# IN THE
# MISSOURI SUPREME COURT

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| STATE OF MISSOURI, | ) | |
| | ) | |
| RESPONDENT, | ) | |
| | ) | |
| VS. | ) | NO. SC85955 |
| | ) | |
| MARK ANTHONY GILL, | ) | |
| | ) | |
| APPELLANT. | ) | |

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APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEW MADRID COUNTY
THE HONORABLE FRED W. COPELAND, JUDGE

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## APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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## JURISDICTIONAL STATEMENT

After trial in New Madrid County, a jury convicted appellant Mark Gill, as charged, of: Count I - first degree murder; Count II – kidnapping; Count III – armed criminal action (in connection with Count I); Count IV – first degree robbery; and Count V – first degree tampering. In accordance with the jury's penalty phase verdict, the trial court, the Hon. Fred W. Copeland, imposed sentence as follows: Count I – death; Count II – fifteen (15) years; Count III – thirty (30) years; Count IV – life imprisonment, and Count V – seven (7) years with all sentences to be served consecutively. This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

## STATEMENT OF FACTS

In June or July of 2002, Pat Davis, an attorney in Cape Girardeau, arranged for Mark Gill to live with Ralph Lee Lape, Jr. (Tr. 630,700,706). Davis' secretary testified this was because Mark could not then drive, and Lape's property, near Fruitland, was close to Mark's job (Tr. 630,700,706). Davis had represented both men: Ralph in a personal injury matter and some driving while intoxicated cases, and Mark in various criminal matters (Tr. 704,710-11,1153-58,1163-66; StEx's 128,129,130,131 & 132). Several years earlier, Ralph developed trouble

with his ankles and retired from the Frisco Railroad; his disability settlement exceeded $200,000 (Tr.634-35). Both Ralph and Mark occasionally did work for Davis (Tr.704,711).

Ralph, Mary Cates (Pat Davis' secretary), and Mary's husband Scott were co-owners of a small trailer at the Kentucky Lake resort area (Tr.697-98,715). July 4, 2002, was on a Thursday, and Ralph and the Cates went to the lake for the holiday (Tr. 700-01,716). Ralph was at the trailer when the Cates left on Sunday, July 7th (Tr.701-02,716-17).

In the days following the July 4th weekend, Scott Cates began trying to contact Ralph about an upcoming bachelor party to be held at the lake (Tr.704,717). Ralph, ordinarily prompt in returning phone calls, did not return Scott's calls (Tr.704-05,717). The Cates continued to call Ralph and went to his house looking for him (Tr.717). Unable to make contact with Ralph, concerned when he did not show up at the bachelor party, Scott called Mary and told her to call Ralph's family (Tr.718). Mary called Diane Miller – Ralph's sister (Tr.629,636,705).

During the period that Ralph was missing, Mark left the keys to Ralph's house at Pat Davis' law office firm (Tr.705). He spoke to Mary Cates and told her "a lot of people had come out to the house and if something happened, he didn't want to be involved in it" (Tr.707). Mary gave the keys back to Mark and told him to go back and stay at the

house in case Ralph tried to make contact with someone (Tr.707).

Mary had met Justin Brown once shortly before the 4th of July when Mark, who had "detail[ed]" her car, returned it to her (Tr.707). Mark wanted Mary to go outside to look at the car; when she walked outside, Mark introduced her to Justin who was standing by her car (Tr.707).

Diane made unsuccessful attempts to contact Ralph on his cell phone and at his house (Tr.637). Diane also called Ralph's daughter Megan and several other people who knew Ralph (Tr.637-38). Diane knew Pat Davis had arranged for Mark Gill to live at Ralph's house; Diane thought this was unusual and out of character for Ralph (Tr.649). Concerned about Ralph, Diane repeatedly called Davis' office; Davis never spoke to her or returned her calls (Tr.649).

On July 22nd, Diane called Ralph's house; a man identifying himself as Mark Gill answered (Tr.646). Mark said Ralph went to the lake on July 18th without saying when he would return (Tr.646). Mark also said Ralph had been "in and out" the previous week – coming in to shower and then leaving again (Tr.646).

Megan also called Ralph's house and cell phone; when he did not answer, she drove to his house with her mother (Tr.654-55). Sheets and blankets were covering the windows of Ralph's house which Megan found unusual because Ralph loved light (Tr.655). A little blue car that did not

belong to Ralph was in the driveway (Tr.655).

Megan's knocked on the door several times before a black man, whom at trial she identified as Mark, opened it and said Ralph was at the lake fishing (Tr.656). Megan walked in and saw "another black man sitting on the couch drinking a beer (Tr.656). Megan walked through the house (Tr.656). Ralph was a "neat freak" (Tr.657). Megan found dirty, used dishes in the kitchen, a pile of unfolded laundry on Ralph's bed, and mud – "disgusting" in the bathroom (Tr.657-58). After leaving Ralph's house, Megan called Diane to say it was very strange that two black guys were living in Ralph's house; it was out of character for him (Tr.664-65).

During this time, Mitch Miller, Diane's husband, also made attempts to contact Ralph (Tr.672-74). Mitch "became very worried" because Ralph had never failed to return Mitch's phone calls (Tr.673-74). After speaking to Megan on the phone and hearing "that there was two gentlemen there, and, that the house was trashed," Mitch went to Ralph's house (Tr.674-75).

There was a bluish car in the driveway and two men at the burn barrel behind Ralph's house burning things (Tr.675-76). Mitch introduced himself as Ralph's brother-in-law; Mark identified himself and "pointed to the other taller gentleman" and identified him as his cousin, Justin Brown (Tr.676).

Mitch, Mark, and Justin went into the house (Tr.678). Mark and Justin talked about helping Ralph move and said they were waiting for him to return before moving his personal stuff (Tr.679). Mark offered to show Mitch, who was well acquainted with Ralph's gun collection, Ralph's guns (Tr.679-80). Mitch found it odd that two bone-handled guns, collector's items, which Mark retrieved from the back bedroom, were loaded and not in the gun case (Tr.680-81). Mitch looked for, but did not find, a .22 that Ralph kept by his bed (Tr.682-83).

Diane knew Ralph was selling his house and closing was scheduled for July 26th; on July 25th, when he had still not returned, Diane contacted the Cape Girardeau County Sheriff and reported Ralph was missing (Tr. 638).

Subsequently, Diane learned someone had "used" Ralph's bank account, someone other than Ralph had used his ATM card at an Amoco gas station in Cape Girardeau, and Ralph's Discover credit card had been used at the Adams Mark Hotel in St. Louis (Tr. 639-41; StEx's 97 & 98). They reported this information to Detective Sikes in the Sheriff's Department (Tr.937). Detective Sikes subsequently located Mark's car which, ultimately, led him to Justin Brown (Tr.952-53). On the 26th, Diane and her husband, Mitch Miller, drove to Ralph's house to look around (Tr. 643). In a fire pit behind Ralph's house that he used to burn

things, they discovered charred remnants of various papers and an old photograph of Ralph and Diane's father (Tr. 643-44).

The Major Case Squad, with the cooperation of Ralph's bank, had been monitoring the use of his ATM card (Tr.877). The Squad had tracked the use of the card out to Las Vegas and from there along Highway 40 in the direction from Missouri (Tr.877). On July 30th, Officer Jarrell of the Missouri State Highway Patrol got a message that Ralph's ATM card had been just used in New Mexico (Tr.877). Officer Jarrell contacted the New Mexico State Police and gave them a description of a black Nissan owned by Katina Brimm – Mark's girlfriend (Tr.877-78). This information was dispatched to New Mexico State officers; two minutes after receiving the dispatch, Officer Kurtis Ward stopped Mark, Katina, and their daughter Raven (Tr.882-88).

Several Missouri law enforcement officers flew to New Mexico (Tr.816-18). On the morning of July 31st, Mark waived his rights and spoke to MSHP Officer Phil Gregory (Tr.818-22). Mark stated Ralph had given him the ATM card to use to withdraw $10,000 in exchange for beating up Megan's boyfriend (Tr. 821). That evening, the officers and Mark flew back to Missouri (Tr.822).

The next day, August 1, 2002, Officer Gregory interviewed Mark a second time (Tr.822). Officer Gregory told Mark the officers knew he had

not told the truth on the 31st, and Mark declined to make a statement (Tr. 823). Shortly afterward, Mark spontaneously changed his mind stating to the officers, "I want to tell you the truth" (Tr. 824).

According to Sgt. Gregory, Mark's second statement, as it pertained to Ralph's shooting, was as follows: Mark and Justin Brown were at Ralph's house; Justin was looking through Ralph's things and noticed that Ralph "had a large amount of money in his bank account or at least the check book indicated he did" (Tr.824). Mark and Justin "began talking about how to get the money" (Tr.824). Their initial idea was to take Ralph out to the country and beat him and steal his money (Tr.824-25). Realizing if Ralph got free he would report them, Mark and Justin decided they would have to kill him (Tr.825). They went to a dollar store where Justin bought duct tape then returned to Ralph's house to wait for him to return from Kentucky Lake (Tr.825).

When Ralph returned on July 7th, Justin and Mark opened the door of his garage so Ralph could drive in; once he was inside, they shut the door, and used the duct tape and nylon ties to restrain him (Tr.825). They took Ralph's wallet and money, put him in the extended cab portion of his pickup truck, and drove away (Tr.825). They weren't sure where to go; concerned the Missouri plates would stand out, they decided against going to Arkansas; they drove to a remote spot adjacent to a cornfield

near Portageville in New Madrid County (Tr.825). En route, Justin held Ralph down so he would not be seen by passing trucks (Tr.825).

Using shovels previously placed in the truck to dig Ralph's grave, they took turns digging a hole; while one dug, the other would watch Ralph in the truck (Tr.826). After digging the hole, they removed the ties and bindings from Ralph's legs and walked him to the hole (Tr.826). Justin had Ralph's .22 and used it to shoot him in the head (Tr.826). Mark told Officer Gregory what happened:

> The first time he tried to shoot the gun, the gun misfired and clicked and Mr. Lape flinched, according to Mark. The second time the gun fired, Mark remembered seeing Mr. Lape's hair blow back and a spot, and Mark pointed to his forehead where he was shot. Following that, Mark said that he became ill and had to stop and smoke a cigarette for a while and then went back and buried Mr. Lape.

(Tr.826).

Sgt. Gregory related, further, that Mark described driving north after burying Ralph, throwing away his cell phone, using Ralph's credit card to buy gas and beer (Tr.826). That night they went to some strip clubs in East St. Louis; they were able to get money with Ralph's ATM card because they had gotten his pin number before he was killed (Tr.827).

Mark and Brown stayed at the Adams' Mark that night (Tr.827).

The following day, after returning to Cape Girardeau, they got rid of the shovel in Herculaneum and burned Ralph's and their clothes in the burn pile behind Ralph's house (Tr.828). Using Ralph's computer, Mark and Justin transferred money from the large account to the checking account accessible through the ATM card (Tr.828-29).

After hearing that in Las Vegas there was no limit on the amount of money that could be withdrawn with an ATM card, Mark and Justin decided Mark and his girlfriend would go to Las Vegas (Tr.829).

At the conclusion of guilt phase, the jury returned guilty verdicts on all counts, as charged, and the case proceeded to penalty phase (LF219-23;Tr.1127-28).

At penalty phase, the state presented evidence of Mark's prior convictions for forgery, failure to return rented personal property, driving while license suspended, and misdemeanor theft, and misdemeanor battery (Tr.1153-57). Diane and Mitch Miller, Ralph's brother Steve, and Ralph's daughter Megan also testified (Tr.1170-1225).

In mitigation, Mark's mother, his sister, and his brother Carl testified about the difficulties Mark endured as a child, about their love for him, the kind things he had done for them, and the good things he had done in his life (Tr.1228-1241; 1257-64; Def.Ex.L).An expert witness, Wanda

Draper, testified Mark was sexually abused between the ages of 6 and 12 by a neighbor (Tr.1319-20). She testified extensively about the dysfunctional nature of Mark's family as he was growing up and the deleterious affect that, and the sexual abuse, had on him (Tr.1303-33).

Mark and his wife, Katina, lived with her mother, Mary Kinder, for approximately a year (Tr.1281-82). Ms. Kinder testified he helped her by buying things for her if she ran out of money between pay checks (Tr.1283). He cooked and cleaned house; more than once when she came home from work late, he had already prepared dinner (Tr.1283). Ms. Kinder testified that Mark loved and cared for his step daughters as well as his own daughter; she knew Mark had paid for school clothes for his step daughters when their own father did not (Tr.1284).

Teachers, coaches, and other people who had known Mark when he was in high school testified he was a good student, respectful to teachers and coaches, had a good sense of humor, never caused problems, got along well with other students, and was a dedicated, hardworking member of the football team, and that it was a shock to learn he had been charged with murder (Tr.1244-53,1294-1300,1371-74;1377-1386).

Deputies James Mills and Jim Vise testified Mark was a good inmate in the jail (Tr.1342-43,1348-49). He was respectful, never caused problems, never had to be disciplined, and never got into fights (Tr.1342-

44,1349). It was apparent Mark was devoted to his family (Tr.345).

Deputy Jason Ward testified that while in jail, Mark assisted Ward with a juvenile who had been using crack, cocaine and marijuana, and burglarizing houses (Tr.1366). Mark spoke with the juvenile to dissuade him from continuing on a path that would lead him to prison (Tr.1368).

The jury returned a verdict sentencing Mark to death (LF236; Tr.1455-60). To avoid repetition, additional facts will be presented as necessary in the argument.

## POINTS RELIED ON

### I

**The trial court erred in overruling appellant Mark's objections that Instructions 8 and 11, verdict directors for Count I, improperly attributed the "conduct element" of shooting Ralph Lape to "defendant or Justin M. Brown" instead of attributing the shooting solely to Brown and improperly instructed the jury Mark "acted together with" Brown and further erred in submitting these instructions to the jury. This violated Mark's rights to due process of law, trial by jury, freedom from cruel, unusual punishment, and reliable**

**sentencing, U.S.Const., Amend's V, VI, VIII, XIV; Mo.Const., Art. 1, §§10, 18(a), and 21; Note 5, Notes on Use to MAI-CR3d 304.04, and Rule 28.02(f). The evidence was Brown, alone, shot Ralph Lape; there was no evidence Mark shot him. Note 5, Notes on Use to MAI-CR3d 304.04 requires: when "the conduct elements of the offense were committed entirely by someone other than the defendant... (1) all of the elements of the offense, including the culpable mental state, should be ascribed to the other person or persons and not to the defendant" and "2) the alternative 'aided or encouraged'" should be used "in the paragraph following 'then you are instructed that the offense of [*name of offense*] has occurred...'"**

**The instructions prejudiced Mark at guilt phase by authorizing the jury to ignore the evidence and convict him of first degree murder based on the unsupported, speculative finding he shot Ralph Lape or acted together with Brown in shooting him thus lessening the state's burden of proof and making it more difficult for Mark to establish his defense: he did not shoot Ralph Lape and did not deliberate. The prejudice in allowing the jury to find Mark shot Ralph Lape spilled into**

**penalty phase in that the prosecutor could argue Mark should be sentenced to death since he killed Ralph Lape.**

*State v. Thompson*, 112 S.W.3d 57 (Mo.App.W.D. 2003);

*State v. Westfall*, 75 S.W.3d 278 (Mo.banc 2002);

*State v. Puig*, 37 S.W.3d 372 (Mo.App.S.D. 2001);

*State v. Taylor*, 422 S.W.2d 633 (Mo.1968).

**II**

**The trial court erred in overruling defense objections to the Armed Criminal Action Verdict Director, Instructions 15, for Count III, first degree murder, because it did not follow the Notes on Use with regard to accomplice liability. This violated Mark's rights to due process of law, fair trial by jury, reliable sentencing and freedom from cruel, unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV. The instruction violated Note 4 of the Notes on Use to MAI-CR3d 332.02 which provides that when someone other than the defendant used the weapon, the verdict director must follow the form of MAI-CR3d 304.04. Mark was prejudiced because the instruction posited that Mark committed the offense "with the aid of a deadly**

**weapon," but the evidence showed Mark did not use a weapon. The instruction thus invited the jury to believe that Mark shot and killed Ralph Lape despite the lack of evidence to support that finding.**

*State v. Thomas*, 75 S.W.3d 788 (Mo.App.E.D. 2002);

*State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002);

*State v. Cole,* 377 S.W.2d 306,307 (Mo.1964);

*State v. Goucher*, 111 S.W.3d 915 (Mo.App.S.D. 2003).

**III**

**The trial court erred in overruling Mark's objections to the prosecutor's voir dire on "accomplice liability." This violated his rights to due process of law, fair jury trial, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art.1, §10, 18(a), & 21. The voir dire was improper because it was an improper and flawed attempt to instruct the jury on the law of accomplice liability. Mark was prejudiced because his degree of liability was the primary question at both phases of trial, and the prosecutor's misleading voir dire, approved by the trial court's**

**overruling of Mark's objection, suggested Mark was guilty of first degree murder simply by being present at the crime.**

*State v. Cummings*, 134 S.W.3d 94 (Mo.App.S.D. 2004);

*State v. Brown*, 902 S.W.2d 278 (Mo.banc 1995);

*State v. Clark*, 981 S.W.2d 143 (Mo.banc 1998);

*State v. Jack*, 813 S.W.2d 57 (Mo.App.W.D. 1991).

**IV**

**The trial court erred in overruling Mark's objections and giving the jury Instruction 7A containing two improper statutory aggravators. This violated his rights to due process, jury trial, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art.1, §10, 18(a), & 21. Statutory aggravating circumstance 1, submitting §565.032.2(4), "murder ... for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another," should only apply and be given when the evidence shows a "murder for hire" situation; statutory aggravating circumstance 3, submitting §565.032.2(7), "the defendant killed Ralph L. Lape,**

**Jr., after he was bound or otherwise rendered helpless…" was plainly erroneous because the evidence showed Justin Brown, not Mark, shot Ralph Lape. This instruction prejudiced Mark by allowing the jury to use the erroneous submissions to support and find the facts required to establish the offense as death-eligible and assess punishment at death.**

*State v. Rousan*, 961 S.W.2d 831 (Mo.banc 1998);

*Stringer v. Black*, 503 U.S. 222 (1992);

*Lane v. State*, 114 Nev. 299, 956 P.2d 88 (Nev. 1998);

*State v. Sostre*, 261 Conn. 111, 802 A.2d 754 (Conn. 2002).

**V**

**The trial court erred in overruling Mark's objections, giving Instructions 3A (MAI-CR3d 314.30), 8A (MAI-CR3d 314.44), and 10A (MAI-CR3d 313.48), and failing to correctly instruct the jury the state had the burden of proving beyond a reasonable doubt all facts that must be found to increase punishment to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 18(a), and 21. Obvious distinctions**

**between the instructions' repetition of the state's burden of proving beyond a reasonable doubt the death-eligibility fact of at least one statutory aggravating circumstance and the instructions' silence regarding the burden of proving the death-eligibility fact of mitigating circumstances not outweighing aggravators would mislead the jurors into believing the state had no burden of proving mitigating circumstances insufficient to outweigh the aggravators or its burden was less than "beyond a reasonable doubt," or the defense had the burden of proof. Failing to ensure the instructions did not mislead the jurors as to the burden of proving the mitigators did not outweigh the aggravators prejudiced Mark by creating a reasonable likelihood the jurors improperly attributed the burden to Mark or failed to hold the state to proof beyond a reasonable doubt.**

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

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

*Blakely v. Washington*, 124 S.Ct. 2531 (2004);

*United States v. Booker*, 125 S.Ct. 738 (2005).

**VI**

**The trial court erred in overruling Mark's motion to quash the information or, alternatively, preclude the death penalty, and in sentencing him to death. This violated his rights to due process of law, notice of the offense charged, prosecution by indictment or information, and punishment limited to the offense charged. U.S.Const. Amend's VI, VIII, and XIV; Mo.Const., Art. I, §§10,18(a) and 21. In Missouri, at least one statutory aggravating circumstance is a fact a jury must find beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Missouri's statutory aggravators are, or effectively are, alternate elements of the greater, distinct offense of first-degree murder, but the information did not, as required by the Fifth, Sixth, and Fourteenth Amendments, notify Mark he could be convicted of aggravated murder and sentenced to death because it failed to charge any statutory aggravators. The offense charged was unaggravated first-degree murder carrying a maximum sentence of life imprisonment. The judgment must be reversed and Mark's sentence of death reduced to life imprisonment without probation or parole.**

*Blakely v. Washington*, 124 S.Ct. 2531 (2004);

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

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

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

**VII**

**The trial court erred in overruling Mark's motion to strike for cause juror No. 72 – Tim Miller. This violated Mark's rights to due process of law, fair and impartial jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's V,VI, III, & XIV; Mo.Const., Art. I, §§10,18(a),and21. In his juror questionnaire and during voir dire, Mr. Miller stated he preferred the death penalty because it would save money. Questioned further, Mr. Miller indicated his money-saving preference for death might influence his decision in certain cases depending on the circumstances. Mr. Miller's voir dire shows he should have been struck for cause because it was not possible to say his "views" would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" which require a**

**juror to determine sentence based only on the evidence presented not on pre-existing notions that "death saves money." Further, §494.480.4 violates the Equal Protection Clause of the Constitution and should not be applied to preclude appellate review in this case.**

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

*Adams v. Texas*, 448 U.S. 38 (1980);

*Morgan v. Illinois*, 504 U.S. 719 (1992);

*Evitts v. Lucey*, 469 U.S. 387 (1985).

**VIII**

**The trial court erred in overruling Mark's objections to portions of the victim impact testimony of Diane and Mitch Miller – Ralph's sister and brother-in-law. This violated Mark's right to due process of law, jury trial, reliable sentencing, and freedom from cruel, unusual punishment. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art.1, §§10, 18(a).**

**The trial court allowed Diane Miller to stand directly in front of the jury showing photographs of her family and sobbing while recounting the circumstances of her father's death and**

**her mother's illness which had nothing to do with the impact of Mark's offense. The trial court allowed Mitch Miller, while sobbing profusely, to testify in narrative form about his and his brothers' own impoverished childhoods, his moral principles, his opinion of the offense,**

**Diane and Mitch Miller's testimony had the effect of encouraging the jury to contrast the value of Ralph's life with the value of Mark's life, and to encourage the jury to make its decision based on passion, prejudice, and emotional impact. Mark was prejudiced because the content and emotional delivery of this evidence exceeded the bounds of victim impact evidence allowed by *Payne v. Tennessee*, 501 U.S. 808 (1991) and permitted by Missouri law.**

## ARGUMENT

**I**

**The trial court erred in overruling appellant Mark's objections that Instructions 8 and 11, verdict directors for Count I, improperly attributed the "conduct element" of shooting Ralph Lape to "defendant or Justin M. Brown" instead of attributing the shooting solely to Brown and improperly instructed the jury Mark "acted together with" Brown and further erred in submitting these instructions to the jury. This violated Mark's rights to due process of law, trial by jury, freedom from cruel, unusual punishment, and reliable sentencing, U.S.Const., Amend's V, VI, VIII, XIV; Mo.Const., Art. 1, §§10, 18(a), and 21; Note 5, Notes on Use to MAI-CR3d 304.04, and Rule 28.02(f). The evidence was Brown, alone, shot Ralph Lape; there was no evidence Mark shot him. Note 5, Notes on Use to MAI-CR3d 304.04 requires: when "the conduct elements of the offense were committed entirely by someone other than the defendant... (1) all of the elements of the offense, including the culpable mental state, should be ascribed to the other person or persons and not to the defendant" and**

**"2) the alternative 'aided or encouraged'" should be used "in the paragraph following 'then you are instructed that the offense of [*name of offense*] has occurred...'"**

**The instructions prejudiced Mark at guilt phase by authorizing the jury to ignore the evidence and convict him of first degree murder based on the unsupported, speculative finding he shot Ralph Lape or acted together with Brown in shooting him thus lessening the state's burden of proof and making it more difficult for Mark to establish his defense: he did not shoot Ralph Lape and did not deliberate. The prejudice in allowing the jury to find Mark shot Ralph Lape spilled into penalty phase in that the prosecutor could argue Mark should be sentenced to death since he killed Ralph Lape.**

*Additional Facts and Preservation*

Mark's August 1st and August 2nd statements confessed his involvement in Ralph Lape's murder and provided facts about the charged offenses.[1]

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[1] Mark's first statement, made July 31st, was that "Mr. Lape had given [him] the ATM card to use to withdraw $10,000 from his bank account"

As related by Sgt. Gregory, Mark's August 1st statement gave the following information about the murder:

When Ralph returned on July 7th, Mark and Justin Brown opened the garage door and Ralph drove in; then they shut the door and used duct tape and nylon ties to restrain him (Tr. 825). They put Ralph into the back of the truck and drove to a remote spot adjacent to a cornfield in New Madrid County (Tr. 25).

Using shovels previously placed in the truck, Mark and Brown took turns digging a hole and watching Ralph (Tr.826). After removing the ties and bindings from Ralph's legs, they walked him to the hole (Tr.826). Brown had Ralph's .22 and used it to shoot him in the head (Tr.826). Sgt. Gregory related Mark's description of the shooting:

> The first time he tried to shoot the gun, the gun misfired and clicked and Mr. Lape flinched, according to Mark. The second time the gun fired, Mark remembered seeing Mr. Lape's hair blow back and a spot, and Mark pointed to his forehead where he was shot. Following that, Mark said that he became ill and had to stop and smoke a cigarette for a while and then went back and buried Mr. Lape.

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in payment for beating up "Mr. Lape's daughter's boyfriend" (Tr. 820-21).

(Tr.826).

Mark's August 2nd videotaped statement[2] was consistent with his August 1st statement:[3]

> [M]e and him got to planning about how we was gone (sic) to do this. Uh, we was going to take him uh, just take him out in the country and leave him, but then we said if we do that we'd get on the down so we, we just decided if we was going to do it we was going to have to do it....
>
> Kill him....
>
> I already knew where all the guns was and everything cause I had already that 357 that he had give me when I was at home by myself... And we found a little silver 22, a little silver 22 pistol and we uh started planning on where was we goin (sic) get him at, in the house or in the garage in the trees on the side of the garage they block that one view and once you pull in the garage can't nobody see....

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[2] StEx-93, the transcript of Mark's videotaped statement, is included in the Appendix.

[3] The quoted portions of Mark's videotaped statement are taken from the transcript, StEx-93, included in the Appendix in its entirety at A27-57.

Ralph pulled up, he was laying on the couch I had the back door open on the deck and back in (sic) forth in the house….

And so, we both come out cause we had, the yard had just been mowed and it look like I had just finished cleaning up around like I'd been doing. I opened the door the big door for Ralph to come in and it was almost like he know that something wasn't right cause I had paused, then he pulled in. Then we had took that 22 pistol, we hid it in the couch at first by the camper in between the cushions then we decided that was too far, if we needed to use that or something, cause I know Ralph packed… .

> [Mark describes himself and Brown grabbing Ralph, binding him with duct tape and plastic ties, putting Ralph in the truck, putting shovels in the truck, taking money from Ralph's ziplock bag and driving to a place out in the country.]

We'd take our turns digging the hole, the ground was hard. We got Ralph out of the truck. Got the tape off of his knees, and his feet. He [Justin] just had, took the tigertails off and he [Justin] had hold of him [Ralph] and he [Ralph] said "please." Pushed him in the hole and Justin had the pistol, took two deep breaths psyching himself up, click. And when he did the first

click it didn't go off. And Ralph jumped like that he heard it. It was like he knew… .

He [Justin] pulled it again click, it still didn't go. Spun, pow. In slow motion his hair blowed back in this little dot, right in his forehead. Then I got hot. I had to go sit down and smoke a cigarette. He [Justin] asked me if I was alright, and then I come over there and we lined him up in the hole. And I don't guess it was long enough where his head was kind of like sticking up, kind of like you know propped up. He stepped on his head… .

Justin did. Stepped on it with force with sandles, stepped on his head. It sounded like his neck was popping or breaking He done fucked up. We done fucked up… .

(StEx-93; A30-A36).

Instruction 8, submitted by the state and patterned after MAI-CR3d-304.04 and modified by MAI-CR3d 314.02, provided:[4]

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[4] Instructions 8 and 11 are included in the Appendix (A12-15). Instruction 11 submitted the lesser included offense of second degree murder under §565.021. The pertinent portions of Instruction 8 – using the disjunctive "defendant or Justin M. Brown" with regard to the conduct elements of the offense and the language "acted together with" in

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 7, 2002, the defendant or Justin M. Brown caused the death of Ralph L. Lape, Jr., by shooting him,[5] and

Second, that defendant was aware that his or Justin M. Brown's conduct was practically certain to cause the death of Ralph L. Lape, Jr., and

Third, that beginning in Cape Girardeau County, Missouri, and ending in New Madrid County, Missouri,[6] the defendant or

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the paragraph following "then you are instructed" – are underlined and identical in Instruction 11 (A14-15).

[5] This first paragraph deviated from MAI-CR3d 304.04 and MAI-CR3d 314.02 by not including venue.

[6] This third paragraph deviated from MAI-CR3d 304.04, Notes on Use,

Justin M. Brown caused the death of Ralph L. Lape, Jr. after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,

then you are instructed that the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the death of Ralph L. Lape, Jr., the defendant acted together with or aided Justin M. Brown in causing the death of Ralph L. Lape, Jr., and did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,

then you will find the defendant guilty under Count I of murder in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF194-95,198-99).

At the instruction conference, Mark objected to Instructions 8 and 11 arguing Notes on Use to MAI-CR3d 304.04, Note 5, directs use of the

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Note 7(b), and MAI-CR3d 314.02 and its Notes on Use, Note 2.

disjunctive language "defendant or Justin M. Brown" only if the evidence is unclear or conflicting "as to which person engaged in the conduct constituting the offense" (Tr.1035-37,1040-41). When "the conduct elements of the offense were committed entirely by someone other than the defendant" and defendant's liability is based on his "aiding" another person, Note 5(a) requires all elements of the offense to be attributed to the other person (Tr.1039-41).

Mark also objected to the language instructing the jury "the defendant acted together with Justin M. Brown" (Tr.1037-38,1040-41). Citing *State v. Puig*, 37 S.W.3d 372 (Mo.App.S.D. 2001), Mark argued "the jury may find evidence" he "aided" Justin Brown but there was no evidence he "act[ed] together with" Justin because he did not commit any of the conduct elements (Tr.1037). He asked that the instruction be modified accordingly (Tr.1037-38).

The prosecutor claimed Mark's involvement was considerably greater than the *Puig* defendant's (Tr.1038). Addressing the first three paragraphs, the prosecutor implicitly acknowledged the only evidence of who killed Ralph Lape was Mark's statement that Brown shot him:

> [T]here could be members of that jury sitting there thinking that, that the Defendant was telling the truth, when he says, Justin Brown pulled the trigger, there could be members of the jury that

are thinking, well we are proving that they were acting together and they went out there with a plan to kill him, but we think maybe the defendant is the one that pulled the trigger. I don't think we have to submit it solely to the jury on what the defendant said in his confession and when each is (sic) a matter of law they are each responsible for the action of another and I don't want to increase the State's burden of proof by having a jury unanimously find one or the other that one had actually pulled the trigger.

(Tr.1039).

The trial court overruled Mark's objections (Tr.1040-41). These rulings were preserved for review by including them in the motion for new trial (LF261-64).

*Standard of Review*

"The Court will reverse due to instructional error 'if there is error in submitting an instruction and prejudice to the defendant.'" *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002) *citing* Rule 28.02(f)[7]; *State*

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[7] "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 judicially determined, provided that objection has been timely made pursuant to Rule 28.03." *See* (A59).

*v. Taylor,* 944 S.W.2d 925, 936 (Mo.banc 1997). When the trial court's failure to give an instruction required by MAI or to "give it in accordance with an accompanying Note on Use, may have adversely influenced the jury … [there] is reversible error." *Westfall*, *supra*, 75 S.W.3d at 284. Such error is presumed prejudicial; the burden is on the state to "clearly establish… that the error did not result in prejudice." *Id*.

"To ascertain whether or not the omission of language from an instruction is error, the evidence is viewed in the light most favorable to the defendant and 'the theory propounded by the defendant.'" *Id*. *citing inter alia State v. Cole,* 377 S.W.2d 306,307 (Mo.1964); *State v. Jones,* 921 S.W.2d 154,155 (Mo.App.E.D. 1996). "Missouri courts require 'religious observance' both as to the forms themselves and the instructions contained in their Notes on Use.'" *State v. Goucher*, 111 S.W.3d 915,917 (Mo.App.S.D. 2003); citation omitted.

"If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it." *Id*. at 280; citations omitted. "Missouri has traditionally placed great emphasis on legally correct instructions, and this Court has made it clear that criminal defendants should be freely allowed to argue their contentions arising from the facts." *Id*. at 284; citations omitted.

*Argument*

The state chose to make Mark's statements a primary part of the state's case at every stage of trial. The prosecutor used them to formulate voir dire questions (Tr.200-02,427-29,488-89,523) and in his opening statement (Tr.586,588-99,622-23). The prosecutor introduced the statements into evidence through Sgt. Gregory's testimony (Tr.816-35). The prosecutor played Mark's videotaped statement, and provided each juror with a copy of a transcript of the statement (Tr.832-35; StEx-92, and StEx-93). References to Mark's statements filled the prosecutor's argument; he urged the jury to take the Mark's videotaped statement back to the jury room and play it again (Tr.1084-91,1094-96,1099).

Mark's statements were important to both sides because they comprised the only evidence of who shot Ralph Lape. And both statements – the only evidence of who shot Ralph Lape – unequivocally stated Justin Brown shot Ralph Lape (Tr.825-26; StEx-92; StEx-93).

That the only evidence of who shot Ralph Lape was Mark's statement that Brown shot Ralph Lape was, as shown by the prosecutor's response to Mark's objections to the instructions, a problem for the state. The prosecutor did not dispute or even address Mark's contention that the Notes on Use required the instructions to use the language "Justin Brown caused the death of Ralph L. Lape, Jr." instead of using the disjunctive. Nor did the prosecutor claim there was substantive evidence

Mark shot Ralph Lape.

Instead, the prosecutor contended the trial court should use the disjunctive language, "defendant or Justin Brown" because some members of the jury might not believe the state's evidence: Mark's statement that Justin Brown shot Ralph Lape (Tr.1039). The prosecutor was concerned that some jurors might disbelieve the state's evidence that Mark "pulled the trigger" (Tr.1039).

The prosecutor never claimed the evidence was unclear or conflicting; he could hardly do so since Mark's statements were clear and consistent. His sole reason for submitting the disjunctive language was his fear some jurors might not believe the state's evidence: Brown was the shooter.

The prosecutor maintained if some jurors did not believe the state's evidence that Brown was the shooter, not using the disjunctive language would "increase the State's burden of proof by having a jury unanimously find one or the other that one had actually pulled the trigger" (Tr.1039). There are serious problems with this argument.

Using this language more likely had a different and prejudicial effect. Some jurors might believe, solely because the instruction used the language "defendant or Justin Brown," there must be evidence Mark shot Ralph Lape; they might believe the instruction would not include that language otherwise.

The state was not obliged to use Mark's statements; the prosecutor chose to do so. If the prosecutor did not like the fact that Mark's statements said Justin Brown shot Ralph Lape – if Mark's statements were problematic for the state – the prosecutor could have chosen to try the case without them.

MAI-CR3d 304.04 effectively addresses the prosecutor's concerns. It protects the state against an improper increase in its burden of proof by requiring the jury be instructed, as in Instructions 8 and 11, "A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing and offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it" (LF194,198; MAI-CR3d 304.04[8]).

Moreover, not only was the improper "defendant or Brown" disjunctive

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[8] Note 2 of the Notes on Use to MAI-CR3d 304.04 provides: 'This instruction provides for the modification of the ordinary verdict directing instruction for an offense to cover the situation where the liability of the defendant is dependent upon his being responsible for the conduct of another person by virtue of being an "aider and abettor." See Sections 562.036 and 562.041, RSMo 2000.'

language unnecessary to protect the state against a greater burden of proof, this language had the prejudicial effect of *diminishing* the state's burden of proof. The prosecutor's response to Mark's objection to the disjunctive language of Instructions 8 and 11 proves the point. The prosecutor admitted he was concerned the jury would not believe the evidence he had presented about the shooting: Mark's statement that Justin shot Ralph.[9] The state's method of eliminating this problem was to include in the verdict directors language that allowed the jury to disbelieve the state's evidence – Mark's statement that Justin shot Ralph – and still convict Mark of first degree murder.

Notwithstanding the state's extensive reliance on Mark's statements to convict him of first degree murder, the prosecutor assured the jurors they could convict Mark of first degree murder even if they did not believe the state's evidence: Mark's statement that Justin Brown shot Ralph Lape. The prosecutor advised the jurors they could use non-existent evidence to create a different version of the shooting evidence. They

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[9] "[T]here could be members of that jury sitting there thinking that, that the Defendant was telling the truth, when he says, Justin Brown pulled the trigger, there could be members of the jury that are thinking ... maybe the defendant is the one that pulled the trigger... ." (Tr.1039).

could find that Mark shot Ralph Lape and use that version to convict Mark of first degree murder:

> And when you look at that instruction [8], you'll see it talks about accomplice liability, read that instruction. It tells you what the law is, but it also points out that when two people are acting together to commit a crime and aiding each other, then each is responsible for the actions of another. *It doesn't matter if we don't know for sure which one of them pulled the trigger, as long as each one of them acted together, and deliberated, then, ladies and gentlemen, both of them are guilty of first degree murder*.

(Tr.1097; emphasis added).

But the prosecutor's "creative" solution was, and is, illegal. Disbelief of evidence presented does not give rise to contradictory facts.

A jury may disbelieve the state's evidence – here, Mark's statement Brown shot Ralph Lape – but the jury's disbelief does not give rise to substantive evidence that Mark shot Ralph Lape.

"The general rule is that an instruction must be based upon substantial evidence and the reasonable inferences therefrom." *State v. Habermann*, 93 S.W.3d 835, 837 (Mo.App.E.D. 2002) *citing State v. Westfall*, *supra*, 75 S.W.3d at 280. "[A] jury's right to disbelieve evidence" does not "create affirmative evidence of the performance of a criminal act

where the evidence is not contradictory or inconsistent." *State v. Thompson*, 112 S.W.3d 57,70 (Mo.App.W.D. 2003).

'If disbelief operates as proof, then the jury may always find on any issue unfavorably to a defendant who offers evidence favorable to himself, despite lack of other evidence on the issue. This is not the law. See *Boatmen's Savings Bank v. Overall*, 16 Mo.App. 510, 515-16, where the point is clearly made thus:

> "* * * *We find no evidence in the record to support this instruction, unless we can assume as a legal proposition that a jury may, when a fact is asserted by a discredited witness, not only disbelieve him, but consider his assertion of one fact as affirmative testimony of another fact diametrically the reverse*. This we must decline to do.'

*State v. Taylor*, 422 S.W.2d 633,638 (Mo.1968) (emphasis added).

"The effect of disbelief by the jury of the defendant's testimony is, of course, persuasive in the jury's arriving at their verdict, but it is not probative and does not constitute substantive proof on a material issue not there... ." *Id*.

*State v. Thompson*, *supra*, is factually similar to the present case and is instructive. The defendant, Thompson, and several fellow gang members were all involved in a series of events that culminated in the

death of the victim. 112 S.W.3d at 60-61. Although Thompson was not present when other gang members severely beat the victim, Thompson later drove two gang members to a river where the victim's throat was cut and his body left in the water. *Id.* On the day after the murder, Thompson made a statement "about the events leading up to the murder of Sutton and about the murder." *Id.* at 61. On the second day after the murder, Thompson made a second statement providing additional details of "the events surrounding" the murder. *Id.*

As in the present case, the trial court overruled Thompson's objections to the verdict director's use of the disjunctive language, "the *defendant or other persons* caused the death of [the victim] by striking him, kicking him and cutting his throat" and his request that the instruction "be modified in accord with Note on Use 5(a)… ." *Id.* at 65-68. On appeal, Thompson contended it was error to submit the instruction to the jury with the disjunctive language because it allowed the jurors to convict him "without evidence that Thompson committed the essential elements of the offense, in that the instruction hypothesized that Thompson *or* others killed the victim." *Id.* at 67.

Relying on *State v. Dulany*, 781 S.W.2d 52 (Mo.banc 1989), the state argued "there was no error" in the verdict director because "the jury could disbelieve all or parts of Thompson's testimony and find that he

committed the conduct elements." *Id*. at 69.

The Western District Court of Appeals found *Dulany* "distinguishable" on its facts. The Western District's analysis applies equally to the present case and bears repeating:

> The instant case is distinguishable from *Dulany*. In *Dulany,* the defendant confessed twice to police *each time claiming a different person was responsible for the killings*. 781 S.W.2d at 55. In addition to the two prior statements made to police by the defendant, the jury had physical evidence, defendant's trial testimony, and the deposition of another participant in the crimes. *Id.* at 53. *Here, the State presented the two consistent statements of Thompson in its case in chief and relied on Thompson's statements to prove its case that he was an accomplice to first degree murder*. The State did not contradict Thompson's statements and argued his version to the jury. It was clear in this case, based on the State's own evidence, that the conduct elements were committed entirely by another person or persons.

*Thompson*, 112 S.W.3d at 70.

Of particular interest are the Western District's comments regarding the effect of a jury's disbelief of evidence:

> We do not read *Dulany* as standing for the proposition that a jury's

right to disbelieve evidence can create affirmative evidence of the performance of a criminal act where the evidence is not contradictory or inconsistent. In *Dulany*, the defendant admitted holding a gun on the victims, getting a rope to bind them, and removing from the house the empty cans of roofing cement used to set the victims on fire. *Id.* at 55. She gave two contradictory confessions accusing two different persons of actually binding the victims and setting the fire. In her last confession she admitted that only she and the other co-defendant were actually in the house when the victims were murdered. *Id.* at 54. We do not believe the Supreme Court intended to suggest that the possibility of juror rejection of evidence would always support an MAI-CR 3d 304.04 submission of a disjunctive submission of the conduct elements of the crime.

*Id*. at 70.

The same is true here. That the jurors may have disbelieved what Mark said – that Justin shot Ralph Lape – does not allow them to create a different fact – that Mark did the shooting.

In *Thompson*, unlike the present case, the paragraph following "then you are instructed that the offense of murder in the first degree has occurred…" did not improperly instruct the jury that he "acted together

with" others. *Id*. at 66-68. But in *State v. Puig*, *supra*, the Southern District was called upon to determine whether the evidence supported including the "acted together with" language in the verdict director and if not, whether it was prejudicial error.

Andrew Puig was convicted as charged of sale of a controlled substance. 37 S.W.2d at 374. Puig was at Anderson's house when an undercover officer arrived and arranged to buy marijuana from Anderson. *Id*. at 374. Anderson's scale, which he said he needed to weigh the marijuana was in Puig's truck. *Id*. At Anderson's request, Puig retrieved the scale from his truck and gave it to Anderson who then weighed out the marijuana and completed the sale. *Id*. at 374-75.

On appeal, Puig alleged the trial court erred in including the disjunctive language that Puig "acted together or aided" Anderson because there was no evidence he 'acted together with Mr. Anderson to commit any "conduct elements" of the offense.' *Id*. at 376. As in the present case, this language was included in the paragraph that followed "then you are instructed that the offense of … has occurred…" *Id*.

The Southern District found "no evidence that Defendant by his own acts committed any of the conduct elements of the offense of selling marijuana." *Id*. at 377. Therefore, although there was sufficient evidence from which the jury could find that Puig "aided" Anderson, "no

evidence supported the alternative submission of acting together with Anderson" and the Court held it was error to submit that alternative to the jury. *Id*. at 377-78.

The Court found the error prejudiced Puig. Although there was no evidence of Puig acting together with Anderson, as a result of the misleading, disjunctive submission, some jurors may have believed Puig "acted together with Anderson by giving him the scale. *Id*. at 378. The prosecutor's argument contributed to prejudice by claiming the evidence showed Puig acted together with Anderson. *Id*. In fact, the "evidence" cited by the prosecutor did not exist. *Id*. The Court explained: "Here, the prosecutor's argument, without evidentiary support, had the effect of misleading the jury." *Id*. "Some jurors may have relied on the prosecutor's remarks and decided guilt based on 'acting together,' while disregarding whether Defendant 'aided' Anderson." *Id*.

Instructions that permit a "prosecutor to argue a theory of the case not supported by the evidence … lessen[s] the State's burden of proof" and allows a jury to find a defendant guilty based on "speculation and conjecture." *State v. Perry*, 35 S.W.3d 397,399 (Mo.App.E.D. 2000) (where evidence supported a finding that one or the other of the defendants possessed drugs but did not support a finding of joint possession, jury instruction on joint possession and prosecutor's

argument that possession could have been joint or sole required reversal). An erroneous instruction "disjunctively hypothesiz[ing]" that the either the defendant or another person killed the victim that lacks evidentiary support for the hypothesis that the defendant killed the victim has been held to be reversible error when the prosecutor argues the jury may find the defendant was the person who killed the victim. *State v. Scott*, 689 S.W.2d 758,760 (Mo.App.E.D. 1985).

As in the *Perry* and *Scott* cases, the prejudice in the present case was compounded by the prosecutor's guilt phase argument which took full advantage of the instructions' disjunctive language not requiring the jurors to find Justin shot Ralph and allowing them to find Mark shot Ralph. Referring to the verdict director, Instruction No. 8, the prosecutor told the jury:

> [L]ook at Instruction No. 8, because that tells you the elements of the crime of first degree murder, which are proven clearly in this case. And when you look at that instruction, you'll see it talks about accomplice liability, read that instruction. It tells you what the law is, but it also points out that when two people are acting together to commit a crime and aiding each other, then each is responsible for the actions of another. *It doesn't matter if we don't know for sure which one of them pulled the trigger, as long as each*

*one of them acted together, and deliberated, then, ladies and gentlemen, both of them are guilty of first degree murder… .*

(Tr.1097).

Here, Mark admitted he was involved in the offenses; the only real issue was the extent of his involvement and his degree of guilt (Tr.625). Thus, the jury's findings concerning the extent of his participation were critical to both the state and the defense. For this reason, Instructions 8 and 11 prejudiced Mark. Despite the lack of actual evidence, the instructions allowed the jury to find as fact, and use as fact to convict Mark of first degree murder, that he, not Brown, shot Ralph Lape (LF194-95, 198-99). Moreover, the disjunctive language in the instructions invited the jury to reject the defense: Mark did not shoot Ralph Lape and did not deliberate and was guilty only of second degree murder (Tr.625-27,1100-14).

The trial court may have personally believed that Mark's statements were self-serving and minimized his own involvement. But the law requires that in instructing the jury, the trial court may only use the evidence actually presented at the trial and must view that evidence in the light most favorable to the language requested by the defendant.

Allowing a trial court to indulge in fact finding violates the Sixth Amendment. *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New*

*Jersey*, 530 U.S. 466 (2000). It is no more proper for the trial court to create nonexistent facts based on the possibility that the jury might not believe the defendant than it is for the jury to create nonexistent facts based on its disbelief of the defendant. *State v. Westfall*, 85 S.W.3d at 283, and n. 20 ("By submitting the jury instruction without the language tendered by Westfall, the trial court treated these questions of fact as matters of law and essentially removed these crucial decisions from the province of the jury.... The dissent relies solely on supposition for its argument that any reasonable juror would find that Westfall used deadly force under the facts of this case. Therein lies the problem. The jury was not allowed to make this finding, and no amount of speculation by the dissent can cure the instructional error that removed this factual inquiry from the province of the jury.")

Mark was also prejudiced because the error in submitting this instruction and allowing the jury to find Mark was the shooter and convict him of first degree murder on that basis also prejudiced him at penalty phase. Among other things, this error made it possible for the prosecutor, at penalty phase, to submit statutory aggravator §565.032.2(7) with the language, "defendant killed Ralph L. Lape, Jr.," and argue Mark should get the death penalty because he was the shooter. To avoid repetition, Mark respectfully directs the Court's

attention to Point III and the corresponding portion of the argument addressing this matter in detail.

For the foregoing reasons, it is impossible to say the trial court did not commit error in submitting Instructions 8 and 11 to the jury. It is impossible to say the error in this case did not help the state and did not hurt the defendant. It is impossible to say the error in this case was harmless beyond a reasonable doubt. The defendant, Mark, was prejudiced and the cause must be reversed and remanded for a new trial.

**II**

**The trial court erred in overruling defense objections to the Armed Criminal Action Verdict Directors, Instructions 15, 17, and 19 for Count III, first degree murder, because they did not follow the Notes on Use with regard to accomplice liability. This violated Mark's rights to due process of law, fair trial by jury, reliable sentencing and freedom from cruel, unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV. Mark was prejudiced because the instructions posited that Mark committed the offense "with the aid of a deadly weapon," but the evidence showed Mark did not use a weapon. The**

**instructions violated Note 4 of the Notes on Use to MAI-CR3d 332.02 which provides that when someone other than the defendant used the weapon, the verdict director must follow the form of MAI-CR3d 304.04.**

*Additional Facts*[10] *and Preservation*

At the instructional conference, Mark objected to the verdict directors for Count III, armed criminal action on the grounds they did not follow MAI-CR3d 332.02 and the Notes on Use (Tr.1041-43). Counsel stated, "the evidence in this case is, very clear, that it was not Mark Gill that used the deadly weapon in killing Ralph Lape, it was Justin Brown that did that (Tr.1041-42). Counsel asked the instructions be struck and re-written using MAI-CR3d 304.04 (Tr.1042). The trial court overruled Mark's objections; he included the Court's ruling in his motion for new trial (Tr.1044;LF264-66).

Instruction 15,[11] the Verdict Director for Count III, Armed Criminal

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[10] For the sake of brevity, in lieu of repeating the facts pertaining to the commission of the offense, Mark respectfully directs the Court's attention to the additional facts presented in detail in the preceding portion of the Argument addressing his Point I - the verdict directors for the offense of first degree murder.

Action, stated,

> As to Count III, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that defendant committed the offense of murder in the first degree, as submitted in Instruction No. 8, and
>
> Second, that defendant committed that offense with the aid of a deadly weapon, then you will find the defendant guilty under Count III of armed criminal action.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(LF203; A16-A18).

*Standard of Review*

"The Court will reverse due to instructional error 'if there is error in submitting an instruction and prejudice to the defendant.'" *State v.*

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[11] Instructions 15, 17, and 19 are included in the Appendix at A16-A18. Instructions 17 and 19 submit the offense of armed criminal action as to the lesser included offenses of second degree conventional and felony murder but are otherwise identical to Instruction 15.

*Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002) *citing* Rule 28.02(f)[12]; *State v. Taylor,* 944 S.W.2d 925, 936 (Mo.banc 1997). When the trial court's failure to give an instruction required by MAI or to "give it in accordance with an accompanying Note on Use, may have adversely influenced the jury … [there] is reversible error." *Westfall*, *supra*, 75 S.W.3d at 284. Such error is presumed prejudicial; the burden is on the state to "clearly establish… that the error did not result in prejudice." *Id*.

"To ascertain whether or not the omission of language from an instruction is error, the evidence is viewed in the light most favorable to the defendant and 'the theory propounded by the defendant.'" *Id*. *citing inter alia State v. Cole,* 377 S.W.2d 306,307 (Mo.1964); *State v. Jones,* 921 S.W.2d 154,155 (Mo.App.E.D. 1996). "Missouri courts require 'religious observance' both as to the forms themselves and the instructions contained in their Notes on Use.'" *State v. Goucher*, 111 S.W.3d 915,917 (Mo.App.S.D. 2003); citation omitted.

The Eastern District recently faced much the same question in a non

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[12] "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 judicially determined, provided that objection has been timely made pursuant to Rule 28.03." *See* (A59).

capital first degree murder case. In *State v. Thomas*, 75 S.W.3d 788 (Mo.App.E.D. 2002), the defendant, driving a Pontiac Trans Am, pulled up at a stop sign facing a Ford Bronco on the other side of the intersection; two other men were in the car with the defendant. Id. at 789-90. The occupants of the two cars all knew each other, and earlier that day, the front seat passenger in the Bronco and defendant had been in a fight. *Id.* at 790.

The men exchanged words as the vehicles pulled along side each other; after the Bronco passed, the defendant made a U-turn and moved close behind the Bronco. *Id.* Defendant's front-seat passenger leaned out of the window and fired at the Bronco which speeded away. *Id.* As defendant pursued the Bronco, his passenger fired at it repeatedly. *Id.* a man in the back of the Bronco was shot in the head and died. *Id.*

At defendant's trial, the trial court gave the following instruction:

Instruction No. 13

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that defendant ... is guilty of the offense of murder in the first degree, as submitted in Instruction No. 11, and

Second, that defendant knowingly committed that offense by or with or through the use or assistance or aid of a deadly

weapon,

then you will find the defendant … guilty under Count II of armed criminal action….

*Id*. at 791.

Defendant was convicted of first degree murder, and on appeal, alleged the trial court plainly erred in submitting the armed criminal action verdict director to the jury. *Id*. The Eastern District agreed finding the verdict director failed to comply with the Notes on Use, Note 6, to MAI-CR3d 332.02 which requires, "where it is alleged that a person other than the defendant used the deadly weapon, the instruction for armed criminal action must be in the form of MAI-CR3d 304.04."

Although the instruction was erroneous, the Court held it was not plain error because it did not mislead the jury. *Id*. First, the instruction referred the jury back to the verdict director which, apparently, correctly submitted accomplice liability. *Id*.

Further, the Court noted "the evidence adduced at trial *and counsel's arguments made it clear that the only theory of defendant's guilt was that by pursuing the Bronco while his passenger was firing a deadly weapon, defendant acted with the shooter*." *Id*. 791-92; emphasis.

The same error was committed in the present case, but unlike the *Thomas* case, the error here was both preserved and prejudicial. Mark

timely and specifically objected and preserved the point by including it in the motion for new trial (Tr.1041-43;LF264-66).

Further, there was nothing to prevent the jury from being misled because, unlike the *Thomas* case, the verdict director submitted to the jury in Mark's case told the jury that he could have fired the gun and killed Ralph Lape (LF194-95; A12-A13). And, finally, the attorneys did not agree that Mark's guilt was premised only on aiding or encouraging Justin Brown. The prosecutor, as noted in the preceding portion of the argument pertaining to Point I, maintained that Mark was the shooter or could have been the shooter.

The effect of this instruction was to further convince the jury that Mark was the shooter. The instruction said Mark used the gun. This instruction increased the prejudice created by the erroneous verdict director. It too, paved the way for the prosecutor's argument at penalty phase: that Mark, himself, killed Ralph Lape.

For the foregoing reasons, Mark's conviction of first degree murder must be reversed and the cause remanded for a new trial.

## III

**The trial court erred in overruling Mark's objections to the prosecutor's voir dire on "accomplice liability." This violated**

**his rights to due process of law, fair jury trial, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art.1, §10, 18(a), & 21. The prosecutor's oversimplified "accomplice liability" hypothetical was improper because it misstated the law and erroneously instructed the jury on the law of accomplice liability. Mark was prejudiced because his degree of liability was the primary question at both phases of trial, and the prosecutor's misleading voir dire, approved by the trial court's overruling of Mark's objection, suggested Mark was guilty of first degree murder simply by being present at the crime.**

*Additional Facts and Preservation*

During the state's general voir dire, the prosecutor asked the jurors for their "thoughts on accomplice liability and if [they] could follow" the court's instructions (Tr.198). The prosecutor then announced that the trial court would tell the jurors, "in Missouri a person is respons[ible] not only for his own conduct, but also for the conduct of another person in committing a crime" (Tr.198). When the prosecutor stated, "The typical example that is given in law school, that *if* two guys are robbing a bank and one waits out in the car as the guy driving a get-away vehicle and

the other one goes in and does the robbery, *then both of them are guilty* of robbery," Mark objected that the prosecutor was "not stating the law correctly" (Tr.199). The trial court overruled Mark's objection; he preserved it for review by including it in his new trial motion (LF261).

*Standard of Review*

"The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury." *State v. Clark*, 981 S.W.2d 143,146 (Mo.banc 1998). "The underlying purpose of voir dire is to determine the ability and willingness of veniremen to follow the law and evidence, and counsel is to be given wide latitude in exposing any latent bias. *State v. Roberts*, 709 S.W.2d 857,866 (Mo.banc 1986).

The trial judge's "wide discretion" in conducting voir dire includes determining "the appropriateness of specific questions," and such rulings are reviewed for abuse of discretion. *State v. Oates*, 12 S.W.3d 307,310-11 (Mo.banc 2000). The party claiming abuse of discretion must prove 'a "real probability" of prejudice....' *Id.* at 311.

Trial court discretion is not unlimited. "'[A]n untenable judicial act that defies reason and works an injustice constitutes abuse of discretion."' *State v. Jack*, 813 S.W.2d 57,60 (Mo.App.W.D. 1991) *citing State v. Williams*, 643 S.W.2d 3,4 (Mo.App.E.D. 1982) *citing State v. Stubenrouch*, 499 S.W.2d 824,826 (Mo.App.St.L.D. 1973). "When the

trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable, the appellate court will find an abuse of discretion." Id. *citing State v. Marks*, 721 S.W.2d 51,55 (Mo.App.W.D. 1986) *citing Mathews v. Chrysler Realty Corp*, 627 S.W.2d 314,318 (Mo.App.W.D. 1982).

*Argument*

The prosecutor's hypothetical misled and misinformed the jurors on the law by greatly oversimplifying the law of accomplice liability. It is for the judge, not counsel to instruct the jury on the law. *State v. Brown*, 902 S.W.2d 278,285-86 (Mo.banc 1995). The prosecutor's accomplice liability hypothetical was improper because instead of asking the jurors if they "could" follow the court's instructions or if they "could" find an accomplice liable, the hypothetical stated the law in absolutes: "*if* …. *then both are guilty*."

Recently, in *State v. Cummings*, 134 S.W.3d 94 (Mo.App.S.D. 2004), the Southern District considered an "accomplice liability" hypothetical. Although superficially similar to the hypothetical used by the prosecutor in present case, slight differences in the wording of the hypothetical formulated by the prosecutor in the *Cummings* case support Mark's argument and the Southern District's finding that there the hypothetical was not manifestly unjust.

The accomplice liability hypothetical in *Cummings* was as follows:

> [Prosecutor:] One goes into the bank and actually holds up the teller. Under the law, they are equally responsible for the robbery and can each by [sic] found guilty, even though the guy driving the car and the lookout never went inside the bank. Is there anyone that does not understand that? (No hands raised.)....
>
> I'm going to take it one step further. The guy that goes in the bank shoots a security officer. Okay? Now, the guy sitting out in the car, that drove the car and is lookout never intended for anyone to get killed.
>
> [Defense Attorney]: Judge, I object to the illustration.
>
> THE COURT: Objection will be overruled, you may continue.
>
> [Prosecutor]: Thank you, Your Honor. But someone is killed inside the bank. Is there anyone that disagrees with the proposition that the lookout driver can be found guilty of the murder of the security guard?

*Id*. at 107-08.

Albeit slight, the differences between the *Cummings'* prosecutor's accomplice liability hypothetical and the accomplice liability comments

the prosecutor in the present case made to Mark's venire is significant. This difference, simply, is that the *Cummings*' prosecutor posed her hypothetical as a possibility – not an absolute: "***can*** be guilty" as opposed to "***are*** guilty."

When a trial court overrules a defendant's objections to a prosecutor's statement, the statement receives the "'imprimatur of the trial court.'" *State v. Massey*, 817 S.W.2d 624,627 (Mo.App.E.D. 1991) *citing State v. Williams,* 659 S.W.2d 778 (Mo.banc 1983). In Mark's case, this official approval of the prosecutor's view of accomplice liability concerned the primary issue at both the guilt and penalty phases of trial. In the eyes of the jury, overruling Mark's objection to the prosecutor's explanation of accomplice liability meant that the prosecutor was correct. The jury went into trial believing that if Mark was not the shooter, under the law, he *was* absolutely as guilty as if he had shot and killed Ralph Lape. The jury had already been told by the prosecutor, with the judge's approval, that this was the law and there was no question of Mark's degree of guilt at guilt phase or his moral culpability at penalty phase.

For the foregoing reasons, the Court must reverse Mark's conviction and remand for a new trial.

## IV

**The trial court erred in overruling Mark's objections and giving the jury Instruction 7A containing two improper statutory aggravators. This violated his rights to due process, jury trial, freedom from cruel, unusual punishment, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art.1, §10, 18(a), & 21. Statutory aggravating circumstance 1, submitting §565.032.2(4), "murder ... for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another," should only apply and be given when the evidence shows a "murder for hire" situation; statutory aggravating circumstance 3, submitting §565.032.2(7), "the defendant killed Ralph L. Lape, Jr., after he was bound or otherwise rendered helpless..." was plainly erroneous because the evidence showed Justin Brown, not Mark, shot Ralph Lape. This instruction prejudiced Mark by allowing the jury to use the erroneous submissions to support and find the facts required to establish the offense as death-eligible and assess punishment at death.**

*Additional Facts and Preservation*

At penalty phase, Mark timely objected to Instruction 7A – MAI-CR3d 314.40 (Tr.1395-1400; LF228-29; A22-23). Mark argued that the first aggravator, submitting §565.032.2(4) – the defendant committed the murder "for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another" – should not be interpreted to duplicate the statutory aggravator of "robbery" under §565.032.2(11) and should be limited to "murder for hire" situations not present in this case (Tr.1395-97; A9-A10). The prosecutor said the term "receiving money" was broader than just robbery and a prosecutor "could choose which of those aggravating factors to present" (Tr.1398).

Mark's objection to the third aggravator, submitting §565.032.2(7), noted it lacked evidentiary support: "The only evidence that came out in this case, pertaining to actual facts of the homicide itself, came through Mr. Gill's statement, the video taped statement, and, Officer Gregory's testimony pertaining to defendant's other two statements, and, the statements that Mr. Gill made was that the victim was unbound before he was killed, and, therefore, this aggravating circumstance would not

apply (Tr.1399-1400; A9).[13] The prosecutor did not respond.

The trial court overruled Mark's objections (Tr.1398,1400-01). Mark included these rulings in his new trial motion (LF271-73).

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[13] In his objection, defense counsel specifically cited Mark's statement as "the only evidence that came out in this case, pertaining to actual facts of the homicide itself" (Tr.1400). Although counsel did not specifically point out that these statements – the only evidence of the shooting – showed Justin Brown did the shooting, since the trial court had previously rejected a lengthy argument to that effect at guilt phase, Tr.1035-41, it is unlikely the trial court would have agreed with it here and sustained Mark's objection to this aggravator. If the trial court were inclined to reconsider its position on the question of who did the shooting, the court could have granted the motion for new trial based on paragraphs 32 and 33, but the court did not do so. Accordingly, because Mark did object, generally, that the evidence did not support this aggravator and for the additional reason that the trial court had ample opportunity to consider this same question in another context, Mark respectfully requests the Court treat the portion of this Point concerning the third aggravator as preserved. In the alternative, if the Court declines to do so, Mark respectfully asks the Court to review for plain error. Rule 30.20.

*Standard of Review and Applicable Law*

A meaningful basis must exist for distinguishing the few cases where death is appropriate from the many where it is not. *Furman v. Georgia*, 408 U.S. 238, 313 (1972). A statutory aggravator that fails to provide adequate guidance for making this distinction is unconstitutional. *Maynard v. Cartwright*, 486 U.S. 356, 365 (1988).

"The Court will reverse due to instructional error 'if there is error in submitting an instruction and prejudice to the defendant.'" *State v. Westfall*, 75 S.W.3d 278,280 (Mo.banc 2002) *citing* Rule 28.02(f); *State v. Taylor,* 944 S.W.2d 925,936 (Mo.banc 1997). When the trial court's failure to give an instruction required by MAI or to "give it in accordance with an accompanying Note on Use, may have adversely influenced the jury … [there] is reversible error." *Westfall, supra*, 75 S.W.3d at 284. Such error is presumed prejudicial; the burden is on the state to "clearly establish… that the error did not result in prejudice." *Id.*

*Argument*

Instruction 7A included the following statutory aggravators:

> "1. Whether the defendant murdered Ralph L. Lape, Jr., for the purpose of the defendant receiving money or any other thing of monetary value from Ralph L. Lape, Jr., or another."

***

> "3. Whether the murder of Ralph L. Lape, Jr., involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant killed Ralph L. Lape, Jr., after he was bound or otherwise rendered helpless by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life."

(LF228;A22).

A statutory aggravator that does not apply to the facts of the offense is incapable of giving any guidance as to that offense. It is not related to the facts and therefore unable to give the jury or the reviewing court any guidance as to whether the facts of the offense committed distinguish it as one of the few appropriate for death. *Furman*, *supra*.

Allowing Mark's jury to find a statutory aggravator not supported by the facts and circumstances of his offense then use that aggravator to sentence him to death violated his rights to due process, jury trial, reliable sentencing, and freedom from cruel and unusual punishment (LF236;A60). *See Stringer v. Black*, 503 U.S. 222,235-36 (1992) ("[T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death

penalty.…"). "Unless the appellate court is able to determine the jury would have reached the same result in the absence of an invalid statutory aggravating factor, affirming the death sentence the defendant is "deprived of the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases." *Id*. at 230-31 *citing Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, *supra*.

For the same reasons, instructing the jury with an aggravating circumstance unsupported by the evidence is no more valid than submitting a "vague" aggravating circumstance. Both subject the defendant to a random, unguided and unreliable sentence.

Mark acknowledges this Court's previous denial of similar claims. *E.g.*, *State v. Kenley*, 952 S.W.2d 250,276 (Mo.banc 1997) ("The murder for money circumstance has been held applicable to a murder committed during the course of a robbery"); *State v. McDonald*, 661 S.W.2d 497 (Mo.banc 1983). Nevertheless, because his claim is based in part on the sufficiency of the evidence in his case, and because recent cases shed new light on this area of the law, Mark respectfully asks the Court to revisit this issue.

The first aggravating circumstance submitted in Instruction 7A was based on §565.032.2(4) which provides: "The offender committed the offense of murder in the first degree for himself or another, for the

purpose of receiving money or any other thing of monetary value from the victim of the murder or another" (LF228; A22). Because the facts were insufficient to support this aggravator, it was inapplicable and error to submit it to the jury. The effect was an unconstitutional and prejudicial skewing of the penalty phase proceedings toward death resulting in an unreliable sentence of death imposed without the meaningful guidance required by the Eighth Amendment. *Stringer v. Black*, *Maynard v. Cartwright*, *Furman v. Georgia*, *supra.*

Cases from two other states, Nevada and Connecticut, with a similar aggravator are instructive. Using different analyses, the courts of both states have recently held the "murder for money" aggravator inapplicable in cases in which the facts showed the murder involved robbery.

In Nevada, as in Missouri, committing a murder "to receive money or other thing of monetary value" is an aggravating circumstance. *Lane v. State*, 114 Nev. 299, 301, 956 P.2d 88, 90 (Nev. 1998). In *Lane*, as a result of a multiple shootings in which he wounded two men and killed and robbed a third, Lane was convicted of several offenses including murder. *Id*. at 300, 956 P.2d at 89. At penalty phase, the jury was instructed on five statutory aggravating circumstances including "3. The murder was committed while … Lane was engaged in the commission of or flight after committing robbery…" and "5. The murder was committed

by …Lane, for himself or another, to receive money or other thing of monetary value." *Id*. at 301, 956 P.2d at 90.

The Nevada Supreme Court affirmed Lane's convictions and death sentence. The Court then granted Lane's motion for rehearing to consider, among other things, whether the "robbery" and "receiving money" aggravating circumstances were duplicative. *Id*.

On rehearing, the Court agreed with Lane that: "the receiving money aggravating circumstance does not apply because it is inconsistent with the 'taking' aspect of the robbery aggravating circumstance" and "the receiving money aggravating circumstance only makes sense if it is construed in a 'murder for hire' situation, not … where there is a robbery-murder." *Id*. at 303, 956 P.2d. at 91. The Court concluded Lane could not be convicted of both the robbery and the "receiving money" aggravating circumstances. *Id*. at 303, 956 P.2d. at 91. Noting Nevada law would not allow Lane to be convicted of both robbery and receiving stolen property,[14] the Court applied it to Nevada's statutory aggravating circumstances stating:

> Lane's conviction may not be aggravated by both the robbery

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[14] *State v. Goffstein*, 342 Mo. 499,505-06, 116 S.W.2d 65,68-69 (Mo. 1938) (citing cases) indicates Missouri follows the same rule.

> and the receipt of money stolen during that robbery. We agree with those courts which have concluded that finding both the robbery and the receiving money aggravating circumstances in the context of a robbery-murder is improper.

*Id*. at 304, 956 P.2d. at 91-92 (citing cases).

The same rationale applies in the instant case even though Mark was not convicted of both the robbery *and* the "receiving money" aggravators. The facts of Mark's case did not show a "receiving money" situation – they showed a robbery. Mark could not have been convicted of the offense of "receiving" stolen property because the state's evidence showed *he himself took* Ralph's property. *State v. Davis*, 607 S.W.2d 149 (Mo.banc 1980).

There is no reason for the term "receiving" to have a different meaning in the statutory aggravator "receiving money" than in the offense of "receiving stolen property." "[T]he primary rule of statutory construction is to determine and give effect to the intent of the legislature, that the court considers the particular statute together with related statutes which shed light on its meaning, that the court must consider the purpose or goal of the statute and any relevant conditions existing at the time it was enacted, and that when ambiguity exists in criminal statutes they are to be construed more strictly against the state." *State v.*

*Withrow*, 8 S.W.3d 75, 79-80 (Mo.banc1999); citations omitted.

For this reason, the facts were insufficient to support submission of the "receiving money" aggravator to Mark's jury. The Connecticut Supreme Court, however, offers an additional reason this aggravator should not have been given.

In *State v. Sostre*, 261 Conn. 111, 802 A.2d 754 (Conn. 2002), the Court considered a case challenging the application of Connecticut's pecuniary gain statutory aggravator. Much like §565.032.2(4), the challenged Connecticut aggravator is "whether 'the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value....'" *Id*. at 114, 801 A.2d at 756. The evidence in that case showed the defendant planned and committed a robbery in the course of which he shot a police officer ; statements by the defendant indicated he intended to shoot any police officer who interfered because he did not want to be sent back to jail. *Id*. at 115-16, 801 A.2d at 757.

Sostre was charged with "capital felony;" prior to trial, at Sostre's request, the trial court struck the "pecuniary value" aggravator. *Id*. at 118-19, 801 A.2d at 759. The state appealed contending the trial court improperly found the pecuniary gain aggravator

> applies only to an offense involving a killing that is an

> essential prerequisite to the receipt of something of value, "including 'murders for hire' or contract killings, killings to obtain insurance proceeds, murders for inheritance, or murders in certain business contexts (e.g., the murder of a partner) which will, due to the operation of law, create pecuniary gain for the perpetrator."

*Id*. at 119, 802 at 759. Although the state's primary argument was, "robbery is committed 'in expectation of the receipt' of pecuniary gain and, therefore, is covered by the statute," *Id*., of particular interest here is an additional argument the state made. The state argued: because there was no separate statutory aggravator "explicitly referring to robbery" there was no reason the "pecuniary gain" aggravator should not apply to a murder committed during a robbery. *Id*. at 134; 802 A.2d at 767. In other words, the state claimed because there was no separate robbery aggravator, the "pecuniary gain" aggravator must cover murder involving robbery.

Rejecting this argument, the Connecticut Supreme Court found it

> more logical to assume that the legislatures that have enacted aggravating factors both for offenses involving pecuniary gain and for those involving robbery have done so because they believed that *the pecuniary gain factor did not apply to*

*offenses committed in the course of a robbery.*

*Id.* at 134-35; 802 A.2d at 767-68; emphasis added.

Mark agrees. In Missouri, §565.032.2(11) explicitly establishes robbery as a statutory aggravator. It is, as the *Sostre* Court said, "logical" to assume the Missouri legislature enacted the robbery aggravator because Missouri's "murder for the purpose of receiving money" aggravator, §565.032.2(4), does not apply to robbery.

In addition to Connecticut, Nevada and other the state courts holding the "receiving money" aggravator does not apply to a murder involving robbery, a number of federal circuits have reached the same conclusion. *See e.g., United States v. Allen*, 357 F.3d 745,750- (8th Cir. 2004) *Rehearing En Banc Granted, Judgment Vacated May 11, 2004*; *United States v. Bernard*, 299 F.3d 467,483 (5th Cir. 2002) *citing United States v. Chanthadara,* 230 F.3d 1237,1263 (10th Cir.2000) ("the 'pecuniary gain' aggravating factor is limited to situations where 'pecuniary gain' is expected 'to follow as a direct result of the [murder]' [and] is only applicable where the jury finds beyond a reasonable doubt that the murder itself was committed 'as consideration for, or in the expectation of' pecuniary gain").

For the foregoing reasons, it was error to submit the first statutory aggravating circumstances. Submission of even one erroneous statutory

aggravator would have been prejudicial error in this case. Instruction 7A, in addition, included a second statutory aggravator that was improper albeit for quite different reasons.

Instruction 7A told the jury it could only find the third statutory aggravator, "Whether the murder of Ralph L. Lape involved depravity of mind ... only if you find that *the defendant killed Ralph L. Lape*, Jr., after he was bound or otherwise rendered helpless by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life" (LF228; A22).

Instruction 7A was based on MAI-CR3d 314.40. Note 7 of the applicable Notes on Use directs:

> If depravity of mind is being submitted where the defendant acted with or aided another in the killing, these paragraphs may be modified accordingly. Any such modification must make clear that a finding of depravity of mind must be premised upon the acts and "intent" of the defendant, not those of any other person. See *State v. Isa*, 850 S.W.2d 876 (Mo. banc 1993), and *State v. Hutchinson*, 957 S.W.2d 757,765 (Mo. banc 1997).

In *Hutchinson* and *Isa*, cited in the Note, the evidence showed the defendants participated in the actual killing. *Isa* at 882-83; *Hutchinson* at 759-60. *Hutchinson* and *Isa* are therefore inapplicable

to the present case in which the only evidence of the shooting shows Justin Brown shot Ralph Lape (Tr.824-30;StEx's 92 and 93). Because there was no evidence that Mark actually killed Mr. Lape, the third paragraph submitting §565.032.2(7) did not apply because it was unsupported by the evidence and should not have been given.

The facts of *State v. Rousan*, 961 S.W.2d 831 (Mo.banc 1998), however, are similar to the present case. In *Rousan*, the trial court submitted the following statutory aggravating circumstance:

> 4. Whether the defendant directed Brent Rousan to murder Grace Lewis.
>
> 5. Whether the murder of Grace Lewis involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> > That the defendant killed Grace Lewis after she was bound or otherwise rendered helpless by defendant or Brent Rousan and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

*Id.* at 852.

On appeal, Rousan argued both statutory aggravators could not be true. He could not have directed someone else to commit the killing and

killed her *himself*. *Id*. This Court found error, stating, "murder can be attributed to an accomplice… [t]he act of killing, however, is not a legal conclusion that is attributable to an accomplice; therefore, an accomplice cannot be said to have 'killed' the victim of a murder."

Reviewing for plain error, the Court found no manifest injustice because "[t]he state's theory throughout trial, the evidence, and the jury's finding at the close of the guilt phase supported a sole finding that appellant was guilty of first degree murder as an accomplice; therefore, the statement in the depravity of mind aggravator that 'defendant killed Grace Lewis' would be insufficient to confuse the jury as to the nature of appellant's involvement in the murders." *Id*. at 853.

But the state's theory throughout this trial was that Mark killed, or could have killed, Ralph Lape. This instruction told the jury Mark killed Ralph Lape. If the jurors had any uncertainty about who had committed the killing – and they should have been uncertain because there was no evidence Mark killed Ralph Lape - this instruction attempted to eliminate all doubt. The court's instruction told the jury: Mark killed Ralph Lape.

Unlike Rousan, there was injustice and it was manifest. The injustice here was far worse than in *Isa*. The facts of that case showed Maria Isa participated in the physical acts – the conduct - of killing the victim. Here, there was no evidence Mark shot or even "participated" in the

shooting of Ralph Lape. In *Isa* this Court found prejudice and reversed because the instructional error allowed the jury to consider the conduct and intent of the codefendant in addition to the defendant. A far greater injustice was done here because the instruction *substituted the conduct* of Brown as though it had been Mark who shot and killed Ralph Lape.

This was a manifest injustice. Rule 30.20. Mark's death sentence must be vacated and the cause remanded for a new penalty phase proceeding.

**V**

**The trial court erred in overruling Mark's objections, giving Instructions 3A (MAI-CR3d 314.30), 8A (MAI-CR3d 314.44), and 10A (MAI-CR3d 314.48), and failing to correctly instruct the jury the state had the burden of proving beyond a reasonable doubt all facts that must be found to increase punishment to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 18(a), and 21. Obvious distinctions between the instructions' repetition of the state's burden of proving beyond a reasonable doubt the death-eligibility fact of**

**at least one statutory aggravating circumstance and the instructions' silence regarding the burden of proving the death-eligibility fact of mitigating circumstances not outweighing aggravators would mislead the jurors into believing the state had no burden of proving mitigating circumstances insufficient to outweigh the aggravators or its burden was less than "beyond a reasonable doubt," or the defense had the burden of proof. Failing to ensure the instructions did not mislead the jurors as to the burden of proving the mitigators did not outweigh the aggravators prejudiced Mark by creating a reasonable likelihood the jurors improperly attributed the burden to Mark or failed to hold the state to proof beyond a reasonable doubt.**

*Additional Facts and Preservation*:

Before and during trial, Mark timely objected to the MAI-CR3d 314 series of instructions pertaining to §565.030.4(3) (Tr.98-99,127-28,411-12,1132-35,1401-08; LF105-07,115-19). At the penalty phase instruction conference, defense counsel objected that Instruction 8A, MAI-CR3d 314.44,

> fails to tell the jury that the State has the burden of proof as to

> 565.030.4(3), as to whether or not the mitigating circumstances are sufficient to outweigh aggravating circumstances. Secondly, this instruction would be read by a reasonable juror as opposing (sic) [imposing] a lesser burden of proof, or no burden of proof on the State instead of the required reasonable doubt standard. Thirdly, this instruction could also be read by reasonable jurors as putting the burden of proof on the defendant to prove that mitigating circumstances outweigh aggravating circumstances....

Tr.1402. Counsel noted the language of Instruction 8A was different than the language of MAI-CR3d 300.03AA, read to the jury before voir dire, which states, "If the jury does find at least one statutory aggravating circumstance, it still cannot return a sentence of death, unless it also, *unanimously finds that the evidence in aggravation of punishment is not outweighed by evidence in mitigation of punishment*[*"*] (Tr.1403; emphasis added). Counsel argued MAI-CR3d 300.03AA, except for omitting the state having the burden of proof beyond a reasonable doubt, followed the law (Tr.1403).

The trial court overruled Mark's objections; he preserved these rulings for review by including them in his new trial motion (E.g.,Tr.127-28,411-12,1132-35,1394,1401-08; LF248-49,250,269-70,273-74).

*Standard of Review*

When ambiguity in an instruction creates "a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence," the instruction violates the Eighth Amendment. *Boyde v. California*, 494 U.S. 370,380 (1990). "[A]n instructional error 'will be held harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt.'" *State v. Ferguson*, 887 S.W.2d 585,587 (Mo.banc 1994) citing *State v. Erwin*, 848 S.W.2d 476,484 (Mo.banc 1993).

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt...." Under this test, the "beneficiary of a constitutional error," the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

*State v. Whitfield*, 107 S.W.3d 253,262 (Mo.banc 2003) *citing Chapman v. California,* 386 U.S. 18,24 (1967); *State v. Driscoll,* 55 S.W.3d 350,356 (Mo.banc 2001).

When "instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings," the error is "structural" and harmless error analysis does not apply. *Sullivan v. Louisiana*, 508 U.S.

275,281 (1993).

*Argument*

Mark's jury was repeatedly—explicitly—instructed the state had the burden of proving at least one statutory aggravating circumstance: the death eligibility fact required by §565.030.4(2). In stark contrast, no instructions addressed the burden of proving the death-eligibility fact required by §565.030.4(3): whether the mitigating circumstances outweighed the aggravating circumstances. The instructions' radically different treatment of these death-eligibility requirements, the wording of the instructions, and information the jury received about the parties' respective use of aggravating and mitigating evidence, created a reasonable likelihood the jurors believed that either the state had no burden of proving the weighing step facts, or its burden was less than beyond a reasonable doubt," or the defense had the burden of proof. As demonstrated *infra,* however, the burden of proving facts of death-eligibility is on the state.

The challenged instructions were, at best ambiguous. Through ambiguity or error, the effect of these instructions was to diminish or eliminate the state's burden of proof as to §565.030.4(3) or place that burden on the defendant. Either way, the instructions violated the Sixth, Eighth, and Fourteenth Amendments, and prejudiced Mark. Because

the instructions failed to specify that as to this death-eligibility step the state had the burden of proof beyond a reasonable doubt, the Court must find the error is structural in nature and *per se* reversible error. *Sullivan v. Louisiana*, *supra*.

Alternatively, if the Court disagrees that the error is structural, under the standards of review described, *supra*, the burden is on the state to prove this constitutional error was harmless beyond a reasonable doubt. *Boyde v. California*, *supra*; *State v. Whitfield*, *supra*. Under either standard, the instructional ambiguities and errors in this case require Mark's death sentence to be vacated and the cause remanded.

Mark acknowledges this Court has previous denial of similar claims:

> Nothing in *Whitfield* or in section 565.030.4 requires the jury to make the findings in steps 2 and 3 beyond a reasonable doubt. In *Whitfield***,** this Court determined that the factual determinations required in the first three steps, set out in subsections 565.030.4(1), (2) and (3), must be made by a jury, not a judge. 107 S.W.3d at 258-61. While subsection 565.030.4(1) expressly requires that a jury find any statutory aggravating circumstances beyond a reasonable doubt, the other subsections do not.

*State v. Glass*, 136 S.W.3d 496,521 (Mo.banc 2004); *see also State v.*

*Deck*, 136 S.W.3d 481,486 (Mo.banc 2004) and *State v. Taylor*, 134 S.W.3d 21,30 (Mo.banc 2004).

Mark, however, suggests full review of his point is warranted because it is preserved whereas the claims in those cases were not preserved. Mark further suggests two recent Supreme Court cases call into question the above-quoted rationale of *Glass*.

In denying relief in *Glass*, this Court relied on the fact that Missouri's statutes only imposed the "reasonable doubt" requirement with regard to the "existence of at least one statutory aggravator" fact-finding step. *Glass*, *supra*, 136 S.W.3d at 521. If this were a valid reason for denying relief of a preserved claim, the Supreme Court would have denied relief for the same reason in two recent cases reviewing sentencing guidelines which did not provide for jury fact-finding beyond a reasonable doubt.

But in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *United States v. Booker*, 125 S.Ct. 738 (2005), instead of using the challenged provisions' failure to specify the necessary fact-finding was to be made by a jury beyond a reasonable doubt as a reason *not* to grant relief, the Court held this was the reason for granting relief. In *Blakely* and *Booker*, the Court held the sentencing guidelines of the state of Washington and the United States, respectively, were unconstitutional because they allowed a judge enhance a sentence by making findings of fact by a

preponderance of the evidence. *Id*. Accordingly, Mark asks the Court to find that review is not precluded by *Glass*, *Deck*, or *Taylor, supra*.

Before "death-qualification" voir dire, in accordance with MAI-CR3d 300.03AA, the trial court orally instructed the jury it must find unanimously and beyond a reasonable doubt "the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance" (Tr.419-20,480-81,515-16;LF178; A19-20). This instruction, however, said nothing about burden of proof when it instructed the jury cannot "return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment is not outweighed by evidence in mitigation of punishment" (LF179; A20).

This pattern repeated at penalty phase. Express and specific references to the state's burden of proving to the jury the existence of statutory aggravators beyond a reasonable doubt contrasted with the complete silence regarding the burden of proof as to the death-eligibility step requiring weighing of aggravators and mitigators.

Instruction 3A, MAI-CR3d 314.30, read and given to the jury stated the jury would later "be told that, in order to consider the death penalty, you must first find one or more statutory aggravating circumstances beyond a reasonable doubt" and the state had "the burden of causing [the jury] to find the statutory aggravating circumstances beyond a

reasonable doubt" (Tr.1144-45; LF224; A21). The instruction never mentioned the jury would be asked to weigh the mitigating circumstances against the aggravators and make a finding.

Instruction 7A, MAI-CR3d 314.40, read and given to the jury, listed the statutory aggravators and stated, "the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt" (LF229; A23). Twice more, the instruction reminded the jury of the state's "reasonable doubt" burden as to the finding of statutory aggravators (LF229; A23).

The trial court read and gave the jury Instructions 8A and 10A. Instruction 8A, MAI-CR3d 314.44, juxtaposed in a single sentence the state's burden of proving beyond a reasonable doubt at least one statutory aggravator and utter silence as to the weighing step's burden of proof: "if you have *unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances* submitted in Instruction No. 7A exists, you must then *determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation* of punishment" (LF230; A24; emphasis added).

Instruction 10A, MAI-CR3d 314.48, told the jury if it unanimously found the "facts or circumstances in mitigation of punishment outweigh

the facts and circumstances in aggravation of punishment" Mark's punishment must be life. It did not assign or explain the burden of proving that death-eligibility fact (LF232-33; A25-26).

Given the instructions' repeated, explicit references to the state's burden of proving at least one statutory aggravator beyond a reasonable doubt, jurors would not have failed to notice the instructions' silence on the burden of proving whether the mitigating evidence was sufficient to outweigh the aggravating evidence. Even before they began deliberations, the jurors were aware of these differences.

The jurors knew the state was seeking the death penalty and using aggravating evidence to prove death was the appropriate sentence. They knew the defense was presenting mitigating evidence to persuade the jurors life was the appropriate sentence (See, e.g., Tr.438-39,489-90,497-99,529-31,1146-47,1422-28,1436-45). The jurors also knew, because the judge read the instructions and gave them to the jury, that the wording of Instruction 8A, setting out the weighing step, required mitigating circumstances to outweigh the aggravating circumstances: "you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment" (LF230; A24). Finally, based on the opening statements, witnesses called by the respective

parties, and arguments of counsel, the jurors would associate "mitigation" of punishment with the defense and "aggravation" of punishment with the state.

Knowing all this, a reasonable juror reading Instruction 8A would logically think it was the responsibility—or burden—of the defense to prove the mitigating circumstances outweighed the aggravating circumstances. The jurors had no reason to think the state had any burden of proving, by any standard, the mitigating circumstances were insufficient to outweigh the aggravating circumstances or the aggravators outweighed the mitigators. The wording of Instruction 8A, alone, would lead the jurors to believe the defense had the burden of proving the mitigating circumstances outweighed the aggravating circumstances.

The jurors' mistaken beliefs that Mark had the burden of proving the mitigating circumstances outweighed the aggravating circumstances and the state had no burden of proving the mitigating circumstances were not sufficient to outweigh the aggravating circumstances, would affect how the jury weighed the evidence and the outcome of the weighing process. It cannot be said application of the correct burden of proof would have made no difference because there was, as evident from the statement of facts, substantial mitigating evidence as well as substantial aggravating evidence. In other words, it is not possible to say the jury

would have inevitably sentenced Mark to death.

If Mark's jury assumed the burden was on the defense to prove the mitigating evidence outweighed the aggravating evidence, then even if the jury had found the evidence of mitigation and aggravation equal, the defense would not sustain its burden. Or, if the jurors were equally divided, the defense would not sustain its burden. Either way, the defense would not get the benefit of a tie and the jurors could proceed to the final step of determining punishment. This would violate Mark's rights to due process of law, jury trial, freedom from cruel, unusual punishment, and reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See State v. Marsh*, 102 P.3d 445,457-64 (Kan. 2004) (finding Kansas statute facially unconstitutional and overruling previous opinion in *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), but reaffirming *Kleypas*' determination that under the Eighth and Fourteenth Amendments, 'fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue').

But had the instructions informed the jury the burden was on the state to prove beyond a reasonable doubt the mitigating evidence was insufficient to outweigh the aggravating evidence, it would take more than a "tie" for the state to sustain its burden. Even acknowledging the state had substantial aggravating evidence, given the substantial

mitigating evidence, it cannot be said beyond a reasonable doubt that the jury would have found the mitigating evidence insufficient to outweigh the aggravating evidence. As this Court has said, 'the evaluation "'of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt.'"' *State v. Mayes*, 63 S.W.3d 615,637 (Mo.banc 2001); *citing State v. Storey*, 986 S.W.2d 462,464 (Mo.banc 1999) *quoting State v. Johnson,* 968 S.W.2d 686,701 (Mo.banc 1998). Given the strength of the mitigating evidence, *see* Statement of Facts, *supra*, it cannot be said the same result would have obtained even if the jurors had been correctly and explicitly instructed as to the state's burden of proof.

In *Whitfield*, this Court acknowledged the ambiguity in the instruction – not expressly directing the jury what to do if it did not unanimously find the mitigating circumstances outweighed the aggravating circumstances – meant the jury might not be unanimous in finding the mitigating circumstances did not outweigh the aggravating circumstances yet determine at that point it was unable to decide punishment, and to return a verdict so stating:

In regard to step 3, the jury was instructed that if it found that aggravators warranting the imposition of death were present, "each of

you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist." The jury was informed that if all of the jurors agreed that one or more mitigators were present that were sufficient to outweigh the factors in aggravation, then it must return a verdict of life imprisonment.

> Unlike for step 2, however, *the jury was not told in regard to step 3 that it had to return a verdict of life imprisonment if it could not unanimously agree whether the mitigating facts outweighed the aggravating facts*. *Sec.* 565.030.4; *see also* MAI-CR3d 313.48... [citation omitted]. Under the instruction, if even one juror, but not all, determined "there is evidence in mitigation of punishment ... which is sufficient to outweigh the evidence in aggravation of punishment ...," the jurors would be unable to agree on punishment and, under the instructions, the jury would be deadlocked and would return a verdict form so stating.

*Whitfield*, 107 S.W.3d at 263-64; emphasis added

The instructional ambiguity recognized in *Whitfield* could have at least one other effect. No instruction expressly tells the jury what to do if it is not unanimous with regard to the weighing step. But MAI-CR3d 313.48 (now, 314.48 and here, Instruction 10A) implicitly directs a jury that lacks unanimity at the weighing step to continue on to the final step of

determining sentence. It does so by telling a jury that is not unanimous at the weighing step that if it is unable to reach a decision *on punishment* (the implication being that a jury not unanimous at the weighing step is to proceed to the final step) it should return a verdict so stating: "If you do unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 7A and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, *but are unable to agree upon the punishment*..." (LF233; A26).

If, as Mark contends, the state has the burden of proof as to the weighing step, the instructions thus diminish that burden by directing a jury that does not unanimously find beyond a reasonable doubt the state has carried its burden (of proving the death-eligibility fact that the mitigating circumstances are insufficient to outweigh the aggravating circumstances) to proceed to determine punishment. The effect is: the state need not prove the facts required by this death-eligibility step.

Missouri's statutes are silent as to the burden of proof on this step. Nor did this Court, in *Whitfield* address which party had the burden of proving such facts or specify the nature of the burden. *Whitfield* did hold, however, the finding required by §565.030.4(3) is a factual finding

"on which [a defendant's] eligibility for the death sentence [is] predicated." *Id*. at 256.

*Whitfield* provides part of the support for Mark's argument; *Ring*, *Apprendi*, and their progeny supply the rest. These recent cases leave no doubt that a fact-finding that must be made before a sentence may be enhanced or increased must be made beyond a reasonable doubt. Under these cases, the §565.030.4(3) fact-finding that *Whitfield* held[15] must be made before a defendant may be sentenced to death must be made beyond a reasonable doubt. A review of these cases proves the point.

In *Ring*, relying on the rule stated in *Apprendi* – the Fourteenth and Sixth Amendments "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which

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[15] In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. *While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees*.

107 S.W.3d at 259.

he is charged, beyond a reasonable doubt'" – the Supreme Court held "[c]apital defendants, no less than non-capital defendants, … are entitled to a jury determination of *any fact on which the legislature conditions an increase in their maximum punishment*." *Ring*, 536 U.S. at 589; emphasis added. *Ring*'s frequent references to *Apprendi* should have left no doubt the Court meant what it said when it stated, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." *Id*. at 602 *citing Apprendi*, 500 U.S. at 482-83.

Further, Justice Scalia emphasized the reasonable doubt requirement is integral to such jury fact-finding. He explained: "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt." *Id*. at 610, Scalia, J., concurring.

Finally, in *Blakely v. Washington*, and *United States v. Booker*, *supra*, the Court held that state and federal sentencing guidelines that allowed judges to find additional aggravating facts by a preponderance of the evidence to increase the range of punishment, violated the defendant's

"federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Blakely,* 124 S.Ct. at 2536; *Booker*, 125 S.Ct. at 747-56.

These cases support Mark's point. Jury fact-finding alone is not enough. The Sixth Amendment requires a jury's finding of facts "essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury *beyond a reasonable doubt*." *Ring*, *supra*, 536 U.S. at 610, Scalia, J., concurring; emphasis added.

In a death penalty case, it is not only the Sixth Amendment, *Apprendi*, and progeny that dictate this result. Under the Eighth and Fourteenth Amendments, establishing proof of death-eligibility is the state's burden. *Schlup v. Delo*, 513 U.S. 298, 328 (1995); *Bullington v. Missouri*, 451 U.S. 430 (1981). *See also Sullivan v. Louisiana*, 508 U.S. 275,278 (1993) ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt").

In the present case, the error in the instructions here was not merely a misdescription of the state's burden of proving the mitigating circumstances were insufficient to outweigh the aggravating circumstances. *Sullivan v. Louisiana*, *supra*. The error here was failing,

altogether, to instruct the jury the state's burden was to prove beyond a reasonable doubt the facts the must be found under §565.030.4(3) to establish death-eligibility. It was structural *per se* reversible error. For the foregoing reasons, even under the harmless error standard, the Court must vacate Mark's sentence and remand for a new penalty phase trial.

**VI**

**The trial court erred in overruling Mark's motion to quash the information or, alternatively, preclude the death penalty, and in sentencing him to death. The court violated his rights to due process of law, to notice of the offense charged, prosecution by indictment or information, and punishment limited to the offense charged. U.S.Const. Amend's VI, VIII, and XIV; Mo.Const., Art. I, §§10,18(a) and 21. In Missouri, at least one statutory aggravating circumstance is a fact a jury must find beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Missouri's statutory aggravators are, or effectively are, alternate elements of the greater, distinct offense of first-degree murder, but the information did not, as required by the Fifth, Sixth, and**

**Fourteenth Amendments, notify Mark he could be convicted of aggravated murder and sentenced to death because it failed to charge any statutory aggravators. The offense charged was only unaggravated first-degree murder carrying a maximum sentence of life imprisonment. The judgment must be reversed and Mark's sentence of death reduced to life imprisonment.**

*Additional Facts and Preservation*:

Before trial, relying on *Ring v. Arizona*, 536 U.S. 466 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Jones v. United States*, 526 U.S. 227 (1999), Mark moved to quash the information or preclude the death penalty; the trial court overruled his motions and subsequent objections at trial (E.g., LF101-04; Tr.94-97;128-29,1141,1394). Mark included these rulings in his new trial motion (LF10,247-48; Tr.129).

*Argument*

In *Apprendi*, *supra*, the Question was, "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id* at 469. Citing its previous holding in *Jones* –"'[U]nder the Due Process Clause of the Fifth Amendment and the

notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt'" – the Court stated, "The Fourteenth Amendment commands the same answer in this case involving a state statute." *Id*. at 476 *citing Jones*, 526 U.S. at 243, n.6.

Subsequently, in *Ring v. Arizona*, 536 U.S. 584 (2002), a capital case applying *Apprendi* to hold the factual finding that a statutory aggravating circumstance exists must be made by a jury, the Court reiterated, "The dispositive question 'is not of form but of effect.'" 536 U.S. at 602 *citing Apprendi*, 500 U.S. at 494. "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id*. *citing Apprendi*, 500 U.S. at 482-83. The Sixth Amendment requires jury fact finding beyond a reasonable doubt, the Court explained, "[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.

In *Blakely v. Washington*, 124 S.Ct. 2531 (2004), the Supreme Court clarified the meaning of "maximum sentence." Petitioner 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 2534-35. A Washington statute provided 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 2535. By statute, 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 the statutory factor that Blakely "had acted with 'deliberate cruelty,'" the judge sentenced Blakely to 90 months – 3 years more than the "standard" range maximum. *Id*. Blakely objected this denied his Sixth Amendment "right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Id*. at 2536. The state courts denied relief; the Supreme Court granted review and held the *Apprendi* rule applied. *Id*.

Justice Scalia's comments noting the connection between Apprendi's jury fact-finding requirement with the "accusation" brought against a criminal defendant relate to Missouri law and this Point:

> This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the

> unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that '*an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason*,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)... . These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi,* [citations omitted]... and need not repeat them here....

*Id*. at 2536-37.

*Blakely's* rejection of the state's "range of punishment" argument is important here: because the "statutory maximum" sentence was ten years (120 months), Blakely's 90-month sentence was within the statutory range for his offense. The state denied an "*Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies ... [which] no exceptional sentence may exceed...." *Id*. at 2537.

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*.

This holding is significant because the Court has previously denied claims similar to Mark's based on reasoning identical to the state's in *Blakely*. In denying such claims, this Court reasoned, "The 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); *citing State v. Taylor*, 134 S.W.3d 21,31 (Mo.banc 2004; emphasis; *State v. Cole,* 71 S.W.3d 163,171 (Mo.banc 2002); *State v. Tisius*, 92 S.W.3d 751,766 (Mo.banc 2002).

*Blakely* is contrary to this rationale and the foregoing opinions. In light of *Blakely*, Mark respectfully asks the Court to reconsider the claim he makes here: to charge an offense punishable by death, the state must plead in the charging document, whether indictment or information, the statutory aggravating circumstances the state will rely on at trial to

obtain a death sentence.

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. 2003); *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003); *State v. Taylor*, 18 S.W.3d 366, 378 n. 18 (Mo.banc 2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); *State v. Shaw*, 636 S.W.2d 667, 675 (Mo.banc 1982) *quoting State v. Bolder*, 635 S.W.2d 673, 683 (Mo.banc 1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence").

Thus, Missouri's statutory aggravators are, like Arizona's statutory aggravators, facts that must be found to authorize an increase in punishment for a defendant convicted of first-degree murder from life imprisonment without probation or parole to death. Missouri's statutory aggravators have precisely the same effect as Arizona's statutory aggravators: they serve as "the functional equivalent of an element of a greater offense...." *Ring v. Arizona*, 536 U.S. at 609 *citing Apprendi*, 530 U.S. at 494, n.19. Both because statutory aggravators authorize an increase in punishment, and because they serve as elements of the

greater offense of aggravated first-degree murder, the state must plead in the charging document the statutory aggravators it will rely on at trial to establish the offense as death-eligible.

"An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224,228 (1998). "[C]onviction 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); *Cokeley v. Lockhart*, 951 F.2d 916 (8th Cir. 1991). In Missouri, "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information… ." Mo. Const., Art. I, §17. An indictment or information must "contain all of the elements of the offense and clearly apprise the defendant of the facts constituting the offense." *State v. Barnes*, 942 S.W.2d 362, 367 (Mo.banc 1997). "[A] person cannot be convicted of a crime with which the person was not charged unless it is a *lesser* included offense of a charged offense." *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo.banc 1992); emphasis added.

Although §565.020 ostensibly establishes a single offense of first-degree murder punishable by either life imprisonment or death, under *Blakely*, *Ring, Apprendi, Jones,* and *Whitfield*, 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. To charge aggravated first-degree murder, the state must plead in the charging document the statutory aggravators on which it will rely at trial to obtain a sentence of death. Previous Missouri appellate opinions support and illustrate this principle.

In *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), the defendant was charged with first-degree robbery. Although the robbery statute authorized an enhanced punishment of ten years imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the information failed to charge this aggravating fact. *Id.* at 52. The jury, however, found the defendant guilty of "[r]obbery first degree, by means of a dangerous and deadly weapon" and based on this aggravator, enhanced his punishment. *Id*.

On appeal, the issue was the necessity of "pleading" in the charging document, "aggravating circumstances which would authorize the imposition of additional punishment." *Id*. at 53. The state claimed the defendant had adequate notice "of the cause and the nature of the

offense for which he was convicted," so it was not necessary to charge the aggravating circumstance in the information. *Id*. at 53-54. The state's two-fold argument was a) it was obvious from "the words used in the information" that the offense involved the use of a weapon, and b) the defendant's motion to vacate his sentence indicated he was aware during voir dire that the state intended to try the case as an aggravated robbery and the defendant never objected. *Id*. at 53-54.

This Court rejected these arguments holding, 'The charge "with force and arms" does not include the allegation that the robbery was committed by means of a dangerous and deadly weapon.' *Id.* at 54. "The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and "[t]he trial court was without power or jurisdiction to impose that sentence." *Id*. *See also State v. Cain*, 980 S.W.2d 145,146 (Mo.App.E.D. 1998) (Defendant charged with two class B felonies of first-degree assault "cannot be convicted and sentenced for a crime with which he was not charged" – two class A felonies of first-degree assault – "and did not have an opportunity to defend against"); *State v. White*, 431 S.W.2d 182,186 (Mo. 1968) ("One cannot be charged with one offense, or with one form of an offense, and convicted of another").

Here, the state did not plead any statutory aggravators in the

Information, (LF 138-42), and therefore did not charge Mark with an offense punishable by death. The state charged Mark only with unaggravated first-degree murder for which the maximum sentence is life imprisonment. Mark's death sentence cannot stand.

The Supreme Court has repeatedly noted the relationship between facts a jury must find beyond a reasonable doubt, facts that must be pled in the charging document, and the lack of constitutionally-required "notice" when such facts are not included in the charging document. The Court's opinions expressly suggest aggravating facts that must be found by a jury beyond a reasonable doubt are elements of a greater offense. *See e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) ("[T]he 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..."); *Harris v. United States*, 536 U.S. 545, 564 (2002) *quoting Apprendi*, 530 U.S. at 483 n.10 ("Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"); *Ring v. Arizona*, 536 U.S. at 609 *citing Apprendi*, 530 U.S. at 494, n.19 (Because Arizona's enumerated aggravating factors operate as "the functional equivalent of

an element of a greater offense…," the Sixth Amendment requires that they be found by a jury).

Mark acknowledges the United States Supreme Court has never directly addressed this precise point and that the language in its opinions supporting this claim is dicta. But it should be noted, in *United States v. Booker,* 125 S.Ct. 738 (2005), in which the Court struck down the federal sentencing guidelines because they violated the principles expressed in *Blakely*, *Ring*, and *Apprendi*, Justice Stevens suggested the remedy was to include the aggravators in the charging document: [P]rosecutors could avoid an *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence. Following our decision in *Apprendi*, and again after our decision in *Blakely*, the Department of Justice advised federal prosecutors to adopt practices that would enable them "to charge and prove to the jury facts that increase the statutory maximum—for example, drug type and quantity for offenses under 21 U. S. C. 841." Enhancing the specificity of indictments would be a simple matter, for example, in prosecutions under the federal drug statutes (such as Booker's prosecution). The Government has already directed its prosecutors to allege facts [required to enhance punishment] … and prove them to the jury beyond a reasonable doubt.

*Id.*, 125 S.Ct. at 775-76, Stevens, J., dissenting in part.

Mark acknowledges *Hurtado v. California*, 110 U.S. 516 (1884), held "the Due Process Clause does not compel the States to proceed by way of grand jury indictment when they initiate a prosecution." *Albright v. Oliver*, 510 U.S. 266, 291-92 (1994), Stevens, J., dissenting. Mark does not contend Missouri must "proceed by way of grand jury indictment" to properly charge aggravated murder punishable by death. Mark contends, under the Fourteenth Amendment's Due Process Clause, a defendant in a state criminal proceeding is entitled to the protections of the Fifth Amendment: probable cause determination by a magistrate or grand jury of the facts the state will rely on to obtain a conviction and sentence, and of the Sixth Amendment: that the charging document must provide notice of the offense charged and the maximum sentence authorized. *Id.*

The Due Process Clause affords no less protection to defendants charged with murder than to those accused of robbery. If aggravators must be alleged in a robbery indictment to charge aggravated robbery and subject the defendant to an enhanced punishment, *State v. Nolan, supra*, then the Due Process Clause must require aggravators to be alleged in the document charging first-degree murder to subject a defendant to the enhanced punishment of death.

*Hurtado* is not inconsistent with states being required, under the Due Process Clause of the Fourteenth Amendment, to adopt procedures for criminal prosecutions providing the same kind and degree of notice of charges as a grand jury indictment. Further, the Due Process Clause mandates that a state be consistent in applying its rules: "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387,401 (1985). Missouri has chosen to require that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information…" Mo.Const., Art. 1, §17; *State v. Barnes*, *supra*, *State v. Parkhurst*, *supra*. Having made this choice, Missouri may not, consistent with Due Process, provide less protection for prosecutions of aggravated forms of first-degree murder than for aggravated robbery or other crimes. *Evitts v. Lucey*, *supra*. A defendant accused of a crime, whether robbery or murder, should be "informed of the nature and cause of the accusation – including *maximum* punishment – from the face of the charging document.

For the foregoing reasons, the Court should find the state charged only unaggravated first-degree murder and the trial court exceeded its jurisdiction and authority in sentencing Mark to death. U.S.Const.

Amend's V,VI,VIII, & XIV; Mo.Const., Art. I, §§10,17,18(a), & 21. Mark's sentence must be vacated and he must be resentenced to life imprisonment without probation or parole.

**VII**

**The trial court erred in overruling Mark's motion to strike for cause juror No. 72 – Tim Miller. This violated Mark's rights to due process of law, fair and impartial jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's V,VI, III, & XIV; Mo.Const., Art. I, §§10,18(a),and21. In his juror questionnaire and during voir dire, Mr. Miller stated he preferred the death penalty because it would save money. Questioned further, Mr. Miller indicated his money-saving preference for death might influence his decision in certain cases depending on the circumstances. Mr. Miller's voir dire shows he should have been struck for cause because it was not possible to say his "views" would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" which require a juror to determine sentence based only on the evidence**

**presented not on pre-existing notions that "death saves money." Further, §494.480.4 violates the Equal Protection Clause of the Constitution and should not be applied to preclude appellate review in this case.**

*Additional Facts and Preservation*: During "death qualification" voir dire, defense counsel asked Mr. Miller about his response to a question in a questionnaire given to prospective jurors prior to voir dire:

> Q [Defense Counsel]. Tim Miller. Mr. Miller, you also stated that you have, you have a preference for the death penalty, because death saves money?
>
> TIM MILLER: Yeah.
>
> Q. And, is that because you feel that housing people in jail, you have to pay for it, and you don't want to, and if they would be executed, it would save a lot of money?
>
> MILLER: It's just all the appeal. Just keep doing it over and over.
>
> Q. All right. In making you're your decision in a case like this, are you going to be thinking about saving money for tax payers in deciding whether or not to give someone the death penalty?
>
> MILLER: I would probably favor the death penalty.
>
> Q. Okay. Will you be able to give realistic consideration to life

without probation and parole on a case where someone has been found guilty of murder in the first degree, which is a knowing killing where they thought about it, coolly, for some period of time?

MILLER: I'd still favor the death penalty.

Q. And when you say favor it, are you gonna expect me to come in here and try to persuade you not to give the death penalty. Would you be starting out with the death penalty and I'd have to push you to the back?

MILLER: No, no.

Q. Are you going to be using this, the fact that you think it costs a lot of money to, to, are you gonna be using that as evidence in this case that a death sentence is more appropriate?

MILLER: Depending upon the crime.

Q. Well, what kind of a crime [might] that be, where, you would think of that, like?

MILLER: Like murdering children.

Q. So, it's specific types of crimes?

MILLER: Yes, sir (sic).

Q. For you. Okay. I guess I'm just confused about this whole saving money issue.

MILLER: Well, like to get on death row and they sit on appeal and appeal and keep going back to court, back to court, and you know, it takes, they're getting the same thing in the end, it's just dragging it out forever.

Q. Okay. So, are you saying that you would confine your concerns about the death penalty to people already on death row?

MILLER: Yes.

Q. But that in general, you feel like you favor the death penalty in a murder case?

MILLER: Like I say, just in certain circumstances.

Q. In certain circumstances and children being kill[ed] is one?

MILLER: Yes, ma'am.

Q. Are there any other specific circumstances?

MILLER: I cannot think of any right now.

(Tr.535-37).

The judge also questioned Mr. Miller:

THE COURT: Mr. Miller, I'm gonna follow up on Ms. Turlington's questions for just a second, because I'm a little confused and I think maybe the lawyers may be too. And I understand that you said, and you've told Ms. Turlington on a number of

occasions that you favor the death penalty in certain situations; is that correct?

MILLER: Yes, sir.

THE COURT: Is that a fair statement of your situation?

MILLER: Yes, sir.

THE COURT: Of course, you've sat through the general voir dire proceedings earlier today, and then this smaller voir dire proceeding, where we've discussed the two possible punishments, if, if the defendant's found guilty of murder in the first degree, to life without parole, or the death penalty, you understand that, now, is that correct?

MILLER: Yes, sir.

THE COURT: Now, I guess my question is, and you've heard a little bit, just in a nutshell of what allegedly, or what Mark's charged with. If you were seated to hear this case, and, if you made a finding of his guilt, as to the charge of murder in the first degree, could you listen to the penalty phase evidence that the, the evidence relative to aggravating circumstance, and if you found an aggravating circumstances, then listen to the evidence as to mitigating circumstances, and make a determination, whether, either the death penalty was

appropriate or life without parole was appropriate, could you consider both those options?

MILLER: Yes, sir.

THE COURT: And you don't think you'd have any problem at all?

MILLER: No, sir.

THE COURT: And, again, I guess this question about the death penalty. You say that you favor, I guess in some heinous situations, you would, you just believe this the death penalty is more appropriate than life without parole?

MILLER: Yes, sir.

THE COURT: What you've heard about this particular case, does that give you any reason one way or the other to believe that the death penalty is more appropriate or life without parole is more appropriate as we sit here today, with hearing anymore evidence?

MILLER: No, sir.

THE COURT: Okay, could you go through this penalty phase, if necessary, and, if we, if we do get to that point, and consider both options?

TIM MILLER: Yes, sir.

THE COURT: Okay. And, and, I just, Ms. Turlington, I didn't

want to take your witness away from you. But, I was, some somewhat confused as to my understanding. And, do you have any other questions of this gentleman?

MS. TURLINGTON: No, I don't.

(Tr.539-41). Mark moved to strike juror Miller for cause (Tr.547-48). The trial court acknowledged, "Mr. Miller was kind of back and forth with his questions of Ms. Turlington, that's why I didn't understand exactly where he stood, and I hope I was not leading in any way with my questions" (Tr.548). The court agreed with the prosecutor that Mr. Miller "made it clear that he could consider both options if chosen as a juror" and denied "that request for cause" (Tr.548).

Mark removed Mr. Miller with a peremptory strike (Tr.562). Before the jury was seated, Mark renewed his motion to strike Mr. Miller for cause and alternatively, if the court would not do so, moved for an additional peremptory strike (Tr.562). The prosecutor objected and the trial court denied the motions (Tr.562). Because his motion to strike Mr. Miller for cause was denied, Mark used one of his peremptory challenges to remove Mr. Miller and requested an additional peremptory strike (Tr.562). The trial court denied this motion; Mark preserved the trial court's rulings for review by including them in the motion for new trial (Tr.562; LF 238-42).

*Standard of Review and Applicable Law:*

"The trial court is in the best position to evaluate a venire person's commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors." *State v. Clayton*, 995 S.W.2d 468,475 (Mo.banc 1999) *citation omitted*. "This Court does not disturb the trial court's ruling on juror qualification matters unless it is clearly against the evidence and amounts to a clear abuse of discretion." *State v. Storey*, 40 S.W.3d 898, 904 (Mo.banc 2001). [16]

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[16] Mark acknowledges this Court has held, under §494.480.4, if the defendant peremptorily strikes a prospective juror defendant unsuccessfully challenged for cause, the juror's disqualification to serve at the defendant's trial cannot constitute a ground for reversal of conviction or sentence. *See e.g., State v. Storey*, supra, 40 S.W.3d at 904-05. To the best of appellant's knowledge, *Storey* and every case to date raising this issue on appeal has raised it as plain error. Mark, however, has fully preserved his challenge to §494.480.4 by moving the trial court, pretrial, to find §494.480.4 unconstitutional, by renewing the motion at trial before the jury was seated, and by including the trial court's denial of this motion in the motion for new trial (Tr.80, 117, 562; LF57-66,238-42).

Further, the concurring opinions of Justice Souter and Justice Scalia,

The 'proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment … is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) *quoting Adams v. Texas*, 448 U.S. 38, 45 (1980). A juror who "cannot consider the entire range of punishment, apply the proper burden of proof, or

---

in *United States v. Martinez-Salazar*, 528 U.S. 304 (2000) suggest this question – whether a defendant may challenge on appeal a juror he has struck peremptorily – has not been definitively settled by the Supreme Court. Justice Souter suggested a different result might be required if a defendant who used a peremptory strike to remove a juror who should have been struck for cause, requested and was refused, an additional peremptory challenge. *Id*. at 317-18. Justice Scalia suggested the opposite: a defendant should have to use a peremptory strike to obtain a reversal on appeal. "I would not find it easy to overturn a conviction where, to take an extreme example, a defendant had plenty of peremptories left but chose instead to allow to be placed upon the jury a person to whom he had registered an objection for cause, and whose presence he believed would nullify any conviction." *Id*. at 318-19.

otherwise follow the court's instructions in a first degree murder case" is not qualified to serve and may be struck for cause. *State v. Rousan*, 961 S.W.2d 831,839 (Mo.banc 1998). "The qualifications of a prospective juror are not determined conclusively by a single response, but are made on the basis of the entire examination." *State v. Clayton*, *supra* 995 S.W.2d at 475; *citations and internal quotation marks omitted*.

In determining whether death is the appropriate punishment, jurors may not consider "the costs and benefits of the death penalty." *State v. Clay*, 975 S.W.2d 121, 142 (Mo.banc 1998) *citing State v. Brown***,** 902 S.W.2d 278, 295 (Mo.banc 1995). "[T]he economic cost of imposing a death sentence is irrelevant to any issue submitted to the jury" and should not be considered because "'it does not reflect the properly considered circumstances of the crime or character of the individual.'" *State v. Armentrout*, 8 S.W.3d 99,110 (Mo.banc 1999).

*Argument*

Mr. Miller's response to the jury questionnaire as well as his responses to defense counsel's questioning plainly and unambiguously stated he believed financial considerations were a valid reason to sentence someone to death. Mr. Miller acknowledged his preference for the death penalty because it would save money (Tr.535). Asked whether, "in a case like this" he would "be thinking about saving money for tax

payers in deciding whether or not to give someone the death penalty" he answered, "I would probably favor the death penalty" (Tr.535).

Mr. Miller never indicated that this was not a case in which, in deciding whether to impose a sentence of death, he would not use his belief that the death penalty was preferable because it saved money. Specifically asked if he would use his belief that death saves money "as evidence in this case" to reach a decision "that a death sentence is more appropriate," Mr. Miller did not say he would not use that belief in deciding punishment (Tr.536). To the contrary, he indicated it might be something he would consider "Depending upon the crime" (Tr.536).

Mr. Miller gave "murdering children" as an example of a crime where, in deciding punishment, he might use his belief that death saves money (Tr.536). Asked if he felt that he "favor[ed] the death penalty in a murder case," Mr. Miller responded, "Like I say, just in certain circumstances" (Tr.537). Asked if there were other specific circumstances, Mr. Miller said, "I cannot think of any right now" (Tr.537).

The trial court's subsequent voir dire of Mr. Miller did no more than establish that Mr. Miller would listen to all the evidence, aggravating and mitigating and then determine whether the death penalty or life without parole was the appropriate punishment. The trial court never asked Mr. Miller specifically about his belief that death was preferable because it

saved money; nor did he ask Mr. Miller if that belief was something he might use in deciding Mark's punishment (Tr.539-41).

The trial court's questioning establish Mr. Miller believed, "in some heinous situations … the death penalty is more appropriate than life without parole" (Tr.540). And Mr. Miller indicated that he not yet decided whether "the death penalty is more appropriate or life without parole is more appropriate" in Mark's case and he would consider both options (Tr.541).

The constitutional problem is: nothing in Mr. Miller's responses rules out the possibility that Mr. Miller would decide Mark's case contained "circumstances" that made it appropriate for him to use his belief that death saves money in deciding to give Mark the death penalty.

When viewed in their entirety, Mr. Miller's responses to the jury questionnaire and to subsequent questioning by defense counsel and the trial court do not show he could be counted on to use only the evidence presented at trial in determining the appropriate sentence for Mark. Although Mr. Miller indicated he would be able to consider both punishments, and at the time of voir dire had not decided whether "the death penalty or life without parole is more appropriate," nothing he said demonstrated he would not use his belief that death saves money as evidence in deciding the question of punishment.

"'[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefore… In exercising its discretion, the trial court must be zealous to protect the rights of an accused."' *Wainwright v. Witt*, *supra*, 469 U.S. at 429-30 *(quoting Dennis v. United States*, 339 U.S. 162, 168 (1950). When a trial court fails to do so, this Court must correct its abuse of discretion.

Mr. Miller's statement that he preferred death because death saves money indicates he holds a view that "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Morgan v. Illinois*, 504 U.S. 719, 728 (1992). The record fails to show otherwise.

Finally, Mark suggests this in this case, §494.480.4 should not preclude this Court from reversing the judgment of the lower court and remanding for a new sentencing phase proceeding. Section 494.480.4 provides, "The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant." The statute is unconstitutional: it violates Mr. Miller's rights to equal protection, due process, fair jury trial, and effective

assistance of counsel, U.S.Const., Amend's V, VI, and XIV; Mo.Const., Art. I, §§2, 10, 18(a), and 21, and it denies and interferes with his right to access to the Missouri courts of justice for relief and remedy of errors occurring at his trial. Mo.Const., Art. I, §14; *Kilmer v. Mun*, 17 S.W.2d 545 (Mo.banc 2000). Further, because this is a death case and Mark challenged Mr. Miller as being unqualified to determine punishment, application of §494.480.4 would also violate Mark's rights to reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend. VIII, Mo.Const., Art. I, §21.

Ironically, §494.480.4 applies only to "the accused" in criminal proceedings – the only class of litigant guaranteed "the right to … trial by an impartial jury… ." U.S.Const., Amend. VI; Mo.Const., Art. I, §18(a). Equally ironic, under §494.480.4, Mark's use of a peremptory challenge – a tool not constitutionally required but valued for its use in ensuring a party's right to fair and impartial jurors – precludes this Court from reviewing his challenge to the trial court's denial of his motion to strike for cause a juror who stated he preferred death because death saves money. Thus, §494.480.4 penalizes Mark for doing everything possible to protect his right to a fair and impartial jury by denying him appellate review of the trial court's denial of that right.

Section 494.480.4 violates the equal protection provisions of the

federal and Missouri Constitutions because its restrictions on challenging a trial court's denial of strikes for cause do not apply to civil litigants. States may "treat different classes of persons in different ways" but not "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt v. Baird*, 405 U.S. 438,447 (1972; citations omitted. Classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.*; citations omitted; *Petitt v. Field*, 341 S.W.2d 106,109 (Mo. 1960) (The Missouri Constitution requires a "reasonable basis" for legislative classifications).

"[R]ules regarding the selection of juries in criminal cases involve an important aspect of a person's treatment in the criminal justice system." *Myers v. Ylst*, 897 F.2d 417,421 (9th Cir. 1990). "A state should not be permitted to treat defendants differently for the purposes of jury selection unless it has 'some rational basis, announced with reasonable precision' for doing so." *Id*. (citation omitted).

But §494.480.4 does exactly that. With no rational basis for treating criminal defendants differently than civil litigants, it makes criminal defendants the only class of litigant not permitted relief on appeal from a

trial court's erroneous denial of a meritorious motion to strike a juror for cause if the juror in question did not serve at trial.

In the instant, death penalty case, §494.480.4 presented Mark and counsel two untenable choices. First, they could have chosen not to use a peremptory strike to Mr. Miller even though, as discussed, supra, he was not qualified to serve. Although, under §494.480.4, this would allow Mark to seek correction on appeal of the trial court's erroneous denial of Mark's motion to strike Mr. Miller for cause, it would also mean Mark would be tried by a jury whose members were not fair and impartial and could not be counted on to reach a decision based only on the evidence adduced at trial. Leaving Mr. Miller on Mark's jury would have undermined the reliability of the sentence; this and the risk that the trial court's error would not be corrected on appeal were unacceptable. The alternative, which Mark chose, was to sacrifice a peremptory strike to remove the unqualified juror – Mr. Miller – who should have been removed for cause by the trial court. Although this allowed Mark to be tried by a qualified, impartial jury, application of §494.480.4 would eliminate Mark's opportunity to ask this Court to correct the trial court's erroneous ruling in denying the strike for cause.

Competent counsel facing such a choice must use a peremptory strike to remove those jurors that are the most unqualified or biased. *See*, *e.g.*,

*Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992); *State v. Price*, 940 S.W.2d 534 (Mo.App.E.D. 1997); *State v. McKee*, 826 S.W.2d 26 (Mo.App.W.D. 1992). Section 494.480.4 thus prevents this Court and other appellate courts from reviewing the most egregious of trial court rulings with regard to strikes for cause. As to cases not originating in this Court, §494.480.4 abridges this Court's constitutional duty to supervise and correct the judgments of the lower courts of this state. Mo.Const., Art. V, §§ 2, 4, 5, and 10. *See*, *e.g.*, *State v. Clark*, 981 S.W.2d 143,146-48 (Mo.banc. 1998); *Villines v. Div. of Aging and Missouri Dept. of Social Services*, 722 S.W.2d 939 (Mo.banc 1987); *Wise v. St. Louis Public Service Company*, 357 S.W.2d 902,905 (Mo.banc 1962); *Blanford v. St. Louis Public Service Co.*, 266 S.W.2d 718,721 (Mo. 1954).

Here, Mr. Miller was the only juror Mark had to remove with a peremptory strike to cure the trial court's denial of a motion to strike for cause. If §494.480.4 is applied, there will be one lower court ruling this appellate Court may not review. But what if a trial court erroneously denied multiple defense motions to strike unqualified jurors for cause and the defendant used all its peremptory strikes to remove them? Section 494.480.4 could potentially preclude this Court and the lower appellate courts from reviewing as many erroneous trial court rulings as there are peremptory strikes.

A particularly arbitrary, capricious and irrational effect of §494.480.4 is, in death penalty cases, it results in very different treatment of a trial court's erroneous rulings involving "death qualification" of jurors who do not serve on the jury. Section 494.480.4 only applies when the challenged juror is "on the panel from which peremptory challenges by the defense are made..." The statute *permits* this Court to review a trial court's erroneous removal for cause, at the request of the state, of a juror who expresses objections to the death penalty but whose views would not substantially impair his or her ability to follow the law. Yet, §494.480.4 *prevents* appellate review of the trial court's erroneous ruling in denying removal for cause of a juror whose views on the death penalty would impair his or her ability to follow the law but who has nonetheless been removed by a peremptory strike by the defense.

There is no reasonable or rational basis for §494.480.4's distinctions *denying* appellate review of a trial court's erroneous ruling denying a meritorious defense motion to strike for cause in which the defense uses a peremptory strike to remove the juror, but *allowing* appellate review of a trial court's erroneous ruling improperly granting a state's motion to strike for cause in which the defense does not use a peremptory strike to remove the juror. In each situation, the defendant challenges the trial court's ruling as to a juror who did not serve on the jury, but the litigants

are treated differently.

Mark acknowledges "[t]here is, of course, no constitutional right to an appeal," and in Missouri the right to appeal is conferred by statute. *Jones v. Barnes*, 463 U.S. 745 (1983); *State v. Williams*, 871 S.W.2d 450, 452 (Mo.banc 1994). "Nonetheless, if a State has created appellate courts as 'an integral part of the … system for finally adjudicating the guilt or innocence of a defendant,' … the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Hunt v. Nuth*, 57 F.3d 1327,1336 (4th Cir. 1995).

"[O]nce established, [the] avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458,459 (1969); *Rinaldi v Yeager*, 384 US 305,310 (1966); *see also Linsdey v. Normet*, 405 U.S. 56 (1972) (double-bond requirements imposed upon tenant appealing decision under Oregon Forcible Entry and Wrongful Detainer Statute but not applicable to other classes of appellants violated Equal Protection Clause). "[N]either the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for

criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal..." *Griffin v. Illinois*, 351 U.S. 12,21-22 (1956), Frankfurter, J., concurring.

For the forgoing reasons, this Court must find the trial court erred in denying Mark's motion to strike Mr. Miller for cause and violated Mark's rights to due process and equal protection of the law, a fair and impartial jury, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's V, VI, VIII, and XIV; Art. I, §§2,10,18(a) and 21. For the foregoing reasons, the Court must also find §494.480.4 unconstitutional and its application in the present case to preclude review of this Point would violate Mark's federal and state constitutional rights to due process and equal protection of law, a fair and impartial jury, reliable sentencing, freedom from cruel and unusual punishment, and access to the Missouri courts of justice for relief and remedy of errors occurring at his trial. The cause must be reversed and remanded for a new penalty phase proceeding.

**VIII**

**The trial court erred in overruling Mark's objections to portions of the victim impact testimony of Diane and Mitch Miller – Ralph's sister and brother-in-law. This violated Mark's right to due process of law, jury trial, reliable sentencing, and freedom from cruel, unusual punishment. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art.1, §§10, 18(a).**

**The trial court allowed Diane Miller to stand directly in front of the jury showing photographs of her family and sobbing while recounting the circumstances of her father's death and her mother's illness which had nothing to do with the impact of Mark's offense. The trial court allowed Mitch Miller, while sobbing profusely, to testify in narrative form about his and his brothers' own impoverished childhoods, his moral principles, and his opinion of the offense,**

**Diane and Mitch Miller's testimony had the effect of encouraging the jury to contrast the value of Ralph's life with the value of Mark's life, and to encourage the jury to make its decision based on passion, prejudice, and emotional impact. Mark was prejudiced because the content and emotional**

**delivery of this evidence exceeded the bounds of victim impact evidence allowed by *Payne v. Tennessee*, 501 U.S. 808 (1991) and permitted by Missouri law.**

*Additional Facts and Preservation*

During Diane Miller's testimony, the trial court allowed her to stand near the jurors so they could see small photographs she had brought with her to court (Tr.1172). Diane showed photographs of Ralph with various members of the family then began talking about the impact of her mother's death on her family: "After my dad passed away, my mom put the house up for sale in Chaffee that we'd lived in all of our lives, so it was up to me and Steve and Ralph to go down and clean it out because mom had gotten sick" (Tr.1178). Defense counsel, at the bench objected that Diane was positioned "a foot from the jury, she's visibly crying" (Tr.1179). Counsel objected further:

> [T]his picture isn't even victim impact, this is a picture of her family home and she had to clean it out. Having to do with her father dying and her mother being sick. this is getting beyond anything that should be allowed. I mean, it's a highly prejudicial and adverse standing with her inches from the jury, crying and we renew all of our motions as to victim impact. We ask that she not be allowed to continue to go through these photos,

inches from the jury, crying.

(Tr.1179). Although the trial court noted "the witness did get visibly upset, in describing the last picture" and told the prosecutor Diane should testify from the witness stand, the court overruled the objection that this was not proper victim impact evidence (Tr.1179). The trial court overruled further objections that the witness had already shown the jury numerous photos and it was time to limit her testimony and restrict display of more photographs (Tr.1179-80).

Diane resumed by showing another photograph, "number 23, and as I had said, that mother sold the house and we went down, the three of us, went down and, we were, we were cleaning out our home that we lived in all of our lives, and that's what we were doing" (Tr.1181).

At the prosecutor's request, Diane read a statement she had prepared "about the impact of this crime on you and your family" (Tr.1185). Diane's statement included moral lessens she and her siblings had learned from their parents about the importance of "working hard … there's always work to be found" and "liv[ing] within your means" (Tr.1186). She continued at length about her father in particular,

> Our parents were the core of our family, and everything centered around them. Dad was a World War II prisoner of war, a guest of the emperor of Japan, he would tell us. He spent three and

> [a] half years in one of their prison camps. And the things he suffered, in spite of it all, dad was one of the nicest, loving, and most easy going people that I have ever known.

(Tr.1187). Counsel objected this was about things Diane's "father went through" and not victim impact (Tr.1188). The trial court directed the prosecutor to "whisper" to Diane to omit further references to her father "I think we've gone too far [a]field in the reference to the father" (Tr.1188).

Diane then began reading the next portion of her statement which discussed both her mother and her father's death:

> Mom was a housewife who worked hard taking care of her family in every way, making sure that we were fed and that we went to church and to school, I remember 1998, when dad became very ill, he was 76 years old, he was on life support for a week, the family was there gathered around him, holding his hand, taking care of him and just trying to comfort him.

(Tr.1188-89). Diane described how Ralph steadied her hand so she could sign the consent form (Tr.1189).

Mitch Miller's testimony followed Diane's. Mitch began by telling the jury about himself and his family and the era he, being 54, was raised in, "of John Wayne westerns, Audie Murphy, hero worship…" and the cowboy names he and his brothers used (Tr.1195). He told the jury of

the moral precepts – the "valuable good life lessons" – he and Ralph had learned studying "the west, the mythical west, and the true west, for years and years...." (Tr.1195). Mitch reminded the jury of these moral principles: "You don't cheat at cards, you don't start any trouble, but you stand up to it when it comes. You never shoot a man in the back, and, two against one is never a good program." As Mitch, unrestrained by the trial court, began launching into his impoverished childhood, "We were terribly, terribly poor, as kids. I grew up..." counsel objected it was non-responsive and narrative; the trial court overruled the objection so the jury could see "where his testimony is coming from" (Tr.1195-96).

Mitch told the jury he was "raised with these boys in a two-room house, fuel and a wood stove that we cut wood for before we went to school, and then now we've kind of all gone our separate ways, except I know I can make a phone call right now, and in a matter of hours, we can have this courthouse surrounded by the Miller gang...." (Tr.1196).

Mitch began talking about meeting Ralph through Diane and becoming buddies (Tr. 1196-97). After a few minutes, defense counsel, at the bench, stated, "I want the record to reflect that the witness has been visibly sobbing, and crying in front of the jury, for the past two or

three minutes… (Tr.1197). The judge acknowledged the defendant[17] is visibly upset, and, has been choking back tears…" (Tr.1197).

Mark included these rulings in his motion for new trial (LF242-43).

*Standard of Review*

In 1991, the United States Supreme Court held that states could elect to admit "victim impact" evidence at capital trials. *Payne v. Tennessee*, 501 U.S. 808 (1991). *Payne* described "victim impact evidence [as] simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id. at 825.*

Recognizing that "[e]vidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation," *Id.* at 836, Souter, J., concurring, the Court held up the Due Process Clause as providing relief from victim impact "so unduly prejudicial that it renders the trial fundamentally unfair" *Id*. at 836, 825 *citing Darden v. Wainwright*, 477 U.S. 168 (1986).

Missouri authorizes admission of "victim impact" at penalty phase. *State v. Storey*, 40 S.W.2d 898,909 (Mo.banc 2001) (The purpose of

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[17] The transcript uses the word "defendant."

victim impact evidence is to show 'each victim's "uniqueness as an individual human being"'); citations omitted. Section 565.030.4 authorizes admission of "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others."

When error in the admission of evidence is of constitutional magnitude, the reviewing court must reverse unless it can say with confidence that the state has proved beyond a reasonable doubt the error was harmless. *State v. Driscoll*, 55 S.W.3d 350,356 (Mo.banc 2001).

*Argument*

In *Payne*, *supra*, the Supreme Court reversed its decisions in previous cases holding inadmissible victim impact statements and disapproving arguments to the same effect. *See Booth v. Maryland*, 482 U.S. 496, 505 (1987); *South Carolina v. Gathers*, 490 U.S. 805, 810 (1989). But the Supreme Court left part of *Booth* intact; *Payne* did not overrule *Booth*'s prohibition on testimony that gave the victim impact witness's opinions and characterization of the crime and of the defendant. *Payne*, 501 U.S. 808,830.n.2 (1991). It remains true today that victim impact evidence may not, under the Eighth and Fourteenth Amendments, serve as a vehicle for the victim's family members to give their opinions about the defendant or the crime.

Here, the testimony of Diane and Mitch Miller not only violated the

limits of *Payne* by its excessively emotional content and presentation, through comparison with their own families and upbringing, it violated the *Booth* holding left untouched by *Payne* by implying Mark was bereft of values and moral scruples, he had violated the rules of justice which Mitch, especially, held true, and Mark deserved to die. Much of Mitch and Diane's testimony was irrelevant in that it dwelt on their own, morally solid upbringings in close-knit families. This, in itself was prejudicial in that it invited the jury to feel sympathy for their painful times – the loss of parents, in Diane's case – and use that irrelevant evidence to sentence Mark to death. It invited the jury to compare the value of Mark's life with the value of Ralph's, Diane's and Mitch's life. It invited – and because it was not stopped by the trial court – it allowed the jury to make its sentencing decision based on passion and emotion rather than the facts.

What a substantial portion of this evidence did *not* do was inform the jury about Ralph as a person or how the crime affected his family and friends. Diane's testimony about her father and mother certainly reflected her emotional distress – but it was not emotional distress caused by this crime. Likewise, Mitch's testimony about the values to be found in the old west and his brothers certainly humanized Mitch but it had nothing to do with the crime's impact.

Mitch's lessen about the moral values of the west – "You never shoot a man in the back, and, two against one is never a good program" – was an unqualified opinion about the crime and Mark. It was powerful, emotional, testimony that the trial court should have curbed and the court's failure to do so violated Mark's rights to due process, jury trial, reliable sentencing and freedom from cruel and unusual punishment.

The victim impact testimony of Mitch and Diane Miller was so prejudicial as to render the trial fundamentally unfair. *State v. Deck*, 994 S.W.2d 527,538-39 (Mo.banc 1999). It injected arbitrary, emotional factors into the sentencing decision violating not only the Fourteenth Amendment, but the Eighth Amendment's command of heightened reliability in capital cases.

For the foregoing reasons, Mark's sentence must be vacated and the cause remanded for a new penalty phase trial.

## CONCLUSION

Wherefore, for the foregoing reasons, as to Points 1, 2, and 3, appellant prays that the Court reverse the judgment and sentences and remand for a new trial, or, in the alternative, for a new penalty phase trial; as to Points 4, 5, 7, and 8, Mark prays that the Court will reverse his sentence of death and remand for a new penalty phase trial, or, in the alternative, reduce his sentence to life imprisonment without probation or parole; and as to Point 6, Mark prays that the Court will reverse his sentence of death and reduce his sentence to life imprisonment without probation or parole

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 84.06(b). The brief comprises _____ words according to Microsoft word count.

The floppy 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.

A true and correct copy of the attached brief, the separately bound appendix, and a floppy disk containing a copy of this brief were delivered, this ___ day of _____, 20___, to the Office of the Attorney General, Supreme Court Building, 207 West High Street, Jefferson City, Missouri 65101.

_____
Attorney for Appellant