually is found in the dictionary.*Abrams,* 819 S.W.2d at 340. If the words are plain and can have but one meaning, the court may not resort to rules of statutory construction. See also *M.A.B. v. Nicely,* 909 S.W.2d 669, 672(Mo.banc1995).

"While," given its plain and ordinary meaning as a conjunction, means "during the time that." Webster's New Collegiate Dictionary. The evidence does not support that the homicides of Harriett Smith and Michael Wells happened "during the time that" the other was occurring.

Eddie Starks, Harriett Smith's boyfriend, was at her house on the morning of December 9, 2002.(T872). Harriett was there and when Michael arrived, Eddie went into the computer room, which he did when Harriett had visitors or drug customers.(T873). Michael entered the computer room to look at the DVD collection and then he and Harriett returned to the living room.(T874). Eddie heard Harriett say, "Earl, what are you doing here?," then Earl ask Harriett why she had failed to buy him a lawnmower as she had promised.(T875). Eddie heard two shots, left the computer room and hid in Harriett's bedroom closet, from where he heard nobody moving about.(T876). He finally came out, walked past

the bed next to which, upon his later return to the house, he saw Harriett's body, but where, at that time, he saw neither body nor blood,[16] and ultimately fled the house.(T876-79). Before his initial flight, he saw Michael, dead, upon the living room sofa.(T877).

Eddie's recitation of what occurred that morning clearly establishes that Michael was killed **before**, not "**while**," Harriett was killed. In fact, Michael's death must have occurred substantially before hers because Eddie was still in the computer room when he heard the first two gunshots. He then ran to Harriett's bedroom and hid in the closet until, some time later, he came out and still did not see Harriett's body, which he found next to the bed only after he returned from the neighbors' house.

Because an invalid statutory aggravating circumstance affected the jury's verdicts on Counts I and II, Earl's death sentences on both Counts cannot stand. Alternatively, since the jury's verdict on Count I rests upon its having considered and weighed this statutory aggravator, which is not supported by the evidence, that death sentence cannot stand. This Court must reverse and remand for a new penalty phase, vacate Earl's sentences on Counts I and II and order him re-

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[16] Ahsens conceded in penalty phase closing that he was "very dubious that he [Eddie] could have gotten out of that room without seeing the blood or the body. I think it's very likely he fled in between the time – during the time that Harriett Smith was outside the house and before she was killed."(T1697).

sentenced to life without parole on those Counts, or vacate Earl's sentence on Count I and order him re-sentenced to life without parole on that Count.

VIII.VENIREMEMBERS CAN'T SIGN DEATH VERDICT

The trial court abused its discretion in sustaining the State's cause challenges of Venirepersons Parrott(127) and Giger(131), because this denied Earl due process, a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const., Art.I,§§10,18(a),21, in that neither veniremember indicated they could not consider imposing the death penalty. They merely could not sign a death verdict. Since that is not a requirement for service and the State did not demonstrate that their hesitancy prevented or substantially impaired their ability to follow their oath and the court's instructions, their inability to sign the verdict was not a proper basis for cause strikes.

The trial court abused its discretion in sustaining the state's cause challenges to Venirepersons Parrott and Giger. Their ability to follow the court's instructions was unimpaired by their views. They were qualified to sit. The court's actions denied Earl's state and federal constitutional rights to due process, a fair and impartial jury and freedom from cruel and unusual punishment. This Court must reverse and remand for a new trial.

Venirepersons may be struck for cause **only** if their views prevent or substantially impair their ability to abide by their oath and the court's instructions. *Wainwright v. Witt*, 469 U.S. 412, 424(1985); *State v. Christeson*, 50 S.W.3d 251, 264(Mo.banc2001). Because capital juries have vast discretion to decide if death is the "proper penalty," general objections to the death penalty or conscientious

and religious scruples against it do not disqualify venirepersons from serving. *Witherspoon v. Illinois*, 391 U.S. 510, 519(1968);Mo.Const.,Art.I,§5. A "man who opposes the death penalty, **no less than one who favors it**, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror."*Witherspoon*, 391 U.S. at 519 (emphasis added).

The Court has scrupulously followed *Witherspoon*. *Davis v. Georgia*, 429 U.S. 122(1976); *Maxwell v. Bishop*, 398 U.S. 262(1970); *Boulden v. Holman*, 394 U.S. 478(1969). *Witherspoon* and its progeny create a narrow class of venirepersons whose views on this issue disqualify them from serving. Only those who can never consider the death penalty or who are partial about the decision on guilt when death is a possibility cannot serve on a capital case.*Witherspoon*, 391 U.S. at 520-22. If a venireperson is excluded "on any broader basis than this, the death sentence cannot be carried out…."*Id.* at 522-23, n. 21. If the trial court removes venirepersons who merely have generalized objections to or scruples against the death penalty, it condones the State's "cross[ing] the line of neutrality." *Id.* at 520.

"The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'"*Gray v. Mississippi*, 481 U.S. 648, 658 (1987),*quoting Witt*, 469 U.S. at 423. Here, the trial court condoned the state's action in removing Parrott and Giger, who were qualified to serve.

On appeal, a trial court's ruling on a cause challenge will be upheld unless it is clearly against the evidence and an abuse of discretion.*Christeson*, 50 S.W.3d at 264. While the trial court is deemed to be in the best position to evaluate whether someone is qualified to serve, those qualifications "are not determined by an answer to a single question, but by the entire examination."*Id.*;*State v. Johnson*, 22 S.W.3d 183, 188(Mo.banc2000). Here, the trial court granted the State's cause challenges based on Parrott and Giger's answers to one question—could they sign a death verdict? Their answers do not mean their beliefs would prevent or substantially impair the performance of their duties.

Ahsens asked Parrott whether she could vote for the death penalty.(T527-28).

Parrott: I don't think so.

Ahsens: Is this a belief that you have held prior to coming into the courtroom today?

Parrott: Pretty much so.

Ahsens: All right.

Parrott: I would – I would have a difficult time.

Ahsens: Well –

Parrott: I'd have to really –

Ahsens: You were about to say?

Parrott: I'd have to really listen to all the facts.

Ahsens: Well, we would expect you to do that.

Parrott: Right.

Ahsens: Is this something that – is this an opinion that you hold that you – let me ask you this question first: Do you have any similar reservations about the other punishment of life in prison without probation or parole?

Parrott: No.

Ahsens: All right. So your reservations are strictly with the death penalty.

Parrott: (Nods her head.)

Ahsens: Is this – is this something that you think – is this an opinion or are these reservations about the death penalty something you think could be changed by the evidence, or is this what you believe no matter what the evidence might be? And again, I ask you to think in realistic terms. I mean, we can all imagine some, you know, terrible, terrible situation that is not realistically involved here.

Parrott: I don't know. I mean, I don't know.

Ahsens: All right. This is obviously something you're having a lot – and look, folks, we don't sit around and talk about this issue with family –

Parrott: Correct.

Ahsens: --over Sunday dinner. Okay. And this is something some of you may be confronting squarely for the first time today, right here, right now, and I understand that.

Last question, you heard me ask it of Ms. Ward Hatchett a moment ago. Assuming you're the foreperson, the foreperson is the only one who signs the verdict, could you sign a death verdict?

Parrott: I don't think so.

Ahsens: Your name on that piece of paper in the court file for as long as may be?

Parrott: (Shakes her head.)

Ahsens: Is that a "yes" or a "no"? I'm going to put you on the spot. You said you didn't think so. Does that mean "no"?

Parrott: Would I sign it? No.(T528-30).

Ahsens thereafter questioned Venireperson Giger.

Ahsens: Same – same question: Final point of decision, could you vote for the death penalty?

Giger: I'm not sure. I'm really not. I – I – I – I'm not sure I could put my name on a certificate that said for the death penalty.

Ahsens: Well, if you were the foreperson and that's a duty that could fall to anyone and –

Giger: I understand that.

Ahsens: -- that's exactly what you'd be asked to do.

Giger: Yeah. And I'm not sure I could do that.

Ahsens: You know I'm going to press you for a yes or no answer. Sorry about that.

Giger: I'd have to say no then.

Ahsens: Okay.(T533).

Turlington later questioned Parrott and Giger.

> Mr. Giger, I think you were a little bit more unsure. And I don't want to put words in your mouth, but it seemed to be that you were unsure about the death penalty, but it's possible that you may consider it in some circumstances. Is that correct? And if it's not, you tell me.
>
> Giger: I would – I said I would have a very difficult time putting my name on a certificate for someone to die. That's what I said.(T570).

Giger reiterated that he didn't think he could "sign as a foreman a verdict of death."(T571). Turlington asked Parrott,

> Ma'am, what I'm asking you is: As a juror, you and the other twelve jurors have gone through this entire process, you've found someone guilty of murder in the first degree, you've considered the aggravating circumstances, you've found one of them beyond a reasonable doubt, you've listened to and weighed the evidence in aggravation and mitigation of punishment, all right, and then all twelve jury members have said that the appropriate punishment should be the death penalty, and you would also at that point be included in the twelve, and you're the foreman, all right, could you at that point sign a verdict form?
>
> Parrott: No.
>
> …

Turlington: Okay. So no matter what, you would not be able to sign the form?

Parrott: No.(T575-76).

Ahsens moved to strike Parrott who "said she could not sign a death verdict under any circumstance, and therefore she's not qualified to serve, and very uncertain about the rest of the function as well."(T578). The defense objected, because "no juror is required to be the foreman and therefore would not be required to sign the death form."(T578). The trial court granted the strike, finding Parrott told both counsels that she would not sign.(T578-79).

Ahsens moved to strike Giger "who similarly was clear that he could not sign a death verdict and had some reservations about the remainder of the process as well."(T579). The defense objected, because Giger's inability to sign a death verdict was not a requirement for service.(T579). The court stated "he said initially he wasn't sure he could vote death, he wasn't sure he could put his name on a certificate, 'And to be honest, I have to say no,' is basically exactly what he said."(T579).

The trial court abused its discretion in granting these cause strikes. Its sole basis for striking Parrott was that she would not sign a death verdict and its bases for Giger appear two-fold—Giger would not sign a death verdict and "wasn't sure he could vote death." These bases do not support the strikes.

Preliminarily, it must be noted that the record does not support the finding that Giger wasn't sure he could even vote for death. Giger's answers to both

counsels were solely about his inability to sign a death verdict. He never said he could not consider imposing death. The court's decision on this basis therefore is an abuse of discretion.

Despite Ahsens' statement that "the case law is fairly clear" on whether veniremembers must be able to serve as foreperson and sign the verdict, in other cases he has acknowledged that no such requirement exists.[17] As in *Alderman v. Austin*, 663 F.2d 558, 563(5thCir.1981), this Court should "reject the State's suggestion that service as foreperson is among every juror's duties." A given juror's ability or willingness to serve as foreperson is immaterial to whether, under *Witherspoon, Witt* and *Gray*, he can serve. Here, the trial court acceded to Ahsens' request to exclude venirepersons on a broader basis than *Witherspoon* and its progeny condone. Parrott and Giger's inability to sign a death verdict does not make them venirepersons who "would clearly be unable to follow the law…in assessing punishment."*Adams v. Texas*, 448 U.S. 38(1980).

In *State v. Smith*, 781 S.W.2d 761(Mo.banc1989), this Court addressed whether the State may even ask whether venirepersons can sign a death verdict. This Court found nothing prohibited asking the question.*Id.* at 770-71.

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[17] In *State v. Christeson*, Ahsens told one panel "You understand that while you're not required to be—when you go on a jury you may have to perform that function, it's something that could happen."(T485-86). Earl requests that this Court take judicial notice of its files in *State v. Christeson,SC82082*.

Parties are entitled to probe the venire's views to make informed decisions about whom to strike.*See State v. McMillin*, 783 S.W.2d 82, 91-92(Mo.banc1990); *State v. Chambers*, 891 S.W.2d 93, 102(Mo.banc1994). That process also helps the trial court determine whether a venireperson's views substantially impair his ability to follow the law. No single response conclusively disqualifies someone from sitting. Rather, disqualification is based on the whole voir dire. Whether someone is substantially impaired is a question addressed to the trial court's sound discretion.

Since the sole basis for these cause strikes was Parrott and Giger's inability to sign a death verdict, the trial court abused its discretion. This Court must reverse and remand for a new trial, or, at least, a new penalty phase.*Gray*, 481 U.S. at 659.

IX.IMPROPER ARGUMENT

The trial court erred and plainly erred in overruling defense counsel's pre-trial motion, objections, not striking the venire, and not declaring a mistrial *sua sponte* based on Ahsens's arguments:

PENALTY PHASE

1. "I submit to you when you—when you get shot in the leg, and shot in the palm, and shot in the wrist, and shot in the torso, and then twice in the head, and again, there is no reason to keep shooting somebody if they're already dead."(T1696);

2. "Your second option is – the second thing is you must find that the statutory –that the aggravating circumstances, that is, all the facts in the case taken as a whole are not outweighed by the mitigating circumstances. And if you find unanimously that that is so, then you will have that final point of decision we talked about, with all options open"(T1700);

3. "Society, just like each one of us as an individual has the right to self-defense, even if that right of self-defense includes killing in order – against an unprovoked attack… Society has the right to defend itself…You are society. We look to you to defend us"(T1702, 1703);

4. "He says putting him in prison is enough, for life. You know, well, unfortunately, there are people in prison too: prisoners and staff and guards. It's not like he's going to be inside of a concrete box with no access to anybody so society is still at risk"(T1725);

5. "Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases…."(T1726);

6. "…the defense made a rather eloquent plea for mercy, but I want you to understand what mercy is. Mercy is something that is given by the powerful to the weak and the innocent. You have power. He's not innocent"(T1726);

7. "I'm tempted to say and I think I will. How many people do you get to kill before you stop them cold? If not now, when? If not here, where?"(T1732);

8. "I was struck when I read some of what Edmond Burke had to say, English philosopher … All that is necessary for evil to triumph is for good men to do nothing. You could send him to prison. He knows all about prison. I suggest to you that's tantamount to doing nothing"(T1732-33);

9. "Show me remorse in this case. Remember what Officer Belawski said? He said he simply asked how Joann was. Why? Because he knew that shooting a cop is one thing, killing a cop is something else altogether and he knew it"(T1728);

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10. "Did he deliberate—did he deliberate after the first shot? He had time. Did he deliberate after the second shot? He had time again. After the third? He had adequate time then. He kept shooting, didn't he?"(T1249);

11. "Now, is the fact that you knowingly shoot somebody enough to be deliberation? In and of itself, no. But certainly if you pull the trigger twice, was there time to deliberate? You bet there was. And he shot Harriet Smith

five or six times"(T1261-62) because these arguments denied Earl due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,AmendsVI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21; §565.030.4 in that Ahsens argued facts not in the record, misstated the law and facts, inserted an external source of law, created the false premise that a life without parole sentence wasn't punishment, converted a mitigator into an aggravator, and raised future dangerousness, rendering the verdicts unreliable.

Ahsens committed repeated misconduct in his arguments despite having been put on notice they were improper through the *Defense Motion in limine to Prohibit Improper Arguments*.(LF230-44). "The touchstone of due process analysis is the fairness of the trial."*Smith v. Phillips*, 455 U.S. 209, 219(1982); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524(W.D.Mo.1996), *aff'd*, 145 F.3d 1006(8th Cir.1998). An accused is entitled to a fair trial and a prosecutor must do nothing to deprive him of one or to obtain a wrongful conviction.*State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27(banc 1947); *Berger v. United States*, 295 U.S. 78, 88(1935);Rule 4.3.8.

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."*Donnelly v. DeChristoforo*, 416 U.S. 637(1974). Argument may be so outrageous as to violate due process and the Eighth Amendment.*Newlon v. Armontrout*, 885 F.2d 1328, 1337(8th Cir.1989); *Antwine v. Delo*, 54 F.3d 1357,

1364(8th Cir.1995). Ahsens's repeated, intentional misconduct violated Earl's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. The trial court erred and plainly erred[18] in denying the pre-trial motion, overruling counsel's objections and not *sua sponte* declaring a mistrial.

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In capital cases, closing arguments undergo a "greater degree of scrutiny" than in non-capital cases.*Caldwell v. Mississippi*, 472 U.S. 320, 329(1985); *California v. Ramos*, 463 U.S. 992, 998-99(1983). Ahsens ignored this constitutional mandate, misleading the jury and encouraging them to render unreliable verdicts.

Dr. Adelstein specifically testified that he could not tell the sequence of Harriett Smith's wounds.(T957). Ahsens misstated the facts, arguing she was shot in a specific order, implying Earl's purpose was to inflict as much pain as possible. (T1696).*Tucker v. Kemp*, 762 F.2d 1496, 1507 (11th Cir.1985);*Drake v. Kemp*, 762 F.2d 1449, 1458-59 (11th Cir.1985)(en banc); *State v. Storey*, 901 S.W.2d 886, 900-01 (Mo.banc1995). This encouraged the jury to sentence Earl to death on false facts.

[18] Since counsel did not object each time, plain error review is requested.*Rule 30.20*. Where counsel did not preserve a specific claim, it is so indicated.

Ahsens stated, "the second thing is you must find that the … aggravating circumstances, that is, all the facts in the case taken as a whole are not outweighed by the mitigating circumstances. And if you find unanimously that that is so, then you will have that final point of decision we talked about, with all options open." (T1700). This misstated the law, *Tucker*, 762 F.2d at 1507; *Storey*, 901 S.W.2d at 900-01, placing the burden of proof on the defense and never requiring the jury find beyond a reasonable doubt the aggravators it weighs.

Over objection, Ahsens argued, "Society, just like each one of us as an individual has the right to self-defense, even if that right of self-defense includes killing in order—against an unprovoked attack."(T1702). This improperly suggested society had more to fear from Earl, who would commit more murders if not sentenced to death. *Id.; Tucker v. Kemp*, 762 F.2d 1480(11th Cir.1985). By referring directly to "self-defense," Ahsens attempted to place the jury in the victims' shoes, implying they would be entitled to kill Earl in self-defense, equating their sentencing function with self-defense. *Storey*, 901 S.W.2d at 902; *State v. Shurn*, 866 S.W.2d 447, 465(Mo.banc1993).

Ahsens argued that defense counsel "says putting him in prison is enough, for life. You know, well, unfortunately, there are people in prison too: prisoners and staff and guards. It's not like he's going to be inside of a concrete box with no access to anybody so society is still at risk."(T1725). He stated, "I'm tempted to say and I think I will: How many people do you get to kill before you stop them cold? If not now, when? If not here, where?"(T1732). Finally, he arged, "I was

struck when I read some of what Edmond (sic) Burke had to say, English philosopher of the last century; actually, I guess two centuries ago now. He said, 'All that is necessary for evil to triumph is for good men to do nothing.'"(T1732).

These arguments suggested with no factual support, that Earl would kill again, even if sentenced to life without parole. *See Tucker v. Francis*, 723 F.2d 1504(11th Cir.1983); *Wallace v. Kemp*, 581 F.Supp.1471 (M.D.Ga.1984); *Storey*, 901 S.W.2d at 900-01; *State v. Rhodes*, 988 S.W.2d 521, 527(Mo.banc1999). They also suggested Ahsens had personal, non-record knowledge that Earl couldn't safely be sentenced to life without parole. *Storey*, 901 S.W.2d at 900-01. By arguing society only could be protected by a death sentence, Ahsens encouraged the jury to believe they must automatically sentence Earl to death. Finally, the reference to Burke suggested an external source of law—that philosopher's views—which, Ahsens suggested, were materially at odds with Missouri's law. *Id.* at 897; *State v. Debler*, 856 S.W.2d 641, 656(Mo.banc1993).

Ahsens also misstated the facts, *id.; Tucker*, 762 F.2d at 1507, telling the jury, "Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases…."(T1726). Ahsens' account was materially inaccurate since neither officer recounted "high speed chases," instead arresting him once without incident in his driveway and once in a hotel.(T1312, 1323-24). They were further inaccurate and misleading since, while drugs were found in his presence, neither incident resulted in drug convictions since no evidence showed they were his.

(T1315-19,1327-29). Moreover, the argument, like the testimony, was highly prejudicial, almost exactly like that in *Debler*, 856 S.W.2d at 657.

Ahsens arged, "the defense made a rather eloquent plea for mercy, but I want you to understand what mercy is. Mercy is something that is given by the powerful to the weak and the innocent. You have power. He's not innocent. I submit to you that mercy would be inappropriate here."(T1726). Ahsens misled the jury by stating mercy can only be applied in particular factual situations and suggesting they lacked discretion to exercise mercy. *Wilson v. Kemp*, 777 F.2d 621 (11th Cir.1985); *Drake*, *supra*.

Finally, Ahsens argued, "Show me remorse in this case. Remember what Officer Belawski said? He said he simply asked how Joann was. Why? Because he knew that shooting a cop is one thing, killing a cop is something else altogether and he knew it."(T1728). Ahsens' argument impermissibly attempted to convert a mitigator into an aggravator, *Zant v. Stephens*, 462 U.S. 862(1983), asserting Earl's expressions of caring and remorse toward Deputy Barnes were actually cold-blooded, self-centered concerns that, if she died, he would face the death penalty. The argument was also impermissible since it was based on no evidence.

But one principle should guide penalty phase: "'The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision.'"*Storey*, 901 S.W.2d at 902; *quoting Tuilaepa v. Calfornia*, 512 U.S. 967(1994).

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Ahsens repeatedly argued, because Earl had time to deliberate, he did. "Did he deliberate—did he deliberate after the first shot? He had time. Did he deliberate after the second shot? He had time again. After the third? He had adequate time then. He kept shooting, didn't he?"(T1249). "Now, is the fact that you knowingly shoot somebody enough to be deliberation? In and of itself no. But certainly if you pull the trigger twice, was there time to deliberate? You bet there was. And he shot Harriet Smith five or six times."(T1261-62).

This misstated the law, encouraging the jury to ignore first degree murder's distinguishing characteristic of deliberation—"cool reflection," not merely passage of time. Misstating the law is never condoned.*Storey*, 901 S.W.2d at 902; *Tucker*, 762 F.2d at 1507; *Drake*, 762 F.2d at 1458-59. "Deliberation [is] the distinctive quality which separates murder in the first degree from murder in the second degree,"*State v. Garrett*, 207 S.W. 784(Mo.1918), and "only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation,"*State v. O'Brien*, 857 S.W.2d 212, 218(Mo.banc1993). The jury cannot be encouraged cavalierly to toss it aside. Ahsens' argument focused upon the passage of time, encouraging them to believe that was sufficient. This contravenes common sense and the law.*State v. Black*, 50 S.W.3d 778,797(Mo.banc2001); *State v. Thompson*, 65 P.3d 420,427(Ariz.2003); C. Torcia, *Wharton's Criminal Law*,§142(15th ed.1994).

Because of Ahsens' repeated misconduct, the jury's verdicts were not reliable. This Court must reverse and remand for a new trial or a new penalty phase.

X.MURDER FIRST OR SECOND?

The trial court erred and plainly erred in overruling Earl's motion for judgment of acquittal at the close of all the evidence; not declaring a mistrial *sua sponte* when Ahsens argued deliberation occurred because Earl had "time" to deliberate; accepting the jury's verdicts of guilty of first degree murder; sentencing Earl to death; submitting Instructions 7,10,13, and not dismissing the first degree murder charges because this denied Earl due process, a fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV, Mo.Const.,Art.I,§§10,18(a),21 in that §565.020RSMo requires proof that the defendant deliberated, which means "cool reflection for any length of time no matter how brief." Ahsens argued because Earl had time to deliberate, he did. By submitting these charges and then convicting on them, the trial court eliminated the distinction between first and second degree murder and relieved the State of the burden of proof on that element, since the definition contains mutually inconsistent elements. Those elements create a statute so vague it leaves jurors free to decide, with no legally-fixed standards, what constitutes deliberation.

When a homicide occurs in Missouri, without more, it is presumed second-degree murder.*State v. Gassert*, 65 Mo. 352(Mo.1877); *Love v. State*, 670 S.W.2d 499, 505(Mo.1984); *State v. Little*, 601 S.W.2d 642(Mo.App.,E.D.1980). To elevate the charge to first degree murder, the state must also prove it was done deliberately.§§565.020,.030RSMo. "Deliberation [is] the distinctive quality which

separates murder in the first degree from murder in the second degree…."*State v. Garrett*, 207 S.W. 784(Mo.1918).

Despite the requirement of proof of deliberation, deliberation has been judicially-applied to render meaningless any rational distinction between first and second-degree murder. Especially as here, where no evidence supports finding "cool reflection," the court's actions in submitting Instructions 7,10,13,(LF578,581,584); accepting the jury's verdicts; not dismissing the first-degree murder charges; and not declaring a mistrial *sua sponte* when Ahsens stated deliberation existed because Earl had "time" to deliberate denied Earl's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

"A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter."§565.020RSMo. Section 565.002 defines deliberation as "cool reflection for any length of time no matter how brief." Despite this seeming clarity, the definition and its interpretations have blurred the line between first and second-degree murder.

When a defendant "with the purpose of causing serious physical injury" causes a death, second degree murder has occurred. "Both second degree murder and first degree murder require that the act be intentionally done. Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation."*State v. O'Brien*, 857 S.W.2d 212, 218(Mo.banc1993);

State v. Black, 50 S.W.3d 778, 797(Mo.banc2001)(Wolff, J.,dissenting). Yet, this Court repeatedly finds deliberation by focusing on time, not the mental process.*Id.* at 788;*State v. Tisius*, 92 S.W.3d 751, 764(Mo.banc2002);*State v. Clemmons*, 753 S.W.2d 901, 906(Mo.banc1988); *State v. Ervin*, 979 S.W.2d 149, 159(Mo.banc1998);*State v. Feltrop*, 803 S.W.2d 1, 11(Mo.banc1991); *State v. Ingram*, 607 S.W.2d 438, 443(Mo.1980);*see also State v. Samuels*, 965 S.W.2d 913, 922(Mo.App.,W.D.1998) ("The deliberation necessary to support a conviction of murder in the first degree need only be momentary; it is only necessary that the Appellant considered taking the victim's life in a deliberate state of mind.").

This focus misdirects the jury. Since, for the statute to be constitutional, the definition of deliberation must provide a meaningful distinction between the two offenses, the legislative and judicial definitions violate due process.*Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03(1966).

Because a defendant's mental state is often difficult to prove by direct evidence, the state often resorts to proof by circumstantial evidence.*See,e.g.*, *Black*, 50 S.W.3d at 788-89. But, that circumstantial evidence often is not proof of the essence of deliberation—cool reflection. That aspect of deliberation is often ignored or mistakenly combined with a discussion of intent and premeditation.

In *State v. Brown*, 836 S.W.2d 530, 540(Tenn.1992), the Tennessee Supreme Court noted, "…even if intent (or 'purpose to kill') and premeditation ('design') may be formed in an instant, deliberation requires some period of

reflection, during which the mind is 'free from the influence of excitement, or passion.'"*Citing,Clarke v. State*, 218 Tenn. 259, 402 S.W.2d 863, 868(1966). Nonetheless, courts often use "premeditation" and "deliberation" to refer to the same concept.*Brown*, 836 S.W.2d at 540. Recent opinions "overemphasize the speed with which premeditation may be formed" converting the proposition that no *specific* amount of time between the formation of the design to kill and its execution is required to prove first-degree murder, into one that requires virtually no time lapse at all, overlooking the fact that while intent may arise instantaneously, the very nature of deliberation requires time to reflect, a lack of impulse, and, a "cool purpose."*Id.* at 540, *citing Dale v. State*, 18 Tenn. (10 Yer.) 551, 552(1837).

Tennessee was not unique in confusing premeditation and deliberation. Commentators also assist in this confusion. More recent learned treatises, however, distinguish the concepts.

Although an intent to kill, without more, may support a prosecution for common law murder, such a murder ordinarily constitutes first-degree murder only if the intent to kill is accompanied by premeditation and deliberation. C. Torcia, *Wharton's Criminal Law*, §142 (15th ed. 1994); *Brown*, 836 S.W.2d at 540-41. ("'Deliberation' is present if the thinking, i.e., the 'premeditation,' is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a 'careful weighing' of the proposed decision.") Deliberation "requires a cool mind that is capable of reflection…." "It is not

enough that the defendant is shown to have had time to premeditate and deliberate. One must actually premeditate and deliberate, as well as actually intend to kill, to be guilty of…first degree murder."2W. LaFave and A. Scott, *Criminal Law,*§7.7(1986).

Courts have further blurred the distinction between first and second degree murder by relying upon "repeated blows or shots" as circumstantial evidence of deliberation.*Brown*, 836 S.W.2d at 541;*State v. Tisius*, 92 S.W.3d 751, 764 (Mo.banc2002); *State v. Samuels*, 965 S.W.2d 913, 922(Mo.App.,W.D.1998). But repeated blows (or shots) alone are insufficient to establish first-degree murder. "Repeated blows can be delivered in the heat of passion, with no design or reflection. Only if such blows are inflicted as the result of premeditation and deliberation can they be said to prove first-degree murder."*Brown*, 836 S.W.2d at 542;LaFave & Scott, §7.7 ("The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant in this regard, as such a killing is just as likely (or perhaps more likely) to have been on impulse").

The Arizona Supreme Court re-visited the meaning of premeditation and determined that reducing its proof to mere passage of enough time to permit reflection rendered the statute vague and unenforceable, eliminating the difference between first and second-degree murder.*State v. Thompson*, 65 P.3d 420, 424(Ariz.2003). The error was harmless since evidence of the defendant's "reflection" was overwhelming.*Id.* at 429. If, however, "the only difference

between first and second degree murder is the mere passage of time, and that length of time can be 'as instantaneous as successive thoughts of the mind' then there is no meaningful distinction between first and second degree murder. Such an interpretation would relieve the state of its burden to prove actual reflection" and would, therefore, violate due process."*Id*. at 427. The Legislature intended premeditation "and the reflection that it requires, to mean more than the mere passage of time."*Id*. "We also discourage the use of the phrase 'as instantaneous as successive thoughts of the mind.' We continue to be concerned that juries could be misled by instructions that needlessly emphasize the rapidity with which reflection may occur."*Id*. at 428.

The first-degree verdict-directors also misled the jury because they so confused the concept of deliberation that it convicted Earl of first-degree murder despite the lack of evidence to prove that element. The verdict-directors instructed that, to convict of first-degree murder, the jury must find, "Third, that the defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief."(LF578,581,584). The defense objected, arguing the State had not proved Earl's mental state and no meaningful distinction existed between first and second-degree murder.(T1229-31).

Whether a jury is properly instructed is a question of law.*Rice v. Bol*, 116 S.W.3d 599(Mo.App.,W.D.2003); *Hosto v. Union Elec. Co.,* 51 S.W.3d 133, 142 (Mo.App.,E.D.2001). To reverse for instructional error, the instruction must have misdirected, misled or confused the jury, prejudicing the person challenging the

instruction.*Williams v. Fin. Plaza, Inc.*, 23 S.W.3d 656, 658(Mo.App.,W.D.2000). To determine whether that occurred, it must be determined whether "an average juror would correctly understand the applicable rule of law" the instruction attempts to convey.*Lashmet v. McQueary*, 954 S.W.2d 546, 550 (Mo.App.,S.D.1997). Prejudice exists if the error materially affected the case's merits and outcome.*Hill v. Hyde*, 14 S.W.3d 294, 296(Mo.App.,W.D.2000).

A jury instruction creates a "roving commission" if it fails to advise the jury what acts or omissions by the defendant create liability.*Lashmet*, 954 S.W.2d at 550;*Paisley v. K.C.Pub.Serv.Co.*, 351 Mo. 468, 173 S.W.2d 33, 38(1943). An instruction may also create a roving commission if it is "too general."*Id*.

The first degree verdict directors misled Earl's jury and, because they were so general as to not advise the jury what constituted deliberation, created a roving commission. They thus let the jury give its unguided interpretation to that element. That they were based on the Approved Instructions does not eliminate the problem.

As Justice Cardozo once observed, the distinction between first and second-degree murder based upon whether deliberation exists is too vague and obscure for any jury to understand.B. Cardozo, *Law and Literature and Other Essays*, 99-100 (1931). The statutory definition "may not explain it in an easily understandable way and, indeed, might mislead the jury."*Thompson*, 65 P.3d at 428. Juries may "be misled by instructions that needlessly emphasize the rapidity with which reflection may occur."*Id.* Instructions must therefore clarify "that the state may

not use the passage of time as a proxy for premeditation. The state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time *is* premeditation."*Id.*

The instructions here did precisely what Justice Cardozo and the Arizona Supreme Court warned against—they combined two concepts that appear mutually exclusive—cool reflection and instantaneous occurrence. Since deliberation requires some period of reflection when the mind is free from excitement or passion,*Brown*, 836 S.W.2d at 540;*Clarke*, 402 S.W.2d at 868, and some time and the ability to permit careful weighing of the proposed decision, *Wharton's Criminal Law*,§142, the instructions misled the jury, letting them convict Earl of first-degree murder absent any evidence of "cool reflection upon the matter," Indeed, all the jury considered was "for any length of time no matter how brief."

Ahsens misled the jury, arguing,

> Did he know what he was doing? If for no other reason, he had the opportunity to deliberate when he was loading that gun and walking to the door and keeping it hidden behind his leg. Oh, yeah, he deliberated. Did he deliberate – did he deliberate after the first shot? *He had time*. Did he deliberate after the second shot? *He had time again.* After the third? *He had adequate time then*. He kept shooting, didn't he? Oh, yeah, there's deliberation here, three times over.

(T1249)(emphasis added). In final closing, Ahsens again argued:

> Now, is the fact that you knowingly shoot somebody enough to be deliberation? In and of itself, no. But certainly if you pull the trigger twice, *was there time to deliberate*? You bet there was. And he shot Harriett Smith five or six times.

(T1261-62)(emphasis added). As the Arizona Court warned, Ahsens did not argue that the passage of time *suggested* deliberation. He argued it *was* deliberation. He misstated the law and denied Earl due process.*Storey*, 901 S.W.2d at 901;*Tucker*, 762 F.2d at 1507;*Drake v. Kemp*, 762 F.2d 1449, 1458-59(11thCir.1985)(en banc).

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."*Donnelly v. DeChristoforo*, 416 U.S. 637(1974). Ahsens preyed upon the lack of evidence showing cool reflection and an instruction that misled the jury. This combination let the jury convict Earl of first-degree murder with no proof, let alone proof beyond a reasonable doubt, of an element of the offense.

This Court must reverse Earl's convictions for first-degree murder, reduce them to second-degree murder, remand for re-sentencing and declare §565.020RSMo unconstitutionally vague.

XI.VOLUNTARY INTOXICATION INSTRUCTION RELIEVES STATE OF BURDEN OF PROOF

The trial court erred in overruling Earl's objections to Instruction 5, submitting that instruction, accepting the jury's verdicts and convicting Earl of first-degree murder because this denied Earl due process, the rights to present a defense, rebut the State's case and hold the State to proof beyond a reasonable doubt, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that the instruction's language ordering the jury not to consider a defendant's intoxication in determining mental state, creates a reasonable likelihood it will excuse the State from proving his mental state beyond a reasonable doubt and will shift that burden of proof to the defense. This likelihood is enhanced by the instruction's prefatory sentence since the diametrical opposition of the instruction's two propositions creates a conundrum about whether the State must prove the defendant's mental state beyond a reasonable doubt and whether the defense must prove that he did *not*.

In *State v. Erwin*, 848 S.W.2d 476, 483 (Mo.banc1993), this Court reversed the defendant's second-degree murder and armed criminal action convictions. It held the instruction based on MAI-Cr3d310.50 created "a reasonable likelihood that the jury would believe that if [the] defendant was intoxicated, he was criminally responsible regardless of his state of mind. That reading has the effect

of excusing the state from proving the defendant's mental state beyond a reasonable doubt and violates due process under *Sandstrom [v. Montana*, 442 U.S. 510(1979)]." It further held, "A jury is at least as likely to assume the instruction relieves the state of its burden of proving the defendant's mental state as a jury is to simply disregard the evidence of intoxication."*Erwin*, 848 S.W.2d at 483.

The instruction was thereafter amended to include a prefatory statement that "The state must prove every element of the crime beyond a reasonable doubt." MAI-Cr3d310.50. This language does not cure the constitutional error. The two propositions are mutually inconsistent and confuse and mislead the jury. A reasonable likelihood exists that the jury misapplied the instruction to violate Earl's constitutional rights.*Boyde v. California*, 494 U.S. 370, 380(1990);*Erwin*, 848 S.W.2d at 483.

Earl need not establish that the jury more likely than not misapplied the instruction.*Id.* It is reasonably likely the jury understood it to mean that voluntary intoxication "stands in the place of intent."*Id.* Instructional error mandates reversal if error occurred in submitting an instruction and prejudice to the defendant resulted.*State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc2002); *State v. Taylor*, 944 S.W.2d 925, 936 (Mo.banc1997);*Rule 28.02(f).* If giving an instruction is error, it is harmless only if the Court can declare it so beyond a reasonable doubt.*Rose v. Clark*, 478 U.S. 570, 583 (1986). If a substantial issue exists regarding the defendant's state of mind, that standard cannot be met.*Erwin*, 848 S.W.2d at 483.

Earl requests that this Court re-visit *State v. Taylor*, 944 S.W.2d 925 (Mo.banc1997) and *State v. Johnson*, 968 S.W.2d 686 (Mo.banc1998) and hold unconstitutional the instruction based on MAI-Cr3d310.50.

Ahsens argued in guilt phase closing that Earl deliberated. But, he didn't refer to Earl's thought processes, instead telling the jury to consider Earl's actions against the passage of time.

> Did he deliberate—did he deliberate after the first shot? He had time. Did he deliberate after the second shot? He had time again. After the third? He had adequate time then. He kept shooting, didn't he?

(T1249). In final closing, he argued:

> Now, is the fact that you knowingly shoot somebody enough to be deliberation? In and of itself, no. But certainly if you pull the trigger twice, was there time to deliberate? You bet there was.

(T1261).

Given the evidence, that was the best Ahsens could argue established deliberation. Angelia Gamblin testified that Earl started drinking Kessler 80-proof whiskey at 5:45a.m. and, when she returned around 10a.m., he had finished a fifth.(T1063-65,1087-88). He was still drinking, trying to get dressed, and telling her they had to go somewhere.(T1065). He was slurring words, stumbling, and was extremely intoxicated.(T1088). Angelia didn't want him to drive because he was so drunk.(T1088). He nonetheless drove them to Harriett's house, swerving everywhere and veering onto the shoulder.(T1089).

Angelia and Sheriff Wofford testified that Earl drove, walked into Harriett's house, talked, shot into the air, shot the lock on Harriett's lockbox, asked Angelia's help in shooting up methamphetamine, and shot at the officers.(T1067-81,1095-98,1175-76,1178). He acted. He spoke. But, did that mean he deliberated? Under Instruction 5, the jury didn't have to find anything else.

Could the jury have found, **under these facts**, that Earl deliberated? This Court acknowledged in *State v. Cross*, 27 Mo. 332, 338 (1858), "To look for deliberation and forethought in a man maddened by intoxication is vain, for drunkenness has deprived him of the deliberating faculties to a greater or less extent…." Indeed, as Dr. Smith testified, Earl's frontal lobe damage, combined with his alcohol and methamphetamine use, substantially impaired his brain function, affecting his ability to process information, make decisions and respond appropriately to situations.(T1207-09,1213).

Earl could not deliberate. Yet, Instruction 5 told the jury it could not consider Earl's intoxication in determining whether the State met its burden of proof on deliberation. The instruction thus violates due process, since conviction is only permissible upon "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."*In re Winship*, 397 U.S. 358, 364(1970).

Instruction 5 is constitutionally infirm in two respects. First, it is internally inconsistent, with the mutually inconsistent language in the two sentences creating

the likelihood of misleading the jury. Because it's confused, the jury thus will ignore its obligation under *Winship* to hold the State to its burden of proof on every element of the offense. As Mr. Kenyon noted, "Any reasonable juror could read this instruction and say that: 'The judge is telling us that if he is charged with murder in the first degree and we believe that intoxication kept him from forming the required mental state, and therefore, he didn't have the required mental state.' Any reasonable juror would think that they still cannot consider that because intoxication won't relieve him of responsibility; and therefore, he could be—has the—runs the risk of being found guilty of murder in the first degree even if the State never proves deliberation."(T1231-32). "If a jury may not consider the defendant's evidence of his mental state, the jury may impute to the defendant the culpability of a mental state he did not possess."[19] *Montana v. Egelhoff*, 518 U.S. 37, 65(1996)(O'Connor, J., dissenting).

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[19] In *Egelhoff*, Justice Scalia, writing for the plurality, attempted to distinguish *Crane v. Kentucky*, 476 U.S. 683 (1986), which affirmed that due process requires criminal defendants have a fair opportunity to defend against the State's accusations. He noted a State can limit the introduction of relevant evidence for a "valid" reason.*Egelhoff*, 518 U.S. at 53. Justice O'Connor pointed out that Montana conceded its purpose in eliminating voluntary intoxication evidence as a defense to mental state was to improve the State's chances of obtaining convictions.*Id.* at 66-67. That reason is constitutionally-infirm.*Id.* at 68.

"When contradictory instructions are given to a jury on a material issue, the error is prejudicial."*State v. Andrus*, 800 P.2d 107, 112 (IdahoApp.1990). If one who is intoxicated *cannot* deliberate, *Cross*, 27 Mo. at 338, the instruction relieves the State of its burden of proof on his mental state once evidence of voluntary intoxication is adduced. This creates an irrebuttable presumption of the requisite mental state.*Sandstrom, supra*.[20] "If jurisdictions do, indeed, hold all voluntarily intoxicated persons responsible for conduct that would be [deliberate] in sober persons, including conduct that such persons lack the capacity to perform, they are necessarily eliminating their usual standards of [deliberation] and replacing them with conclusive presumptions of [deliberation.]"Peter Westen, "*Egelhoff* Again," 36 Am.Crim. L.Rev. 1203, 1223 n.76(1999).

From this flows the instruction's second constitutional infirmity. Instruction 5 seems to allow a redefinition of the substantive law, eliminating the requirement that the State prove the defendant's mental state, and allowing conviction based solely upon his conduct. Yet, since this Court in *Erwin* specifically stated that the requirement of proof of *mens rea* continues, we must conclude that Missouri's rule is evidentiary, not substantive.

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[20] The *Erwin* Court held that MAI-Cr3d310.50, as then-formulated, created an irrebuttable presumption that an intoxicated person had the requisite mental state. The *Egelhoff* plurality did not disavow or find that holding inconsistent. *Egelhoff*, 518 U.S. at 48, n.2.

The *Egelhoff* Court was split on whether Montana's statute was substantive or evidentiary. The plurality, joined by Justice Ginsburg, stated it was substantive. Justice Ginsburg made clear that, "[c]omprehended as a measure redefining *mens rea*, §45-2-203 encounters no constitutional shoal."*Egelhoff*, 518 U.S. at 58. The plurality alone held that, even if it were evidentiary, excluding the evidence would be constitutional. The dissenters, led by Justice O'Connor, stated the statute was evidentiary and thus violated the defendant's due process rights, under *In re Winship*, that the State prove every element of the offense beyond a reasonable doubt, and, under *Chambers v. Mississippi*, 410 U.S. 284, 294(1973), to present a defense.

While the Justices do not articulate their definitions of evidentiary and substantive, one commentator has suggested the terms mean:

> Substantive. A jury instruction to disregard evidence which a defendant offers to negate an element of an offense is "substantive" if the instruction is predicated upon, or functionally equivalent to, eliminating the issue to which the evidence is otherwise logically relevant as a required element of the offense.
>
> Evidentiary. A jury instruction to disregard evidence which a defendant offers to negate an element of an offense is "evidentiary" if the instruction directs the jury to disregard the logical relevance of the evidence to an element that the jury must find in order to convict.

Egelhoff Again, 36 Am.Crim. L.Rev. at 1239.

Missouri's statute appears to be evidentiary, *contra State v. Fanning*, 939 S.W.2d 941, 946 (Mo.App.,W.D.1997), since it does not eliminate the State's burden of proof on mens rea. *Erwin*, 848 S.W.2d at 483. Given this position, and given that *Winship* is only violated by rules that formally shift or reduce the State's burden on evidence otherwise deemed admissible, *Egelhoff*, 518 U.S. at 54-55, Missouri's statute and instruction, which **reduce** the State's burden on mens rea, *Id*. at 54-55,64, are unconstitutional. Missouri thus differs from Montana, where, one commentator suggested,

> Properly understood, Montana's exclusionary statute is intended only to prevent intoxicated wrongdoers from being ipso facto excused from criminal liability. This is very different from asserting that intoxication is irrelevant to the question of mens rea.

Brett G. Sweitzer, *Implicit Redefinitions, Evidentiary Proscriptions, and Guilty Minds: Intoxicated Wrongdoers After* Montana v. Egelhoff, 146 U.Pa.L.Rev. 269, 306(1997). Missouri's instruction tells juries that intoxication is irrelevant to their decision on mental state and the defendant may be presumed to have the requisite mental state. Because he is intoxicated, he **must** have had it. The state interest is "to ensure that even a defendant who lacked the required mental-state-element—and is therefore not guilty—is nevertheless convicted of the offense."*Egelhoff*, 518 U.S. at 66 (O'Connor, J., dissenting).

Because a reasonable likelihood exists that the jury misapplied Instruction 5 to relieve the State of its burden of proof on deliberation, *Boyde*, 494 U.S. at 380,

it thus violated Earl's state and federal constitutional rights to due process and present a defense. This Court should reverse and remand for a new trial.

XII.JURY INSTRUCTIONS MIS-DEFINE REASONABLE DOUBT

The trial court erred in overruling Earl's pre-trial motions on reasonable doubt, overruling Earl's objections to Instructions 4 and 19 and the oral instruction based on MAI-Cr3d 300.02 because this denied Earl due process, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that these instructions, equating "reasonable doubt" with proof that leaves the jury "firmly convinced" of the defendant's guilt but does not "overcome every possible doubt," lowers the State's burden of proof and allows conviction on a quantum of proof less than that mandated by due process.

The State bore the burden of proving beyond a reasonable doubt that Earl committed first degree murder and his death-eligibility. The instructions let the jury convict Earl and sentence him to death based on a quantum of proof less than that which due process requires. This violated Earl's state and federal constitutional rights to due process, a fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment.

Pre-trial, Earl filed written objections to the Approved Instructions purporting to define reasonable doubt. He also proposed modifications to eliminate the constitutional error.(LF149-68). The court summarily denied those

motions.(T11). Counsel renewed those motions at the penalty phase instruction conference.(T1663-73).[21]

Instructional error that mis-describes the State's burden of proof is structural, rendering harmless error analysis inapplicable.*Sullivan v. Louisiana*, 508 U.S. 275, 281(1993). The question is whether a reasonable likelihood exists that the jury applied an instruction unconstitutionally.*Victor v. Nebraska*, 511 U.S. 1, 6(1994). Such a likelihood exists here, especially since Instruction 5 relieved the State of its burden of proof on mental state.

In the verbal instructions read at the outset of trial, the court instructed that Earl was presumed innocent:

> Unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty.
>
> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

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[21] To the extent that this claim is imperfectly preserved, Earl requests plain error review.*Rule 30.20.* Although this Court has rejected similar claims,*see e.g.*, *State v. Wolfe*, 13 S.W.3d 248, 264(Mo.banc2000), Earl requests that it re-visit the issue since the "voluntary intoxication" instruction relieved the State of its burden of proof on mental state.

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all th[e] evidence, you are firmly convinced that the defendant [i]s guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

(LF559). The substance of that text was reiterated in Instructions 4 and 19.(LF575,597).

Due process requires that, for conviction in state and federal prosecutions, the State prove beyond a reasonable doubt every fact necessary to constitute the charged offense.*In re Winship*, 397 U.S. 358, 364(1970);*Cupp v. Naughten*, 414 U.S. 141(1973). The instructions here, equating proof beyond a reasonable doubt with proof that leaves a jury firmly convinced of the defendant's guilt, are legally incorrect and dilute the standard of proof, thus misleading the jury and creating unreliable verdicts.

In *Victor v. Nebraska*, 511 U.S. 1(1994), the United States Supreme Court discussed instructional language that would comport with due process by not unconstitutionally lowering the State's burden of proof. Petitioner Sandoval argued that the instruction, equating "moral certainty" with reasonable doubt unconstitutionally lowered the standard of proof.*Id.* at 14. "The problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of

probability required by the Constitution in criminal cases." *Id.* While the instruction there was problematic in that respect, since its totality gave the phrase context, it passed constitutional muster. The Court held, "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." *Id.* Thus, "reference to moral certainty, in conjunction with the abiding conviction language, 'impress[ed] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.'" *Id*. at 15, citing *Jackson v. Virginia*, 443 U.S. 307, 315(1979). The Court expressly did "not condone the use of the phrase" 'moral certainty.' *Victor*¸ 511 U.S. at 16.

Justice Ginsburg, concurring, approved the instruction containing the "firmly convinced" and "the law does not require proof that overcomes every possible doubt" language. Distinct from Missouri's Instructions, however, the federal instruction also stated proof in a criminal case must be "more powerful" than the "more likely true than not true" standard in civil cases and they must acquit if they "think there is a real possibility he [defendant] is not guilty." That cautionary language does not appear in Missouri's Approved Instructions. Thus, as in *State v. Perez*, 976 P.2d 427, 442-43(Haw.App.1998), where the "firmly convinced" language unconstitutionally lowered the State's burden of proof because it was too similar to the civil "clear and convincing evidence standard," the instructional language here lowered the burden of proof.

Because the instructions in both phases lowered the State's burden of proof, allowing Earl's conviction on evidence less than that which is constitutionally mandated, this Court shoul d reverse and remand for a new trial.

XIII.TESTIMONY BOLSTERS CREDIBILITY

The trial court erred and abused its discretion in overruling Earl's objections to and admitting Sheriff Wofford's testimony about Officers' Sigman and Piatt's statements and Officer Roark's testimony about Angelia Gamblin's statements because this denied Earl due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that the out-of-court statements were hearsay, offered solely to bolster the in-court testimony of these witnesses. Earl was prejudiced since, by presenting the same testimony through multiple witnesses, the State established a drumbeat of violent, precipitous action in its attempt to establish deliberation.

Despite that its witnesses testified about what they saw and heard at Earl's house, the State nonetheless sought to bolster their credibility and hammer home its portrait of Earl as a violent, deliberate killer by presenting that testimony through as many witnesses as possible. The State thereby obtained an unfair advantage. This violated Earl's state and federal constitutional rights to due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

The trial court abused its discretion in overruling Earl's objections and admitting this evidence. *State v. Pettit*, 976 S.W.2d 585, 590(Mo.App.,W.D.1998). This Court will reverse if the improper admission of evidence was so prejudicial it

denied Earl a fair trial.*State v. Cole*, 867 S.W.2d 685, 686(Mo.App.,E.D.1993); *State v. McMillin*, 783 S.W.2d 82, 98(Mo.banc1990). Errors will be deemed harmless only if they are harmless beyond a reasonable doubt. *Cole*, 867 S.W.2d at 686, citing *State v. Miller*, 650 S.W.2d 619, 621(Mo.banc1983); *Chapman v. California*, 386 U.S. 18, 24(1967). The burden is on the State, as the beneficiary of the error, to prove harmlessness.*Id.*

Corporal Folsom testified that the Dent County Sheriff's Department requested the Highway Patrol's help, following a reported double homicide.(T904-05). Folsom and Sgt. Roark initially headed toward Harriett Smith's house but, upon hearing about shootings at Earl's house, they went there instead.(T905). Folsom detailed their approach and what they found.(T906-07). Folsom stated on cross that he heard no gunfire.(T920). Roark also described their approach to the house.(T1019-21). Roark then recited, over a hearsay objection, what Folsom saw when he looked around the corner of the house.(T1022). Roark stated Folsom saw Earl and told Roark and another officer that it was he.(T1023). Roark later stated, again over a hearsay objection, that, when he asked Angelia Gamblin what had happened, she responded that the Sheriff shot her.(T1025). He asked who shot first and she responded, "Earl."(T1025).

Officer Sigman testified that he and Officer Piatt initially set up at an intersection to await Earl but, upon hearing Deputy Barnes had been shot, went to Earl's house.(T1003). Sigman saw Barnes lying before the house and he and Piatt ran toward Sheriff Wofford, who, wounded, was beside his patrol car.(T1006-

07,1009). Sigman heard two volleys of shots while standing behind the car. (T1007). Sheriff Wofford stated, over a hearsay objection, that Sigman and Piatt heard gunfire and saw sparks, coming, they thought, from Earl's house.(T1179).

Angelia Gamblin testified that, when the officers came to the door, she first saw Earl's gun as he pointed it at the officers.(T1079). She stated that Earl fired first and several times.(T1079).

In *State v. Seever*, 733 S.W.2d 438,441 (Mo.banc1987), this Court ruled, "When a witness testifies from the stand, the use of duplicating and corroborative extrajudicial statements is substantially restricted. Thus it would not be proper to read a witness's consistent deposition testimony, before or after the witness testifies from the stand. The party who can present the same testimony in multiple forms may obtain an undue advantage." Thus, although §492.304.2 RSMo "does not authorize total repetition, and we believe that it should not be construed to permit a substantial departure from customary procedures … The statement and the testimony covered the same precise ground. This bolstering is a departure from the normal course of trial proceedings."*Id.* Since the issues were sharply contested, this Court could not say no prejudice resulted. It reversed and remanded for a new trial.*Id.*

In *State v. Silvey*, 894 S.W.2d 662(Mo.banc1995), this Court reiterated that using a child's videotaped statement and his live testimony improperly bolstered his testimony because "it effectively allowed the witness to testify twice."*Id.* at 672. Critical was whether the out-of-court statement "wholly duplicated" the in-

court testimony.*Id.*; see also, *State v. Smith*, 136 S.W.3d 546, 550(Mo.App.,W.D. 2004).

In *State v. Cole*, 867 S.W.2d 685(Mo.App.,E.D.1993), the defendant was convicted of first degree murder and armed criminal action. Lena Mitchell, the victim's sister, testified that her brother had been in a street fight and later, when her brother returned, she saw a man approach and shoot him in the back.*Id.* at 686. That night, she told police that the shooter was Cole and gave a taped statement. *Id.* She testified for the State. On cross, using the tape, the defense noted inconsistencies between it and her in-court testimony.*Id.* She then changed or recanted her in-court testimony.*Id.* The State thereafter entered the whole tape into evidence, over objection.*Id.*

The Eastern District held that playing the tape "was improper bolstering in that it substantially repeated her in-court testimony. A party who can present the same testimony in multiple forms may obtain an undue advantage."*Id.*; *Seever*, 733 S.W.2d at 441. The tape improperly bolstered Lena's in-court testimony and, since it also contained hearsay, the cumulative effect of the hearsay and improper bolstering "was prejudicial and constitute[d] grounds for reversal." *Cole*, 867 S.W.2d at 687.

Here, that Earl shot the victims was not questioned. Whether he deliberated was hotly contested. Since the State sought to prove deliberation by his actions, and not his mental state, it needed to hammer home that he had fired repeatedly and was the initial aggressor. Thus, through hearsay statements, it bolstered

Angelia's and Sigman's in-court testimony that Earl fired first and fired repeatedly at the officers outside his house, even after Barnes was down. By presenting the same testimony "in multiple forms," the State sought and obtained an unfair advantage.

Because the trial court overruled defense counsel's objections, the jury effectively heard Angelia and Sigman testify twice—through their own mouths and through two other officers. This reiteration was not harmless since it hammered home Earl's apparently purposeful actions, which, according to the State, demonstrated deliberation.(T1248-49). This Court must, therefore, reverse and remand for a new trial.

CONCLUSION

For the reasons set forth above, Earl requests that this Court reverse and remand for a new trial, for a new penalty phase or to re-sentence him to life without parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of August, 2005, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

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

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 30,441 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson