No. SC84515

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IN THE
SUPREME COURT OF MISSOURI
EN BANC

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STATE OF MISSOURI,

Respondent,

vs.

DEANDRA M. BUCHANAN

Appellant.

_____

Appeal from the Circuit Court of Boone County, Missouri
Honorable Gene Hamilton, Judge

_____

BRIEF OF RESPONDENT

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I N D E X

TABLE OF AUTHORITIES

Decisions

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Constitutional Provisions, Statutes and Rules

JURISDICTIONAL STATEMENT

This appeal is from a conviction of three counts of first degree murder, §565.020, RSMo 2000, and one count of first degree assault, §565.050, RSMo 2000, obtained in the Circuit Court of Boone County and for which appellant received three sentences of death and one sentence of life imprisonment. Because of the sentences of death imposed, the Supreme Court of Missouri has exclusive appellate jurisdiction over this appeal. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

The appellant, Deandra M. Buchanan, was charged by information in the Circuit Court of Boone County on December 20, 2000 with three counts of first degree murder and one count of first degree assault (L.F. 27-30).[1] Appellant's trial began on March 7, 2002 before the Honorable Gene Hamilton with the selection of a jury from Henry County (Tr. 405).

Appellant does not contest the sufficiency of the evidence to sustain his conviction of the crimes charged. Viewed in the light most favorable to the verdict, the evidence at trial showed the following: appellant was a drug dealer who cooked and sold crack cocaine, and sold marijuana, from a residence located at 512 Mary Street in Columbia, Missouri (Tr. 1698-1701, 1718-1719, 1726-1727, 1857-1861; S.Ex. 8A-8C, 9, 10A). Among the other persons living at this residence in November of 2000 were appellant's stepfather, William Jefferson; and appellant's aunt, Juanita Hoffman (Tr. 1651-1652, 1661, 1754, 1756-1757; S.Ex. 1-2). Appellant's girlfriend, Angela Brown,

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[1]**The record on this appeal consists of the seven-volume trial transcript ("Tr."), a three-volume legal file ("L.F."), a supplemental legal file ("Supp.L.F."), and various state's exhibits ("S.Ex.") and defense exhibits ("D.Ex.") as designated.**

had recently moved into the house with appellant along with their two infant daughters, Dreisha and Dre'Janay (Tr. 1487-1488, 1651-1652, 1969-1970, 1996; S.Ex. 45A at 9; S.Ex. 1, 3). Appellant, who frequently accused Brown of cheating on him, rarely let her leave the bedroom in which she and appellant were living (Tr. 1702-1704, 1707, 1759-1761, 1850-1851).

For some time before November of 2000, appellant had expressed fears for his safety (Tr. 1668-1669). He had been robbed at gunpoint while engaging in a drug deal, had escaped an attempt on his life in California, and expected retaliation from an associate in East St. Louis whom he had shot in the leg (Tr. 1487, 1861-1862, 1864, 2027-2028, 2052-2056). Appellant was on probation for a previous assault upon Angela Brown, and a warrant had issued for his arrest in August of 2000 based in part upon urine tests showing his use of cocaine and marijuana (Tr. 2346, 2348-2358, 2364-2365). To avoid detection, appellant obtained a birth certificate under a false name, changed his hairstyle and "stripped" his fingertips so he would not leave fingerprints (Tr. 1776-1777, 1862-1864; S.Ex. 45A at 60-61). The back door to the house, which opened into the bedroom where appellant lived and where he stored his drugs, was barricaded because appellant was afraid that police or other drug dealers would break in (Tr. 1670-1672, 1701-1702, 1716-1719, 1767-1773, 1866; S.Ex. 9, 19B-19C). Appellant habitually carried a .45 caliber pistol and a 12 gauge shotgun concealed on his person (Tr. 1531-1532, 1625-1627, 1643, 1667-1668, 1704-1705, 1764, 1778-1779).

On the morning of Tuesday, November 7, appellant accidentally fired his shotgun

in the house while cleaning it (Tr. 1664, 1705-1706). Appellant and Brown had been fighting and he was "upset with her all day" (Tr. 1814, 1851). At around 6:30 that evening, appellant was heard to say that he was "going to kill me a bunch of motherfuckers tonight" (Tr. 1867-1868, 1890-1891, 1904). He also shoved Brown and threatened to kill her (Tr. 1851-1855, 1888). The persons who heard appellant's statements did not take them seriously (Tr. 1868, 1888-1889, 1894).

Later that evening, a number of people gathered at the house at 512 Mary to celebrate the fact that Juanita Hoffman, appellant's aunt, was moving to an apartment (Tr. 1663, 1796-1797). Those present included Hoffman, appellant, Angela Brown and William Jefferson, as well as Jeffrey Stemmons, known as Mcadoo; and Linda Dawson, who was dating Jefferson (Tr. 1489, 1625, 1646-1647, 1660, 1663, 1665, 1752-1753, 1787-1794; S.Ex. 45A at 4-5). Several children were also present, including Angela Brown's two daughters and two grandchildren of Juanita Hoffman (Tr. 1667, 1780-1781, 1787-1788). Some of the persons present consumed alcohol or controlled substances (Tr. 1665-1667, 1796, 1802, 1805-1806); appellant smoked "primos," cigarettes laced with cocaine (Tr. 1699-1700; S.Ex. 45A at 12, 72-73). While most of the group sat and watched a movie in the living room, appellant walked around carrying his shotgun (Tr. 1625, 1786, 1788-1795, 1797-1800, 1888). When a relative knocked on the front door, appellant looked outside to confirm the visitor's identity before the door was opened (Tr. 1801-1802). Later, he accused Angela Brown of infidelity and also said that she and others in the room were trying to kill him or put him in jail (Tr. 1807-

1812). The other persons present had heard appellant say things like that before and did not think he was serious, and appellant left the room (Tr. 1678-1683, 1691, 1808, 1816-1817, 1868, 1894-1896).

Appellant then returned to the living room and pointed his shotgun at various persons, including Juanita Hoffman, and shouted that they were all trying to "set him up" or hurt him (Tr. 1680-1683, 1685, 1817-1819, 1855-1856, 1873-1875, 1898-1899). He used a cell phone to dial 911 and told the operator that he needed help and that people were attempting to kill him (Tr. 1683-1684, 1819-1823). When Hoffman tried to leave the house with her two grandchildren, appellant blocked her way and told her not to open the door (Tr. 1677-1678, 1685-1686, 1823-1827, 1831-1833, 1875-1876). William Jefferson gave a portable telephone to Linda Dawson and told her to call the police, and she and other persons ran to the back door of the house, removed the barricade and fled (Tr. 1831-1835, 1877-1878). Jeffrey Stemmons hid in a bedroom closet (Tr. 1686-1687, 1707-1709, 1712-1713; S.Ex. 9). At that point, a gunshot was heard (Tr. 1686, 1708, 1712-1713, 1877-1878).

In his subsequent statement to police, appellant claimed that Juanita Harris had asked him to come outside with her, but after he got outside she tried to shut the door behind him (Tr. 1490, 1492; S.Ex. 45A at 7, 16-18). Appellant said that he forced the door open and in the process dropped his shotgun, which discharged (Tr. 1490-1491; S.Ex. 45A at 16, 19-20, 24-25). A hole in the floor and a burn mark from a shotgun blast were later found on the rug just inside the front door (Tr. 1324-1326; S.Ex. 9, 11D-11G).

In order to reload the shotgun, appellant had to pump ("rack") the action of the weapon, expelling the expended shell and putting a live round in the chamber (Tr. 1495-1496). Harris retreated toward the back of the living room, and appellant followed her (Tr. 1491; S.Ex. 45A at 27-29). Jeffrey Stemmons, who was hiding in a nearby closet, heard Harris shout, "Deandra, stop this. I love you" (Tr. 1687, 1709). Appellant stated to police that Harris tried to grab the shotgun and that he pulled the weapon out of her grasp (Tr. 1491-1493; S.Ex. 45A at 29-31, 34). He then shot Harris once in the chest, and she fell to the floor (Tr. 1491-1493, 1688, 1710-1712; S.Ex. 45A at 34-35, 42; S.Ex. 4A-4D, 9, 12A-12C). Appellant "racked" the shotgun a second time, reloading it (Tr. 1493; S.Ex. 45A at 67).

Appellant saw that other people in the residence were escaping through the back door of the house, and began walking in that direction (Tr. 1496). In the kitchen that adjoined the bedroom with the back door, he encountered his stepfather, William Jefferson, hiding next to the refrigerator (Tr. 1496; S.Ex. 45A at 35-37; S.Ex. 9, 17A-17D). Jefferson, who had his hands up, told appellant not to shoot him because he was appellant's stepfather (Tr. 1496; S.Ex. 45A at 38). Appellant shot Jefferson once in the left chest (Tr. 1497, 1596; S.Ex. 45A at 38, 42; S.Ex. 5A-5E). The projectile, a shot slug, damaged the victim's heart and penetrated his liver, killing him (Tr. 1596-1597; S.Ex. 5F).

After shooting Jefferson, appellant went out the back door and onto Mary Street (Tr. 1497-1498; S.Ex. 45A at 38, 40; S.Ex. 20). He saw running figures to his left and

fired two shots in that direction (Tr. 1497-1498, 1689, 1711; S.Ex. 45A at 41-42, 44, 68; S.Ex. 20). Appellant's shotgun had run out of shells, so he reloaded it with ammunition from his pocket (Tr. 1498-1499; S.Ex. 45A at 42-43, 68). He saw Angela Brown running north on Mary Street with her two children, and ran after her (Tr. 1499, 1723-1725; S.Ex. 45A at 44-45). Brown stopped running when appellant told her to "come here" (S.Ex. 45A at 45). Brown denied appellant's accusation that she was trying to set him up to be killed, and appellant said that he "needed help" (Tr. 1689-1690, 1725; S.Ex. 45A at 46, 49-50). Appellant then put the muzzle of the shotgun to Brown's neck and pulled the trigger (Tr. 1500, 1689, 1725; S.Ex. 45A at 50, 69; S.Ex. 6A-6D, 20). The shot struck the victim's spinal cord and she fell to the ground (Tr. 1599, 1725). Appellant later told police that he shot Brown in the neck to avoid hitting the children (Tr. 1500-1501; S.Ex. 45A at 51-52, 69). He also said that "[i]f I could of caught them all, I think I'd [have] got them all" (S.Ex. 45A at 48).

After shooting Angela Brown, appellant ran north on Mary Street and then west on Sexton Road toward Oak Towers (Tr. 1405-1407, 1501, 1726; S.Ex. 45A at 52; S.Ex. 8A). He concealed the shotgun in his clothing (Tr. 1502; S.Ex. 45A at 52-54). A passing motorist, Jerry Key, stopped and offered appellant a ride (Tr. 1406-1411, 1501-1502; S.Ex. 45A at 51, 53); Key was acquainted with appellant and had once dated Brown (Tr. 1408; S.Ex. 45A at 51, 53). After ascertaining that Key was alone in the car, appellant got into the front passenger seat (Tr. 1410-1411; S.Ex. 45A at 54). When appellant got into the car, he revealed his shotgun and told Key to shut up and drive (Tr. 1411-1413,

1439, 1443; S.Ex. 45A at 55-56). Key asked appellant where he wanted to go, and appellant responded that he didn't know and that he had just shot his girlfriend (Tr. 1414-1415, 1443). As he was driving, Key noticed that appellant was slowly turning the muzzle of the shotgun in his direction, and he pushed the weapon away (Tr. 1415-1416). Key saw a police car coming in the other direction and, as he began to slow down, appellant said, "I don't need you no more anyway" and shot him in the upper chest (Tr. 1416-1420, 1443, 1449, 1454-1455; S.Ex. 45A at 59).

After being shot, Key jumped out of the window of the car as it was still moving, and the vehicle rolled off the street and into a yard before coming to a stop (Tr. 1381-1387, 1420-1422, 1455-1456; S.Ex. 45A at 59-61; S.Ex. 8A, 8D, 36A-36F, 37A-37H). Appellant ran into the back yard of a house, but surrendered to police a short time later (Tr. 1423-1424, 1426, 1457-1463, 1472-1473, 1476; S.Ex. 45A at 61). Appellant's shotgun was found in the back yard (Tr. 1391-1396; S.Ex. 39G-39I). At the police station, appellant was advised of and waived his Miranda rights, and gave an oral and a videotaped confession to the shooting of Juanita Hoffman, William Jefferson, Angela Brown and Jerry Key (Tr. 1480-1512; S.Ex. 45, 45A). Appellant claimed that the persons in the house had surrounded him, that all of them had been trying to kill him and that he "just lost it" (S.Ex. 45A at 5-6, 31, 36-39, 45-50, 53-59, 65-66, 71-72, 78).

Police officers arrived at 512 Mary Street at around 9:00 p.m. and found Angela Brown lying on the sidewalk, with her children nearby, some distance north of the residence (Tr. 1253, 1255, 1257-1259, 1269-1270; S.Ex. 9, 20, 24C-24D). She was still

alive but was later determined to have no brain activity, and was pronounced dead three days later (Tr. 1260-1262, 1599-1600). Juanita Hoffman, who was also severely wounded, was able to walk from the house and state that she had been shot by appellant, but the shotgun blast to her chest resulted in bleeding that could not be controlled, and she died several hours after being taken to the hospital (Tr. 1279-1281, 1285-1286, 1591-1594, 1882-1883; S.Ex. 10C-10E). The body of William Jefferson was found in the kitchen of the residence (Tr. 1282, 1287-1292; S.Ex. 17A-17E). A number of expended shotgun shells and shot wadding from shotgun blasts were found near the locations where the victims had been shot, and also in the street where appellant had fired shots at persons in the distance (Tr. 1300-1321, 1326-1337; S.Ex. 9, 12A, 13B, 13E-13G, 20, 21A-21C, 24E-24G, 28C-28H). Forensic analysis of the expended shells discovered at the various shooting scenes established that all of them had either probably or certainly been fired from appellant's shotgun (Tr. 1546-1551).

Jerry Key, who was shot in the chest by appellant, was hospitalized for two weeks and suffered permanent scarring and an impairment in the use of his upper body (Tr. 1429-1433, 1435-1439; S.Ex. 7A-7C).

The defense conceded that appellant had shot the victims (Tr. 1250), but presented evidence in support of a theory that appellant suffered from "cocaine-induced psychotic disorder with delusions" and other mental illnesses at the time of the murders, and that as a result he was unable to act with deliberation (Tr. 1250, 1616-2385). At the close of the evidence, instructions and arguments of counsel, the jury

found appellant guilty as charged of three counts of first degree murder and one count of first degree assault (Tr. 2458-2459).

In the punishment phase of trial, the state presented evidence of the impact of the victims' deaths (Tr. 2491-2535), and evidence concerning a prior assault by appellant upon Angela Brown (Tr. 2477-2490). The defense called eight witnesses to testify about mitigating aspects of appellant's character and history (Tr. 2553-2649).

The jury returned a verdict stating that it was unable to decide or agree upon the punishment for the three counts of first degree murder (Tr. 2682). The court assessed three sentences of death for these counts and sentenced appellant as a persistent misdemeanor offender to life imprisonment for the count of first degree assault (Tr. 2684-2687, 2696-2697; L.F. 441-443). Appellant brings this appeal from his convictions and sentences.

ARGUMENT

I.

Appellant's claim that the jury selection procedures in Henry County violated his Sixth Amendment right to a jury selected from a fair cross-section of the community on the ground that blind and disabled persons were excluded from jury service has been waived by his failure to raise this claim in his pretrial motion challenging the composition of the jury pool, thus denying the state an opportunity to respond to his factual allegations on this issue.

Even if this waived claim were to be reviewed on the existing record, the Circuit Court did not err or commit manifest injustice in declining to hold, sua sponte, that appellant's fair cross-section rights were violated because appellant failed to bear his burden of establishing a prima facie case in that he failed to prove that blind and disabled persons constitute a distinctive group for purposes of fair cross-section analysis.

Appellant contends that the procedure by which the jury pool was created in Henry County, where his trial jury was selected, violated his right under the Sixth and Fourteenth Amendments to a jury selected from a fair cross-section of the community on the ground that persons who were blind or disabled were excluded from jury service for the reason that the jury pool was selected from a list of licensed drivers (App.Br. 34-40).

A. The Facts

Appellant filed a pretrial motion in which he challenged the jury selection procedures in Henry County on the ground that these procedures failed to "substantially comply" with Missouri statutes on the empanelment of juries (Supp.L.F. 1-6). His motion also alleged the violation of various state and federal constitutional rights, including his fair cross-section right, but stated only that "cognizable groups, such as African-Americans, are being substantially underrepresented on juries in Henry County" because an insufficient percentage of the county was included on the master jury list (Supp.L.F. 1-2, 5).

An evidentiary hearing was held on appellant's motion in which evidence was adduced regarding the creation of the Henry County jury pool and the selection of jury venires from that pool (Tr. 332-392). As relevant to the present claim of error, this evidence was that the master jury list in Henry County consisted of a list obtained from the Department of Revenue of persons with zip code addresses in Henry County who had driver's licenses and were over twenty years of age (Tr. 336-337, 352, 367). Defense counsel asked the Honorable William John Roberts, the Circuit Judge of Henry County and a member of the jury commission, whether he had "taken into consideration" that persons with disabilities that prevented them from getting driver's licenses would not be on this list (Tr. 377). Judge Roberts responded that this was generally known but that he had not specifically considered it (Tr. 377). He agreed that persons who were barred by age, disability or criminal record from having driver's licenses would not be in the jury pool in Henry County (Tr. 377-381, 389-390).

After the presentation of evidence, appellant's counsel argued that the jury selection procedures in Henry County were not in substantial compliance with Missouri law (Tr. 393-396). Counsel mentioned that some classes of persons eligible for jury duty could not serve as jurors, but did not identify this as a fair cross-section violation or specify the excluded groups (Tr. 393). The trial court ruled only that the jury selection procedure in Henry County was in "substantial compliance" with the statutes of this state (Tr. 398).

B. Standard of Review

In order to establish a fair cross-section violation, a defendant must first present a prima facie case of such a violation by showing (1) that the group alleged to have been excluded is a "distinctive group" in the community, (2) that the representation of this group in the jury pool is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of this group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1976); see also State v. Brooks, 960 S.W.2d 479, 487 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998). If the defendant bears the burden of presenting a prima facie case, the burden then shifts to the state to demonstrate that the attainment of a fair cross-section is "incompatible with a significant state interest." Duren v. Missouri, supra, 439 U.S. at 368.

C. Appellant Failed to Present This Claim to the Trial Court

"One who would challenge a jury panel must do so before trial by pleading and

proving fatal departures from the basic procedural requirement. . . . The failure to make a timely and proper objection constitutes a waiver" (citations omitted). State v. Sumowski, 794 S.W.2d 643, 647 (Mo. banc 1990). Nothing in appellant's pretrial motion afforded notice to the trial court, or to the state, that he was alleging that the blind and disabled were excluded from jury service and that this violated his right under the Sixth and Fourteenth Amendments to a jury selected from a fair cross-section of the community. Even in the argument following the evidentiary hearing on his motion, appellant made no effort to identify the blind and disabled as an excluded distinctive group, and his only references to "fair cross-section" related instead to the (erroneous) allegation that the master jury list was composed of less than five percent of the population of the county (Tr. 394-396).

A major consequence of appellant's failure to give notice of his present constitutional claim is that the state was denied any opportunity to contest the elements of a fair cross-section violation as set out in Duren v. Missouri, supra with regard to the class of blind or disabled persons. For example, although the Henry County officials involved in creating the jury pool described the list they obtained from the Department of Revenue as being one of licensed drivers (Tr. 336-337), no testimony was offered by any witness with actual knowledge of the composition of the list. Section 302.181, RSMo 2000, the statute that prescribes the form of driver's licenses, also authorizes the issuance of "nondriver's licenses" for use as identification. Section 302.181.7. The present record is silent as to whether holders of "nondriver's licenses"–among whom

could be persons who are blind or disabled–would be listed by the Department of Revenue in the same database as licensed drivers.

A claim of constitutional error that is not presented to the trial court at the earliest opportunity is not preserved for appellate review. State v. Galazin, 58 S.W.3d 500, 505 (Mo. banc 2001). But the present claim is not merely unpreserved: it was raised in such a manner that the state was denied an opportunity to address a constitutional test under which, as to some elements, it bore the burden of proof. Duren v. Missouri, supra. A similar circumstance was presented in State v. Taylor, 944 S.W.2d 925 (Mo. banc 1997), where the defendant alleged, for the first time on appeal, that the state had exercised racially-discriminatory peremptory challenges upon two venirepersons in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). State v. Taylor, supra at 934. This Court declined to review that claim, holding that "[a] defendant's failure to challenge the State's race-neutral explanation in any way waives any future complaint that the State's reasons were racially motivated, and leaves nothing for this Court to review" (citations omitted). Id.; see also People v. Fauber, 2 Cal.4th 792, 831 P.2d 249, 261 (1992), cert. denied 507 U.S. 1007 (1993) (fair cross-section claim waived by defendant's failure to raise this claim by pretrial motion or objection). Under this principle, appellant's belatedly-asserted constitutional claim should be summarily rejected.

D. Appellant Failed to Establish That Blind and Disabled Persons Constitute a Distinctive Group

Where a fair cross-section violation is alleged, it is the burden of the defendant to establish a prima facie case of such a violation, including proof that the group that is alleged to have been excluded or underrepresented is a distinctive group in the community. Duren v. Missouri, supra. Appellant offered no evidence whatsoever at the pretrial hearing on his motion regarding the size, characteristics or alleged views of blind and disabled persons as a group.[2] Even if it was possible to overlook appellant's failure to give notice of his claim to the trial court and the state–and respondent does not advocate that it be overlooked–appellant has utterly failed to bear his burden of

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[2]For the first time on appeal, appellant seeks to offer statistical evidence concerning the population of disabled persons in Henry County (App.Br. 37-38). Even aside from the fact that Duren requires the proponent of a fair cross-section claim to present a prima facie case to the trial court, appellant is not at liberty to offer new evidence on appeal. State v. Tokar, 918 S.W.2d 753, 761-762 (Mo. banc 1996), cert. denied 519 U.S. 933 (1996).

establishing that persons who are blind or disabled constitute a distinctive group.

The United States Supreme Court has described, but has not explicitly defined, what constitutes a distinctive group. In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Supreme Court held that women, who made up 53% of the citizens eligible for jury service, were "sufficiently numerous and distinct from men" to constitute a distinctive group. Id., 419 U.S. at 531; see also Duren v. Missouri, supra, 439 U.S. at 364. In Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court noted that "groups defined solely in terms of shared attitudes" were not distinctive groups. Id., 476 U.S. at 174. The court stated that a group was not distinctive unless its exclusion violated all three of the purposes for the fair cross-section requirement: (1) "'[guarding] against the exercise of arbitrary power' and ensuring that the 'commonsense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor'"; (2) "preserving 'public confidence in the fairness of the criminal justice system'" and (3) "implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'" Id, 476 U.S. at 174-175, quoting Taylor v. Louisiana, supra, 419 U.S. 530-531.[3]

Based upon these principles, state and federal courts have promulgated various

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[3]**Contrary to the assertion of appellant (App.Br. 37), neither Taylor nor Duren, or any other decision of the United States Supreme Court, has defined a distinctive group as any group that "warrants protection."**

tests for determining whether a particular class of persons is a distinctive group. The predominant standard is that a distinctive group is not present unless:

> **1. The group is defined or limited by an objective factor (such as race or sex);**
>
> **2. A common thread or basic similarity in attitude, ideas, or experience runs through the group; and**
>
> **3. There exists a community of interest among the members of the group, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.**

United States v. Fletcher, 965 F.2d 781, 782 (9th Cir. 1992) (citing four other federal circuits); see also State v. Compton, 333 Ore. 274, 39 P.3d 833, 842 (2002), cert. denied 123 S.Ct. 165 (2002); State v. Pelican, 154 Vt. 496, 580 A.2d 942, 946-947 (1990); and State v. Rupe, 108 Wn.2d 734, 743 P.2d 210, 218 (1987), cert. denied 486 U.S. 1061 (1988). Among the many categories of persons that have been found not to be distinctive groups are college students,[4] persons not registered to vote,[5] convicted felons,[6] poor

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[4]Commonwealth v. Evans, 438 Mass. 142, 778 N.E.2d 885, 893 (2002); Ford v. Seabold, 841 F.2d 677, 681-683 (6th Cir. 1988), cert, denied 488 U.S. 928 (1988).

[5]State v. Compton, supra.

[6]Id.; Carle v. United States, 705 A.2d 682, 685-686 (D.C.App. 1998), cert. denied 523 U.S. 1066 (1998).

persons,[7] persons over seventy years of age,[8] occupational categories[9] and persons who are hearing-impaired.[10]

Appellant has failed to establish that the category of "blind and disabled" persons meets the test set out above. While disability is an objective distinguishing factor–a fact that is equally true of all of the "nondistinctive groups" listed above–appellant presented not a scintilla of evidence that persons who are blind or disabled exhibit a "common thread or basic similarity in attitude, ideas, or experience." Persons in this category could be of any age, sex, race or occupation. The nature or

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[7]State v. Wooten, 193 Ariz. 357, 972 P.2d 993, 998 (1998).

[8]Commonwealth v. Manning, 41 Mass.App.Ct. 696, 673 N.E.2d 73, 74-76 (1996); Rojem v. State, 753 P.2d 359, 365 (Okl.Cr.App. 1988), cert. denied 488 U.S. 900 (1988).

[9]Sweet v. United States, 449 A.2d 315, 323-325 (D.C.App. 1982).

[10]People v. Fauber, supra, 831 P.2d at 260-261.

degree of their affliction could be lifelong or recent, and could vary greatly in its nature and degree. Nothing in the mere fact of disability supports an inference that persons who suffer from it hold similar views and possess similar experience. See Commonwealth v. Manning, supra, 673 N.E.2d at 75-76; and Brewer v. Nix, 963 F.2d 1111, 1112-1113 (8th Cir. 1992), cert. denied 506 U.S. 896 (1992) for similar analyses.

Nor is there the slightest evidentiary basis for a conclusion that the interests of blind or disabled persons "cannot be adequately represented if the group is excluded from the jury selection process." No support was offered by appellant for the proposition that persons in this category exhibit a "community of interest" on matters of crime and punishment, or on any other issue that might be decided by a jury, such that the impartiality of the jury might be impaired without them. See Johnson v. McCaughtry, 92 F.3d 585, 592-593 (7th Cir. 1996). cert. denied 519 U.S. 1034 (1996).

Appellant offers no pertinent authority in support of his assertion that persons who are blind or disabled constitute a distinctive group for purposes of the Sixth Amendment. Instead, he cites cases holding that the exclusion of visually impaired persons from jury service would in some cases violate federal statutes, including the Americans With Disabilities Act (App.Br. 35, 37). Neither of appellant's cited decisions purports to address the constitutional claim advanced by appellant, or whether persons with disabilities constitute a distinctive group. If the exclusion of a disabled person from jury service violated state or federal law, that would be a matter to be pursued by the person aggrieved by their exclusion, not by appellant. See People v. Janes, 942 P.2d

1331, 1334-1335 (Colo.App. 1997) (criminal defendant lacked standing to assert ADA claim on behalf of person excluded from jury service because of disability).

Appellant's belated constitutional challenge to the selection of his jury should be rejected.

II.

The Circuit Court did not err in overruling appellant's pretrial motion challenging the jury selection procedures of Henry County because these procedures were in "substantial compliance" with the applicable statutes of this state in that (A) the use of a list of licensed drivers as the master jury list was not in violation of the law; and (B) the failure to remove from the master jury list persons found unqualified to serve as jurors, and the pretrial excusal by court clerks of one or more persons who were on vacation at the time of trial, did not amount to substantial noncompliance for the reason that appellant's constitutional rights were not violated, he was not otherwise prejudiced, and these errors were not of such a character as to permit the handpicking of the jury panel at appellant's trial.

Appellant next contends that, even if his fair cross-section rights were not violated, his conviction should be reversed on the ground that the manner by which Henry County selects its jury pool was not in "substantial compliance" with Missouri law (App.Br. 41-49).

A. Standard of Review

The purpose of this state's jury selection statutes is "to provide a jury pool containing a fair cross section of the adult population, with random selection of jurors from that pool, all in accordance with the requirements of the federal and state constitutions." State v. Bynum, 680 S.W.2d 156, 160 (Mo. banc 1984). When a timely pretrial challenge is made to the manner of jury selection, the test is whether there has

been "substantial compliance" with the statutes. State v. Sumowski, 794 S.W.2d 643, 647 (Mo. banc 1990); Section 494.465, RSMo 2000. "[T]here is a strong presumption that the jury tendered at the outset of the trial has been properly selected." State v. Sumowski, supra.

In the recent decision of State v. Anderson, 79 S.W.3d 420 (Mo. banc 2002), cert. denied 123 S.Ct. 199 (2002), this Court quantified to some degree what is meant by a substantial noncompliance with the jury selection statutes. It held that "a 'substantial' failure to comply is one that either rises to the level of a constitutional violation, and/or that actually prejudices a defendant" (footnote omitted). Id. at 431. In a footnote, this Court acknowledged that

> **In rare cases, certain violations of the statutory jury selection requirements may be so fundamental or systemic in nature as to amount to a 'substantial' failure to comply with the statutes, thereby entitling a defendant to relief, even in the absence of a clear showing of actual prejudice or of a constitutional violation. See State v. Gresham, 637 S.W.2d 20, 26 (Mo. banc 1982).**

State v. Anderson, supra at 431 (n. 4). In State v. Gresham, 637 S.W.2d 20 (Mo. banc 1982), jury commissioners examined the questionnaires submitted by members of the jury pool and selected or rejected them for service on the jury venire according to the commissioners' personal views on whether each person could serve as a fair juror. Id. at 22. This Court reversed, observing that the commissioners' exercise of discretion

on whether individuals in the jury pool would be good jurors was wholly contrary to the law and "readily lends itself to jury packing." Id. at 24-27.

B. Relevant Law and Facts

Under the law of this state, the process of providing persons eligible for jury service at a given trial proceeds in three stages: the creation of a "master jury list," the drawing from that of a "qualified jury list," and the selection from that of a jury venire. Sections 494.410 through 494.420, RSMo 2000.

1. The Master Jury List

Section 494.410.1 provides that the master jury list–the jury pool–is to be compiled by "consult[ing] one or more public records" and must be comprised of not less than five percent of the total population of the county.

Under a procedure adopted by the Henry County Jury Commission in 1992, the master jury list for that county is a computerized list obtained annually from the Department of Revenue containing all persons with Missouri driver's licenses who are over twenty years of age and who have addresses with zip codes that are wholly or partially within Henry County (Tr. 336-337, 340, 352-353, 357-358, 365, 367-368, 381, 390; State's Pretrial Exhibit 1). The population of Henry County at the time of the 2000 census was 21,997, and there were 22,009 names on the list provided by the Department of Revenue (Tr. 352).[11] Since some of the zip codes on the list overlapped into other

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[11]In his brief on appeal, appellant cites hearsay census data from an Internet website that he did not see fit to present to the trial court (App.Br. 42, 45). It is

counties, not all of the persons on the list were residents of Henry County (Tr. 381-383).

2. The Qualified Jury List

When needed, a list containing "as many prospective jurors as the court may require" is selected at random from the master jury list. Section 494.415.1. Persons selected for this list are sent a juror qualification form or questionnaire. Id. If it is determined from their responses that a person is not qualified to serve as a juror, that person is not required to serve, and his or her name is removed from the master jury list. Section 494.415.2. The resulting list of persons who are qualified to serve as jurors is the "qualified jury list." Section 494.415.4.

In Henry County, qualified jury lists are selected at random in groups of 500 three times each year (Tr. 335-339, 353). Jury questionnaires are sent to all of the persons on this list (Tr. 335, 341-342, 373-374). If the responses to the questionnaires indicate that a person was deceased, not a resident of the county, had a felony conviction or was an attorney, the clerks in charge of the jury selection process are authorized to delete that name from the qualified jury list (Tr. 342-345, 350-351, 361). If any interpretation is required on issues of juror qualifications, the decision is made by the

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impermissible for appellant to offer evidence for the first time on appeal. State v. Tokar, 918 S.W.2d 753, 761-762 (Mo. banc 1996), cert. denied 519 U.S. 933 (1996).

Circuit Judge (Tr. 342-347, 361-362). Persons found unqualified to serve are deleted from the qualified jury list, but not from the master jury list (Tr. 340-341, 369-371).

3. The Jury Venire

When a jury panel is required for a trial, the court designates the number of prospective jurors that are required and that number is randomly selected from the qualified jury list. Section 494.420.2. Prospective jurors are entitled to be excused from service if, in the judgment of the court, they are "incapable of performing the duties of a juror because of illness or infirmity," §494.425(9), RSMo 2000; and may also be excused if the court is of the view that their service would impose an extreme hardship. Section 494.430(4), RSMo 2000.

Jury panels in Henry County are drawn as described above (Tr. 347-348). After the panel is drawn, persons who stated on their jury questionnaires that they would be on vacation during the time of the trial are removed by clerks in charge of the jury empanelment process and replaced with other persons on the qualified jury list (Tr. 349-352). "[A]t least one" person was removed for this reason from appellant's jury panel (Tr. 351). The clerks were also authorized to excuse persons who telephoned before trial and reported that they had an injury or illness if it was "patently obvious" that this condition would prevent them from serving as jurors (Tr. 362, 364-365). No evidence was offered that any person was excused on this ground at appellant's trial.

The qualified jury list that was originally used to select the jury venire at appellant's trial produced 106 persons who were eligible for jury service and who had

not been used in previous trials, a number that was deemed insufficient for the present case (Tr. 359-360). Therefore, the court ordered that a second qualified jury list of 125 persons be randomly selected, and appellant's jury was selected from the eligible persons on both lists (Tr. 359-361).

C. Appellant's Attacks Upon Henry County Procedures

Appellant alleges that the jury selection procedures of Henry County were not in substantial compliance with the law in three respects.

1. Composition of the Master Jury List

Appellant argues that the list of licensed drivers obtained by Henry County from the Department of Revenue could not be used as the master jury list because §494.410.1 states that the master jury list is "compiled" and must be taken "from" public records, and thus could not consist of the public records themselves (App.Br. 43-44). An identical argument was rejected by this Court in State v. Anderson, supra, 79 S.W.3d at 431, and before that by State v. Albrecht, 817 S.W.2d 619, 622-624 (Mo.App., S.D. 1991), where a county employed a procedure identical to that used in Henry County. While the words "compile" and "from" in the statute obviously authorize the use of less than all of a public record or records as the master jury list, nothing in those words supports appellant's claim that using the entire record is a violation of that law.

Appellant cites the fact that the Department of Revenue list supplied to Henry County contained a large number of persons who were not qualified to serve as jurors under §494.425 because they were not residents of the county, and argues that "[t]he

Legislature intended for counties to maintain a clean list of potential jurors" (App.Br. 44). Appellant's notion that a master jury list fails to comply with Missouri law if it is not "clean" finds no support in the statutes he cites, and was expressly rejected in State v. Albrecht, supra. As noted in that decision, there are many other grounds stated in §494.425 that disqualify a person from jury service, including conviction of a felony, active service in the armed forces, being a licensed attorney and being unable to perform the duties of a juror because of illness or infirmity. Id., 817 S.W.2d at 623. By appellant's reasoning, a master jury list that contained any person in any of these categories would violate the law. Such reasoning is absurd, finds no support in the statutory language, and has been rejected by the courts of this state. Id.; see also State v. Bynum, supra, 680 S.W.2d at 160.

Appellant also asserts that the selection of his jury venire was not "random" because the initial qualified jury list was exhausted in selecting the jury venire for his trial and a supplemental qualified jury list had to be selected to complete the venire (App.Br. 45). He does not explain how the addition of a second randomly-selected list makes the process "not random," let alone how this process could amount to substantial noncompliance. See State v. Boston, 910 S.W.2d 306, 312-313 (Mo.App., W.D. 1995) (selection of jury panel from first 45 members of qualified jury list did not violate requirement of substantial compliance). Therefore, the composition of the master jury list in Henry County was not in violation of Missouri law.

2. Removal From the Master List of Persons Later Found to be Unqualified

When a person was randomly drawn from the master jury list and returned a questionnaire indicating that he or she was not qualified to serve as a juror, the practice in Henry County was to remove that person from the qualified jury list, but not from the master jury list. Appellant notes, correctly, that §494.415.2 directs that such persons be deleted from the master jury list (App.Br. 44).

Appellant wholly fails, however, to demonstrate how this error "rises to the level of a constitutional violation, and/or . . . actually prejudices a defendant." State v. Anderson, supra, 79 S.W.3d at 431. He vaguely asserts that his right to a jury selected from a fair cross-section of the community was violated (App.Br. 47-48), but offers not a scintilla of evidence that would support a prima facie case of such a violation under Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1976). His complaint that the master jury list was "contaminated" by unqualified persons and that the removal of such persons "yields a substantially different pool than the Legislature intended" (App.Br. 47) is nothing more than a reprise of his meritless argument that the law requires the master jury list to be "clean" in order to be valid. In short, appellant makes no showing that any of his constitutional rights were violated by the jury selection procedures in Henry County, nor does he establish that he was prejudiced as a result.

3. Excusal of Venirepersons Before Trial

Finally, appellant complains that the clerk's office was authorized to excuse from the jury panel before trial persons who had previously notified the clerk's office that

they would be on vacation at the time of trial, and persons who called in before trial with injuries or illnesses that would clearly preclude their service as jurors (App.Br. 46). "[A]t least one" person was removed from appellant's jury panel for vacation reasons; no evidence was presented that anyone on that panel was excused by the clerk because of injury or illness.

This Court addressed an identical claim in State v. Anderson, supra: there, as here, it was alleged that the clerk's office excused persons before trial on grounds of illness or vacation. Id., 79 S.W.3d at 431-432. This Court held that

> **Appellant also has not shown that he was in any way prejudiced by some isolated and minor technical violations that might possibly have occurred if the clerk, for example, removed some venirepersons who were thought to be away on vacation. The exclusion of a prospective juror for reasons not listed in the statute is not grounds for reversal absent a showing that a defendant was actually prejudiced by failure to strictly observe the statutory provisions for excuse.**

(Citations omitted.) Id. at 432. The courts of this state have long recognized that the erroneous excusal of a prospective juror is harmless unless persons who served on the jury were biased or unqualified. State v. Brown, 916 S.W.2d 420, 422 (Mo.App., E.D. 1996); see State v. Ringo, 30 S.W.3d 811, 816 (Mo. banc 2000), cert. denied 532 U.S. 932 (2001) (where juror is excused for reasons unrelated to views on the death penalty, defendant cannot ordinarily show prejudice). Appellant has demonstrated neither a

constitutional violation nor any other kind of prejudice as a result of this occurrence.

To the extent that the jury selection practices in Henry County deviated from the statutes, as described in Parts C2 and C3, above, this is not an instance in which the deviations were so "fundamental and systematic" as to warrant relief without the presence of prejudice or constitutional infringement. State v. Anderson, supra, 79 S.W.3d at 431 (n. 4). This is not a case like State v. Gresham, supra, where persons involved in the jury empanelment process had the opportunity to handpick the members of the jury panel. See also State v. Bynum, supra; and State v. McCaw, 668 S.W.2d 603, 604 (Mo.App., E.D. 1984) for similar facts. Therefore, the trial court did not err in finding that jury selection in Henry County was in substantial compliance with the law.

III.

The Circuit Court did not abuse its discretion in excusing for cause Venireperson Cassandra Tucker because the court reasonably concluded from Tucker's testimony that she was substantially impaired in her ability to consider the imposition of a sentence of death in that Tucker equivocated regarding her ability to return a death sentence and categorically stated that she could not sign a verdict of death as the jury foreman.

During the death-qualification phase of voir dire, the state inquired as follows:

> **[Mr. Crane, prosecutor:] If you were selected, what happens is you go back there after the evidence is in and the foreperson is elected. Okay. And if after you go through the whole process, if we get there, in a decision of death, the foreperson is the one that signs for the jury on this verdict. Other than the three women I've just talked to, would everybody else be able to do that?**
>
> **Yes, ma'am?**
>
> **[Venireperson Cassandra Tucker:] I don't think I could sign. See, I mean, you know, for somebody to die, if I had to vote for it, I don't think I could sign my name to it.**
>
> **MR. CRANE: You misunderstand. It's Ms. Tucker, right?**
>
> **VENIREMAN TUCKER: Yes.**
>
> **MR. CRANE: Ms. Tucker, now I want to make sure we're clear. Nothing is ever going to say you've got to vote death.**

VENIREMAN TUCKER: Yeah, I know. But if it was me who's deciding he's death penalty, I wouldn't want to be the one to sign my name on that line. No.

MR. CRANE: Okay. Let me ask you: Would your views on the death penalty make it difficult for you to consider that option, death, as an appropriate punishment?

VENIREMAN TUCKER: I don't think so. I don't think taking a life for another life is right. But I could probably, you know, if I had to.

MR. CRANE: But you won't have to.

*** * ***

VENIREMAN TUCKER: I know. If I was in the jury and it was my choice to give him the death penalty, then that was my choice. But I don't, like I said, I don't want to sign the paper.

MR. CRANE: Okay. You could not sign if, you know, just like I said, you never have to vote for death. Nobody is going to put a gun to your head, to the foreperson.

VENIREMAN TUCKER: I understand.

MR. CRANE: If you were the foreperson, you could not sign the verdict of death?

VENIREMAN TUCKER: No.

*** * ***

MR. CRANE: Okay. But I think in a given case you could recommend death, follow the procedure, hold the state to the right burden, no more, no less?

VENIREMAN TUCKER: Probably, if I heard all the evidence.

MR. CRANE: Well, you would.

VENIREMAN TUCKER: Then I might be able to, but –

MR. CRANE: But it's unlikely?

VENIREMAN TUCKER: Yeah.

MR. CRANE: It's unlikely that you would come back with a verdict of death?

VENIREMAN TUCKER: It's unlikely that I would sign that paper.

MR. CRANE: Forget the paper. We are clear as a bell on you ain't signing the paper. I got you. What about just you're not the foreperson?

VENIREMAN TUCKER: Okay. Just the death penalty thing itself?

MR. CRANE: Yeah. Do you think you would have a good deal of trouble coming back with a verdict of death?

VENIREMAN TUCKER: Yeah.

MR. CRANE: . . . . Would your views on the death penalty substantially impair your ability to consider that, legitimately consider it as a punishment?

VENIREMAN TUCKER: Yeah.

Tr. 620-623. During the defense examination of Venireperson Tucker, defense counsel repeatedly elicited from her that she was not saying that she could never impose a

sentence of death, though she said it would be "difficult" for her to do so (Tr. 679-682). She persisted in her view, however, that she could not sign a verdict of death as foreperson (Tr. 681-682). The trial court sustained the state's challenge for cause, noting that it had "listened closely to Ms. Tucker and she could not sign the form and she was very questionable as to whether she could impose the death penalty or not" (Tr. 701-703). Appellant claims, inaccurately, that Venireperson Tucker was shown to be a qualified juror except for her refusal to sign a verdict of death, and argues that this refusal was insufficient to warrant her removal from the jury panel (App.Br. 50-58).

A. Standard of Review

The standard for determining whether a prospective juror may be excused for cause based upon his or her views on punishment is whether those views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 417-424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. State v. Christeson, 50 S.W.3d 251, 265 (Mo. banc 2001), cert. denied 534 U.S. 978 (2001). The trial court is in the best position to evaluate the qualifications of a venireperson and has broad discretion in making that determination. Id.

B. Venireperson Tucker Was Properly Excused Under Wainwright v. Witt

Appellant's argument that Venireperson Tucker could not be excused for cause

under Wainwright v. Witt, supra solely on the ground that she could not sign a verdict of death has been presented to this Court in numerous past cases, and is meritless for two reasons. First, even if Venireperson Tucker had testified without equivocation that she was able to fairly consider a sentence of death but was unable to sign a death verdict as the jury foreman, this would have been a "substantial impairment" in her ability to perform her duties as a juror under Witt. "An unequivocal statement concerning a venireperson's ability to sign a death verdict alone is enough [to warrant disqualification of that venireperson]" (citation omitted). State v. Smith, 32 S.W.3d 532, 545 (Mo. banc 2000). "No panel of twelve jurors, all of whom decided that he or she could not sign a verdict form assessing the death penalty against the defendant, could be said to have the unimpaired ability to consider the appropriateness of the death penalty." Id. Appellant's argument is, in effect, that courts are required to accept jurors who have stated that they would refuse to follow the law as forepersons of the jury, and to gamble that those persons are not later selected to lead the jury. Nothing in Witt supports this absurd reasoning, and it is directly contrary to the reasoning of that decision.

The second defect in appellant's argument is that Venireperson Tucker was not excused solely because of her refusal to sign a verdict of death, but also because she repeatedly equivocated about her ability to follow the law as to punishment.[12] She

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[12]Appellant inaccurately asserts that the state "candidly conceded that Tucker was not opposed to the death penalty at all" (App.Br. 50, 52, 57). The defense elicited

asserted that she could "probably" consider a sentence of death "if I had to" (Tr. 621), that she could "probably" do so "if I heard all the evidence" (Tr. 622), that she would

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from this venireperson that she was not saying that she could never return a sentence of death (Tr. 689-680), and when defense counsel asked the same question a second time, the prosecutor objected that this was "established," which seems to have been another way of saying "asked and answered" (Tr. 681). The issue in determining Venireperson Tucker's qualifications to serve as a juror was not whether she would categorically refuse to assess this sentence, but whether she was "substantially impaired" in her ability to consider that punishment. Wainwright v. Witt, supra, 469 U.S. at 417-424. The state objected on precisely that ground in challenging this venireperson for cause (Tr. 701).

have "a good deal of trouble" in returning a verdict of death (Tr. 622), and that her views on the death penalty would substantially impair her ability to legitimately consider that punishment (Tr. 623). When strongly led during the defense examination, she stated that her position was not that she could never assess a death sentence, but even then said that it would be "difficult" for her to do so (Tr. 679-682). This equivocation was cited by the trial court when it excused her for cause (Tr. 705).

"A venireperson's equivocation about his ability to impose the death penalty in a capital case, especially when coupled with an unequivocal statement that he could not sign a verdict of death, provides a basis to exclude him from the jury" (citations omitted). State v. Christeson, supra, 50 S.W.3d at 264-265; see also State v. Johnson, 22 S.W.3d 183, 186 (Mo. banc 2000), cert. denied 531 U.S. 935 (2000); and State v. Clayton, 995 S.W.2d 468, 476 (Mo. banc 1999), cert. denied 528 U.S. 1027 (1999). The testimony of Venireperson Tucker was even more dubious than that of the prospective juror in Christeson in that nowhere in her testimony did she categorically state that she could fairly consider a sentence of death; the best that even defense counsel was able to elicit from her was that she was not saying that she could never impose that sentence (Tr. 679-682). Even had she never testified that she could not sign a death verdict, the trial court could reasonably have found that Venireperson Tucker was "substantially impaired" in her ability to fairly consider the full range of punishment.

In attempting to surmount the great weight of authority against him, appellant relies upon Alderman v. Austin, 663 F.2d 558 (5th Cir. 1982), affirmed in part 695 F.2d

124 (5th Cir. banc 1982) for the proposition that prospective jurors should not be excluded because they would not sign a death verdict as foreperson (App.Br. 55). He omits to note that this Court has expressly rejected Alderman as valid authority because it predated Wainwright v. Witt, supra, which modified the death-qualification test from whether a prospective juror would never return a sentence of death in any circumstances to whether a venireperson was "substantially impaired" in being able to perform his or her duties as a juror. State v. Johnson, supra, 22 S.W.3d at 187. The trial court could not have abused its discretion in finding that Venireperson Tucker was so impaired.

IV.

(Appellant has abandoned the claim raised in Point IV of his brief in a pleading filed with this Court on April 14, 2003.)

V.

The Circuit Court did not err or commit manifest injustice in declining to intervene, sua sponte, in the state's cross-examination of defense witness Dr. Todd Poch because the questioning by the prosecution did not "link appellant to 9/11" in that the state's questioning made no reference whatsoever to 9/11 or terrorism, and could not reasonably have been understood by the jury as implicating appellant in such conduct.

One of the defense witnesses presented in the guilt phase of trial was Dr. Todd Poch,

a psychologist retained by the defense who had examined appellant (Tr. 2075-2336). Dr. Poch opined that appellant suffered from "cocaine induced psychotic disorder with delusions," delusional disorder, post-traumatic stress disorder and adult antisocial behavior, and that as a result he was unable to act with deliberation (Tr. 2100-2101, 2213-2214).

The state's cross-examination of Dr. Poch occupies slightly more than one hundred transcript pages and raised a number of matters pertaining to bias on the part of the witness and the reliability of his conclusions (Tr. 2216-2318). One line of questioning by the prosecutor concerned the fact that, even though the witness described appellant as "delusional," appellant displayed an understanding of events around him and exhibited an ability to make rational choices (Tr. 2253-2256, 2262-2264, 2297-2298, 2313-2318). Part of this questioning concerned appellant's interaction with other persons while at the Boone County Jail awaiting trial:

[Mr. Crain, prosecutor:] Well, Doctor, let me ask you this: I mean, on the medical records, he, while he's been in jail, has asked for various things, acne medicine, written notes. I mean, he writes and you can read it. It's clearly legible?

[Witness:] Oh, yes.

Q. He's very fluent in English, correct?

A. I don't know that he's very fluent, but he can certainly read and write.

*** * ***

Q. . . . . Another thing is, he writes letters to the jail personnel saying, I don't want no pork item anymore. He asks for various, like I said, lotions and treatment and he receives it. You read the medical records. I mean, the jail is very attentive to his needs; is that correct? They don't ignore him?

A. It seems like his medical needs are being met.

Q. He has a head cold. He got medicine for that. He wanted diet changes when I talked to you about pork, and that was addressed, correct?

A. Right.

Q. He had a toenail problem, and that was addressed; isn't that true?

A. I recall that.

Q. So he knows when he's hurting and he writes notes. There's no indication by his medical records that he's suffering from delusions, right? There's no indications, just reading the medical records, that he's suffering from delusions?

A. There's one troubling exception, which is the report of auditory hallucinations.

Q. When is that?

A. I don't recall the date. I just know there was an entry from the medical records.

Q. Okay. You got me on that one as well. Did you – Now, I guess did you get the record where he indicated, in August of 2001, that he was notifying jail personnel that he was changing his religion to that of Muslim?

A. I think I recall that.

Q. Would his ability to keep up with current events in any way be impaired as a result of all these problems you say he's got?

A. Not necessarily.

Q. He could read, he could know what's going on in the outside world?

A. Correct.

Q. He's not schizophrenic, correct?

A. I'm not certain, Counselor.

Tr. 2313-2315. For the first time on appeal, appellant seizes upon the last several questions and accuses the state of "conjur[ing] up images of 9/11, while linking [appellant] to that devastating tragedy" (App.Br. 64).

A. Standard of Review

Since no defense objection was made to this questioning, appellant's belated claim of error is reviewable, if reviewed at all, only for the presence of manifest injustice or a miscarriage of justice. State v. Goodwin, 43 S.W.3d 805, 813 (Mo. banc 2001), cert. denied 534 U.S. 903 (2001); Supreme Court Rule 30.20. The plain error rule is to be exercised sparingly, and does not justify review of every unpreserved claim. State v. Mayes, 63 S.W.3d 615, 633 (Mo. banc 2001).

Whether an objection is made or not, the trial court possesses extensive authority in the control of cross-examination:

> **The trial court has broad discretion over the extent of cross-examination, especially in criminal cases. . . . Cross-examination tests a witness' accuracy, veracity and credibility. . . . Therefore, cross-examination is not necessarily limited to those matters that tend to prove the issues on trial. . . . True, cross-examination may not encompass incompetent, irrelevant, or immaterial matters. . . . However, questions of relevancy are for the trial court, whose ruling will be disturbed only for abuse of discretion.**

(Citations omitted.) State v. Gardner, 8 S.W.3d 66, 72 (Mo. banc 1999). The scope permitted in the cross-examination of experts is especially broad "because the factual basis for psychiatric testimony is particularly important." State v. Parker, 886 S.W.2d 908, 927 (Mo. banc 1994), cert. denied 514 U.S. 1098 (1995).

B. The State's Inquiry Was Not Improper

Colorful though his argument may be, appellant offers not the slightest support for his strident accusation that the state was attempting to "fan the flames of prejudice by linking [appellant] to terrorism" (App.Br. 64). To state the obvious, the prosecution made no direct reference to terrorism or 9/11 in its questioning; indeed, the only reference to 9/11 in the testimony of Dr. Poch came during the direct examination of this witness (Tr. 2191).

Appellant's theory, therefore, seems to be that the state was making an improper insinuation by "connecting [appellant's] conversion to Islam to 'current events'" (App.Br. 64). In the first place, the prosecutor made no such "connection" by the mere fact that one subject followed the other. But more significantly, what is appellant alleging that the prosecutor implied by these questions? Appellant informed jail officers of his religious conversion one month before the tragedy of 9/11 (Tr. 2315). Is appellant attributing to the state an implication that appellant was an actual conspirator in this terrorist plot, or that he should have forsworn his declared religion after the attacks occurred? Either suggestion is facially preposterous, and the record

provides not the slightest support for appellant's bizarre hypothesis.

It is appellant, not the state, who is attempting to stigmatize adherents of Islam by suggesting that jurors would associate any member of this religion with terrorism. The trial court could not possibly have committed manifest injustice in declining to intervene sua sponte in the state's cross-examination of Dr. Poch on the basis of this absurd theory.

VI.

The Circuit Court did not err or abuse its discretion in sustaining the state's punishment-phase objection to Defendant's Exhibit U, a videotape depicting various scenes at two state prisons, because this exhibit was properly excluded as irrelevant and misleading in that (A) by repeated use of the caption "Life Means Life," it falsely suggested that appellant could never be released from custody if he was sentenced to life imprisonment without parole; and (B) this videotape had no bearing upon appellant's character, prior record or the circumstances of his offense, and therefore was irrelevant to the issue of punishment.

Appellant's claim, advanced for the first time on appeal, that the state improperly presented evidence and argument concerning the conditions of prison confinement while objecting to defense evidence on that subject is inaccurate in that (A) the state adduced testimony regarding the conditions at the Boone and Callaway County Jails, not the Department of Corrections, and only as relevant to impeach evidence that appellant was a model inmate at these jails; and (B) the state referred in argument to conditions in the prison system solely in retaliation to appellant's improper argument on this subject based upon matters outside the trial evidence.

During the punishment phase of trial, the defense offered Defendant's Exhibit U, a seven-minute videotape (Tr. 2550-2551). This videotape largely depicts the exterior grounds of the Potosi Correctional Center, interspersed with various captions such as, "Tight Internal Security," "Nowhere to Run," and "All Inmates Accounted For" (D.Ex.

U). The Jefferson City Correctional Center is also briefly shown, together with the caption "Old Prisons Had Hiding Places" (D.Ex. U). At the beginning and end of the videotape is the caption, "Life Means Life" (D.Ex. U).

The state objected to this exhibit as irrelevant (Tr. 2551-2553). The trial court sustained this objection, noting among other things that persons sentenced to life imprisonment without parole could and did seek commutation of their sentence by the Governor (Tr. 2553). Appellant challenges the court's ruling and, for the first time on appeal, further accuses the state of excluding his evidence relating to the conditions of his confinement if sentenced to life imprisonment while at the same time adducing evidence and argument on that subject (App.Br. 69-74).

A. Standard of Review

The trial court is vested with broad discretion in determining the admissibility of evidence offered in the punishment phase of a capital trial, State v. Storey, 40 S.W.3d 898, 903 (Mo. banc 2001), cert. denied 534 U.S. 921 (2001), and such rulings will not be overturned on appeal absent a "clear abuse of discretion." State v. Nicklasson, 967 S.W.2d 596, 619 (Mo. banc 1998), cert. denied 525 U.S. 1021 (1998).

B. Appellant's Exhibit Was Properly Excluded as Misleading and Irrelevant

The trial court could not have erred or abused its discretion in excluding Defendant's Exhibit U because the repeated assertion in that exhibit that "Life Means Life" was intended to affirmatively mislead the jury into believing that, if he was sentenced to life imprisonment without parole, appellant could never be released from

prison.[13] In point of fact, §565.020.2, RSMo 2000 provides that the lesser penalty for first degree murder is "imprisonment for life without eligibility for probation or parole, or release except by act of the governor" (emphasis supplied). A similar circumstance was presented in State v. Storey, supra, where the defense offered testimony in the punishment phase that, if sentenced to life without parole, the defendant would always be classified as a "maximum security inmate." Id., 40 S.W.3d at 910. This Court upheld the exclusion of this evidence, noting in part that "the Governor of Missouri retains the power to grant [defendant] clemency and reduce his sentence." Id.

Even if Defendant's Exhibit U had not contained an affirmative misstatement of law, it was properly excluded because it was irrelevant to the jury's decision upon the appropriate punishment that appellant should receive. While the United States

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[13]Defense counsel also misled the jury on this issue in his opening statement and closing argument in the punishment phase by claiming, among other things, that a life sentence would be a "guarantee" that appellant would die in prison (Tr. 2469-2470, 2472, 2662-2663, 2670).

Supreme Court has held that the sentencer in a capital case "[cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record," Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), it simultaneously stated that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id., 438 U.S. at 604 (n. 12); see also State v. Nicklasson, supra, 967 S.W.2d at 619.

The conditions at the Potosi Correctional Center had nothing whatsoever do with the degree of appellant's moral culpability for his murder of three human beings, or with his claim that his mental condition and upbringing mitigated these acts. They were nothing more than an attempt by the defense to convince the jury that appellant would suffer if he were to receive life imprisonment, and therefore should not be sentenced to death. A similar attempt was rejected by this Court in State v. Sidebottom, 753 S.W.2d 915 (Mo. banc 1988), cert. denied 488 U.S. 975 (1988), where a defense attempt to introduce evidence regarding the precise manner in which a sentence of death was carried out was rejected as irrelevant. Id. at 925. The trial court could not have abused its discretion in excluding the videotape offered by appellant.

C. The State Did Not Take Inconsistent Positions on this Issue

For the first time on appeal, appellant charges that the state, after successfully excluding Defendant's Exhibit U as irrelevant, improperly presented evidence and argument concerning conditions of confinement in the prison system and implied, in

appellant's words, that incarceration "is something close to an all-expenses-paid vacation" (App.Br. 71). If reviewed for the presence of manifest injustice, Supreme Court Rule 30.20, appellant's accusation is meritless because it rests upon a highly selective and distorted editing of the facts in the trial record.

To begin with, the state did not introduce any evidence concerning the conditions of confinement for inmates in the Department of Corrections. The defense called as punishment-phase witnesses officers from the Boone County Jail and the Callaway County Jail to testify that appellant was respectful and well-behaved while incarcerated in those facilities (Tr. 2574-2585, 2627-2630). During the cross-examination of these witnesses, the prosecutor adduced evidence that appellant had had direct experience with the fact that he would lose jail privileges such as recreation time and access to television if he violated jail rules (Tr. 2588-2595), and that he had expressed a desire to be transferred to the Callaway County Jail because that jail permitted smoking and access to outside food that were not available at the Boone County facility (Tr. 2586-2588, 2595, 2631-2632).

Appellant's misleading omission of the subjects of the cross-examination, and his deletion of all context to the state's references to jail conditions (App.Br. 71), do not lend support to his accusation that the prosecutor "implied" that these same conditions would exist if appellant was incarcerated for life in the Department of Corrections. In so asserting, appellant takes no account of the fact that this evidence showed that the same rules did not even apply in county jails in adjacent counties. Appellant could not

have suffered manifest injustice from the introduction of this relevant impeachment evidence.

In the punishment-phase closing argument, appellant's attorney improperly informed the jury of "facts" about conditions in the prison system that were not presented as evidence (Tr. 2663, 2669-2670). Defense counsel claimed that, if appellant was sentenced to life imprisonment without parole, he would "remain his entire life under the oppressive tyranny, behind the granite walls, the iron bars, the concertina razor wire of the penitentiary" (Tr. 2663, 2670). Counsel stated that appellant would be "away from drugs" in the prison system and could receive treatment, and cited appellant's "great" adjustment to incarceration based upon the testimony discussed above (Tr. 2671). Most amazingly, the defense gratuitously drew the very inference that it now accuses the state of making:

> **Now, the prosecuting attorney, during his examinations of the deputies who talked about [appellant] being a good inmate, talked about, well, he gets, you know, to have pizza or TV or, you know. And it's easy to think, Gosh, he doesn't deserve that.**
>
> **But life without parole is punishment. . . . [The prosecutor] trying to tell you that that's not punishment. It is. It's the longest possible sentence of imprisonment he can have.**

Tr. 2669.[14]

[14]**This argument by defense counsel is nowhere to be found in the brief of**

In its rebuttal argument, the state responded as follows:

> **Prison is what they want. The defense attorney called it oppressive tyranny of the penitentiary. Is that what you've heard about today?**
>
> **He can cruise around in a big room there with his buddies, who he gets along with real good, the other inmates. He can chat with the guards, you know. He doesn't hit on those other inmates, you know. They're not like Angela. No, he's – he's doing real well in there: TV, meals, plenty of recreation whenever he wants it.**

Tr. 2674.

"A defendant may not provoke reply by arguing outside of the record and then assert error based on the State's retaliation" (citation omitted). State v. Johns, 34 S.W.3d 93, 117 (Mo. banc 2000), cert. denied 532 U.S. 1012 (2001). This is not a case like State v. Weiss, 24 S.W.3d 198, 202-204 (Mo.App., W.D. 2000), cited by appellant, where the state successfully objected to defense evidence and then argued the failure of the defense to present that evidence. It is one in which irrelevant and misleading defense evidence was rightly excluded, and the defense–not the state–then drew an inference unsupported by evidence on that subject, to which the state rightfully retaliated. Appellant's charge that the state deliberately engaged in the "distasteful

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appellant.

tactic" criticized in Weiss rests entirely upon the distortion of the record in the brief of appellant.

Therefore, appellant suffered neither error nor manifest injustice.

VII.

The Circuit Court did not err or commit manifest injustice in not stating to the jury, sua sponte, that "life without parole means just that" in response to a note from the jury in the punishment phase inquiring if there was any possibility that appellant would be released if sentenced to life imprisonment, because the instructions expressly advised the jury that the lesser punishment for first degree murder was life imprisonment "without eligibility for probation or parole," this term is one of common understanding, and any elaboration on this matter would have been misleading unless it also informed the jury that appellant could be released by act of the Governor.

Appellant's offer, for the first time on appeal, of an affidavit purporting to state the views of unspecified jurors regarding the meaning of life without parole is improper because (A) it contravenes the well-settled principle that jurors are not permitted to impeach their verdict, and (B) appellant may not offer new evidence on appeal.

In the punishment phase of trial, the jury was instructed that the lesser penalty for murder in the first degree was "imprisonment for life by the Department of Corrections without eligibility for probation or parole" (L.F. 354). During its punishment-phase deliberations, the jury inquired in a note to the court, "Is there any circumstance under which [appellant] may ever be released from incarceration?" (Supp.L.F. 12; Tr. 2680-2681). The court responded with a note stating that "I cannot

answer your question. Please follow your instructions" (Tr. 2681). No formal objection to this response was made by the defense, but one of appellant's attorneys suggested that the court's answer should be "no" (Tr. 2681). No claim regarding the trial court's response to the jury note was raised in appellant's Motion for New Trial.

The correct answer to the jury's question as to whether appellant could ever be released from incarceration is, of course, "yes." As noted in the previous point, §565.020.2, RSMo 2000 provides that the lesser penalty for first degree murder is "imprisonment for life without eligibility for probation or parole, or release except by act of the governor" (emphasis supplied). On appeal, appellant seems to have abandoned the notion that the jury should have been misinformed that he could never be released if sentenced to life imprisonment. Instead, he argues that the trial court should have explained to the jury in its response that "a sentence of life without parole means just that" (App.Br. 75-80). Since appellant made no such suggestion to the trial court, his present claim is necessarily that the trial judge committed manifest injustice when it did not do so on its own motion. Supreme Court Rule 30.20.

If this Court elects to review appellant's newly-asserted claim of error, no manifest injustice is present. The instructions expressly advised the jury that a sentence of life imprisonment would be served without eligibility for probation or parole, and this was also a subject of discussion during the defense argument (Tr. 2662-2663, 2670). This Court has previously held that this phrase is one of common understanding and should not be defined. State v. Smith, 32 S.W.3d 532, 545 (Mo. banc 2000); State v.

Feltrop, 803 S.W.2d 1, 14 (Mo. banc 1991), cert. denied 501 U.S. 1262 (1991). Moreover, any accurate elaboration upon when a person sentenced to imprisonment for first degree murder could be "released"–the question asked by the jury–would have required acknowledgment that release was possible by act of the Governor. Unsurprisingly, appellant does not advocate such a reference.

For the first time on appeal, appellant offers a recently-executed affidavit by a jury consultant in the employ of the defense, quoting a juror as saying that other jurors were uncertain what was meant by life without parole (Appellant's Appendix A-47 - A-48). Even if appellant was at liberty to present this multiple hearsay as new evidence on appeal, which he is not, State v. Tokar, 918 S.W.2d 753, 761-762 (Mo. banc 1996), cert. denied 519 U.S. 933 (1996), his offer of this affidavit violates the well-settled principle that "once a verdict has been rendered, a juror may not impeach the verdict with oral or written testimony of any thought process, partiality, or conduct that occurred inside or outside the jury room." State v. Thompson, 85 S.W.3d 635, 641 (Mo. banc 2002), citing State v. Johnson, 968 S.W.2d 123, 134 (Mo. banc 1998), cert. denied 525 U.S. 935 (1998). This prohibition includes allegations that jurors did not understand the law. Henderson v. Fields, 68 S.W.3d 455, 482-483 (Mo.App., W.D. 2001).[15]

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[15]Respondent has separately filed a motion to strike the affidavit that appellant

has filed with this Court. That motion is pending.

Appellant makes no direct reference to this body of law but implicitly attempts to circumvent it by characterizing the jurors' alleged misunderstanding of the law as "juror misconduct" (App.Br. 102-105). He offers no Missouri authority for this absurd misdescription, and it is not supported by the out-of-state decision he cites. Cf. Buentello v. State, 826 S.W.2d 610, 611-614 (Tex.Cr.App. banc 1992) (evidence may be admitted regarding jury discussion of parole that was in direct violation of jury instructions). Nor can appellant find refuge in the shibboleth that "death is different." Permitting jurors to present evidence retrospectively disputing, confirming or embroidering upon their decisions as a jury would increase the potential for arbitrariness and injustice, not reduce it. It would be possible, for example, for jurors who were unhappy in hindsight with their part in a verdict to invalidate that verdict by claiming legal misunderstanding or misconduct. Parties could file "duelling affidavits" in an effort to litigate what was said or thought during jury deliberations. Appellant makes no attempt to argue that these consequences are justifiable as a matter of public policy in any trial, let alone in the trial of a capital case.

The trial court committed no manifest injustice in referring the jury to its instructions.

VIII.

The Circuit Court did not err or commit manifest injustice in overruling appellant's request to require the jury to specify the statutory aggravating circumstances it found on the verdict forms stating that it was unable to decide or agree upon punishment, and in sentencing appellant to death after the jury returned these verdicts, because these actions did not violate appellant's right under the Sixth and Fourteenth Amendments to a jury determination of all elements of the crime in that the jury's finding of a statutory aggravating circumstance as to each murder is established by the presumption that jurors follow their instructions, and also by the fact that the jury's verdicts of guilt necessarily established that each of the three murders were committed while appellant was engaged in the commission of the other murders.

Appellant's additional claim that Ring v. Arizona and Apprendi v. New Jersey required that the jury find other steps in the capital sentencing process is refuted by the language of those decisions (Responds to Appellant's Points VIII and IX).

At the close of the punishment phase at appellant's trial, the jury returned a verdict stating that it was unable to decide or agree upon punishment on the three counts of first degree murder (Tr. 2681-2682; L.F. 382-385). Thereafter, the trial court rendered its verdict sentencing appellant to death on these counts (Tr. 2684-2686). Appellant contends in Point VIII of his brief that his sentence of death by the court after the jury was unable to agree upon punishment violates the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (App.Br. 81-90). He argues in his

Point IX that the trial court erred in not requiring the jury to specify in its verdict the matters on which it was able to agree (App.Br. 91-96). Because these claims relate to the same principles of law, they will be addressed together.

Neither of appellant's claims of error is preserved for appellate review. Appellant offered modified verdict forms during the punishment-phase instructions conference (Tr. 2652-2653), but did not raise any constitutional objection or cite Ring until his Motion for New Trial (Supp.L.F. 54-58). Constitutional claims are not preserved for appellate review unless raised at the earliest opportunity. State v. Galazin, 58 S.W.3d 500, 505 (Mo. banc 2001). Therefore, appellant's due process attack upon his sentence of death is reviewable, at most, for the presence of manifest injustice. Supreme Court Rule 30.20.

A. The Applicable Law

1. The Missouri Capital Sentencing System

Any procedure for capital sentencing presents the trier of fact with two issues: whether a defendant can receive a sentence of death (the "eligibility decision"), and whether that defendant should receive such a sentence (the "selection decision"). Tuilaepa v. California, 512 U.S. 967, 971-973, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994).

Missouri, like other states with capital punishment statutes, premises a defendant's eligibility for this punishment on the finding of a statutory aggravating circumstance. Section 565.030.4, RSMo 2000; State v. Worthington, 8 S.W.3d 83, 88

(Mo. banc 1999), cert. denied 529 U.S. 1116 (2000); see Tuilaepa v. California, supra, 512 U.S. at 972. As of the time of appellant's offense, the selection determination was broken down into three subquestions. Section 565.030.4(2, 3, 4).[16] A defendant convicted of first degree murder in Missouri must be sentenced to life imprisonment without parole if any one of the following propositions exists:

Eligibility

1. The trier of fact does not find at least one statutory aggravating circumstance beyond a reasonable doubt. Section 565.030.4(1).

Selection

2. The trier does not find that the evidence in aggravation of punishment warrants imposing a sentence of death. Section 565.030.4(2).

3. The trier concludes that the evidence in mitigation of punishment is sufficient to outweigh the evidence in aggravation of punishment. Section 565.030.4(3).

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[16]This statute was later amended to add mental retardation as an additional ground for ineligibility, and to reduce from three to two the number of selection questions. Section 565.030.4, RSMo Cum.Supp. 2002.

4. The trier decides under all of the circumstances not to sentence the defendant to death. Section 565.030.4(4).

2. Principles of Due Process

It has long been established that the Sixth Amendment right to a trial by jury, applied to the states by the due process clause of the Fourteenth Amendment, guarantees to criminal defendants the right to a jury determination as to all "elements" of the crime charged. Sullivan v. Louisiana, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The United States Supreme Court has held, however, that this principle does not apply to "sentencing factors," which may be found by a court outside the hearing of the jury. McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (jury was not required to find sentencing factor that established mandatory minimum sentence); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (statutory aggravating circumstance in capital case was a sentencing factor that was not required to be found by jury).

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court was confronted with a sentencing factor–commission of a crime for the purpose of intimidation on grounds of race, gender or similar factors–that increased the range of punishment for the offense beyond that authorized by the verdict of the jury. Id., 530 U.S. at 468-469. The Supreme Court noted that in this circumstance, calling this finding a "sentencing factor" did not insulate it from the dictates of the Sixth and Fourteenth Amendments, and held that "[o]ther than the fact

of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 530 U.S. at 490. The court did not abandon the distinction between elements of a crime and sentencing factors, but restricted the findings that fit into the latter category:

> **This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.**

Id., 530 U.S. at 494 (n. 19); see also Harris v. United States, 536 U.S. 545, 557-560, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). The court declined to apply this holding to statutory aggravating circumstances in capital cases, relying upon Walton v. Arizona, supra, which had previously held that aggravating circumstances were not required to be found by a jury. Apprendi v. New Jersey, supra, 530 U.S. at 496-497.

In Ring v. Arizona, supra, the Supreme Court reexamined the applicability of its

holding in Apprendi to capital cases. Under the Arizona law reviewed in Ring, the eligibility of a defendant for the death penalty was premised upon the finding of a statutory aggravating circumstance, and the "selection decision" was made by weighing the aggravating circumstance or circumstances found against any mitigating circumstances. Id., 536 U.S. at 592-593. Both of these decisions were made by the trial court, not by the jury. Id. The Supreme Court noted that Ring's claim was "tightly delineated": his only argument before that court was that a jury was required to find the statutory aggravating circumstance that made him eligible for the death penalty, not that a jury must weigh the mitigating evidence or make the actual sentencing decision. Id., 536 U.S. at 597 (n. 4).

The Supreme Court ruled that Apprendi and Walton v. Arizona, supra, were irreconcilable, and the requirement that a statutory aggravating circumstance be found before a sentence of death could be imposed operated as the "functional equivalent" of an element of a crime. Ring v. Arizona, supra, 536 U.S. at 609. Accordingly, the court overruled Walton and held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring v. Arizona, supra.

B. The Holding of *Ring* Applies Only to the First Step in This State's Sentencing Procedure

Given the holdings of Apprendi and Ring, there can be no doubt that the first step in this state's four-step capital sentencing process–determining a defendant's

eligibility for the death penalty by finding whether or not a statutory aggravating circumstance has been proven beyond a reasonable doubt–must be performed by a jury.[17] Appellant argues, however, that Ring also requires a jury finding of the second and third steps: that the evidence in aggravation of punishment warrants a sentence of death, and that such evidence outweighs the evidence in mitigation (App.Br. 85-87).

The difficulty with this argument is that not only is it unsupported by Ring or Apprendi, it is directly contrary to those decisions. Ring expressly declined to address whether the jury was required to make any finding other than that of the statutory aggravating circumstance because that was the only question presented to it. Id., 536 U.S. at 597 (n. 4). More important, Ring and Apprendi hold that a jury must find matters that are "functional equivalents" of elements of a crime because they increase the range of punishment for a crime, and specifically exclude from this holding any sentencing factor that "supports a specific sentence within the range authorized by the jury's finding." Apprendi v. New Jersey, supra, 530 U.S. at 494 (n. 19); Ring v. Arizona, supra, 536 U.S. at 609. Once the eligibility of a defendant for the death penalty is determined by the finding of a statutory aggravating circumstance, the remaining steps in this state's sentencing procedure do not alter the range of punishment, and do

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[17]Respondent believes that State v. Tisius, 92 S.W.3d 751, 766-767 (Mo. banc 2002) is incorrect in holding, based upon pre-Ring authority, that that doctrine does not apply to this state's sentencing procedure.

nothing more that support the imposition of the greater available sentence for first degree murder. This conclusion has been reached by a number of other jurisdictions since the decision of Ring.[18]

Appellant offers no pertinent authority in support of his claim that a jury is required to finds the second and third capital sentencing steps, and incorrectly asserts that the issue in making this determination is whether the steps involve a "fact-finding" as opposed to a "weighing process" (App.Br. 85-90). This theory overlooks the language in Apprendi, later reaffirmed in Harris v. United States, supra, that factual

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[18]People v. Snow, 65 P.3d 749, 2003 Cal.LEXIS 2072 (Cal. 2003) at *158; State v. Gales, 265 Neb. 598, 628-629, 658 N.W.2d 604 (2003) at *57-*59; Caulk v. State, 815 A.2d 314, 317-322 (Del. 2003); Ex parte Waldrop, 2002 Ala.LEXIS 336 (Ala. November 22, 2002) at *16-*22; Torres v. State, 58 P.2d 214, 215-216 (Okla.Cr.App. 2002), cert. denied 123 S.Ct. 1580 (2003). But see Johnson v. State, 59 P.2d 450, 458-460 (Nev. 2002).

sentencing factors can exist and need not be found by a jury unless they increase the range of punishment for the crime. Apprendi v. New Jersey, supra, 530 U.S. at 494 (n. 19); Harris v. United States, supra, 536 U.S. at 557-560. The only sentencing issue at appellant's trial that increased the range of punishment was the determination that a statutory aggravating circumstance existed, the first step in the Missouri capital sentencing process.

C. A Statutory Aggravating Circumstance Was Found By the Jury

Appellant further argues that, since the jury made no written finding of a statutory aggravating circumstance when it returned its verdict stating that it was unable to decide or agree upon punishment, it should be presumed that no such finding was made and that Ring was therefore violated. This argument conflicts with a fundamental and well-established presumption of law regarding the conduct of jurors, and also with the particular facts presented in this case.

1. Presumption That the Jury Follows its Instructions

Each of the four sentencing steps that a jury in a capital case is required to consider is presented to them in a separate MAI-CR instruction form. MAI-CR 3d 313.40, 313.41A, 313.44A, and 313.46A. The form instruction as to step 1, the finding of a statutory aggravating circumstance, expressly informs the jurors that they must return a sentence of life imprisonment if they cannot unanimously find a statutory aggravating circumstance beyond a reasonable doubt:

Therefore, if you do not unanimously find from the evidence beyond

a reasonable doubt that (the) (at least one of the) foregoing statutory aggravating circumstance(s) exist(s), you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.40.

The verdict mechanics instruction, MAI-CR 3d 313.48A, repeats the admonition that the jury cannot return a verdict other than one of life imprisonment if they cannot unanimously agree beyond a reasonable doubt on the existence of a statutory aggravating circumstance:

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. __ [Insert the number given to MAI-CR 3d 313.40.], . . . then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI-CR 3d 313.48A. This instruction form also advises the jury that it must return a sentence of life imprisonment without parole if it cannot reach a unanimous decision as to step 2, but that it should return a verdict stating that it is unable to or agree upon punishment if it fails to reach a consensus on steps 3 or 4. The jury at appellant's trial was given these instructions three separate times, once for each count of murder (L.F. 357, 361, 363, 367, 369, 373; Respondent's Appendix A-1 through A-9).

Few principles are more well-settled than the "strong presumption that juries will follow the court's instructions." United States v. Scheffer, 523 U.S. 303, 336, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); see also State v. Mayes, 63 S.W.3d 615, 630 (Mo. banc 2002); and State v. Smith, 944 S.W.2d 901, 919 (Mo. banc 1997), cert. denied 522 U.S. 954 (1997). This presumption gives way only when "'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" Simmons v. South Carolina, 512 U.S. 154, 171, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), quoting Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In Simmons, for example, the presumption was defeated by a "confusing and frustrating" jury instruction on the availability of parole for the lesser punishment of imprisonment in a capital prosecution. Id., 512 U.S. at 170; see also State v. Thompson, 85 S.W.3d 635 (Mo. banc 2002) (ambiguous and confusing polling question).

In the present case, by contrast, there is not the slightest factual basis for an inference that the jury would not or could not follow its instructions, let alone a "great" risk that this might occur. The requirement that the jury return a sentence of life imprisonment if it could not unanimously agree upon the existence of a statutory aggravating circumstance, and the fact that the jury could not return a verdict stating that it was unable to decide or agree upon punishment without such a finding, could not possibly have been clearer from the instructions given to the jury. In State v. Smith, supra, this Court inferred a jury finding of a statutory aggravating circumstances in

precisely the circumstances that are presented in this case:

> **The jurors cannot return a verdict announcing that they cannot agree on a sentence if they have not agreed on at least one statutory aggravating factor. . . . The jurors were instructed that if they could not unanimously find at least one statutory aggravating factor beyond a reasonable doubt, they must return a verdict of a life sentence. . . . We presume that the jury acted in accordance with the court's instructions.**

(Citations omitted.) Id., 944 S.W.2d at 919-920; see also State v. Griffin, 756 S.W.2d 475, 488 (Mo. banc 1988), cert. denied 490 U.S. 1113 (1989). Contrary to appellant's suggestion (App.Br. 83), nothing in the decision of Ring v. Arizona, supra, addresses the applicability to these facts of the presumption that the jury will follow its instructions.

If it were to be held, contrary to the above principles and authorities, that the presumption that a jury follows its instructions was inapplicable to the punishment verdict of the jury in the present case, when would this presumption ever apply? A jury that determines guilt, in either a capital or a noncapital case, does so based upon the elements of the crime as stated in the verdict directing instruction, but it returns no "finding" of those elements–only a verdict of guilty. The validity of that verdict rests entirely upon the presumption that the jury followed its instructions by determining that the defendant was guilty beyond a reasonable doubt of each element submitted to them. Appellant offers neither explanation nor authority as to how the punishment verdict in the case at bar differs in quality from every other criminal verdict, or why

the presumption that these verdicts are in compliance with the law should be discarded.

2. The Facts of This Case

Appellant's argument that the jury should be presumed to have made no finding of a statutory aggravating circumstance also overlooks the peculiar facts of this case. In finding appellant guilty of the first degree murder of Juanita Hoffman, William Jefferson and Angela Brown, the jury relied upon the trial evidence–adduced by both the state and the defense and undisputed by either party–that appellant murdered three human beings over a short period of time because he believed that they were plotting to kill him or have him arrested. See respondent's Statement of Facts, supra. The only statutory aggravating circumstance submitted in the punishment phase as to each of these murders was that appellant killed the victim "while the defendant was engaged in the commission of another unlawful homicide" of the other two persons who were killed by appellant (L.F. 357, 363, 369). Section 565.032.2(2), RSMo 2000.

As the trial court noted (Tr. 2684), this statutory aggravating circumstance was established by the jury's verdicts in the guilt phase of trial, not by any evidence or issue presented in the punishment phase. Following the decision of Ring v. Arizona, supra, Ring's conviction and sentence was remanded to the Supreme Court of Arizona and consolidated with a number of other death sentences for a determination of sentencing issues related to the decision of the United States Supreme Court. State v. Ring, et al., 65 P.3d 915, 2003 Ariz.LEXIS 29 (Ariz. 2003). One of the issues addressed in that decision was whether the absence of a jury finding of a statutory aggravating

circumstance could ever be harmless on the ground that the finding of the aggravating circumstance was implicit in the jury's verdict on guilt. Id. at *76-*77.[19] The court held that harmless error could exist if "no reasonable jury could find that the state failed to prove the [statutory aggravating circumstance] beyond a reasonable doubt." Id. at *81.

The case at bar is unlike Ring's Arizona conviction in that the jury at appellant's trial was required to find a statutory aggravating circumstance, and was specifically so instructed. But even if it was possible to overlook the presumption that the jury followed its instructions, no reasonable jury could have refused, under the facts of this case, to find that appellant murdered Juanita Hoffman, William Jefferson and Angela Brown while engaged in the commission of the other murders. Appellant murdered each of the victims in quick succession, and all based upon his belief that they and other persons were plotting against him–that is, he murdered these victims as part of a "common scheme" to kill them and other persons. State v. Anderson, 79 S.W.3d 420,

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[19]The United States Supreme Court noted this issue in its opinion but reserved it for review by the lower court on remand. Ring v. Arizona, supra, 536 U.S. at 609 (n. 7).

442 (Mo. banc 2002), cert. denied 123 S.Ct. 199 (2002). The defense conceded this fact in its guilt-phase closing argument, arguing that this was proof that appellant was delusional (Tr. 2423-2429). Under these circumstances, there can be no plausible dispute that the jury at appellant's trial found a statutory aggravating circumstance before reaching an impasse on the appropriate punishment. Because the jury made a determination that appellant was eligible for the death penalty, it was proper under Ring v. Arizona, supra, for the trial court to decide whether or not appellant should be sentenced to death.

D. The Punishment-Phase Verdict Was Not Fatally Defective

Appellant argues under a separate point that the trial court erred in refusing the defense request to modify the punishment-phase verdict forms prescribed by MAI-CR 3d 313.58A by requiring the jury to specify the matters upon which it had been able to agree when returning a verdict stating that it was unable to decide or agree upon punishment (App.Br. 91-96). To the extent that appellant contends that Ring v. Arizona and Apprendi v. New Jersey require the jury to find anything other than the statutory aggravating circumstances that make a defendant eligible for the death penalty, his argument is meritless for the reasons discussed in Part B of this argument, supra.

In light of the holding in Ring that statutory aggravating circumstances must be found by a jury, it would certainly be prudent to modify the MAI-CR punishment-phase verdict forms to require the jury to specify the aggravating circumstance or circumstances it found when it returns a verdict that it was unable to decide or agree

upon punishment. But nothing in Ring even purports to address the contents of the jury's verdict forms as a constitutional issue; the holding of that decision is that the jury must make the finding of a statutory aggravating circumstance, not how that finding is reflected.[20] Under the principles discussed in Part C of this argument, supra, an ample basis exists to conclude that the jury found a statutory aggravating circumstance as to each of the three counts before returning its verdicts that it was unable to decide or agree upon the punishment for these offenses.

An identical argument was recently rejected by the Supreme Court of Indiana in Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003). Under the law of that state, the jury was required to find a statutory aggravating circumstance to make the defendant eligible for the death penalty, but it was not directed to specify the aggravating circumstance it found in its verdict returning a sentence of death. Id. at 1160-1161.[21] The court rejected a claim that the failure of the jury to indicate in its verdict that it

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[20]The assertion in appellant's brief that Walton v. Arizona, supra, which was later overruled by Ring, "concluded that the Sixth Amendment did not require specific findings of fact to authorize the imposition of death" (App.Br. 94) is inaccurate. Neither Walton nor Ring addressed whether or not "specific findings" must be made in a punishment-phase verdict, but rather whether the defendant's eligibility for the ultimate punishment should be determined by the court or by the jury.

[21]Indiana has since amended its statutes to require such a specification. Id.

found a statutory aggravating circumstance violated the defendant's rights under the Sixth and Fourteenth Amendments:

> **We hold that Ring and Apprendi do not require specific verdict forms in this case. The jury here was instructed that it could only recommend a sentence of death if it unanimously found "beyond a reasonable doubt, each and every material allegation of at least one aggravating circumstance." . . . . With this explicit predicate to the recommendation ultimately made by the jury, we find compliance with Ring's and Apprendi's mandate.**

(Record citation omitted.) Id. at 1161.

For the reasons stated above, appellant's claim of error should be rejected.

IX.

This Court should, in the exercise of its independent review, affirm appellant's sentences of death because (A) they were not imposed under the influence of passion, prejudice or any other arbitrary factor; (B) the statutory aggravating circumstances found by the jury and the court are supported by the evidence; and (C) appellant's sentences are not excessive or disproportionate to those in similar cases, considering the crimes, the strength of the evidence and the defendant (Responds to appellant's "Proportionality" argument).

Finally, appellant invokes this Court's duty of independent sentence review under §565.035.3, RSMo 2000 (App.Br. 97-112). He argues at length that his sentence of death was the result of "passion, prejudice or any other arbitrary factor," §565.035.3(1), relying upon the claims of error raised in Points VI and VII of his brief (App.Br. 97-108). Aside from the fact that his argument rests upon the highly dubious proposition that, but for these alleged errors, the jury would have unanimously agreed upon a sentence of life imprisonment, appellant's contention is meritless for the reasons stated in respondent's Points VI and VII, supra.

Appellant offers no dispute that the statutory aggravating circumstance found as to each of the three counts of first degree murder, that the murders of Juanita Hoffman, William Jefferson and Angela Brown were committed "while the defendant was engaged in the commission of another unlawful homicide" of the other two victims, was supported by the evidence. Section 565.035.3(2). As discussed in the previous point, no

such dispute is possible.

As to whether appellant's sentence of death was "excessive or disproportionate to the penalty imposed in similar cases, considering . . . the crime, the strength of the evidence and the defendant," §565.035.3(3), the fact that appellant committed multiple murders places this case within the ambit of past homicides where sentences of death have been upheld. See State v. Christeson, 50 S.W.3d 251, 273 (Mo. banc 2001), cert. denied 534 U.S. 978 (2001) (two murders); State v. Ringo, 30 S.W.3d 811, 826 (Mo. banc 2000), cert. denied 532 U.S. 932 (2001) (two murders); State v. Johnson, 22 S.W.3d 183, 193 (Mo. banc 2000), cert. denied 531 U.S. 935 (2000) (three murders). The facts that appellant murdered persons who were helpless and made no attempt to resist in the face of his shotgun, State v. Kenley, 952 S.W.2d 250, 276 (Mo. banc 1997), cert. denied 522 U.S. 1095 (1998), and that he murdered Angela Brown in the presence of her two children, State v. Bucklew, 973 S.W.2d 83, 97 (Mo. banc 1998), cert. denied 525 U.S. 1082 (1999) also weigh against his claim that his sentence is disproportionate.

The strength of the evidence against appellant could hardly be greater, given the defense concession at trial that appellant committed the murders (Tr. 1250).

In alleging that his sentence of death is excessive and disproportionate, appellant relies upon the theory of mitigation that he unsuccessfully advanced in the guilt and punishment phases of trial: that he suffered from mental illnesses that reduced his culpability in the murders of Juanita Hoffman, William Jefferson and Angela Brown (App.Br. 108-112). The allegation that a defendant suffers from mental impairments

does not itself disqualify a defendant from receiving the death penalty, and this Court has upheld death sentences despite such evidence. See State v. Johnson, supra, 22 S.W.3d at 193. That aside, this Court is not compelled to credit the self-serving and extensively impeached opinion of appellant's psychiatric witness regarding appellant's mental condition. Appellant was engaged in the dangerous business of selling illegal drugs, and the record suggests that he had legitimate reasons to fear for his life. To the extent that his suspicions of his immediate family may have been unfounded, they may well have been the result of appellant's voluntary ingestion of cocaine, which could hardly be considered a mitigating factor in this case.

Viewing the trial record as a whole, it cannot be said that appellant's murders of Hoffman, Jefferson and Brown are "plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed." State v. Ramsey, 864 S.W.2d 320, 327-328 (Mo. banc 1993), cert. denied 511 U.S. 1078 (1994). Accordingly, appellant's sentences of death should be affirmed.

CONCLUSION

In view of the foregoing, respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of, _____, 2003, to:

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Appendix