IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
VS.	)	NO. SC89895
	)	
TERRANCE ANDERSON,	)	
	)	
APPELLANT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY,
HONORABLE WILLIAM SYLER, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTION§AL STATEMENT

In 2001, on change of venue from Butler to Cape Girardeau County, a jury convicted appellant Terrance Anderson of two counts of first-degree murder for killing Debbie and Stephen Rainwater.[1] In accordance with the jury's verdicts, the trial court, the Hon. William Syler, sentenced Terrance to death for Debbie's murder and to life imprisonment without probation or parole for Stephen's murder. This Court affirmed on direct appeal, *State v. Anderson*, 79 S.W.3d 420 (Mo.banc 2002), but on appeal from the denial of Terrance's post-conviction motion reversed the death sentence for Debbie's murder and remanded.[2] *Anderson v. State*, 196 S.W.3d 28 (Mo.banc 2006). On retrial, the jury assessed punishment at death, and on December 29, 2008, the trial court sentenced Terrance to death. Terrance timely filed notice of appeal on January 6, 2009. This Court has jurisdiction. Mo.Const., Art. V, §3, (as amended 1982).

STATEMENT OF FACTS

Abbey Rainwater was 15 or 16 when she began dating Terrance Anderson (T656). Because Terrance was black and older than Abbey, and the Rainwaters were white, her

[1] At trial, individuals involved were consistently referred to by their first names. Appellant follows that practice in this brief and intends no disrespect to the persons involved.

[2] Terrance's sentence of life imprisonment for the Stephen Rainwater murder was affirmed on appeal and was not involved in the remand or this appeal.

parents, Debbie and Stephen, were concerned; they told Abbey they didn't want her dating Terrance (T657-58). Abbey once stayed out all night with Terrance and didn't tell her parents where she was; Debbie called the police and Abbey got in trouble (T659). That Abbey continued dating Terrance after this incident led to arguments between Abbey and Debbie, and Abbey "overdosing" at one point (T659-60).[3]

After learning that her friend Stacey was pregnant, Abbey, too, got pregnant (T660). Both Abbey and Terrance were both happy about her pregnancy (T660-61). Although they did not plan to marry, Abbey wanted Terrance with her, and thinking it best for Abbey, her parents invited Terrance to move into their home (T661-62). In September 1996, Terrance began living with Abbey in her bedroom in the Rainwater house (T663).

Abbey's and Terrance's relationship soon soured (T644,664). After discussions with her parents, Abbey asked Terrance to move out, and he complied (T664-65). For a time, Abbey no longer considered Terrance her boyfriend (T666). Their relationship involved repeated "break ups" and reconciliations (T666).

Terrance testified that race was a factor in his relationship with the Rainwaters; an example was Debbie's comments about black people being "on welfare in ther projects" (T756-57). It had been "strange and uncomfortable" for him at the Rainwaters; Terrance blamed himself for jumping in without evaluating it first (T757).

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[3] Some time before trial Abbey had been convicted of manufacturing methamphetamine and was incarcerated.

He was motivated to "be there" for his child because he had never known his own biological father (T759). He had never talked about this with anyone except Abbey (T759). Whether or not he and Abbey ended up together, Terrance wanted to be part of his child's life (T759-60).

Another source of conflict between Terrance and the Rainwaters was that both Abbey and Debbie smoked and Terrance thought this was bad for the baby (T668-69,674,760-61). He wanted Abbey to stop smoking during her pregnancy; she promised to stop, and when he found packs of cigarettes, she got mad (T760-61).

Terrance and Debbie argued because she smoked around the baby (T674). Terrance and Debbie got into a big argument when he saw her "holding the child and smoking a cigarette at the same time" (T761). He appealed to Debbie's training as a nurse: she should know not to smoke around a baby (T762).

Once Terrance tried to take Kyra from Debbie when she was smoking; she pulled away and told him not to tell her what to do in her house (T762). Terrance ended up taking Kyra out of Debbie's arms and taking Kyra outside (T762). As a result of that incident, Debbie obtained a restraining order against Terrance in May of 1997 (T763). After getting the restraining order, the Rainwaters still invited Terrance to the house (T763).

A couple of weeks before the shooting, Stacey told Terrance about a conversation she had overheard at the Rainwater's house (T768,770). She first asked Terrance what he thought the Rainwaters' feelings were about him, and he said he knew Debbie didn't like him (T768). Stacey then asked about Stephen, and Terrance said he didn't know

(T768). Stacey said that Stephen "'probably hates you worse than all three of them'" (T768). This did not surprise Terrance or seem strange (T768).

Next Stacey asked Terrance what he thought the Rainwaters' feelings were about Kyra (T768). Terrance said he thought they were happy but didn't know "for sure " (T768). Stacey answered, "'They probably hate her just as much as they hate you'" (T768).

Terrance thought Stacey and Abbey must have had a "little tiff' "and that Stacey was "playing" (T768). Stacey said she wasn't playing and that Terrance needed to get Kyra "'out of that house'" (T769). Terrance got upset and insisted that Stacey "stop playing" (T769). Stacey "didn't budge" (T769). Stacey said that what Debbie and Stephen said had scared her "but what scared her the worst is what Abbey has let come out of her mouth" (T769). Stacey said, "'They're talking about killing both of you all'" (T769).

Terrance never talked to the police about what Stacey said or confronted Abbey (T770-71). He just asked Abbey to let him have Kyra (T771).

During this time, Abbey's father moved from the house to an apartment (T665). Abbey testified that he was "manic depressive, bipolar (T665).

Louis Van Buchanan testified that he and Terrance had been friends for 15 years (T834). After Kyra's birth, Terrance lived with Louis for about six weeks (T834-35). Terrance was "somebody that you could hang with, somebody that would be there for you.... Pretty nice guy" (T835).

Louis witnessed arguments between Terrance and the Rainwaters (T836).

Sometimes Louis answered the phone when Stephen called; Stephen would think Louis was Terrance and would "talk down" to him calling him "a nigger," saying, "'I'll whoop your ass,'" and "'[y]ou and my daughter don't need to be together.'" (T836). Stephen also said, "this black and white thing does not work" and "[s]he needs to be with her own kind" (T836). One time Louis heard Stephen threaten Terrance on the phone (T837). Louis said, "'[c]ome on over here'" and Stephen drove to the apartment building (T837). He left "real fast" when Louis and Terrance came out of the building (T837).

Louis thought Stephen was threatening: he would call, "talk real crazy," and tell Terrance to leave Abbey alone (T838). Louis knew Abbey came to see Terrance and tried to tell that to Stephen and suggest that he talk to Abbey (T838). Terrance moved out of Louis' apartment before the shootings, and Louis was shocked to learn about them (T838-39).

Terrance had eagerly anticipated being involved with the baby and consistently spoke of being part of the baby's life (T667). He maintained regular contact with Abbey – by phone and by visiting her at the house – during the periods when they were "broken up" (T663, 666). He told Abbey that he had never known his own biological father and for that reason wanted to be a father for the baby (T667). He was in the labor room at the hospital before Abbey was moved for cesarean delivery (669).

Abbey and Terrance had planned to name the baby Kyra Nicole Anderson (T670). Without telling Terrance, Abbey changed the baby's name to Kyra Nicole Rainwater because she thought he would have "more rights" if his name was on the birth

certificate (T670).

Kyra was born in April 1997 (T671). Terrance visited Kyra and Abbey at the Rainwater's, or at Stephen's apartment (before he moved back in June) or sometimes Abbey brought Kyra to Terrance's parents' home (T671, 673-74). Whether Abbey and Terrance were "on again" or "off again," he maintained contact with Kyra (T674).

After Kyra's birth, Abbey got a job (T674). Terrance or his mother took care of Kyra when Abbey was at work (T674-75). Abbey was scheduled to work the day her parents were killed and had previously arranged for Terrance to care for Kyra (T675). Instead, Abbey and her father went to court, and she obtained an *ex parte* order limiting Terrance's contact with her (T645). Abbey testified she got the restraining order because Terrance beat her (T678).

Abbey did not let Terrance know she was not bringing Kyra to his house (T675). He "paged" Abbey; she did not respond (T675-76). That afternoon, Terrance went to Abbey's house to talk to her, and Stephen told him to leave (T676). Later that day, Abbey and Terrance talked on the phone; she told him about the restraining order and that he could no longer come to the house (T646,676). She told him she wouldn't keep Kyra from him; the courts would decide about him seeing Kyra and there would have to be a paternity test (T676,679-80). Terrance was angry (T646-47,680).

That night, Abbey and her friends, Stacey and Amy, were in the lower level of the Rainwater house smoking and "hanging out" and heard knocking at the back door (T624,642,646-47,688-89). The girls told Abbey's parents, who were upstairs with Kyra and Whitney, about the knocking (T626,643,690,717). Stephen looked out a bay

window and walked around the house with a rifle but "couldn't see anything" (T626,647,690,718). He decided to "drive around" looking for Terrance's car (T626-27,648,690,718).

Stephen left and the living room door was locked (T648,718). Terrance knocked on the door, rang the doorbell, looked through the sidelight, then kicked in the door; he had a gun (T627-28,648-49,691-92,718). Debbie, holding the baby, shoved Abbey and told her to run, and Abbey ran outside through the back door (T649,719).

Amy testified that Terrance and Debbie argued (T628). He yelled, and she begged him not to shoot her (T628). Debbie was in front of Terrance, holding Kyra, on her knees, (T628). Terrance said, "'Bitch, I told you I was going to do this'" (T630). "There was a lot of yelling, and then the gun went off" (T631). Amy ran outside, but stopped when Terrance said he would shoot her if she didn't (T631). Terrance made her call for Abbey or Stacey to come out or he would shoot her (T631-33). Neither Abbey nor Stacey appeared; Terrance took Amy into the house and they went toward the sound of Kyra crying (T631-32). Whitney was with Kyra (T632).

Whitney testified that she ran outside with Abbey and was at the back deck when she heard a gunshot (T719-20). Whitney went back into the house "[b]ecause Kyra was inside" (T714,720). Debbie was "kneeled over still holding Kyra" who was under Debbie (T720). Whitney grabbed Kyra and ran to the laundry room to hide (T720).

Whitney answered the telephone in her parents' bedroom (T721). It was Amy's boyfriend and Whitney told him what had happened (T721-22). Terrance came into the bedroom and hung up the phone (T722). Terrance took Kyra, and he and Whitney went

outside (T722). Amy was there (T722).

Terrance called for Abbey to come outside or he would shoot Kyra (T649-50,722).

At one point he held the gun to her head (T633). He said he would shoot Amy and Whitney if they ran (T723).

Car lights appeared: it was Stephen coming home (T633,723). Terrance told Whitney and Amy to hide alongside the house and not run (T633,723). He "had words" with Stephen in front of the house then shot him (T724). Amy ran into the woods and stayed there until long after the police had arrived (T634). Whitney refused to leave Kyra (T634724). Terrance, Kyra and Whitney went back inside (T724).

Stacey testified that she fell behind the door before it was kicked in (T691-92). She was "crawl[ing] down the hall" to hide in the Rainwaters' bedroom closet and heard a gunshot (T692-94).

From the closet Stacey heard Terrance and Whitney bringing Kyra into the bedroom (T694). After she heard Terrance and Whitney go outside, Stacey looked through a window; Terrance, Kyra, Amy, and Whitney were outside Terrance told Stacey to "come out because [her] time was coming (T695). Stacey called 911 to report "someone had been shot" (T695). Then she hid in the shower (T696). Terrance and Whitney came back inside, and Terrance told Whitney to look for people in the house (T696,724). Whitney saw Stacey but did not tell Terrance (T696,724-25).

Whitney saw the police lights from Abbey's bedroom window (T725). Terrance began opening the window (T725). The police told them to go outside; they did and Stacey came out of the shower (T.697,725). Terrance complied with police orders to

give Kyra to Whitney (T697,726).

Stacey testified that she had previously dated Terrance (T698). They were friends, he was never violent toward her, and she found him fun to be around (T700). She knew he was happy and excited when Abbey became pregnant and looked forward to being a dad (T701-02). Stacey never saw Terrance hit Abbey or get violent toward her (T706-07). Terrance with a gun was unlike the Terrance she knew or had seen before (T710).

Jason Brandon and Terrance had been good friends since they were 5 or 6 years old (T614,731-35). Terrance stopped at the Brandon's house to visit Jason before the shooting (T614-15). Later that evening, the Brandons learned about the shooting and discovered that a gun belonging to Jason was missing (T616). Terrance used that gun to shoot the Rainwaters (T617). Jason had never seen Terrance act in a violent way and at first couldn't believe it had happened (T739-40). Jason still "look[s] at [Terrance] as a brother" (T740).

Jo Ann Brandon, Jason's mother, was shocked to hear of the shooting (T620). This was not the Terrance she knew; she would "never" have thought he would be involved in something like this (T620).

Donald Brandon, Jason's father, remembered Terrance at the Brandon house almost every day; he never caused problems and was always welcome (T743-44). Donald's reaction to Terrance shooting the Rainwaters was "disbelief": "Knowing him the way I know him, I just could not picture him doing anything of that nature" (T746).

Abbey called Terrance on July 24th, the day before the shooting, and he agreed to watch Kyra the following day: the 25th (T752). On the 25th, Abbey did not bring the

baby to his house and did not respond when he "paged" her (T752). Terrance called her job and was told she "called in because she didn't have a baby-sitter" (T752-53).

Later, Terrance drove to the Rainwater's house (T753). Stephen came outside looking as though he wanted to fight, so Terrance just left without asking what was going on (T753-54). Terrance drove to his cousin's house and called Abbey; Stephen answered and initially refused to let Terrance talk to Abbey then gave her the phone (T754).

Abbey was "kind of crying" and mumbling and said "she was sorry we had to go to court" (T755). Before Abbey could explain why, Stephen got back on the phone and told Terrance not to call the house anymore (T755).

Terrance was upset (T756). He talked to his cousin and "got a few things off [his] chest" and "just kept getting madder and madder" (T756). He was upset because for "the whole pregnancy" he had been dealing with the Rainwaters "trying to separate [him] from his child or blame [him] for something that [he] really didn't do" (T756).

"[E]verything that had happened up to that point" was rolling through Terrance's mind (T774). He was mad: all he wanted to do was be there for his child and just see her (T774). Now he had to go to court, the Rainwaters were keeping him in the dark, not telling him anything, stringing him along, and he was tired of it (T774).

Terrance went to the Rainwaters' house and "went through the front door" (T774-75). Debbie was holding Kyra and yelled at him to get out of the house (T775). Terrance answered, "'I just want my daughter, and I'm really tired of you all getting in my way. I ain't never asked you all for nothing'" (T775). He told Debbie not to come

between him and Kyra and tried to take Kyra (T775). He got Kyra out of Debbie's arms and shot Debbie (T775). He looked at Debbie, and put Kyra down next to her (T776).

Whitney came back for Kyra; Terrance helped Whitney pull Debbie off Kyra then got Kyra from Whitney (T776). They went to the back room where the phone was ringing and put the baby on the bed (T776). Whitney wouldn't leave (T776).

Terrance wiped blood off Kyra with his shirt and started to the front door (T778). He saw Amy in the yard and asked her where Abbey and Stacey were (T778). Then Terrance saw headlights coming up the road and stepped behind a bush at the corner of the house (T779). Amy and Whitney followed (T779).

Stephen pulled into the driveway (T779). As he came up the steps into the yard, Terrance stepped out and Stephen stopped (T779). Stephen said, "'What are you doing here? You're not supposed to be here'" (T779). Terrance repeated what Stacey had told him, and Stephen asked how Terrance knew that (T779-80). By this time, they were face to face (T780).

Terrance pulled out the gun and Stephen said, "'Wait a minute. We can talk about it'" (T780). Terrance said, 'There's nothing else to talk about. You wanted to kill me and my daughter. There's nothing else to talk about'" (T780). Stephen kept talking and Terrance "wasn't trying to hear it" (T781). Stephen lunged forward, Terrance fired, and Stephen dropped forward (T781). To his left, was Whitney "still standing right there" (T781).

Terrance walked back into the house, went to Abbey's bedroom, and put Kyra on

the bed (T781). Whitney came in and sat on the floor and asked if Terrance was going to kill her (T781). Terrance looked at her and asked her why she didn't just leave (T781).

By then, the police were outside (T781). Terrance stood over Kyra and looked at her (T781). Then he picked her up and hugged her (T782).

The police ordered Terrance to put his gun down and come outside, and he did (T782-83). He left the gun inside on the banister (T783). He and Whitney walked out together (T783). The police ordered him to give Kyra to Whitney, and he did (T784).

Terrance testified that he really did not feel good about what he did (T784). He spoke of Whitney: "I mean, my heart really goes out to her. Like I say, I was, when you're locked up, you think a lot of things and I never could understand, out of all the people, why she come back" (T785).

Terrance's relatives and friends and his former teammates and coaches came to court to testify for him; these people knew Terrance and were shocked that he shot the Rainwaters:

Timothy McMillian played basketball with Terrance beginning in high school (T798-99). Terrance was average in high school and got "really good" after graduation (T801). He was polite, mild-mannered, not argumentative, and had a quiet humor (T801-02). If a coach "chewed him out," Terrance did not get angry (T802). Timothy would not have expected Terrance to shoot the Rainwaters (T802-03). Terrance is still his "quiet friend" (T803).

For four years, Larry Morgan coached Terrance in basketball, and Terrance served

as Coach Morgan's 8:00 a.m. physical education class student aide (T805-06). Terrance was always on time and the coach "could always depend on him to be there and be ready to go" (T805). Coach Morgan never had a problem with Terrance as his student aide (T805). Terrance never talked back to referees or coaches, acted out on the court, or was cross with teammates (T808-09). The coach never heard of or saw any racial tension between Terrance and white kids on the team (T809).

Coach Morgan testified that the point guard on a basketball team is "kind of the coach on the floor" assumes great responsibility during games (T811). Terrance was the backup point guard on the team his junior year and the point guard his senior year and did a fine job (T811). His team "trusted him in what he was doing on the floor" (T811). During his senior year, Terrance was part of the Homecoming court (T812-13; DefExK).

Coach Morgan was upset and shocked when he learned about the shootings (T813). Of all the kids he had seen in 32 years as coach and teacher, Terrance was "one of the last persons that [he] would have thought would have committed anything like this" (T814). Coach Morgan never saw "anything violent come out of Terrance in any way" (T814).

Terrance's mother, Linda Smith, is married to Robert Smith who has acted as Terrance's father for his entire life (T818). Linda never told Terrance that Robert was not his biological father (T818). Terrance only learned about that when he found a picture and his grandfather said it was his biological father (T759). Linda's father, Phillip Anderson, spent a lot of time with Terrance teaching and playing baseball with

him (T823). Phillip's death, which occurred about the time Terrance learned found out Robert Smith was not his biological father, affected Terrance a lot (T823). Robert never adopted Terrance (T824). As a little boy, Terrance was quiet and good and did not cause his mother problems (T824-25; DefEx's A, B, F, and J).

Terrance's stepsister, Deborah Moore, testified that she and Terrance were raised together (T829). He was polite and pleasant when they were children and continued to treat her well and with respect as they grew up (T830-31). Deborah loves her brother; the shootings "stunned" her (T831). It impacted both her family and the Rainwaters (T831).

Kevin Pruitt went to high school with Terrance and played basketball with him (T840-41). When playing basketball Terrance might get upset at himself for missing a shot but never got angry at anybody else (T841-42). He was never violent with other players (T842). Kevin had "never seen or heard Terrance ever get into any kind of altercation with anybody" (T842). "He was laid back... very laid back" (T842).

Kevin testified that White and African American guys played together on the basketball team and there were never any racial problems among the players (T842). Poplar Bluff High School was "probably 20 percent black" (T843). There were racial issues at school but Terrance was not part of that (T843). Terrance shooting the Rainwaters shocked Kevin (T843). "[I]t just didn't seem like he was capable, you know, of doing something like that" (T843).

Terrance's older cousin, Mark Hunt, also went to Poplar Bluff High School (T845). They spent a lot of time together while growing up and talked about what they wanted

to accomplish (T845-46):

> Be successful, be successful. Get a job, take care of our families, take care of each other. Be productive citizens.

(T846). Mark would not have imagined Terrance shooting the Rainwaters; Terrance was "nice, humble, never known to even get into a fight" and "[v]ery athletic" (T848). Mark never saw or heard of Terrance being violent (T848). What happened was out of character for Terrance and hard for Mark to believe (T848). It had an impact on the family and Mark was "saddened for both sides of the family" (T849).

Robert Lewis Smith, Terrance's stepfather, first met Terrance when he was about 10 months old (T849-50). Smith described Terrance as "a little bit different," "a pretty good kid," and an "awfully quiet, easy going kid" – "one of those kids that went to bed at 9:00 at night" (T850). Smith enjoyed playing sports with Terrance and went to all of his high school games except for one (T851). Smith never told Terrance that he wasn't his "real" father (T852-53). He identified pictures of Terrance growing up (T853-56;DefEx's C, D, E, G, H, I, and N).

Smith had no problems with Terrance as a child or teenager (T856-57). Terrance was well-adjusted, popular in high school, and had no behavioral problems (T857). Terrance was "elevated" – happy – to learn he would be a father (T857). After Kyra was born he was protective of her and happy to be a father (T857-58). Smith drives a bus for the Poplar Bluff School District and sees Kyra on the bus; he doesn't know if she knows he is her grandfather (T858). What happened saddened Smith and his wife and has not been good for her (T859-60). Smith still loves Terrance: "might even love

him more now than [he]did before because [he] just, you just kind of feel for him" (T860).

Mike Brey coached Terrance in the basketball program at Poplar Bluff High School for 3-4 years (T883-84). Terrance was "a very mild-mannered person, soft spoken," led "by example" and not by "talking about it" (T885). As point guard, Terrance was "kind of an extension of the coaching staff on the floor" and played a leadership role within the team (T884, 886). Terrance never got inappropriately angry at anyone (T887). Brey might have yelled at Terrance "for maybe making a mistake in a play... or trying to push him to play harder... but not for a disciplinary measure" (T887). Terrance would respond by working harder and not by getting upset (T888).

Brey was shocked and "completely surprised" to learn Terrance had shot the Rainwaters (T890). He "would have never dreamed that Terrance would have been involved in anything like that" (T890). Terrance was not one of the people on the team who Brey would have expected to do this (T890).

Donald Roper, Potosi Correctional Center Warden, testified[4] about how violations

[4] At trial, because Warden Roper was not available to testify, the parties agreed that his deposition could be read into the record in lieu of testimony and stipulated as to those portions of the deposition that would be read and excluded (T832). Unfortunately, the court reporter did not record the portions of the deposition read into the record. Undersigned counsel has located the copy of the deposition that was marked to designate the portions to be read and omitted. Counsel has, further, notified the

of the rules governing conduct at Potosi Correctional Center – called conduct violations – are treated (RoperDepo 13-16). He also described how Potosi encourages good behavior by transferring inmates whose behavior improves to less restrictive housing units with more "benefits" (RoperDepo 24-29). Inmates "work[] their way through to the honor dorm or to the high level that they want to be, where they have a lot more recreation, they have other activities, they have food visits, et cetera, et cetera..." (RoperDepo 27). Wardon Roper explained that the honor dorm was not for everyone:

> [Y]ou can walk out into my honor dorm, and those guys feel relatively safe out there because we have created that to be a safe environment with our classification system. We watch the inmates. We don't put someone over that that has violent behavior that every time you turn around he's spitting on somebody or he attacks someone. We don't put him in five house.

(RoperDepo 27-28).

To be placed in the honor dorm, an inmate must be "conduct violation free for a year" (RoperDepo 44). Terrance placed into the honor dorm on June 27, 2008 (Roper Depo 45).

Terrance was received into Potosi on May 16, 2001 (RoperDepo 48). He had received nineteen total conduct violations – most but not all minor – since arriving

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Attorney General's Office that appellant will be requesting respondent to stipulate that the deposition was read into the record as marked.

there (RoperDepo 6-40). Terrance's particular history of conduct violations indicated difficulties with behavior "early on," but his movement "up the—the tiers into the—into the honor dorm" reflected "he appears to be adjusting" to being at Potosi (RoperDepo 49). Inmates generally have a period of adjustment and with age, they tend to have fewer behavioral problems (RoperDepo 50). Honor dorm inmates must get up for count and submit to being locked down; they are still in a penal institution – not free – and must follow the rules (RoperDepo 51).

Pretrial, Terrance filed an objection to preceeding under §565.030 and the MAI 313-CR3d instructions because they violated his fifth, Sixth, Eighth, and Fourteenth Amendment rights by failing to require the state to prove all sentence-enhancing facts beyond a reasonable doubt (LF72-76). The trial court denied this objection and Terrance preserved this ruling in his new trial motion (T22-23; LF207-08). Terrance filed an objection to §565.030.4(3) and MAI-CR3d 313.44A on the grounds that the statute and instruction violated his fifth, Sixth, Eighth, and Fourteenth Amendment rights by shifting the burden of proof from the state to the defendant on the sentence-enhancing fact of whether the mitigation outweighed the aggravation (LF77-79). The trial court denied this objection and Terrance preserved this ruling in his new trial motion (T23-24; LF208-09).

Terrance timely objected to oral instruction MAI-CR3d 300.03A, and Instructions 3, 7, 8, and 10 on the grounds, among others, that these instructions failed to tell the jury that the state's burden of proof beyond a reasonable doubt applied to its

determination of whether the aggravating evidence warranted death and whether the mitigation was insufficient to outweigh the aggravation – findings required before a death sentence could be imposed (T867, 871-73, 874; LF155-56, 162, 166, 167, 169-70). Terrance also objected to Instructions 7 and 8 on the grounds that they allowed the jury to consider non-stautory aggravating evidence that was not proven either beyond a reasonable doubt or by a preponderance of the evidence" (T870-72). He also objected to Instruction 8 because it imposed on him the unconstitutional burden of proving to a unanimous jury that the mitigation outweighed the aggravation and did not limit the jury's consideration of aggravating evidence to only that which was "found" (T871). He specifically objected to the sentencing verdict director, Instruction 10, because it failed to include any language regarding consideration and use of mitigating evidence (T874,880). The trial court rejected these objections (T880).

To correct the problems outlined in his objections, Terrance proffered Instructions A, B, C, D, and F and E all of which the trial court refused (T61-62,866,867-68,870-73; LF172,173,174-79,180-85,186-87,188). Terrance preserved in his motion for new trial the trial court's rulings denying his objections and refusing his proffered Instructions (LF190-95, 198-204).

The jury deliberated from 10:18 a.m. to 2:05 p.m. before returning a verdict imposing a sentence of death (T927-29; LF 189). On December 29, 2008, the trial court denied the motion for new trial and sentenced Terrance to death (T935; LF190).

To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I

The trial court erred in overruling Terrance's objections to Instruction 10, sentencing verdict director MAI-CR3d-313.48A, because Instruction 10's omission of language concerning the mitigating evidence prevented the jury from using and giving effect to the mitigating evidence in determining Terrance's sentence thereby violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV; §565.030.4(3); MAI-CR3d 313.48A, in that this sentencing "verdict director" erroneously failed to include required language instructing the jury that if it "decide[d] that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment" the verdict must be life imprisonment which prejudiced Terrance by excluding evidence crucial to his defense against a death sentence.

State v. McClure, 612 S.W.2d 314 (Mo.App.S.D. 1982);

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

Brewer v. Quarterman, 550 U.S. 286 (2007);

Deck v. State, 68 S.W.3d 418 (Mo.banc 2002).

II

The trial court erred in overruling Terrance's motions to dismiss based on

double jeopardy and to quash the information or preclude death and in sentencing him to death because under *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the constitutional right to due process, freedom from double jeopardy, notice of the offense charged, jury trial, and reliable sentencing, U.S. Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1 §§ 10, 17, 18(a), 19, and 21, the court lacked authority and jurisdiction to retry the penalty phase and sentence Terrance to death in that no statutory aggravating circumstances were pled in the information charging Terrance with Debbie's murder, so he was only charged with, and convicted of, unaggravated first-degree murder – a lesser included offense of aggravated first-degree murder punishable only by life imprisonment; the sentencing retrial placed Terrance in jeopardy twice for the same offense; imposing a death sentence punished him for the greater, aggravated offense although he was convicted only of the lesser, unaggravated offense.

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003);

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

Blakely v. Washington, 542 U.S. 296 (2004);

State v. Nolan, 418 S.W.2d 51 (Mo. 1967).

III

The trial court erred in overruling Terrance's objections to evidence of the details of Stephen Rainwater's autopsy because it was irrelevant to any issue at the sentencing retrial for Debbie Rainwater's murder and violated Terrance's rights to due process, fair trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV, in that although the fact that Terrance murdered Stephen was relevant, the state proved that fact by having the court take judicial notice of Terrance's conviction for murdering Stephan; the autopsy evidence did not prove Terrance murdered Stephan during Debbie's murder or any other statutory aggravator pertaining to Debbie's murder; and the gruesome, violent nature of this evidence of a crime for which Terrance had already been tried and sentenced served only to inflame the jury's passions and prejudice Terrance.

Anderson v. State, 196 S.W.3d 28 (2006);

State v. Anderson, 79 S.W.3d 420 (Mo.banc 2002);

State v. Walkup, 220 S.W.3d 748 (Mo.banc 2007);

*State v. Anderson***,** 76 S.W.3d 275, 276 (Mo.banc 2002)

IV

The trial court erred in overruling Terrance's objections to §565.030.4(3) and Instruction 8, MAI-CR3d 313.44A, and refusing to submit Instruction C or D

because §565.030.4(3) and Instruction 8 imposed on Terrance the burden of proving himself non death-eligible thus violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VI, VIII, and XIV, in that under *Apprendi v. New Jersey*, 500 U.S. 466 (2000), and progeny, the state bears the burden of proving beyond a reasonable doubt all sentence-enhancing facts, but in *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo.banc 2008), this Court has that §565.030.4(3), which provides the sentence must be life if the jury concludes mitigation outweighs aggravation, places on the defendant the burden of proving to a unanimous jury that mitigation outweighs aggravation to obtain a life sentence; Terrance was prejudiced because unlike Instruction 8, Instructions C and D correctly placed on the state the burden of proof of this sentence-enhancing fact.

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

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

Bullington v. Missouri, 451 U.S. 430 (1981);

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

V

The trial court erred in overruling Terrance's objections to §565.030.4; oral instruction MAI-CR3d 300.03A; written Instructions 3, 7, 8, and 10 (MAI-CR3d

313.30A, 313.41A, 313.44A, and 313,48A); and refusing his modified-MAI, alternative instructions A, F, B, C, D, E, and F because the statute's and instructions' failure to require the state to prove, and the jury to find, beyond a reasonable doubt *all* facts required to enhance punishment for first-degree murder from life imprisonment to death violated his rights to fundamental fairness, due process, jury trial, and reliable sentencing, U.S. Const., Amend's V, VI, VIII, and XIV, in that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and progeny, and the Sixth, Eighth, and Fourteenth Amendments, require a jury to find beyond a reasonable doubt those facts necessary to enhance punishment meaning the state must prove to the jury beyond a reasonable doubt the sentence-enhancing steps of §565.030.4(2) and (3) – whether the aggravation warrants death and whether the mitigation is insufficient to outweigh the aggravation – and the jury must be so instructed.

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

State v. Wakefield, 921 A.2d 954 (N.J. 2007);

Dumas v. State, 803 N.E.2d 1113 (Ind. 2004).

VI

The trial court erred in overruling Terrance's motion to quash the jury panel because jury selection procedures in Cape Girardeau County "systematically" exclude African-Americans resulting, now and historically, in disproportionately

low numbers of African-American jurors or, as in the present case, no African-American jurors and this violated Terrance's rights to due process, equal protection, trial by jury selected from a fair cross-section of the community, and subjected him to arbitrary and capricious imposition of a death sentence, and violated the County's African-American citizens' equal protection rights, U.S. Const., Amend's V, VI, VIII, XIV, in that the venire was virtually all-white and the petit jury was all-white; there is a history of all-white Cape Girardeau juries; the venire and petit jury did not reflect the County's racial makeup: the 2005 U.S. census shows African-Americans comprise 5.9 percent of the population, but less than 2 percent of the venire were African-American; §494.430, RSMo., allowed the judge, *ex parte*, to excuse jurors without documenting the numbers and races of those excused, not excused, and the reasons for being excused or not; and an all-white petit jury sentenced Terrance, an African-American, to death for killing a white woman.

Taylor v. Louisiana, 419 U.S. 522 (1975);

Duren v. Missouri, 439 U.S. 357 (1979);

United States v. Jackman, 46 F.3d 1240 (2nd Cir. 1995);

Holland v. Illinois, 493 U.S. 474 (1990.

VII

The trial court erred in overruling Terrance's objections to Instructions 7 (MAI-CR3d 313.41A) and 8 (MAI-CR3d 313.44A) and in refusing his Instruction B because Instructions 7 and 8 failed to provide any direction to the jury regarding the burden of proof of non-statutory aggravating evidence and violated Terrance's rights to fundamental fairness, due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV, in that under *State v. Clark*, 197 S.W.3d 598 (Mo.banc 2006), at a minimum, the state had the burden of proving non-statutory aggravating evidence by at least a preponderance of the evidence, Instructions 7 and 8 said nothing about the state's burden of proof, and Instruction B instructed the jury that the state had the burden of proving the aggravating evidence warranted death.

State v. Clark, 197 S.W.3d 598 (Mo.banc 2006);

State v. Fassero, 256 S.W.3d 109 (Mo.banc 2008);

State v. Jaco, 156 S.W.3d 775 (2005);

United States v. Watts, 519 U.S. 148 (1997).

VIII

The trial court erred in overruling Terrance's objections and request for a mistrial made when the prosecutor argued that "mercy is for the weak and the innocent…" and that sending Terrance back to prison was "doing nothing" and plainly erred in allowing the prosecutor to argue that "for the ultimate crime, not once, but twice, two ultimate crimes, that the ultimate punishment is necessary and proper" because these arguments were contrary to the law and facts of record and violated Terrance's rights to fundamental fairness, due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV, and were manifestly unjust, Rule 30.20, in that they misled the jury about "mercy" and, contrary to the law, told the jury to sentence Terrance to death to punish him for both Debbie's murder and the uncharged murder of Stephen.

State v. Blakeburn, 859 S.W.2d 170 (Mo. App.W.D. 1993);

State v. Burnfin, 771 S.W.2d 908 (Mo.App.W.D. 1989);

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

State v. Peeples, 2009 WL 1451334 (Mo.App.E.D. 2009).

ARGUMENT

I

The trial court erred in overruling Terrance's objections to Instruction 10,

sentencing verdict director MAI-CR3d-313.48A, because Instruction 10's omission of language concerning the mitigating evidence prevented the jury from using and giving effect to the mitigating evidence in determining Terrance's sentence thereby violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV; §565.030.4(3)[5]; MAI-CR3d 313.48A, in that this sentencing "verdict director" erroneously failed to include required language instructing the jury that if it "decide[d] that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment" the verdict must be life imprisonment which prejudiced Terrance by excluding evidence crucial to his defense against a death sentence.

In a capital case, the penalty phase sentencing verdict-director, MAI-CR3d 313.48A,[6] provides the jury with directions regarding the use of aggravating and mitigating evidence in returning a sentencing verdict. *See* A43-46. MAI-CR3d 313.48A directs the jury that if it determines the mitigating circumstances outweigh the aggravating circumstances, the jury "must" return a verdict of life imprisonment. *Id*. MAI-CR3d 313.48A further directs the jury what to do if it does not find that the mitigation outweighs the aggravation and is unable to agree on punishment: the jury is

[5] Unless otherwise noted, all statutory references are to RSMo. 1994.

[6] This version applies because the offense charged occurred prior to August 28, 2001. *See* Note 1, Notes on Use to MAI-CR3d 313.48A.

not told to return a verdict of death; the instruction directs the jury to return a verdict stating it is unable to determine punishment and listing the statutory aggravators found. *Id*.

In the present case, however, Instruction 10 omitted all mention of mitigating circumstances. Despite repeated objections from defense counsel pointing out this omission, the trial court declined to change its instructions to submit a correct sentencing verdict-director.

At the instruction conference, while objecting to the state's sentencing verdict director, Instruction 10, defense counsel realized it failed to mention "the mitigating step as it's written in the statute" (T874). Counsel pointed out, "this instruction doesn't even really include the mitigating step as it's written in the statute, and we feel that it should be included in the instruction more clearly" (T874). Before the instruction conference ended, counsel again addressed Instruction 10's problematic omissions:

> [A]s to the paragraph on the first page of this instruction, it's the last paragraph on the page...
>
> This paragraph should additionally, to comply with the statute, have an additional requirement that if the jury finds that evidence in mitigation of punishment outweighs evidence in aggravation of punishment unanimously, then the verdict should be life without probation and parole, and that is not mentioned in the MAI version of the instruction anywhere. I think it should be included in this paragraph or at least included somewhere in this instruction, and I just don't think I was clear enough about that, and I just wanted to make it very

clear."

(T879-80). The court rejected "changing any of [its] instructions...." (T880)[7]

Instruction 10 entirely omitted MAI-CR3d 313.48A's directions to the jury concerning the use of mitigating evidence (LF169-70; A22-A23). This effectively eliminated all mention of the penalty phase defense: the evidence mitigating the state's case for death. Submitting this erroneous sentencing verdict-director to the jury was prejudicial error, and the judgment of the trial court must be reversed.

"On a claim of instructional error, '[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant.'" *State v. Zink*, 181 S.W.3d 66, 74 (Mo. 2005); Rule 28.02(f).

"'Prejudice, as that term is used in connection with erroneous jury instructions, is defined as the potential for misleading or confusing the jury.'" *State v. Green*, 812 S.W.2d 779, 787 (Mo.App.W.D. 1991) citing *State v. Livingston*, 801 S.W.2d 344, 349 (Mo.banc 1990). Submission of incorrect MAI-CR3d instructions to a jury is "error" with "the error's prejudicial effect to be judicially determined...." Rules 28.02(c) and (f). Instruction 10 not only violated Rules 28.02(c) and (f), it violated the Eighth Amendment by eliminating directions for the jury's use of mitigating evidence.

Trial court error in failing to "instruct the jury in compliance with MAI-CR instructions and applicable notes ... creates a presumption of prejudice." *State v. Davenport***,** 174 S.W.3d 666, 668 (Mo.App. S.D. 2005) (failure to submit requested

[7] Terrance preserved this ruling in his motion for new trial (LF190-94).

converse was reversible error).

"In every criminal case, it is the trial court's duty to instruct the jury in writing 'upon all questions of law arising in the case that are necessary for their information in giving the verdict.'" *State v. Langston*, 229 S.W.3d 289, 295 (Mo.App.S.D. 2007) quoting Rule 28**.**02(a).

"[A]n instruction that purports to cover the whole case but ignores a defense supported by the evidence is erroneous and constitutes reversible error." *State v. Foster*, 631 S.W.2d 672, 675 (Mo.App.E.D. 1982). "[T]he error is not cured by a separate instruction covering the defense. *State v. McClure*, 612 S.W.2d 314, 317 (Mo.App.S.D. 1982).

The Southern District's treatment of a similar error in *McClure* is instructive. In *McClure*, the appellant argued that the verdict-director improperly omitted a cross-reference to his "'special negative defense instruction'" on intoxication. *Id*. at 316. The state agreed that the Notes on Use required a reference to this defense instruction in the verdict-director but argued "there was no prejudice to [appellant] as the intoxication defense instruction cross-referenced the verdict director." *Id*. at 316-17. The Southern District disagreed: "If the reference in [the defense instruction] was sufficient, then there would be no reason to require a reference in the verdict director to [the defense instruction]." *Id*. at 317. The Court reasoned that this Court found it necessary for the verdict-director to include a cross-reference to the defense instruction "to insure that the jury would follow 'special negative defense' instructions." *Id*. The Court concluded that for this reason, "omitting the cross-reference might have been prejudicial" and

there was no reason to find it was not prejudicial. *Id*.

At the penalty phase of a capital case, mitigation evidence is often a primary defense to the state's case for death. In the present case, it was the only defense. In a capital case the "qualitative difference between death and other penalties" calls for "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

As the *McClure* Court explained, MAI instructions are not only presumptively correct: it must also be assumed that this Court had reasons for what is included in a particular instruction. MAI-CR3d 313.48A requires more than a mere cross-reference: it requires inclusion of the language and directives of MAI-CR3d 313.44A. With regard to the inclusion of the language of §565.030.4(3)'s weighing step in MAI-CR3d 313.48A, the *McClure* explanation also holds true: the language of the weighing step – as well as language from the other death-eligibility steps of §565.030.4 – was included to make sure the jurors did not overlook it.

It is a fair assumption that the language of §565.030.4 – rather than simply a reference to other instructions – was included in MAI-CR3d 313.48A because each of these steps is critical and, as *McClure* explained, putting the language of the step right into the sentencing verdict-director was the only way to insure that a jury would not overlook it. If an instruction omitting a cross-reference to a defense instruction is reversible error in a non-capital felony case, then it is surely reversible error in a capital case to omit from the sentencing verdict-director language expressly setting out the defense.

Insuring that the jurors will not overlook the need to consider whether the mitigation outweighs the aggravation is precisely the kind of heightened reliability that the Eighth Amendment requires when a sentence of death is involved. There is nothing to show that omission of the requisite language concerning weighing the mitigation against the aggravation did not prejudice Terrance in this case.

Omission of the defense of mitigation from the sentencing verdict-director violated the Eighth Amendment's requirement that a jury *must* consider all "relevant mitigating evidence." *Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989). Errors preventing a jury "from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence," violate the Eighth Amendment. *Brewer v. Quarterman*, 550 U.S. 286, 288-89 (2007). Instruction 10 was prejudicially and improperly weighted toward death because it contained only directions for the use of aggravating evidence.

A similar error involving omission of language directing the jurors in the consideration and use of mitigating evidence in a capital case was before the Court in *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002). In *Deck*, language required by MAI-CR3d 313.44A was omitted; the complete instruction is reproduced below with the omitted paragraphs in bold:

> [I]f you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the

facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.

You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment.

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

Id. at 423; emphasis added.

In determining the prejudicial effect of the omissions, the *Deck* Court noted that "the penalty of death cannot be imposed in an arbitrary and capricious manner." *Id*. citing *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The legislature channeled the jury's discretion by requiring consideration of both aggravating and mitigating circumstances. *Id*.

The Court explained the role of the penalty phase instructions in avoiding arbitrary and capricious imposition of death sentences: "[A] series of jury instructions [was] promulgated that guide the jury through these critical determinations." *Id*. The proper use of the MAI instructions was "particularly important," the Court said, when "the issue is the consideration of mitigating circumstances in a death penalty case, for the

jury is never required to impose the death penalty, no matter how egregious the crime." *Id*.

The correct use of the MAI instructions is also critical because the "significant constitutional difference between the death penalty and lesser punishments'" mandates greater "need for reliability in the determination that death is the appropriate punishment in a specific case." *Id*. citing *Beck v. Alabama*, 447 U.S. 625, 637-38, n.13 (1980).

The error in this case is much like the error in *Deck* and also requires reversal. Like the omissions in *Deck*, erroneous Instruction 10, omitting all mention of mitigating circumstances and evidence, prejudiced Terrance. Instruction 10 prejudiced Terrance because it likely misled and confused the jury by failing to mention mitigating evidence. *Green*, *supra*. Like *Penry* and *Brewer*, it prevented the jury from giving meaningful effect to mitigating evidence. In fact, Instruction 10 entirely cut out Terrance's defense – the mitigation – to the state's case for death.

In mentioning only aggravating evidence, and omitting all reference to mitigating evidence, Instruction 10 tilted the sentencing proceedings in favor of death. For this reason and all of the foregoing reasons, the error in Instruction 10 violated Terrance's rights to due process, fair jury trial, and reliable sentencing. The judgment of the circuit court must be reversed and Terrance sentenced to life imprisonment or, alternatively, the cause remanded for further proceedings.

II

The trial court erred in overruling Terrance's motions to dismiss based on double jeopardy and to quash the information or preclude death and in sentencing him to death because under *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the constitutional right to due process, freedom from double jeopardy, notice of the offense charged, jury trial, and reliable sentencing, U.S. Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1 §§ 10, 17, 18(a), 19, and 21, the court lacked authority and jurisdiction to retry the penalty phase and sentence Terrance to death in that no statutory aggravating circumstances were pled in the information charging Terrance with Debbie's murder, so he was only charged with, and convicted of, unaggravated first-degree murder – a lesser included offense of aggravated first-degree murder punishable only by life imprisonment; the sentencing retrial placed Terrance in jeopardy twice for the same offense; imposing a death sentence punished him for the greater, aggravated offense although he was convicted only of the lesser, unaggravated offense.[8]

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[8] Terrance timely raised these claims in pretrial motions which the trial court heard and denied (LF87-119,130-39;T38-39,40-41,52-53). Terrance preserved those rulings in his motion for new trial (LF209, 212-14). An appellate court reviews questions of double jeopardy, which are questions of law, *de novo*, and "need not defer to the trial

In *Apprendi v. New Jersey*, *supra*, the Supreme Court held that a factual determination authorizing an increase in the maximum prison sentence must be "made by a jury based on proof beyond a reasonable doubt." In *Ring*, *supra*, the Court applied *Apprendi* to a capital case and held that the factual finding that a statutory aggravator exists must be made by a jury "[b]ecause *Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense...,'*" *Id*. at 609 citing *Apprendi*, 530 U.S. at 494, n.19; emphasis added.

Subsequently, in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), the Supreme Court applied *Ring* to the Fifth Amendment Double Jeopardy Clause[9] and held that for both Sixth Amendment jury trial purposes and Fifth Amendment Double Jeopardy purposes, first degree murder with "one or more aggravating circumstances" is a greater offense of unaggravated first degree murder; unaggravated first-degree murder

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court's determination of law." *State v. Kamaka*, 277 S.W.3d 807, 810 (Mo.App.W.D. 2009).

[9] The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161,165 (1977) citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown*, 432 U.S. at 169.

is a lesser included offense of first-degree aggravated murder. 537 U.S. at 111-12. Again, the Court explained that the underlying principle is that "aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a ***greater offense***." *Id*. at 111 citing *Ring*; emphasis added in *Sattazahn*.

In Missouri, a defendant convicted of first-degree murder may not be death-sentenced unless a jury additionally finds, beyond a reasonable doubt, at least one statutory aggravator. Section 565.030.4(2), RSMo. (Supp. 2007); *see e.g*., *Whitfield I* and *II*, *supra*. Missouri's statutory aggravators, like Arizona's, are facts required to increase the punishment for a defendant convicted of first-degree murder from life imprisonment to death. Missouri's statutory aggravators thus have precisely the same effect as Arizona's and as the Pennsylvania statutory aggravators described in *Sattazahn*: they serve as "the functional equivalent of an element of a greater offense…." *Ring*, 536 U.S. at 605; *Sattazahn*, 537 U.S. at 111.

"An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224,228 (1998); *State v. Barnes*, 942 S.W.2d 362, 367 (Mo. banc 1997). "[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978). A person may not be convicted of a crime not charged unless it is a lesser included offense. *State v. Parkhurst*, 845 S.W.2d 31,35 (Mo.banc 1992); *State v. Billingsley*, 465 S.W.2d 569, 570 (Mo.1971).

'The constitutional provision that an accused has the right "to demand the nature and cause of accusation"(Art. I, § 18(a)) requires an indictment or information to state all the essential elements of the offense.' *State v. Elgin*, 391 S.W.2d 341, 343 (Mo. 1965) citing *State v. Schultz*, 295 S.W. 535, 536 (Mo. 1927) ("It is the constitutional right of the accused to be informed as to the nature and cause of the accusation against him, and he is not so informed if the indictment or information lacks any of the essential elements of the offense sought to be charged."). "The test for the sufficiency of an indictment or information is whether it contains all of the elements of the offense and clearly apprises the defendant of the facts constituting the offense." *Barnes*, 942 S.W.2d at 367.

To charge a "greater offense" with aggravating elements, the aggravating elements must be alleged in the information or indictment. *State v. Badakhsan*, 721 S.W.2d 18, 20 (Mo.App.E.D. 1986). This is so even if the additional element "only goes to punishment." *Id*. citing *State v. Nolan,* 418 S.W.2d 51, 54-55 (Mo. 1967). *See also State v. Jess*, 184 P.3d 133, 150 (Haw. 2008) ("[A] charging instrument, be it an indictment, complaint, or information, must include all 'allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed.'").

Although §565.020 ostensibly establishes a single offense of first-degree murder punishable by either life imprisonment or death, under *Ring, Apprendi, Jones v. United States*, 526 U.S. 227 (1999), and *Whitfield I* and *II*, the combined effect of §§565.020, 565.030.4, and 565.032.2 is to create two kinds of first-degree murder: *unaggravated*

first-degree murder which does not require proof of a statutory aggravating circumstance, and the greater offense of *aggravated* first-degree murder which requires the additional finding of fact, and includes as an additional element, at least one statutory aggravator.

In the instant case, the state did not include any statutory aggravating circumstances in the information (LF35-38). The offense charged was unaggravated first degree murder because the pleading lacked the element – at least one of Missouri's statutory aggravating circumstances – necessary to charge the greater offense of aggravated first-degree murder.

Therefore, at the first trial, the offense Terrance was charged with, and convicted of, was unaggravated first-degree murder. On Terrance's appeal from that conviction, this Court set aside the death sentence imposed for Debbie's murder, but affirmed his conviction. He thus remained convicted of unaggravated first-degree murder. *Cf*. *Sattazahn*, *supra*, 537 U.S. at 113.

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court clarified the meaning of "maximum sentence." Blakely pled guilty in state court to the class B felony of second-degree kidnapping involving domestic-violence and use of a firearm. *Id*. at 298-99. A Washington statute provided that the punishment for conviction of a class B felony was not to exceed a term of ten years (120 months), but a separate statute limited punishment to a "standard range" of 49 to 53 months. *Id*. at 299. A judge could impose an "exceptional sentence" *greater* than the standard range, only if based on statutory aggravating "'factors other than those which are used in computing

the standard range sentence for the offense.'" *Id*.

Finding a statutory aggravating factor, the judge sentenced Blakely to 90 months – 3 years more than the "standard" range maximum. *Id*. at 300. Blakely objected that this denied his Sixth Amendment "right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Id*. at 301. The state courts denied relief; the Supreme Court granted review and held the *Apprendi* rule applied. *Id*.

The state argued that the "statutory maximum" sentence was ten years (120 months), so Blakely's 90-month sentence was within the statutory range for his offense. *Id*. at 303. There was thus no "*Apprendi* violation because the relevant 'statutory maximum' is not [the standard range maximum of] 53 months, but the 10-year maximum for class B felonies ... [which] no exceptional sentence may exceed...." *Id*.

The Court disagreed: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Id*. citing *Ring* at 602. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id*.

Blakely is significant because this Court has previously denied claims similar to those raised in this motion based on reasoning identical to the state's in *Blakely*. In denying such claims, the Missouri Supreme Court reasoned, "[t]he omission of statutory aggravators from an indictment charging the defendant with first-degree

murder does not deprive the sentencing court of jurisdiction to impose the death penalty [because] *Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty did not have the effect of increasing the maximum penalty for the offense*." *State v. Deck*, 136 S.W.3d 481,490 (Mo.banc 2004) (emphasis added) citing *State v. Taylor*, 134 S.W.3d 21,31 (Mo.banc 2004); *State v. Cole*, 71 S.W.3d 163,171 (Mo.banc 2002); *State v. Tisius*, 92 S.W.3d 751,766 (Mo.banc 2002). The foregoing opinions are in conflict with *Blakely*.

Under *Blakely*, *Sattazahn*, *Ring*, and *Apprendi*, the maximum sentence authorized for unaggravated first-degree murder is life imprisonment. Because no statutory aggravating circumstance was ever alleged in the information, both the death sentence imposed upon Terrance at the first trial, and the death sentence imposed on him at retrial, exceeded the authorized maximum punishment.

For the foregoing reasons the Court must find that subjecting Terrance to a second trial for the same offense violated his right not to be twice placed in jeopardy. The Court must find that because the information did not allege any statutory aggravating circumstances, Terrance was charged with the lesser offense of unaggravated first-degree murder and the death sentence imposed on him was unauthorized. Terrance must be resentenced to the only punishment authorized for the charged crime of unaggravated first-degree murder: life imprisonment without probation or parole.

III

The trial court erred in overruling Terrance's objections to evidence of the details of Stephen Rainwater's autopsy because it was irrelevant to any issue at the sentencing retrial for Debbie Rainwater's murder and violated Terrance's rights to due process, fair trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV, in that although the fact that Terrance murdered Stephen was relevant, the state proved that fact by having the court take judicial notice of Terrance's conviction for murdering Stephan; the autopsy evidence did not prove Terrance murdered Stephan during Debbie's murder or any other statutory aggravator pertaining to Debbie's murder; and the gruesome, violent nature of this evidence of a crime for which Terrance had already been tried and sentenced served only to inflame the jury's passions and prejudice Terrance.

Terrance timely objected to admission of evidence concerning the details of Dr. Costin's autopsy of Stephen on grounds that it was not relevant to the current question being tried: Terrance's sentence for Debbie's murder (T601). Counsel noted, "they can consider the fact he was killed at the same time ... but to give details of an autopsy which is extremely graphic, ... [is] overly prejudicial and not relevant to this case"(T601).

Judge Syler observed, "I don't know where we're going with this yet, Mr. Ahsens," and Mr. Ahsens replied, "I think that the nature and cause of death is relevant. I have to establish that he was murdered as well. It's [a] statutory aggravating circumstance"

(T601-02). Judge Syler overruled the objection but allowed it to continue (T602). Terrance preserved this ruling in his motion for new trial (LF219-20).

Before resting his case, in front of the jury, to prove that Terrance Anderson had murdered Stephen Rainwater, the prosecutor asked the trial court to "take judicial notice of the records of this Court indicating that the defendant has also been convicted of the murder of Stephen Rainwater" (T729-30). The trial court did so (T730).

The evidence of Stephen's autopsy, as elicited by the prosecutor, included the following:

Dr. Costin first described the injuries he saw during his initial examination of Stephen Rainwater's body (T602). "The most apparent and obvious ... was a bullet entrance wound above his left eyebrow" (T602). Dr. Costin testified he could not determine the extent of the damage without "open[ing] up the cranium to examine the internal wound" (T602). There were also "some fractures of [Stephen's] skull as related by palpation of the skull" (T602-03).

Upon opening Stephen's head, Dr. Costin found that from the bullet entrance wound, the bullet "had gone from the anterior above his eyebrow to posterior, gone through the bony part of the skull, but did not exit the skin" (T603). The bullet lay just below the skin's surface and Dr. Costin removed it for evidence (T603).

Dr. Costin found Stephen "also had comminuted fractures of the skull" (T603). He explained:

> The concave, front of the skull on the inside was concave. The bullet enters the skull. Then it blows out the bone on the other side.

(T603).

Dr. Costin testified that the bullet had fractured the skull in the front and in the back (T604). Stephen's skull "also had comminuted fractures that extend from those entrance and exit wounds ... fracture lines extend from the entrance wound and the exit wound (T604).

Dr. Costin described Stephen's the internal brain damage:

> [There was] a high velocity bullet track through his frontal lobe and peritoneal lobe, and that would have caused extensive damage to his brain. It would have rendered him immediately uncapable of doing anything. He would, with that type of wound, he would have immediately collapsed. He may have survived for a very short interval of time. I can't say that that would have resulted in an instantaneous death.

(T605). The bullet wound through Stephen's brain caused his death (T605).

In *Anderson v. State*, 196 S.W.3d 28 (2006), this Court reversed the "judgment as to the penalty phase concerning the killing of Debbie Rainwater" and "remanded" to the circuit court. *Id*., at 42. By the terms of the remand, the retrial was limited to determining the penalty to be imposed on Terrance Anderson for *Debbie Rainwater's* murder. *Id*.

The matter at issue in this penalty phase retrial – what was the appropriate punishment for Terrance for Debbie Rainwater's murder – established the parameters of relevance in this retrial. *Dawson v. Delaware*, 503 U.S. 159 (1993) (evidence must be relevant to be admissible, and relevance is determined by the matters at issue). In

Missouri evidence must be both logically and legally relevant to be admissible. *State v. Anderson***,** 76 S.W.3d 275, 276 (Mo.banc 2002). Evidence tending "to make the existence of a material fact more or less probable" is logically relevant. *Id*. "Legal relevance weighs the probative value of the evidence against its costs-unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id*. Even if logically relevant, evidence must be "excluded if its costs outweigh its benefits." *Id*.

"'On questions of relevance, the trial court certainly has discretion, but its discretion is bounded by the principle that the court's rulings will be overturned if they are 'clearly against the logic of the circumstances.'" *State v. Walkup*, 220 S.W.3d 748, 757 (Mo.banc 2007). "Evidentiary decisions of the trial court as to relevance are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial." *Id*.

Under the foregoing rules, evidence proving that Terrance murdered Stephen Rainwater was, potentially, logically relevant because it tended to prove the first and third statutory aggravating circumstances: "Whether the murder of Deborah Rainwater was committed while the defendant was engaged in the commission of another unlawful homicide of Stephen Rainwater" and "Whether the ... the defendant killed Deborah Rainwater as part of the defendant's plan to kill more than one person..." (LF165).

But the autopsy evidence was neither *necessary* to prove, nor *probative* of, this fact. That Terrance murdered Stephen was established at the first trial and affirmed on

appeal. *State v. Anderson*, 79 S.W.3d 420,427 (Mo.banc 2002). In this sentencing retrial, the prosecutor proved that Terrance murdered Stephen by having the trial court take judicial notice of Terrance's conviction for Stephen's murder (T729-30).

The autopsy evidence could show that someone shot and killed Stephen – it could not and did not prove that Terrance was the shooter or that he murdered Stephen. It was therefore logically irrelevant and inadmissible.

Even if this Court should disagree and somehow find this evidence probative and logically relevant, it is legally irrelevant and inadmissible because the prejudicial effect of such graphically violent material outweighed any probative value. This is particularly true since, as explained above, the prosecutor had a far less prejudicial, less costly, means of establishing the fact that Terrance murdered Stephen: Terrance's prior conviction for murdering Stephen. *Anderson*, *supra*.

Introducing the gory evidence of Stephen's autopsy served only to expose the jury to the gruesome details of Stephen's injuries. The prosecutor's use of this inflammatory evidence served only to prejudice the jury against Terrance and arouse their emotions against him. If there was any probative value to this evidence, it was greatly outweighed by its prejudicial effect.

"[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' *Zant v. Stephens*, 402 U.S. 862, 884-85 (1983). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be,

based on reason rather than caprice or emotion." *Id*. at 885.

Introduction of the evidence of Stephen's autopsy was at the cost of a fair trial. For this and the foregoing reasons, the Court should find that this evidence was legally irrelevant, inadmissible, and requires reversal.

IV

The trial court erred in overruling Terrance's objections to §565.030.4(3) and Instruction 8, MAI-CR3d 313.44A, and refusing to submit Instruction C or D because §565.030.4(3) and Instruction 8 imposed on Terrance the burden of proving himself non death-eligible thus violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VI, VIII, and XIV, in that under *Apprendi v. New Jersey, supra,* and progeny, the state bears the burden of proving beyond a reasonable doubt all sentence-enhancing facts, but in *State v. McLaughlin,* 265 S.W.3d 257, 268 (Mo.banc 2008), this Court has that §565.030.4(3), which provides the sentence must be life if the jury concludes mitigation outweighs aggravation, places on the defendant the burden of proving to a unanimous jury that mitigation outweighs aggravation to obtain a life sentence; Terrance was prejudiced because unlike Instruction 8, Instructions C and D correctly placed on the state the burden of proof of this sentence-enhancing fact.[10]

Section 565.030.4's three subsections – "steps" – provide circumstances under

[10] Terrance acknowledges this Court has denied similar claims, *e.g.*, *State v. Johnson*, No. SC89168 (Mo.banc May 26, 2009) slip op. at 39-40, but requests review because this point raises a federal constitutional issue not yet ruled on by the United States Supreme Court.

which the punishment for first-degree murder "shall" be life imprisonment: "(1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances... (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances... warrants imposing the death sentence... (3) If the trier concludes that there is evidence in mitigation of punishment... which is sufficient to outweigh the evidence in aggravation of punishment found by the trier...." Each of these steps requires findings of fact. *State v. Whitfield*, 107 S.W.3d 253, 256, 261 (Mo.banc 2003) ("*Whitfield II*").

The phrasing of §565.030.4 as to each of the "steps" of subsections (1), (2), and (3) establishes the factual finding that, if made, will require a sentence of life. Thus, for (1), a sentence of life is required if the jury does not find beyond a reasonable doubt at least one statutory aggravator. For (2), a sentence of life is required if the jury does not find the aggravation warrants death. For (3), a sentence of life is required if the jury finds the mitigation outweighs the aggravation found by the trier. If any one of these facts is found, the defendant must be sentenced to life.

It logically follows that the jury must find the converse at ***all*** of these steps to impose a death sentence (because any one of the steps found for life will require a life sentence). For a death sentence, then, the jury must (1) find at least one statutory aggravator, (2) find the aggravation warrants death, and (3) find the mitigation is not sufficient to outweigh the aggravation.

This Court's previous holdings were consistent with this logic. Previously, this

Court held that "[t]he jury can impose the death penalty only under certain conditions.... [*T]he jury must unanimously find that* ***mitigating circumstances weigh less than aggravating circumstances****....*

State v. Whitfield, 837 S.W.2d 503, 515 (Mo.banc 1992) ("*Whitfield I*"); emphasis added; *Whitfield II* at 259 citing *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) ("Colorado's death penalty statute, like Missouri's, requires... [that] mitigating factors must not outweigh the aggravating factors" for a sentence of death to be imposed.).

More recently, however, this Court has held that §565.030.4(3) requires the defendant to bear the burden of proving the mitigation outweighs the aggravation to obtain a sentence of life imprisonment and both this statute and MAI-CR3d 314.44[11]. *See, e.g., State v. Johnson, supra,* citing *State v. Taylor*, 134 S.W.3d 21, 30 (Mo.banc 2004); *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo.banc 2008) ("under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence."). These recent cases are inconsistent with the United States Supreme Court's Sixth, Eighth, and Fourteenth Amendment jurisprudence which requires the state to bear the burden of proving all facts necessary for a sentence of death. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101,117 (2003), O'Connor, J., concurring in part and concurring in judgment citing *Poland v. Arizona*, 476 U.S. 147,155 (1986) ("A defendant is 'acquitted' of the death penalty for purposes of double jeopardy when the sentencer 'decide[s] that the

[11] 313.44A is an earlier version of 314.44 and similar in all relevant respects.

prosecution has not proved its case that the death penalty is appropriate'"); *Poland*, 476 U.S. at 154 ("the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners"); *Bullington v. Missouri*, 451 U.S. 430,432 (1981) ("the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed...").

Apprendi v. New Jersey, *supra*, teaches that it is the *effect* of statutory provisions that matters – not the form. *Id*. at 494; *see also Ring v. Arizona*, 536 U.S. 584, 604 (2002); Although the "form" of §565.030.4(3) is to establish the fact that must be found for a sentence of life, this overlooks the "effect" of that provision.

The effect of §565.030.4(3) is that the findings of this step (and the other steps of §565.030.4 determine whether the sentence for a person convicted of first-degree murder will be enhanced to death. Unless the requisite findings of §565.030.4 are made, a sentence of life imprisonment is the only punishment authorized for a person convicted of first degree murder. Thus, to comply with *Apprendi* and progeny, and the Eighth and Fourteenth Amendment's requirements that the state bear the burden of proving its "case" for death, Missouri juries must be instructed that the state bears the burden of proof at the §565.030.4(3) weighing step.

Instruction 8 was erroneous because it misplaced the sentencing burden of proof: it required Terrance to prove he was eligible for a life sentence by proving the mitigation outweighed the aggravation. Instruction 8 violated his Sixth, Eighth, and Fourteenth Amendment rights to due process, jury trial, reliable non arbitrary sentencing rights by

diminishing the state's obligation to prove the sentence of death it was seeking. It was the sentencing equivalent of shifting the burden of proving an element of the offense at guilt phase and requiring the defendant to show it did not exist.

Terrance's Instructions C and D each provided constitutionally correct alternatives to Instruction 8 (LF174-75,180-81; A27-A28, A33-A34). Instruction C told the jury that "[t]he burden of proving beyond a reasonable doubt that the mitigating circumstances weigh less than aggravating circumstances that you have found is on the state" (LF174; A27). Instruction D told the jury that "[t]he state bears the burden of proving beyond a reasonable doubt that the aggravating circumstances that you have unanimously found outweigh the mitigating circumstances" (LF180; A330. Instructions C and D were equally valid methods of instructing the jury on the §565.030.4(3) weighing step, and the trial court shuld have submitted one or the other in lieu of Instruction 8.

For the foregoing reasons, the trial court erred in overruling Terrance's objections to §565.030.4 and Instruction 8 and in refusing to submit either Instruction C or D. Terrance was prejudiced because had his jury been correctly instructed, the result might very well have been a sentence of life imprisonment. His sentence of death must be reversed and he must be resentenced to life imprisonment or, alternatively, the cause remanded for further proceedings.

V

The trial court erred in overruling Terrance's objections to §565.030.4; oral instruction MAI-CR3d 300.03A; written Instructions 3, 7, 8, and 10 (MAI-CR3d 313.30A, 313.41A, 313.44A, and 313,48A); and refusing his modified-MAI, alternative instructions A, F, B, C, D, E, and F because the statute's and instructions' failure to require the state to prove, and the jury to find, beyond a reasonable doubt *all* facts required to enhance punishment for first-degree murder from life imprisonment to death violated his rights to fundamental fairness, due process, jury trial, and reliable sentencing, U.S. Const., Amend's V, VI, VIII, and XIV, in that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and progeny, and the Sixth, Eighth, and Fourteenth Amendments, require a jury to find beyond a reasonable doubt those facts necessary to enhance punishment meaning the state must prove to the jury beyond a reasonable doubt the sentence-enhancing steps of §565.030.4(2) and (3) – whether the aggravation warrants death and whether the mitigation is insufficient to outweigh the aggravation – and the jury must be so instructed.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that the Sixth Amendment right to a jury trial requires all facts "that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved [by the state] beyond a reasonable doubt." *Id*. at 476. The *Apprendi* rule

incorporates two requirements. A defendant is entitled to have a jury make the findings of fact necessary to increase punishment, and the state must prove beyond a reasonable doubt those facts necessary to increase punishment beyond the statutory maximum. *Id.* 530 U.S. at 490.

Missouri has structured its capital sentencing system to require that to enhance the range of punishment from life imprisonment to death, the state must prove more than the existence of a statutory aggravator (App. Br.). The state must also prove that the aggravating evidence warrants death, §565.030.4(2), and that the mitigating circumstances outweigh (or do not weigh less than) the aggravating circumstances, §565.030.4(3).

But the penalty phase instructions submitted in this case required the jury to apply the standard of beyond a reasonable doubt *only* to its findings of statutory aggravating circumstances (LF162,165,166,167169-70).[12] Under *Apprendi*, the failure to require the jury to find the other sentence-enhancing facts beyond a reasonable doubt violated the Sixth Amendment. In contrast, as required by *Apprendi* and the Sixth Amendment, Terrance's proferred instructions, A, B, C, D, E, and F, directed the jury to make all sentence-enhancing findings beyond a reasonable doubt (A25-A41).

Even if only the statutory aggravating circumstances of §565.032.2 are required by the Eighth Amendment to "narrow" the class of defendants eligible for death, the Sixth

[12] "On a claim of instructional error, '[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant.'" *State v. Zink*, 181 S.W.3d 66, 74 (Mo. 2005); Rule 28.02(f).

Amendment still applies to all facts necessary to increase the penalty for an offense. Those facts must, therefore, be found beyond a reasonable doubt.[13] Missouri does not apply the Sixth Amendment or Apprendi to the sentence-enhancing steps of

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[13] Courts have been misled by the Eighth Amendment cases' "eligibility" terminology, which they have transported without analysis into the Sixth Amendment context, assuming that Eighth Amendment "eligibility" means the same thing as "exposure to a higher maximum sentence" under *Apprendi*, *Ring* and the Sixth Amendment. It does not, however. The Eighth Amendment "eligibility"/"narrowing" requirement serves to channel the jury's sentencing discretion, so as to avoid the "arbitrary and capricious" imposition of death that was the concern of a majority of the Justices in *Furman* and satisfy the *Gregg* plurality's concern that the penalty ought to be imposed only for the most heinous of crimes. It thus represents a substantive constitutional dividing line designed (in theory, at least) to separate the worst of the worst from the rest of the worst, and thereby ensure some minimal rationality in capital sentencing. The *Apprendi*/*Ring* "exposure to an increased sentence" doctrine, by contrast, is exclusively statutory: *Apprendi* and *Ring* hold that, once the legislature has made a factual finding the predicate of an increased maximum sentence—regardless of the substantive content of that finding, and regardless of how the statutory scheme itself characterizes the finding—then certain procedural rights attach.

Adam Thurschwell, *After Ring*, 15 Fed. Sent. Rptr. 97, 102-03 (2002).

§565.030.4(2) and (3). Appellant's research indicates there are at least two states that apply *Apprendi* to capital sentencing and hold that other sentence-enhancing facts – not just statutory aggravating circumstances – must be found beyond a reasonable doubt. *See State v. Wakefield*, 921 A.2d 954, 1000 (N.J. 2007) (jury's finding that aggravating factors outweigh mitigating factors must be made beyond a reasonable doubt); *Dumas v. State*, 803 N.E.2d 1113, 1121 (Ind. 2004) ("Like the guilt-determination phase, the penalty phase of a capital trial requires the introduction of evidence with the burden on the State to prove its case beyond a reasonable doubt").

In *Apprendi*, the Court explained the rationale for applying the Sixth Amendment reasonable doubt requirement to all facts necessary to enhance the punishment for an offense:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not-at the moment the State is put to proof of those circumstances-be deprived of protections that have, until that point, unquestionably attached.

Id., 530 U.S. at 484.

This rationale is uniquely applicable to a capital case in which the sentence-enhancing facts truly make the difference between life and death. If ever it were necessary that facts be found beyond a reasonable doubt, it is in a case in which the findings of those facts may lead to a sentence of death.

For the foregoing reasons, it was error to deny Terrance's objections to the state's instructions and refuse his proffered instructions A-F. The trial court's failure to require the sentence-enhancing findings to be made beyond a reasonable doubt prejudiced Terrance. The judgment must be reversed and Terrance sentenced to life imprisonment or, alternatively, the cause must be remanded for further sentencing proceedings.

VI

The trial court erred in overruling Terrance's motion to quash the jury panel because jury selection procedures in Cape Girardeau County "systematically" exclude African-Americans resulting, now and historically, in disproportionately low numbers of African-American jurors or, as in the present case, no African-American jurors and this violated Terrance's rights to due process, equal protection, trial by jury selected from a fair cross-section of the community, and subjected him to arbitrary and capricious imposition of a death sentence, and violated the County's African-American citizens' equal protection rights, U.S. Const., Amend's V, VI, VIII, XIV, in that the venire was virtually all-white and the petit jury was all-white; there is a history of all-white Cape Girardeau juries; the venire and petit jury did not reflect the County's racial makeup: the 2005 U.S. census shows African-Americans comprise 5.9 percent of the population, but less than 2 percent of the venire were African-American; §494.430, RSMo., allowed the judge, *ex parte*, to excuse jurors without documenting the numbers and races of those excused, not excused, and the reasons for being excused or not; and an all-white petit jury sentenced Terrance, an African-American, to death for killing a white woman.

On the day before trial, the trial court informed the attorneys he had "from time to time received calls or e-mails or something from individuals regarding their inability to serve, and some have been excused and some have not" (T45). He gave no information

regarding the race or numbers of jurors "excused" and "not" excused or why some jurors were, and others were not, excused.

Before the jury was sworn, the defense moved to quash the panel "due to the fact that there are no African-Americans on this panel" (T515). Counsel noted that Terrance is African-American and had a Constitutional right to a fair and impartial jury of his peers (T515). The jury chosen would not be a jury of his peers or afford him due process (T515).

Counsel expressed disbelief that the jury panel accurately reflected the African-American population of Cape Girardeau County: only two of the 114[14] persons on the venire were African-American (T515). One was disqualified because she could not consider the death penalty (T515). The other arrived a few minutes late in the morning[15] and was moved to the end of the afternoon panel where he was "not reached" (T516).

Counsel added that "the rights of African-American jurors are not being upheld" because the panel did not reflect "the population makeup of this county" (T516). Counsel argued that denying the motion to quash would violate the equal protection rights of African-American county residents and Terrance's rights to due process, a fair

[14] Per the judge, T516.

[15] Another juror also arrived late and was also instructed to return that afternoon (T517).

and impartial jury representing a cross-section of the community, and the Eighth Amendment (T516).

The trial court noted that this issue was raised in Terrance's first trial and Cape Girardeau had not made any changes "regarding the way the process is conducted" since then (T516). The trial court denied the motion (T517). Terrance preserved this ruling in the motion for new trial (LF210-11). Review of the trial court's denial of the motion to quash is for abuse of discretion. *State v. Thompson*, 985 S.W.2d 779, 789 (Mo.banc 1999).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S.Const., Amend. VI. The right to an impartial jury is protected by the 'Sixth Amendment right to the "fair possibility" of a representative jury ... [which has been held to] require ... the inclusion of all cognizable groups in the venire.' *Holland v. Illinois*, 493 U.S. 474, 478 (1990). Exclusion of distinct racial groups from the venire violates the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id*., at 478-79. "[J]ury trial" in this country "contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). "[T]he jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id*. at 538. Petit juries must be "drawn from a pool broadly representative of the community..." *Id*.

In *Duren v. Missouri*, 439 U.S. 357 (1979), the Supreme Court invalidated a procedure under which Missouri "exempt[ed] women from jury service upon request." *Id*. at 360. The Court found that the "systematic exclusion of women that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement." *Id*. Under *Duren*, a defendant alleging a "violation of the fair-cross-section requirement" must show 1) the group alleged to be excluded is a "distinctive" group, 2) "representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community," and 3) "underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id*. at 364.

In the present case, Terrance has satisfied the first *Duren* requirement. The underrepresented group, African-Americans, have long been recognized as a "distinctive" group. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Terrance has also met the second *Duren* requirement. According to the figures the trial court provided during the pre-trial conference, approximately 1.75% of the venire was African-American (T515-16). In 2005, 5.9% of the population of Cape Girardeau County was African-American. *U.S. Census Bureau State & County QuickFacts.* http://quickfacts.census.gov/qfd/states /29/29031.html.

1.75% African-Americans corresponds to not quite 30% of the African-American population of Cape Girardeau County being represented on the venire. This is "not fair and reasonable *in relation to the number of [African-Americans] in the community....*" *Duren, supra*; emphasis added.

Duren's third requirement is "systematic exclusion." *Id*. "Systematic exclusion" does not require "prov[ing] discriminatory intent on the part of those constructing or administering the jury selection process." *See United States v. Jackman*, 46 F.3d 1240, 1246 (2nd Cir. 1995) citing *Duren*, 439 U.S. at 368, n.26. It simply means that whatever system is being used, it consistently results in underrepresentation of congnizable, distinctive groups. The *Duren* court found systematic exclusion based on the fact that underrepresentation of the distinctive group (women) occurred repeatedly over a period of time and was not just occasional "indicat[ing] that the cause of the underrepresentation was systematic" meaning "inherent in the particular jury-selection process utilized." *Duren* at 366.

With regard to *Duren*'s third step, appellant is unaware of any statistics that have been compiled that provide data or information pertaining to the historical racial composition of venires and petit juries selected in Cape Girardeau County. Appellant's research, however, has revealed a series of reported cases, from 1978 to 1996 in which the opinions indicate that the appellants raised challenges to all-white jury panels. These cases include *State v. Brown***,** 916 S.W.2d 420, 421 (Mo.App.E.D. 1996); *State v. Evans*, 701 S.W.2d 569, 575 (Mo.App.E.D. 1985); *Pride v. State*, 615 S.W.2d 445, 446 (Mo.App.E.D. 1981); and *State v. Pittman*, 569 S.W.2d 277, 280-81 (Mo.App.St.L.D. 1978).

These cases do not provide comprehensive data on jury selection in Cape Girardeau County. But under *Duren*, systematic exclusion may be shown by historical and ongoing patterns of jury selection repeatedly resulting in a disproportionately low

number of African-American jurors appearing on venire panels or serving on petit juries.

The foregoing cited cases[16] plus the instant case indicate that under-representation of African-Americans on summoned venires and all-white juries has been, and remains, an ongoing feature of the jury selection system in Cape Girardeau County. Terrance has thus also established *Duren*'s third requirement: systematic exclusion.

Responding to the motion to quash, the trial court noted that "[n]othing has really changed regarding the way the process is conducted in this county since" Terrance's case was tried the first time (T516). It would appear that venires from which petit juries are selected are still summoned from a "master jury list" which is "compiled" using "a combined cross-referenced list of the eligible voters and licensed drivers within Cape Girardeau County." *State v. Anderson*, 79 S.W.3d 420, 430 (Mo.banc 2002). For whatever reason, this procedure appears to systematically exclude African-Americans.

The jury selection procedures' systematic exclusion of African-Americans is further compounded by §494.430, RSMo. (Supp 2007), which allows a judge, *ex parte*, to excuse jurors. Again, it is not a question of discriminatory intent on the part of the judge. *Duren*, *Jackson*, *supra*. The question is whether the statute allowing a judge to excuse jurors *ex parte* results in systematic exclusion of African-American jurors. Section 494.430 is particularly troublesome because it does not require the judge to

[16] The cited cases obviously do not include non reported cases or cases in which no challenge was made to all-white panels.

keep a record of, at a minimum, such data as the numbers of jurors requesting to be excused, the number and race of those excused and of those not excused. Without such data, there is no way to determine the extent to which this statutory provision for *ex parte* exclusions contributes to the systematic exclusion of African-Americans.

For the foregoing reasons, it was error for the trial court to overrule Terrance's motion to quash the jury panel. The underrepresentation of African-Americans on his venire and the all-white petit jury in his case and the consistent and historical underrepresentation of African-Americans from venires and petit juries in other Cape Girardeau County cases demonstrates that the jury selection procedures in that County violate the Sixth and Fourteenth Amendment rights to jury trial, fair cross section, due process, and equal protection of the law. The cause must be reversed and Terrance sentenced to life imprisonment or, alternatively, remanded for a new sentencing proceeding.

VII

The trial court erred in overruling Terrance's objections to Instructions 7 (MAI-CR3d 313.41A) and 8 (MAI-CR3d 313.44A) and in refusing his Instruction B because Instructions 7 and 8 failed to provide any direction to the jury regarding the burden of proof of non-statutory aggravating evidence and violated Terrance's rights to fundamental fairness, due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV, in that under *State v. Clark*, 197 S.W.3d 598 (Mo.banc 2006), at a minimum, the state had the burden of proving non-statutory aggravating evidence by at least a preponderance of the evidence, Instructions 7 and 8 said nothing about the state's burden of proof, and Instruction B instructed the jury that the state had the burden of proving the aggravating evidence warranted death.

The problem here was two-fold. The first part of the problem was that Terrance's jury received no instruction on the burden of proof of two of the three sentence-enhancing steps of §565.030.4. The jury was told that the state had the burden of proof with regard to §565.030.4(1): the existence of one or more statutory aggravating circumstances (LF165, A18). But the jury was not instructed at all as to §§565.030.4(2) and (3): whether the evidence in aggravation, as a whole, warranted death and whether the mitigating evidence outweighed the aggravating evidence (LF166, 167; A19-A20).

Given the lack of direction as to a burden of proof for the question of whether the

aggravation as a whole warranted death and whether the mitigation outweighed the aggravation, the most logical thing for the jury to do was assume that the state had no burden to prove these facts. These instructions were in striking contrast with Instruction 6 – which told the jurors that the state had the burden of proving "at least one" of the statutory aggravating circumstances beyond a reasonable doubt. The difference between Instruction 6, and Instructions 7 and 8, would naturally lead the jury to think that as Instructions 7 and 8 were silent on the state's burden, the state had no burden. Or, the jury might apply to the defendant, the burden of proving that the aggravating evidence, taken as a whole, did not warrant death since the "if each juror finds" language of Instruction 7 was also used in Instruction 8 which put the burden of proof on the defendant.

Instruction B solved this problem. Had the trial court submitted this instruction to the jury, the jurors would have been told that "the burden rests upon the state to prove that there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the death penalty (LF173).

The second part of the problem concerns what burden of proof to apply, and, in particular, what burden to apply to nonstatutory aggravation. *State v. Clark*, 197 S.W.3d 598 (Mo.banc 2006), is instructive.

The issue in *Clark*, a non capital felony case, was whether the trial court erred in admitting, at the punishment phase of trial, evidence of prior offenses for which Clark had previously been tried and acquitted. *Id*. at 599-600. This Court noted that the same issue had been raised in *United States v. Watts*, 519 U.S. 148 (1997), and the Supreme

Court had "reasoned that an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *Id*. at 601 citing *Watts*, 519 U.S. at 155. This Court explained that accordingly, "the Supreme Court held that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Id*.

This Court then reiterated its holding in *State v. Jaco*, 156 S.W.3d 775, 780 (2005): "the punishment phase of a trial is generally subject to a lower standard of proof than the guilt phase of the trial" and facts that are not being used to enhance the range of punishment need not be found beyond a reasonable doubt by a jury. *Id*. citing *Jaco*, 156 S.W.3d at 780-81. According to *Clark*, "under *Ring* and *Apprendi*, facts that are the functional equivalent of elements of offenses, such as a statutory aggravating circumstance that is required for eligibility for the death penalty, must be found beyond a reasonable doubt." *Id*. Like the defendant in *Jaco*, Clark's punishment was unenhanced, so "any facts that would have tended to assess his punishment within that range were not required to be found beyond a reasonable doubt by a jury." *Id*. at 602.

Noting the Supreme Court's reasoning in *Watts*, that an acquittal "does not prevent the sentencing court from considering conduct underling the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence,"519 U.S. at 155, this Court held the trial court did not error by allowing the State to introduce evidence of Clark's prior acquittals during the penalty phase of the trial." *Id*.

The rule of *Clark* is that as long as the sentence is not enhanced, a jury may consider acquitted conduct "if proven by a preponderance of the evidence." *State v. Fassero*, 256 S.W.3d 109,119 (Mo.banc 2008) citing *Clark*, 197 S.W.3d at 601. Here, however, because the trial court refused Instruction B, there was no instruction telling the jurors that the state must of prove the aggravating evidence, including the non-statutory aggravating evidence, before it could be used to determine Terrance's sentence. The jurors were free to use this evidence whether or not they believed it.

If *Clark* and *Fassero* apply, evidence of misconduct allegedly committed by Terrance would have to be proved by a preponderance of the evidence for the jury to consider and use it at sentencing. This evidence included, specifically, the orders of protection that Debbie Rainwater and Abbey Rainwater obtained against Terrance and Abbey's allegations that Terrance beat her (e.g., T645, 763).

But *Clark and Fassero* were both cases in which the range of punishment was unenhanced. Terrance's entire penalty phase retrial was conducted because the state wanted to enhance his punishment from life imprisonment to death. The non-statutory aggravating evidence was part of the aggravating that the jurors could use to determine if the evidence in aggravation, "as a whole" warranted death and whether the mitigation outweighed the aggravation. For this reason, the jury should have been instructed that the state had the burden of proving all aggravating evidence – statutory and non-statutory beyond a reasonable doubt for it to be used in determining Terrance's sentence.

Even though *Clark* and *Fassero* do not directly apply, they are important because

they establish that a jury at the penalty phase of *any* felony trial must be instructed on the burden of proof of non-statutory aggravating evidence if it is to be used in determining sentence. Under *Apprendi* and the Sixth Amendment, because such evidence is used in a capital case to enhance punishment, the jury should have been instructed that the state's burden was to prove all the aggravating evidence beyond a reasonable doubt.

"On a claim of instructional error, '[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant.'" *State v. Zink*, 181 S.W.3d 66, 74 (Mo. 2005); Rule 28.02(f). In the present case, instruction on the burden of proving the aggravation warranted death and on the use of non-statutory aggravation in determining whether the mitigation outweighed the aggravation was completely absent from Instructions 7 and 8. This was error that prejudiced Terrance.

For the foregoing reasons, the judgment below must be reversed and Terrance must be resentenced to life imprisonment or, in the alternative, the cause must be remanded for further proceedings.

VIII

The trial court erred in overruling Terrance's objections and request for a mistrial made when the prosecutor argued that "mercy is for the weak and the innocent…" and that sending Terrance back to prison was "doing nothing" and plainly erred in allowing the prosecutor to argue that "for the ultimate crime, not once, but twice, two ultimate crimes, that the ultimate punishment is necessary and proper" because these arguments were contrary to the law and facts of record and violated Terrance's rights to fundamental fairness, due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, and XIV, and were manifestly unjust, Rule 30.20, in that they misled the jury about "mercy" and, contrary to the law, told the jury to sentence Terrance to death to punish him for both Debbie's murder and the uncharged murder of Stephen.

At the end of his opening argument, the prosecutor told the jury, "I'm going to suggest to you that there is only one logical thing, and that *is for the ultimate crime, not once, but twice, two ultimate crimes*, that the ultimate punishment is necessary and proper. Not because we like the idea, but because it is just" (T901; emphasis added).

In his closing argument, responding to defense counsel's request that the jury "deliver justice with mercy," T918, the state argued,

> But keep in mind what mercy is. Mercy is something that is given by the strong, the powerful. And in this case, you make the decision. That's power. But it is something that is given to the weak and to the innocent. This man does not

qualify.

(T924). Defense counsel objected that the argument "that mercy is only reserved for the innocent [is] a misstatement of the law" (T925). The prosecutor responded that he had "made the argument repeatedly" and "[i]t's been upheld...." (T925). The judge denied the objection and Terrance preserved this ruling in his motion for new trial (T925-26;LF221-22).

When the prosecutor began discussing John Stuart Mill, defense counsel objected that it wasn't evidence (T926). The trial court overruled the objection and the prosecutor finished quoting Mills: "The only thing necessary for evil to triumph is for good men to do nothing. I suggest to you that if you send this man back to prison, you will have done nothng" (T926). The prosecutor concluded by telling the jury, "I suggest to you that if you send this man back to prison, you will have done nothing" (T926).

Defense counsel timely objected to the prosecutor's argument that sending Terrance back to prison was "doing nothing" (T926). The trial court overruled this objection, T926, and Terrance preserved this ruling in his motion for new trial (LF222-23). Defense counsel did not object to the prosecutor's arguments that "for the ultimate crime, not once, but twice, two ultimate crimes, that the ultimate punishment is necessary and proper," T901, and that sending Terrance back to prison was "doing nothing," T926. Therefore, as to these arguments, Terrance requests review for plain error. Rule 30.20.

Impose a sentence of death to punish Terrance for both murders; sending

him back to prison would be "doing nothing"

These arguments were improper because contrary to the law. *State v. Blakeburn*, 859 S.W.2d 170, 174 (Mo. App.W.D. 1993). The law authorizes using a prior murder as aggravating evidence to support a sentence of death for a different murder. §565.032.2(1). But due process and the double jeopardy clause prohibit punishing a defendant for a crime for which he has already been tried, convicted, and sentenced. *Brown v. Ohio*, *supra*, 432 U.S. at 165 (1977); *North Carolina v. Pearce*, *supra*, 395 U.S. at 717. The prosecutor's argument was contrary to the law because asking the jury to sentence Terrance for "two ultimate crimes" asked them to sentence Terrance to death for Stephen's murder.

Further, the law prohibits sentencing a defendant for a charge not being tried. *State v. Barriner*, 34 S.W.3d 139, 144-45 (Mo.banc 2000). Stephen's murder was not the case "charged" or being tried. Arguments or comments of counsel that encourage the jury to convict the defendant for crimes and offenses not being tried violate the defendant's right to be tried only for the offense charged. *State v. Burnfin*, 771 S.W.2d 908, 911 (Mo.App.W.D. 1989).

The prosecutor's argument that sending Terrance "back to prison" was "doing nothing" was contrary to the law: §565.020.2 provides that life imprisonment without probation or parole is an authorized sentence for first-degree murder. This argument was a thinly-veiled way of saying that Terrance had not been punished enough already – it was, especially in combination with the prosecutor's other comments, a message to

the jury that Terrance had not received the death penalty for murdering Stephen and the jury should remedy that by sentencing him to death.

These arguments were particularly unjust because of the high likelihood they would mislead the jury. Evidence of Stephen's murder was injected to prove a statutory aggravator and as part of the surrounding evidence of Debbie's murder. The irony of the lack of objection is that it left the jurors with not even a hint that it was completely improper for the prosecutor to encourage imposing a sentence of death as punishment for Stephen's murder. This argument was manifestly unjust and requires reversal.

Mercy is not only for the innocent

Although "[t]rial courts have wide discretion in controlling the scope of closing argument," *State v. Barton*, 936 S.W.2d 781, 783 (Mo.banc 1996), misstatements of the law are impermissible during closing argument, and a positive and absolute duty rests upon the trial judge to restrain such arguments. *Blakeburn*, *supra*, 859 S.W.2d at 174. "When an argument will result in a misstatement of the law, the trial court has 'a positive and absolute duty' to restrain" such "impermissible" arguments. *State v. Peeples*, 2009 WL 1451334 *5 (Mo.App.E.D. 2009).

The prosecutor's "mercy is for the innocent" argument was outside the law. The argument was particularly prejudicial because it sounded like it was based on the law and, because the trial court overruled counsel's objection, the jury would naturally assume it was legally correct. For this reason, not restraining the prosecutor was an abuse of the trial court's discretion.

The prosecutor's arguments in this case undermined the reliability of the sentence of death imposed and violated the Eighth Amendment. The prosecutor's assertion of the legal fiction that mercy was only for the innocent was a blatant misstatement of the law. Urging the jury to impose a death sentence to punish Terrance for a crime not being tried – the murder of Stephen – was prosecutorial overreaching that reached the level of manifest injustice. Failing to restrain and check those arguments was an abuse of the trial court's discretion.

For the foregoing reasons, the judgment must be reversed and Terrance resentenced to life imprisonment or, in the alternative, the cause must be remanded for further proceedings.

Conclusion

Wherefore, for the foregoing reasons, Terrance Anderson prays that the Court will reverse the judgment of the circuit court and reduce his sentence to life imprisonment without probation or parole or, in the alternative, remand for a new penalty phase proceeding.

Respectfully submitted,

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Certificate of Compliance and Service

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rules 84.05 and 84.06. The brief comprises 19, 226 words according to Microsoft word count.

The CD Rom disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

This 1st day of July, 2009, a true and correct copy of the attached brief, the separately bound appendix, and a CD Rom containing a copy of this brief were {mailed, first class postage pre-paid} {delivered}, to the Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102, and an email with this brief attached was sent to Shaun.Mackelprang@ago.mo.gov.

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Attorney for Appellant