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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

The jurisdictional statement from Earl's opening brief is incorporated herein by this reference.

STATEMENT OF FACTS

The Statement of Facts set forth in the opening brief is incorporated herein by this reference.

POINTS RELIED ON[1]

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. Whitfield, 107 S.W.3d 253 (Mo.banc200);

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

[1] Although response is not made to all of the State's arguments, no waiver of any claim is intended.

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, 380 F.Supp.2d 936(S.D.Ohio2005);

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

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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.

Parker v. Dugger, 498 U.S. 308(1991);

Richmond v. Lewis, 506 U.S. 40(1992);

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

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);

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

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.

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

… 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);

… 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) 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.

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

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

People v. Harris, 33 Cal.Rptr.3d 509 (Cal.2005);

People v.Kuntu, 196 Ill.2d 105 (Ill.2001);

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.

This Court changed the penalty phase landscape in Missouri when it decided *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). Ten years earlier, in *State v. Debler*, 856 S.W.2d 641 (Mo.banc 1993), this Court had confronted whether plain error resulted in penalty phase from the admission of extensive evidence of the defendant's unconnected criminal bad acts. *Id.* at 657. This Court noted that Missouri courts routinely had admitted, as non-statutory aggravators,

evidence of a defendant's un-convicted, un-connected prior bad acts. *Id.* Part of the solution, this Court stated, was to require that the State give notice of its penalty phase evidence. *Id.* This Court reiterated that requirement in *State v. Clay*, 975 S.W.2d 121, 132 (Mo.banc 1998); *State v. Ervin*, 979 S.W.2d 149, 158 (Mo.banc 1998), and *State v. Thompson*, 985 S.W.2d 779, 792 (Mo.banc 1999).

The *Debler* Court stated, however, that requiring notice did not remedy the constitutional violation. The Court found that admitting un-convicted, un-connected 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. This Court held that only an instruction requiring unanimous findings beyond a reasonable doubt would cure some of that unreliability. *Id.* at 656-57.

Since *Debler*, as the State points out, Resp.Br. at 24, this Court's opinions have stated that "the error in *Debler* was lack of notice." *See State v. Ervin*, 979 S.W.2d 149, 158 (Mo.banc 1998); *State v. Kreutzer*, 928 S.W.2d 854, 874 (Mo.banc 1996). Yet, the cases to which the State points are pre-*Whitfield*, and, also significantly, pre-*Apprendi* and *Ring*. While this Court apparently retreated from its holding in *Debler* in the intervening years, that initial holding has gained new vitality and force because of *Whitfield*, *Apprendi* and *Ring.*

In *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000), the Court addressed "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for

an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." The Court held that a Legislature may not remove from the jury the power to determine the facts that increase the punishment to which a criminal defendant is exposed. The Court found that "It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 490.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court reiterated that "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602. The Court went on to find that, because the enumerated aggravating factors were the functional equivalent of an element of a greater offense, the Sixth Amendment required that they be found by a jury. *Id.* at 609.

In *State v. Whitfield, supra*, this Court applied *Ring* to Missouri's death penalty statute. It held that, "under the Sixth and Fourteenth Amendments, as set out in *Ring*," a defendant has the right to have a jury make "the factual determinations on which his eligibility for the death sentence [is] predicated." 107 S.W.3d at 256. This Court expressly noted that, in *Ring*, the Court, relying on *Apprendi's* holding ("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*")(emphasis added), 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." *Whitfield*, 107 S.W.3d at 257.

This Court then ruled that the three steps set out in then-Section 565.030.4(1-3) RSMo "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *Id.* at 261. Those three steps, this Court determined, are **eligibility**, not selection steps. And, as eligibility steps, they are facts that must be proved beyond a reasonable doubt. *Ring*, 536 U.S. at 602. Included in those factual findings are those dealing with so-called non-statutory aggravators. This Court's decision in *Whitfield* thus makes clear that which before had been blurred by decisions subsequent to *Debler*. The constitutional underpinning for requiring that the State prove the non-statutory aggravating circumstances beyond a reasonable doubt is established by this Court's decision in *Whitfield*.

The Sixth and Fourteenth Amendments require that the jury find, beyond a reasonable doubt, those facts that are death-eligibility factors. Those facts include non-statutory aggravators. In this case, the State was constitutionally obliged to prove to the jury, beyond a reasonable doubt, the non-statutory evidence upon which it urged the jury to sentence Earl to death. Since this jury was not instructed that its findings as to that step must be unanimous and beyond a reasonable doubt, this Court must reverse and remand for a new penalty phase or reverse and order that Earl be 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.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that the Eighth Amendment erects no *per se* bar to victim impact evidence. Concurring, Justice O'Connor stated however, that such 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 (internal citations omitted); *Id.* at 822 (Rehnquist, J.). Against this limitation, the *Payne* Court stated that generally,

> victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

Id. at 823. But, as the Court had stated in *Booth v. Maryland*, 482 U.S. 496, 506 (1987), extensive victim impact evidence creates the risk that the sentencing decision will "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."

The *Payne* Court concluded that "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question…." *Payne*, 501 U.S. at 825. The Court went on to hold that, "In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.*

But, what happens when the State goes beyond the "brief glimpse" that the *Payne* Court approved? What happens when it adduces irrelevant evidence? ("There is no reason to treat such evidence differently than other relevant evidence

is treated." *Id.* at 827). At that point, the Eighth and Fourteenth Amendments are implicated. And, that occurred here.

Despite the State's protestations to the contrary, the testimony the State adduced in penalty phase went far beyond that authorized by §565.030.4 RSMo or condoned by *Payne*.[2] It must be remembered that the admission of evidence in penalty phase still must accord with the rules of evidence in criminal trials. §565.030.4 RSMo. And, as the *Payne* Court recognized, those rules include that, to be admissible, evidence must be relevant. *Payne*, 501 U.S. at 827.

Of special concern is Ms. Lambiel's testimony about what has happened to various family members since her sister's death. Lambiel testified that "One of my brothers has had five strokes just right afterwards." (T1349). She then stated that, "then one brother died about six months after Joann did." (T1349-50). Mr. Ahsens then asked Lambiel, "are the things that have happened to your family *because of Joann's death*, do they go on even now?" (T1350)(emphasis added).

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[2] While the State protests that victim impact evidence is not intended to "encourage comparative judgments," making the killing of a sterling member of the community more egregious than the killing of a reprobate, it must be noted that the State here focused its victim impact evidence upon the police officer who was killed, and not the acknowledged drug dealer. Were the State's sole purpose to present a brief glimpse of the unique life extinguished, why then did it not present victim impact evidence about the drug dealer as well?

She responded, “they 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).

The State asserts that Lambiel’s testimony “never associated her brother’s strokes and her other brother’s death to appellant’s murder of Barnes.” (Resp.Br. at 29). This assertion is contrary to the record, as Mr. Ahsens clearly linked causation of her brothers’ medical problems and death to Barnes’ death. Alternatively, if these medical problems and death are unrelated to Earl’s actions and their direct impact upon the family, the evi dence was irrelevant. Under either scenario, its admission was erroneous and it rendered the jury’s penalty phase verdicts unreliable.

Although the State has not addressed the issue, the prejudice from this evidence may well have been exacerbated since Lee Pitman, the jury foreperson, acknowledged having placed himself in the position of the victims’ families when he made his penalty phase decision. (T1775-76). The speculative, irrelevant evidence created a substantial risk of prejudice. *United States v. Mayhew*, 380 F.Supp.2d 936 (S.D.Ohio 2005). This Court must reverse and remand for a new penalty phase or reverse and order that Earl be 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 Court, in *Simmons v. South Carolina,* 512 U.S. 154, 163 (1994), stated that "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." Many of those factors are contained within the statutory mitigators Missouri's Legislature has enumerated. §565.032.3 RSMo. But mitigation evidence is not limited to statutory factors. Indeed, the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." *Hitchcock v.*

Dugger, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

The Court has recognized the vast array of evidence that may be adduced as non-statutory mitigation. It 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). Among the evidence that the jury may consider mitigating is the impact of the defendant's 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*, 168 S.W.3d 433, 445 (Mo.banc 2005). This Court's opinion in *Williams* erroneously states that only one case—*Stevens, supra*—recognizes the admissibility of such evidence. As indicated above, many courts have recognized that mitigation may well encompass such evidence.

For a death sentence to comport with due process and the Eighth Amendment, sentencing considerations must be individualized. Only in that way can reliability in the determination that death is the appropriate punishment in a

particular case be assured. *Tuilaepa v. California*, 512 U.S. 967, 972-73(1994); *Woodson v. North Carolina*, 428 U.S. 280, 304-05(1976).

By sustaining the State's objection, the trial judge precluded Earl's jury from hearing relevant evidence in mitigation of punishment. This violated due process and the Eighth Amendment and rendered Earl's death sentences fundamentally unreliable. This Court must reverse and remand for a new penalty phase or to impose life without parole sentences.

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). The instructions mirrored each other, implicitly requiring a finding on both or neither, but the jury found the statutory aggravator only on Count I(LF630-31). This inconsistency in verdicts violated Earl's state and federal constitutional rights to due process, reliable sentencing, a fair trial and freedom from cruel and unusual punishment.

INCONSISTENT VERDICTS

The State asserts that "the mere fact that the jury did not make the written finding that the murder of Michael Wells was committed during the commission of another unlawful homicide does not mean that the jury rejected that finding or disbelieved the evidence supporting that aggravator." (Resp. Br.at 47). The State further maintains that the jury's failure to make a written finding of the statutory aggravator "does not render the verdicts inconsistent. The jury was not necessarily unconvinced of this aggravator but could have compromised. The lack of a written finding of this aggravator does not indicate that the jury rejected this aggravator or that the verdicts were invalid." (Resp. Br.at 48-49). The State's argument improperly relies upon non-capital cases and fails to recognize the unique characteristics of capital sentencing proceedings.

To comport with Sixth and Eighth Amendment requirements, the jury must make specific findings of the statutory aggravators that it finds unanimously and beyond a reasonable doubt. *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Given that requirement, the jury's failure to make the written finding makes clear that it did not find the statutory aggravator in question unanimously and beyond a reasonable doubt.

Although inconsistent verdicts in guilt phase do not necessarily lead to the need for reversal, *see Dunn v. United States*, 284 U.S. 390 (1932); *State v. Davis*, 797 S.W.2d 560, 563 (Mo.App.,W.D. 1990), different considerations control in penalty phase. As the Court in *United States v. Powell*, 469 U.S. 57, 65 (1984)

conceded, inconsistent verdicts "most certainly" demonstrate the jury has not followed the instructions. The jury's inconsistent findings that the murder of Harriett Smith occurred "while the defendant was engaged in the commission of another unlawful homicide of" Michael Wells but not finding the obverse also occurred make that clear. The question for this Court thus is not whether error occurred but whether the State can show it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

What impact did the jury's action have 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 punishment decision was skewed because it considered this statutory aggravator, despite not having found it unanimously and beyond a reasonable doubt. The jury's consideration of this aggravator created the possibility of randomness, placing a thumb on death's side of the scale. *Sochor v. Florida*, 504 U.S. 527, 532(1992) citing *Stringer v. Black*, 503 U.S. 222, 232, 236 (1992).

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. This Court must reverse and remand for a new penalty phase; vacate Earl's sentences on Counts I and II and order him re-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.

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

… 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);

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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'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. Especially in penalty phase, in which 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 misled the jury, encouraging them to render unreliable verdicts.

The State asserts no error resulted from Ahsens' argument 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). The State asserts that this argument is proper rebuttal and that arguments about future dangerousness are appropriate in penalty phase. (Resp.Br.at 72-74).

The State relies on *State v. Ramsey*, 864 S.W.2d 320 (Mo.banc 1993). There, the prosecutor argued that people incarcerated with Ramsey would not be protected from him. Defense counsel objected and the court overruled the objection but admonished the jury that "the prosecutor is 'not arguing the law in

the respect that there are no options.'" *Id.* This Court stated that the prosecutor's argument was retaliatory and "was not improper, particularly in light of the trial court's admonition and defendant's history of violent crime." *Id.* Here, by contrast, the jury heard the prosecutor's argument, unchallenged by counsel and uncorrected by the trial court. Further, in this case, it is pure speculation to assert that Earl would be violent while incarcerated. While *evidence* of future dangerousness might be admissible, *State v. Chambers*, 891 S.W.2d 93, 107 (Mo.banc 1994); *State v. Bucklew*, 973 S.W.2d 83, 96 (Mo.banc 1998), such argument based on no evidence is improper.

As one court has recently noted, "the prosecution may argue future dangerousness is the argument is based on the evidence." *People v. Harris*, 33 Cal. Rptr.3d 509, 558 (Cal.2005). But such argument, especially when based solely on sheer speculation, is highly prejudicial. In vacating the defendant's death sentence under similar circumstances, the Illinois Supreme Court stated,

> "Unsupported predictions as to the kinds of crimes the defendant will commit if not executed are even more to be condemned than references to the possibility of parole, for they convey more directly to jurors the vi vid, but misleading, message that the death penalty is the only way to protect society from the defendant and forestall his violence." … The prosecutor's statements on this point … could well have caused the jury to consider the death penalty as the only way to protect society from the defendant and diverted its attention from the proper aggravating and mitigating factors.

People v. Gacho, 112 Ill.2d 221, 256-57 (Ill. 1988), citing *People v. Holman*, 104 Ill.2d 133, 165 (Ill. 1984). Here, Mr. Ahsens had no evidentiary basis from which to argue that the jury could not sentence Earl to life in prison and thus protect society. His argument was speculative and suggested non-record knowledge of facts that Earl would be violent in prison. As such, his argument was improper and highly prejudicial. *State v. Storey*, 901 S.W.2d 886, 900-01 (Mo.banc 1995). Finally, he argued, "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).

The State asserts that "A prosecutor's argument may make reasonable inferences from the evidence." (Resp.Br. at 74). Reasonable inferences, yes. Inferences contrary to the evidence, no. Mr. Ahsens misstated the facts, telling the jury to "Remember the incidents described by Lt. Trudeau and Officer Ridenour: high speed chases…." (T1726). The State's argument attempts to stretch to distortion the officers' testimony that their dealings with Earl included "high speed chases," making Earl seem like someone with a history of altercations with law enforcement and thus more appropriately sentenced to death in this case. The argument was not a permissible inference drawn from the officers' testimony. The officers clearly described instead that they had arrested him once, without incident, in his driveway, and once, again without incident, in a hotel room.

(T1312,1323-24). To stretch such testimony into "high speed chases" was clearly an attempt to mislead the jury.

Ahsens' reference to Edmund Burke was, contrary to the State's argument, not "simply the rhetoric designed to convince the jury that life imprisonment was not an appropriate sentence in light of the gravity of the crime…." (Resp.Br. at 78). It presented the jury with an external source of law—that philosopher's views—which were materially distinct from Missouri's law. *Storey*, 901 S.W.2d at 897; *State v. Debler*, 856 S.W.2d 641, 656 (Mo.banc1993). Ahsens, referring to Burke, equated "doing nothing" with sentencing Earl to life without parole. He thus encouraged the jury to believe that the only way to punish Earl was to sentence him to death.

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); *People v. Kuntu*, 196 Ill.2d 105, 143 (Ill. 2001); *see State v. Williams*, 793 N.E.2d 446, 461 (Ohio 2003); *State v. Hill*, 653 N.E.2d 271, 280 (Ohio 1995). Ahsens' argument, which was sheer speculation, based on no evidence, asserted that 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. While a prosecutor may argue that a defendant has failed to exhibit remorse, *See*

State v. Tokar, 918 S.W.2d 753, 769 (Mo.banc 1996)(Resp.Br.at 80), he may not contort the *expression* of remorse into precisely the opposite, especially when no evidence supports it.

"'The State must ensure that the [penalty phase] 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). Ahsens' repeated misconduct rendered the jury's verdicts unreliable. Not only did he fail to guard against bias or caprice—his actions engendered them. This Court must reverse and remand for a new trial or a new penalty phase.

CONCLUSION

For the reasons set forth above and in his opening brief, 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 November, 2005, two true and correct copies of the foregoing reply brief and floppy disk(s) containing a copy of this brief were hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

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

The attached 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 5,976 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

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Janet M. Thompson