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,
THE HON. WILLIAM SYLER, JUDGE

APPELLANT'S REPLY BRIEF

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APPELLANT'S INITIAL BRIEF

Counsel for appellant wishes to correct two inadvertent errors she has noted in Appellant's Initial Brief as follows:

In Point IV of Appellant's Initial Brief, Pages 26 and 57, the word "has" was used instead of the word "held." In pertinent part, the "in that" portion of Point IV should be as follows: "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 **held** that §565.030.4(3)...,"

On page 64 of Appellant's Initial Brief, the page citation at the end of the first sentence of the first full paragraph was inadvertently omitted. The citation should have been as follows:

> "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. **58-59**).

REPLY ARGUMENT

REPLY TO RESPONDENT'S POINT I:

Respondent's Point and Argument fail because giving the jury the outdated, 2003 version of MAI-CR 3d 313.48A – placed in the Appendix to show where to make additions and deletions – failed to comply with the law because it omitted the penalty phase defense and thereby prejudiced Mr. Anderson.

Respondent first argues that using the outdated version of MAI-CR 3d 313.48A[1] at appellant's trial was not error because that version appears in the Appendix to MAI-CR 3d Chapter 313. (Resp.Br. 15). MAI Chapter 313, its Notes on Use, and its other notes, refute this claim. Respondent's argument lacks support, and the Court should reject it.

Note 6 of the Supplemental Notes on Use to Chapter 313 indicates that instructions are used in the Appendix to Chapter 313 to show what changes are necessary to the MAI-CR 3d 313 Series instructions when the penalty phase only is being retried.[2] An

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[1] MAI-CR 3d 313.48A (September 1, 2003).

[2] *See* Note 6, MAI-CR3d 313 Supplemental Notes on Use Applicable to 313.00 Series (Before August 28, 2001): when there is a retrial of the penalty stage only, "certain

explanatory note[3] at the beginning and end of the Appendix, stating that instructions not needing modification do not appear in the Appendix, indicates that instructions were included in the Appendix merely as examples: models displaying where to add and delete language to comply with revisions to the instructions. Neither the Appendix to Chapter 313 nor any Note in the entire MAI-CR 3d 313 series suggests that the demonstrative instructions found in the Appendix may be used instead of current, approved, instructions.[4]

Tacitly conceding that the revised version of MAI-CR 3d 313.48A in the 313 series instructions should have been used, respondent alternatively argues that as the Notes on Use to MAI-CR 3d 313.48A do not cite a change in the law, the revision to MAI-CR 3d 313.48A must have been solely for clarification. (Resp.Br. 14). Therefore, according to respondent, appellant could not have been prejudiced since the older, 2003, version of 313.48A complied with the law. *Id*.

Respondent's argument overlooks the fact that the old 313.48A verdict-director could

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instructions must be modified" and the "approved modifications" are "contain[end] in the Appendix to Chapter 313.

[3] "*Note: Material deleted from the instruction is crossed-out. New material is in bold italics. Instructions that are to be given, but that are not modified, are not included in the appendix."

[4] The Appendix appears to not have been revised since 2003.

comply with the law only to the extent of the law included in therein. The old instruction could not fully comply with all law governing the jury's determination of sentence in a death penalty case because it did not include all applicable law: it omitted the law governing the jury's consideration and use of mitigation and the §565.030.4(3)[5] requirement that the jury must return a sentence of life imprisonment if it found the mitigation outweighed the aggravation.

"Clarification" in this instance was not de minimis. This "clarification" was a substantive revision of the penalty phase verdict director adding a step required by statute and critical to the defense in the sentencing process: the law of §565.030.4(3), concerning the jury's use and consideration of mitigation at the sentencing phase of a capital case.

Respondent's argument is equivalent to claiming there is never prejudice when an old instruction that only partially instructed on the law is used instead of a revised instruction that fully covers the law of the case. This argument is contrary to Rule 28.02(c) ("Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes On Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form") and Rule 28.02(f) ("The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be

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

judicially determined, provided that objection has been timely made pursuant to Rule 28.03").

As for prejudice, omitting law required by the case from an otherwise correct verdict-directing instruction – *even though the omitted law is covered by a separate instruction* – has been held prejudicial. *State v. Winn*, 324 S.W.3d 637 (Mo. 1959) (citing cases). In *Winn*, despite a separate instruction on self-defense, this Court held that omitting law concerning self-defense from the verdict director was prejudicial error and reversed. *Id*. at 640-42.

In *State v. Nunn*, 646 S.W.2d 55 (Mo. banc 1983), the defendant was charged with rape, assault first degree, and kidnapping and convicted of the charged assault. *Id*. at 56. The assault verdict director included a paragraph instructing that, to find the defendant guilty, the jury must "find 'that the defendant did not act under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" as defined in a separate instruction. *Id*. at 57.

On appeal, the issue was whether the trial court erred in failing to give the jury the required "separate converse instruction directing a verdict of not guilty of assault in the first degree if the issue of extreme emotional disturbance was found for defendant...." *Id*. at 58. Appellant argued that without the converse, "he was denied his right to a fair trial in that the jury was not allowed to fully and fairly consider his responsibility for an assault committed under extreme emotional disturbance..." *Id*. This Court concluded that including the defense of extreme emotional disturbance in the verdict director was not

enough to prevent prejudice.

Although the instructional posture in *Nunn* is somewhat the opposite of that in the present case – in *Nunn*, the defense *was included* in the verdict director, but a separate (converse) instruction on the defense *was not* given; here, the defense (mitigation) *was not included* in the verdict director, but a separate instruction regarding mitigation *was* given – the fundamental question in both cases is whether the error in failing to include required law concerning the defense in an instruction when another instruction contains the same law was prejudicial. The Court's reasoning in *Nunn* bears on the question of prejudice in the instant case:

> [D]efendant had no defense on the facts.... His only salvation was in mitigation from assault in the first degree, with its strict penalties.... Defendant was entitled to have the issue of mitigation called to the attention of the jury twice: once negatively in the State's main verdict director, and again in a separate and direct instruction hypothesizing defendant's side of the case, written with an affirmative cast, emphasizing defendant's theory of mitigation. Such an instruction would have tended to equalize the positions of the contending parties in the eyes of the jury. It would have benefitted defendant by lending additional dignity and importance to the issue of mitigation. By depriving defendant of that benefit he was prejudiced.

Id.

Respondent cites *State v. Sandles*, 740 S.W.2d 169, 173 (Mo. banc 1987) for the

general proposition that "absence of language in a particular instruction does not prejudice the defendant if the subject matter is covered and provided elsewhere in the instruction." (Resp.Br. 16). But the *Sandles* Court did not rely on this broad general rule in finding no prejudice. Rather, the Court noted that at oral argument appellate counsel had conceded that the possibility of prejudice resulting from the particular instructional errors in this case was "incredibl[y] speculat[ive]," 740 S.W.2d at 173. The Court held that prejudice requires more than speculative errors. *Id*.

Respondent also relies on three previous cases, *State v. Tisius*, 92 S.W.3d 751, 770 (Mo.banc 2002), *State v. Cole*, 71 S.W.3d 163, 176 (Mo.banc 2002), and *State v. Storey*, 40 S.W.3d 898, 913 (Mo.banc 2001), holding "that the prior version of MAI-CR 3d 313.48A," which did not instruct on the consideration and use of mitigation, "properly instructs the jury...." (Resp.Br. 16[6]). Respondent claims that if the Court finds omission of the §565.030.4(3) mitigation step prejudicial, it "would be contrary to" *Tisius*, *Cole*, and *Storey*. But after *Tisius*, *Cole*, and *Storey* were decided, the Court adopted a revised version of 313.48A that expressly include directions for considering and using mitigation as required by §565.030.4(3). In *Tisius*, *Cole*, and *Storey*, the new version of 313.48A did not exist, and Court was not asked to decide the presented here: whether, under the facts in *this* case, using the old version instead of the current, approved version prejudiced the

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[6] Respondent repeats this argument in attempting to distinguish *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002). (Resp.Br. 18-19).

defendant.

The Court does not gratuitously make substantive changes to instructions of the sort involved here. The reasons articulated by this Court in *Nunn*, *supra*, and the Southern District in *State v. McClure*, 632 S.W.2d 314 (Mo.App.S.D. 1982), App.Br. 36-37, regarding the importance of including the law of the defense in the verdict director, refute respondent's argument.

Respondent, still maintaining there was no prejudice in not including the mitigation defense in the capital verdict director given at Mr. Anderson's trial claims his reliance on *McClure*, *supra*, is misplaced because the verdict director in *McClure* omitted a "special negative defense" which like an element, must be disproved by the state beyond a reasonable doubt, but "mitigation evidence is not subject to such a requirement." (Resp.Br. 17-18.) Citing no authority, respondent says this means that "a separate instruction" on mitigation evidence, alone, "is sufficient to assure that the jury will properly consider such evidence." (Resp.Br. 18.)

But focusing on which party has the burden of proof on the defense misses the real issue: contrary to the current MAI-CR3d 313.48A and its Notes on Use, the penalty phase verdict director given to the jury in this case, laying out the procedure for sentencing, made no mention of the mitigation defense for a sentence of life imprisonment. In fact, the current MAI-CR3d 313.48A requires the §565.030.4(3) mitigation step itself to be included ***in*** the instruction. The omission here, of the complete §565.030.4(3) mitigation step, is far greater than the *McClure* omission of only a cross-

reference. Adoption of the current MAI-CR3d 313.48A indicates that a mere reference to the mitigation instruction, MAI-CR3d 313.44A, was insufficient. The omission in this case meant that the verdict director failed entirely to reference or instruct on Terrance's penalty phase mitigation defense.

Whether the omitted defense is a special negative defense or any other type of defense, its omission from the verdict director prejudices the defendant because it "[removes] the assur[ance] that the jury will properly consider such evidence." (Resp.Br. 18). And the omission here created prejudice because the verdict director contained only instructions concerning the state's case for death but nothing concerning the mitigation defense.

Respondent claims submitting the erroneous verdict director was not prejudicial because "the concept of mitigation was discussed during voir dire." (Resp.Br. 19). But "arguments of counsel cannot substitute for instructions by the court," *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978), and voir dire cannot substitute for defective verdict directors. Lack of jury questions about mitigation hardly proves no prejudice (Resp.Br. 20); it as likely proves the jury did not consider mitigation.

Moreover, reversal for failure to include a defense in the law of the case is not limited to special negative defenses on which the state bears the burden of proof. *See State v. Taylor*, 375 S.W.2d 58, 59-62 (Mo. 1964) (failing to instruct the jury on the defense of entrapment, supported by the evidence, was prejudicial error and required reversal); *State v. Simon*, 375 S.W.2d 102, 106 (Mo.banc 1964) ("Defendant had the right to rebut the

State's case, and his evidence was offered in rebuttal of the State's evidence…. If believed, it refuted the State's case and defendant was entitled to a jury's verdict on said fact issue…. In the circumstances of record, defendant, having tendered a proper instruction, was entitled to have his defense of an alibi submitted.")

That Mr. Anderson, according to this Court, bears the burden of proof as to §565.030.4(3) does not mean that its omission from the verdict director was harmless, non-prejudicial error. Quite the opposite. Not only did Mr. Anderson bear the burden of proving that the mitigation outweighed the aggravation, the verdict directing instruction which put all the sentencing steps together for the jury to follow, (Resp.Br. 13), added to his burden of convincing the jury that the mitigation warranted life by omitting all reference to his mitigating evidence. In other words: in this case, the law pronounced by this Court required Mr. Anderson to prove to the jury that the mitigation outweighed the aggravation, but the verdict director discussed only aggravation and made no mention of mitigation.

No two cases are exactly alike. A correct determination of prejudice requires examining the current instruction and the current circumstances. *Deck*, 68 S.W.3d at 431 (cautioning that "the failure to give [two paragraphs of MAI-CR3d 313.44A which were omitted at Deck's penalty phase trial] is [not] so inherently erroneous that it will always result in prejudice" and that "each case must be decided on its own facts.").

Although the circumstances and facts here are not identical to those in *Deck*, the mitigation here was powerful. The following brief summary does not fully and accurately

convey the strength of the mitigation in this case, but for purposes of this argument it will offer some idea of the strength and quality of the mitigation defense.

The mitigating evidence largely came from people who had known Mr. Anderson for many years – some for his entire life. His immediate family members testified that even knowing what he had done, they loved him; they knew he had been elated about the birth of his daughter and that he was protective of her; they felt sorry for both families (Tr.828, 831, 857-58, 860). Other relatives and friends, their parents, Mr. Anderson's high school basketball teammates, and his former high school basketball coaches testified, without exception, that they were shocked and surprised by the killings because they were so out of character for him (*e.g.*, Tr. 739-40, 746, 802-03, 813-14, 839, 843, 848-49, 890). The Potosi Correctional Center warden testified that Mr. Anderson had not only adjusted to being at Potosi, he had earned his way into the honor dorm. (RoperDepo 27-28, 44-45).

The state's own witnesses, who knew Mr. Anderson, testified to his joy on learning he would become a father and his commitment to being part of his child's life. (Tr. 662, 701-02). He, himself, expressed remorse testifying that he did not feel good about what he had done and saying his heart went out to Whitney, the Rainwater's younger daughter (who went back into the house for baby Kyra knowing he was inside). (Tr.784-85).

In the Missouri capital sentencing scheme, the verdict director is crucial: it is the one instruction that puts all of the sentencing steps together. Omission of the §565.030.4(3) mitigation step from the verdict director eliminated the mitigation defense from the sentencing procedure in this case. When all the instructions are considered together, what

emerges is disparate, unequal treatment of aggravating evidence and circumstances – supporting death, and mitigating evidence and circumstances – supporting life.

The non-capital cases discussed, *supra*, indicate that prejudicial error occurs when a trial court a) fails to submit a converse instruction on the defense even though the verdict director included the defense (*Nunn*, *supra*), b) omits the defense from the verdict director although the defense was given in a separate instruction (*Winn*, *supra*), c) does not include a cross-reference to defendant's special negative defense instruction in the verdict director even though there is a cross-reference to the verdict director in the special negative defense instruction (*McClure*), and d) fails to instruct the jury on a defense supported by the evidence (*Taylor* and *Simon*). If prejudicial error occurred in the circumstances of those foregoing cases, prejudicial error surely occurred in this capital sentencing case when the trial court gave the jury a penalty phase verdict director that completely omitted all reference to the jury's consideration and use of mitigating evidence.

"When an issue challenging an MAI modified instruction or a not-in-MAI instruction is preserved for appeal, the burden is on the party deviating from MAI to show that its deviation is not prejudicial." *State v. Phillips*, 583 S.W.2d 526, 530 (Mo.banc 1979). The state has failed to sustain its burden.

The defective verdict director here, omitting all mention of mitigating evidence, violated the Eighth Amendment by unacceptably heightening the risk that the jury would adhere to the erroneous sentencing procedure in that Instruction and thus never consider

the substantial mitigating evidence comprising Mr. Anderson's defense against the state's case for death.

For the foregoing reasons, and the reasons set forth in Appellant's Initial Brief, the cause must be reversed and Terrance Anderson sentenced to life imprisonment without probation or parole, or the cause must be remanded for further sentencing proceedings.

REPLYING TO RESPONDENT'S POINT II:

Respondent's argument fails because a "conviction" and a "sentence" are not the same thing, and Supreme Court jurisprudence indicates that statutory aggravating circumstances must be treated as elements of a greater offense of first degree, aggravated murder.

Respondent's argument (attempting to refute appellant's point that under *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), allowing the state to seek the death penalty at Terrance Anderson's sentencing retrial and sentencing him to death violated Double Jeopardy) largely rests on the premise that "conviction" and "sentence" are interchangeable. The premise and argument must fail because under the law of this state and the jurisprudence of the United States Supreme Court, "conviction" and "sentence" – particularly in the context of determining whether seeking a sentence of death at a retrial violates the Double Jeopardy Clause – are not the same thing.

In *Sattazahn*, the Supreme Court's description of what occurred in the Pennsylvania courts illustrates this distinction:

> The Commonwealth of Pennsylvania prosecuted petitioner and sought the

> death penalty. On May 10, 1991, a jury returned a ***conviction*** of first-, second-, and third-degree murder, and various other charges. In accordance with Pennsylvania law the proceeding then moved into a penalty phase.

537 U.S. at 103-04; emphasis added. The Court noted that when, at penalty phase, the jury was unable to agree upon ***sentence***, "[t]he trial judge, in accordance with Pennsylvania law, discharged the jury as hung, and indicated that he would enter the required life ***sentence***, ... which he later did...." *Id*. at 104-05; emphasis added.

Sattazahn, continuing to distinguish between "conviction" and "sentence," noted that on appeal, the Pennsylvania appellate found instructional error, "reversed petitioner's first-degree murder ***conviction*** and remanded for a new trial." 537 U.S. at 105 citing *Commonwealth v. Sattazahn*, 631 A.2d 597 (1993); emphasis added.

On remand, the state again sought the death penalty. 537 U.S. at 105. On retrial, "the jury again ***convicted*** [Sattazahn] of first-degree murder, but this time imposed a ***sentence*** of death." *Id*. On appeal, the Pennsylvania Supreme Court rejected Sattazahn's claims that "the Double Jeopardy Clause [and] the Due Process Clause barred Pennsylvania from seeking the death penalty" on retrial. *Id*.; emphasis added.

Sattazahn is also instructive on the Double Jeopardy question here. First, the Court discussed *Stroud v. United States*, 251 U.S. 15 (1919), holding that "[w]here, as here, a defendant is ***convicted*** of murder and ***sentenced*** to life imprisonment, but appeals the ***conviction*** and succeeds in having it set aside, we have held that jeopardy has not terminated, so that the life ***sentence*** imposed in connection with the initial ***conviction***

raises no double-jeopardy bar to a death ***sentence*** on retrial." 537 U.S. at 106; emphasis added. Next, the Court compared *Stroud* to *Bullington v. Missouri*, 451 U.S. 430 (1981) which held that "the Double Jeopardy Clause does apply to capital-sentencing proceedings" which involves a procedure that requires "the prosecution [to] prove certain statutorily defined facts beyond a reasonable doubt to support a sentence of death" and "the jury to determine whether the prosecution has proved its case" for death. 537 U.S. at 106 quoting *Bullington*, 451 U.S. at 438; internal quotation marks omitted. Since, in such a procedure, "a sentence of life imprisonment signifies that the jury has already acquitted the defendant of whatever was necessary to impose the death sentence, the Double Jeopardy Clause bars a State from seeking the death penalty on retrial." 537 U.S. at 106; citations and internal quotation marks omitted.

Sattazahn then explained that the Court's recent line of cases had further clarified its Fifth and Sixth Amendment jurisprudence. First, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the Court had "clarified what constitutes an 'element' of an offense" in holding that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." 537 U.S. at 111 citing *Apprendi*, 530 U.S. at 482-84.

The Court continued by noting that its subsequent holding in *Ring v. Arizona*, 536 U.S. 584 (2002), "that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a *greater offense*"

meant that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of murder is a distinct, lesser included offense of murder plus one or more aggravating circumstances: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." 537 U.S. at 111 citing *Ring*, 536 U.S. at 608-09; internal quotation marks omitted; emphasis added in *Sattazahn*.

Although in his initial brief, appellant's second point relied on the Court's entire recent "*Apprendi*" line of cases, *Sattazahn* is particularly important for the following reasons. First, in *Sattazahn*, the Court found no distinction "between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." 537 U.S. at 111. Of particular importance, the Court held:

> For purposes of the Double Jeopardy Clause, then, "*first-degree murder" under Pennsylvania law–the offense of which petitioner was convicted during the guilt phase of his proceedings–is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s).*" See *Ring, supra*, at 609, 122 S.Ct. 2428. Thus, if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove any aggravating circumstances, that conclusion would operate as an "acquittal" of the greater offense–which would bar Pennsylvania from retrying petitioner on that greater offense (and thus, from seeking the death penalty) on retrial. [Citation omitted].

> But that is not what happened. Petitioner was ***convicted*** in the guilt phase of his first trial of the lesser offense of first-degree murder. During the sentencing phase, the jury deliberated without reaching a decision on death or life, and without making any findings regarding aggravating or mitigating circumstances.... [T]he judge dismissed the jury as hung and entered a life sentence in accordance with Pennsylvania law.... [N]either judge nor jury "acquitted" petitioner of the greater offense of "first-degree murder plus aggravating circumstance(s)." Thus, when petitioner appealed and succeeded in invalidating his ***conviction*** of the lesser offense, there was no double-jeopardy bar to Pennsylvania's retrying petitioner ***on both the lesser and the greater offense***; his "jeopardy" never terminated with respect to either.

Id. at 112-13; emphasis added.

Missouri law also distinguishes "conviction" of a crime from the "sentence" for that crime. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543-44 (Mo.banc 2003) ("a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment"); *Mercer v. State***,** 666 S.W.2d 942 (Mo.App. S.D. 1984) (" movant ... sought to vacate a death sentence imposed upon conviction of capital murder....); *State v. Hagan*, 79 S.W.3d 447, 454 (Mo.App.S.D. 2002) ("precedent does exist under which we may remand to the trial court with

instructions for it to correct the judgment and enter sentence and judgment of a lesser charge, none exists for us to remand to enter judgment of conviction and sentence for a greater charge."). Even assuming, solely for purposes of argument, that Missouri law did not distinguish between "conviction" and "sentence," on the double jeopardy point appellant raises, federal law controls. *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969). As *Sattazahn* makes clear, respondent's argument – that "double jeopardy does not bar retrial" in this case because "Appellant was simply retried after he succeeded in overturning his conviction on appeal" (Resp.Br. 21, 27) – rests on the false premise that "conviction" and "sentence" are equivalent and there is no distinction between reversal of a "conviction" and reversal of a "sentence."

What occurred here – reversal of appellant's ***sentence of death*** – was *not* what occurred in *Sattazahn*: reversal of the underlying ***conviction***. Under the principles set out in *Sattazahn*, in accordance with *Apprendi*, *supra*, Mr. Anderson's penalty phase retrial and resultant sentence of death violated his right to be free of double jeopardy under the Fifth Amendment.

Respondent, however, argues that Fifth Amendment indictment clause does not apply to the states, so the statutory aggravating factors need not be alleged in the charging document. (Resp.Br. 22). Although the Supreme Court has not held that the Fifth Amendment indictment clause applies to the states, that does not preclude this Court from holding that it applies, and Mr. Anderson requests this Court to rule that the Fifth Amendment indictment clause does apply in Missouri.

Alternatively, even if the Court does not hold that the Fifth Amendment indictment clause applies in Missouri, the Sixth Amendment Notice Clause, applicable through the Fourteenth Amendment, provides the same protections. Accordingly, because in a capital case, statutory aggravating circumstances are the equivalent of elements of the greater offense of "aggravated" first degree murder, they must be alleged in the charging document whether an indictment or an information. *See Gautt v. Lewis*, 489 F.3d 993, 1004 (9th Cir. 2007) ("[F]or purposes of AEDPA's "clearly established Federal law" requirement, it is "clearly established" that a criminal defendant has a right, guaranteed by the Sixth Amendment and applied against the states through the Fourteenth Amendment, to be informed of any charges against him, and that a charging document, such as an information, is the means by which such notice is provided.").

Further, even though the Supreme Court has never expressly ruled that in a state prosecution, the charging document must include the facts required to enhance a sentence, appellant's argument that statutory aggravators are elements of a greater offense of aggravated murder and must be included in the charging is fully consistent with its jurisprudence.[7] Since *Apprendi*, the Court has repeatedly stated that facts that

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[7] Appellant argued in his initial brief that under both the recent United States Supreme Court "*Apprendi*" cases and long-standing Missouri law, facts required to enhance or increase the punishment for an offense must be included in the charging document, App.Br. 42-50, and will not repeat those arguments here.

must be found to exist to increase the range of punishment are the equivalent of elements, *e.g.*, *Cunningham v. California*, 549 U.S. 270, 282 (2007), *Washington v. Recuenco***,** 548 U.S. 212, 220 (2006), and *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004), and that in a capital case, statutory aggravating factors required for a sentence of death are the equivalent of elements. *See Sattazahn*, *Ring*, *supra*.

For the foregoing reasons, the Court should a) reject respondent's arguments that Mr. Anderson was properly and correctly charged with an offense punishable by a sentence of death and had all the notice of the statutory aggravating circumstances that the indictment, notice, and due process, provisions of the Fifth, Sixth, and Fourteenth Amendments require; and b) reject respondent's arguments that his penalty phase retrial and ensuring sentence of death did not violate the foregoing federal constitutional provisions and the double jeopardy clause of the Fifth Amendment.

REPLY TO RESPONDENT'S POINT IV:

Respondent's argument, relying on *Zink v. State*, 278 S.W.3d 170 (Mo.banc 2009) and *State v. Johnson*, 284 S.W.3d 561 (Mo.banc 2009), must fail because neither *Zink* nor *Johnson* addressed the Point raised here by Mr. Anderson: that under *State v. Clark*, 197 S.W.3d 598 (Mo.banc 2006), non-statutory aggravators must be proved by at least a preponderance of the evidence.

In Mr. Anderson's initial brief, Point VII and the corresponding argument, he claimed and argued, *inter alia*, that "Instructions 7 and 8 failed to provide any direction to the jury regarding the burden of proof of non-statutory aggravating evidence." (App.Br. 30, 77). Specifically, this Point and Argument claimed 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." *Id*.

In response, Respondent's brief alleges that this Court "rejected this same argument" in *Zink v. State*, 278 S.W.3d 170, 193 (Mo.banc 2009) and *State v. Johnson*, 284 S.W.3d 561, 585 (Mo.banc 2009). But the argument in *Zink* and *Johnson* concerned the "beyond a reasonable doubt" standard. Those cases did not address the claim presented here: that non-statutory aggravating circumstances must be proved by at least a preponderance of the evidence.

Zink merely says,

> Only findings of fact that increase the penalty for a crime beyond the

> prescribed statutory maximum are required to be found by a jury beyond a reasonable doubt. This Court previously has recognized this distinction and held that *steps two and three do not need to be found by a jury beyond a reasonable doubt*.

Id., 278 S.W.3d at 193; emphasis added.

Likewise, in *State v. Johnson*, the appellant contended that the non-statutory aggravating circumstances must be found *beyond a reasonable doubt*. 284 S.W.3d at 585. Again, this Court disagreed.

Zink nor *Johnson* are inapposite because neither addressed the Point and Argument made here by Mr. Anderson – that under *State v. Clark, supra*, the state must prove the existence of non-statutory aggravating evidence by at least a preponderance of the evidence. Nor, from the reported opinions, does it does appear that the appellant in either *Zink* or *Johnson* even raised a claim that non-statutory aggravating circumstances must be proved, at the very least, by a preponderance of the evidence.

Accordingly, the Court should reject the state's argument regarding proof of non-statutory aggravating circumstances. The Court should find that, under *Clark*, non-statutory aggravating circumstances must be proved by no less than a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his initial brief, as to Points 1, 2, 3, 4, and 6, appellant prays that the Court will reverse the judgment of the circuit court

and grant him a new trial; in the alternative, as to Points 5, 7, 8, 9, 10, and 11, he prays that the Court will vacated his sentence of death and resentence him to life imprisonment without probation or parole or, in the alternative, grant him 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 provisions of Missouri Supreme Court Rule 84.06(b). The brief comprises 5, 987 words according to Microsoft word count.

The CD ROM disk filed with this brief contains a copy of this brief and complies with Missouri Supreme Court Rule 84.06(g). The disks filed with this Court and served on respondent have been scanned for viruses by a McAfee Virus Scan program and according to that program are virus-free.

A true and correct copy of the attached brief and the disk containing a copy of this brief were mailed, this ____ day of _____, 20____, to Jamie Pamela Rasmussen, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Attorney for Appellant