No. SC85955

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

vs.

MARK ANTHONY GILL

Appellant.

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

BRIEF OF RESPONDENT

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INTRODUCTION AND SUMMARY

Defendant Mark Anthony Gill was convicted of murder and sentenced to death for his part in the execution-style shooting and burial of the victim: Ralph Lee Lape, Jr. Key evidence in the case included (but was not limited to) Defendant Gill's confession. Gill admitted that he and an accomplice (Justin Brown) jumped the victim in his garage, bound him, induced him to provide his bank account "PIN" number, drove him to a cornfield, and had him watch while Gill and Brown took turns digging what would be the victim's grave. According to Gill, he then watched Brown point the gun at the victim's head and shoot him. The shot was fatal. Gill and the accomplice then took money from the victim's bank account before Gill was caught in New Mexico.

The evidence also showed that Gill's confession was inaccurate in some respects, giving the jury reason to doubt that Gill's confession was completely candid. An autopsy showed that the victim had been beaten before death, but Gill denied that the victim was beaten. The record shows that the prosecutor knew (but could not put before the jury) that Brown accused Gill of being the shooter.

The prosecution presented 27 witnesses; the defense none. The jury found Defendant Gill guilty on five counts, including first degree murder. After a penalty phase, the jury found three statutory aggravators and recommended that Gill be executed. The trial court imposed the sentence of death.

Gill does not argue actual innocence on his part. His primary argument is that the trial court should not have given an instruction that allowed for the possibility that Gill

was the shooter. But Gill's argument, if accepted, would mean that if the jurors thought there was a reasonable possibility that Gill was understating his involvement in the victim's shooting as well as understating his involvement in the victim's beating, the jury would have had to *acquit* Gill on the murder charge. And the prosecutor would have to tell two different juries that the absent accomplice was the shooter.

Four of the remaining seven Points Relied On (IV, V, VI, and VII) are contrary to controlling precedent of this Court, which Gill acknowledges. His request that this Court overrule its precedent on these issues should be rejected. He makes two other guilt phase arguments. Point II, relating to accomplice liability for the armed criminal action count only, should be rejected because the verdict director was proper. Point III, relating to the prosecutor's description of accomplice liability during voir dire, should be rejected because the prosecutor accurately explained the "basic concept" and the need to defer to the judge's instructions. Gill's last point (VIII), in which Gill asserts that the victim impact statements drifted too far from describing the impact of the victim's death, should also be rejected. The statements that did not directly describe the impact of Ralph Lape's death on the family were brief, merely provided context, and were not prejudicial.

The trial court did not err. The judgment and the sentence were supported by the facts and the law and should be affirmed.

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

This appeal is from the conviction of defendant Mark Anthony Gill for the following crimes for which the following sentences were imposed: Count I: murder in the first degree, § 565.020.1, RSMo 2000 (death); Count II: kidnapping, § 565.110, RSMo 2000 (fifteen years); Count III: armed criminal action, § 571.015, RSMo 2000 (thirty years); Count IV: robbery in the first degree, § 569.020, RSMo 2000 (life imprisonment); and Count V: tampering in the first degree, § 569.080.1, RSMo 2000 (seven years). The sentences for a term of years are to be served consecutively (Def. App. A1-A6, L.F. 138-40, 282-86). Because a sentence of death was imposed, the Missouri Supreme Court has exclusive jurisdiction over this appeal. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Defendant Mark Anthony Gill was convicted of first degree murder for his part in the murder of Ralph Lee Lape, Jr. in Cape Girardeau County, Missouri on or near July 7, 2002, and was sentenced to death. He was convicted of four other charges in relation to those actions: kidnapping, armed criminal action, robbery, and tampering with an automobile (L.F. 138-39).[1]

Gill, through his counsel's opening statement, admitted his guilt to all charges other than first degree murder, and defended that charge based on lack of deliberation or cool reflection. Defense counsel stated: "And I'm not here to ask you to forgive him or to find him not guilty. What I am here to talk to you about is whether or not he committed the crime of murder in the first degree as he has been charged. And he has been charged with a number of crimes. And he is guilty of all of those crimes, except for murder in the first degree . . . . Mark Gill did not make decisions that were cool and rational in this case. And that is what the State would need to show you" (Tr. 625, 627).

In the light most favorable to the verdict, the following guilt-phase evidence was adduced. The victim, Ralph Lee Lape, Jr., 54 years old, lived alone in a mobile or modular home in a sparsely populated area in Cape Girardeau County (Tr. 629-31, 636,

[1]In this brief "L.F." refers to the Legal File, "Tr." refers to the trial court transcript (including pretrial matters through sentencing), "Def. App." refers to defendant's separately bound Appendix to Appellant's Brief, and "State App." refers to the State's Appendix bound at the back of this brief.

741). In approximately June 2002, a lawyer in Cape Girardeau (Pat Davis) whose secretary was a friend of Lape's (Mary Cates) asked Lape if a client could live with Lape. The client was defendant Gill. Davis made the request because Lape lived near Gill's place of employment, and Lape agreed (Tr. 697-98, 704-06, 710_11).[2]

Lape owned a cabin on Kentucky Lake with Mary Cates and her husband, Scott (Tr. 697_98, 704). They spent the July 4, 2002, weekend at the lake. The Cates last saw Lape on Sunday, July 7, 2002, when they left the lake, with Lape indicating he would be leaving shortly thereafter (Tr. 701-02).

The description of events that took place next comes primarily from the videotaped confession of defendant Gill, which was played for the jury in this case (Tr. 830-35). A transcript of the statement was prepared and was made available to the jury during the playing of the tape, but was not admitted into evidence (Tr. 834-35, Trial Exhibits 92-93, Def. App. A27-A57).[3]

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[2] It is not completely clear from the record whether Gill was staying inside Lape's house or in a camper on Lape's property (Tr. 721-22).

[3] Exhibit 92 is the videotape of the Gill confession and Exhibit 93 is the transcript of that video. The transcript of the video is found at Def. App. A27-A57. When the video was played for the jury, the court reporter did not record the statements on the videotape, a procedure to which the parties stipulated (Tr. 834-35). Therefore, the only transcript of the confession is found at Def. App. A27-A57. Gill also made a confession to a police officer that was not recorded and was described by that officer at trial, which was similar to the recorded confession (Tr. 824-30).

Gill and his accomplice, Justin Brown, were alone at Lape's house over the July 4, 2002, weekend. Brown discovered Lape's checkbook in his garage and saw that it showed that Lape had $270,000.[4] They made the decision to get the money and kill Lape (Def. App. A29-A30). On Saturday, July 6, 2002, they bought the tape they would use to bind Lape. They found two of Lape's guns – a .357 magnum and a silver .22 pistol. They hid the pistol because Gill said he knew Lape carried a gun (Def. App. A30-A31).

The next day, Sunday, July 7th, Lape arrived home and pulled his truck in the garage. After the garage door closed, Gill and Brown grabbed Lape and bound his hands, legs, and feet with wire ties ("tiger tails") and the tape they bought the day before. Lape told them he would give them money and told Gill he had done nothing but tried to help him. Gill said "yeah, but at that point I already stuck my foot in something." They taped his mouth shut, but later removed it (Def. App. A31-A32).

They put Lape in the backseat part of his truck. Gill put shovels in the back of the truck because "I knew I was going to kill him" (Def. App. A33). They found Lape's ATM bank card in the truck. With the tape removed from his mouth, he gave them the PIN number for the card (Def. App. A34). Lape and Brown drove the truck into the cornfield. They took turns: one would dig what would become Lape's grave while the other was in the truck with Lape (Def. App. A35). They got him out of the truck and

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[4] Lape had worked for a railroad but became disabled and received approximately $200,000 in a settlement (Tr. 634-35).

took him to the hole they had made. Lape said "please" (Def. App. A36).

Then, according to Gill, Brown pulled the trigger. It misfired. He pulled the trigger again and shot Lape in the head. They "lined him up in the hole," and Brown stomped on his head to make it fit (Def. App. A36). Lape was buried naked (Tr. 794). They covered him with dirt and drove away (Def. App. A36).

After having killed Lape, they changed clothes at Lape's house, used Lape's card to get money from an ATM, and went to strip clubs in the Metro East St. Louis area until those establishments closed, spending $800-900. They spent part of the night at a St. Louis hotel and then went back to Lape's house (Def. App. A38-A41).

Once at the house, they began to dispose of the evidence. They discarded the shovels in woods near Herculaneum, Missouri. They were unable to find a "chop shop" to destroy Lape's truck, so they took it to Kentucky and left it in a hospital parking lot. They threw the keys out the window on the side of the road (Def. App. A41-A43). They burned Lape's clothes and their clothes. They threw in the river the gun, jewelry, and anything that would not burn (Def. App. A53).

The gun was never found (Tr. 1012).

Having taken nearly all the money from Lape's bank account that was accessible with the ATM card, they used Lape's computer to transfer $30,000 into the ATM-accessible account. Gill and Brown then got drunk and high (Def. App. A44-A45). A friend told Gill he could obtain any amount of money from ATM's in Las Vegas. Gill and his girlfriend went to Las Vegas and were married. He was arrested in New Mexico

on the way back. Gill drew about $16,000 from Lape's account on the trip (Def. App. A46-A47, A49). The plan was for Gill and Brown to split the remaining money in the account (Def. App. A50-A51).

The State presented evidence in addition to Gill's confession, some of which was inconsistent with the confession.

When persons started looking for the victim Lape, Gill lied about Lape's whereabouts. He told Scott Cates and the victim's sister Diane Miller that Lape had not come back from the lake (Def. App. A41-A43, Tr. 646-47).

Lape's daughter went with her mother (Lape's ex-wife) to Lape's home on or near July 22, 2002, after being unable to reach Lape. There she saw defendant Gill and Brown. Gill claimed that Lape had gone fishing (Tr. 654-56).

When Gill was first apprehended by police, he denied any knowledge of what had happened to Lape, and claimed Lape had authorized him to use his ATM to withdraw $10,000 in return for beating up Lape's daughter's boyfriend (Tr. 821-22, 959-60).

The State presented evidence Gill and Brown destroyed evidence of the crime in addition to what was described in the confession. Lape's daughter saw one of the bathrooms full of mud, as if someone drenched in mud and with mud on their shoes had just jumped in the shower (Tr. 656-57). The next day Ralph Lape's brother-in-law visited Ralph's house and the mud had been rinsed out, but a mud residue remained (Tr. 687-88). The next day, following two days of visits from Ralph Lape's family, Gill brought Lape's house keys and garage door opener to Mary Cates at her law firm. Gill

said he was bringing her the keys because a lot of people were coming to Ralph's house and "if something happened" he did not want people "looking at him funny." She refused to take the keys, telling Gill he should be at Lape's home in case Lape tried to reach someone (Tr. 705-07).

In addition to evidence, Lape burned personal mementos of the Lape family, including World War II paperwork of Lape's father (Tr. 986-87).

Lape was shot in the head with a trajectory that was consistent with the victim kneeling in a shallow grave, two to three feet deep, the gun being put to his head, and being shot from a short distance (Tr. 776).

In addition to being shot, the victim was beaten, including a fractured skull, bruising in chest, a rib that was broken in two (Tr. 770-776). A post-shooting stomp on the head would not have caused three head fractures (Tr. 778-82). Gill denied that Lape was beaten before his death (Tr. 849).

A bank witness testified that $55,000 (rather the $30,000 to which Gill admitted) was transferred to the ATM account (Tr. 727-31).

The jury returned verdicts of guilty on all counts (L.F. 219-23, Tr. 1127-30). After the penalty phase of the trial, the jury returned a verdict of death on the first degree murder charge (L.F. 236, Tr. 1456-60). The trial court imposed the sentence in accordance with the verdict (L.F. 282-86, Tr. 1473-74). This appeal followed.

ARGUMENT

I. The trial court correctly submitted a verdict-directing instruction allowing for the possibility that defendant Gill shot the victim because an instruction responsive to Gill's objection would have required the jurors to *acquit* defendant Gill if they believed that Gill *may* have been the shooter .

Defendant Gill argues that the trial court should not have given a disjunctive verdict-directing instruction, that is, an instruction that did not preclude the possibility that Gill was the shooter. Gill asserts that the jury should have been instructed that it had to find beyond a reasonable doubt that Justin Brown was the shooter, with no reference to the possibility that Gill was the shooter because, according to Gill, there was no evidence that Gill was the shooter.

This Court should deny this Point Relied On. First, Gill's premise – that the identity of the shooter was clear – is incorrect. Second, Gill does not properly distinguish between whether the evidence was sufficient to convict Gill as the shooter (which the State did not set out to prove beyond a reasonable doubt at trial) as opposed to whether there was no reasonable doubt that Justin Brown was the shooter. Third, Gill's argument would lead to unjust results if accepted. If the instruction were modified in the way Gill suggests, then a reasonable doubt as to whether an absent accomplice is the shooter would lead to an **acquittal** of the defendant. In other words, if the jury believed the defendant was even more involved than he admitted, the defendant would go free. Such an interpretation would undermine principles of accomplice liability. Fourth, this Court

in a unanimous opinion, rejected an argument like Gill's just two years ago in a murder-accomplice case. *State v. Gilbert*, 103 S.W.3d 743, 747-48 (Mo. banc 2003)(State App. A1-A8). Fifth, Gill's cases are distinguishable because they do not deal with situations with the level of involvement of Gill in this case and there are reasons to doubt his exculpatory statements in his confession.

Gill assumes that the identity of the shooter was clear (Def. Br. at 43-44). But that is not the case. This is not a situation in which there was forensic evidence such as fingerprints on a murder weapon that might have made it clear whether Gill or Brown was the shooter. Nearly everything involved in the crime was destroyed, for which Gill admitted involvement or responsibility (Def. App. A41-A-43, A53). There was no physical evidence that disproved that Gill was the shooter. Gill said "I knew I was going to kill him" (Def. App. A33). And it was obvious that Gill had an incentive to blame someone else.

Gill's arguments are also based on the assumption that the disputed instruction allowed the jury to find that Gill was the shooter (Def. Br. at 56). But the instruction given merely allowed the jury to **refrain from making a finding** as to who shot the victim Lape (L.F. 194_95, State App. A9-A10). That is the point of accomplice liability: it is not necessary to pinpoint which accomplice did the last act causing the death of the victim. §§ 562.036, 562.041, RSMo 2000. Gill's suggestion would end up being a back-door method of requiring the State to determine, beyond a reasonable doubt, the identity of the shooter in cases where doing so is difficult or impossible, contrary to the statute.

If the instruction had been modified as Gill suggests, the evisceration of the accomplice liability statute would lead to unjust results. The pertinent part of the instruction at issue is set out below, with the portion that Gill said should have been deleted in brackets.

> 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 Lape, Jr., by shooting him . . . .
>
> 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. . . . .
>
> [U]nless 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.

(Emphasis added, Instruction 8, L.F. 194-95, State App. A9-A10, Defendant's Objection at Tr. 1035-36).

Without the bracketed phrase that Gill argues should have been deleted, the jury would have to find Gill **not guilty** if they believed (1) defendant Gill did everything he admitted he did in the murder of Lape, and (2) the jury held some reasonable doubt as to whether Justin Brown was the shooter.

Defendant Gill does not address the inequity of an accomplice in murder being

acquitted when the identity of the shooter among the accomplices is uncertain. Nor does Gill discuss the most relevant case: *State v. Gilbert*, 103 S.W.3d 743, 747-48 (Mo. banc 2003)(State App. A1-A8).

Gilbert was charged with first degree murder and sentenced to death for his role in the murder of an elderly couple. He and an accomplice went to the home of the couple, shot them in head, stole their car, and drove to the southwest United States. As is the case here, the verdict director attributed the conduct elements of the offense to either Gilbert or his accomplice. Except for the names of the perpetrators and victims, the instruction was nearly identical to the instruction given as to Gill:

> First, that on or about August 30, 1994 . . . . **the defendant or** [the accomplice] Eric Elliot caused the death of Flossie Brewer by shooting her . . . .
>
> Fourth, that with the purpose of promoting or furthering the death of Flossie Brewer, the defendant aided or encouraged Eric Elliott in causing the death of Flossie Brewer . . . . .
>
> [U]nless 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. . . .

Gilbert, 103 S.W.3d at 747-48 (emphasis added)(State App. A4).

This Court in *Gilbert* stated the long-established proposition that "[i]f the evidence is unclear as to which person committed the conduct constituting the offense, the jury instruction should be written in the disjunctive." *Id.* at 748 (State App. A4-A5).

Because of Gill's own actions, there was at least as much uncertainty as to the identity of the shooter in *Gilbert* as there is in Gill's case. Gilbert took the stand at trial and admitted he tied the hands of one of the victims behind her back, helped her down the stairs to the basement, and went upstairs while his accomplice shot the 75-year-old victim. He had given another version of the events in which he blamed the shooting on his accomplice, but said he was in the basement rather than upstairs when the victim was shot. *Id.* There was no direct evidence or testimony that Gilbert was the shooter. Nevertheless, this Court unanimously held that there was sufficient uncertainty to allow the use of the disjunctive "the defendant or" in the verdict director.

The jury here also could have had reasonable doubt that Brown was the shooter. As was the case in *Gilbert*, Gill made inconsistent statements, even more inconsistent than Gilbert's. In Gill's first statement, he denied any involvement in the victim's death, stating that he obtained the victim's money in payment for a promise to beat up the boyfriend of the victim's daughter (Tr. 821-22, 959-60). He later gave the version that described Justin Brown as the shooter. Like the *Gilbert* testimony, Gill admitted to deep involvement in the murder. Gill admitted to jumping the victim, tying him up, driving him to a secluded location, and leading him to what would be his grave and had him watch while Gill and Brown dug the victim's grave (Def. App. A29-A36). And Gill admitted to more involvement than Gilbert, with Gill admitting he was present when the shot was fired that killed the victim and he did nothing to stop the murder. Gill's admitted level of involvement in Lape's death was enough to meet the *Gilbert* standard

for a disjunctive instruction.

But there was more. The jury could intuitively recognize defendant Gill's incentive to try to decrease his level of culpability in the hope that he would be treated less harshly if he were not believed to be the shooter. No physical evidence disproved that Gill was the shooter. The jury heard Gill's statement that "I knew I was going to kill him" (Def. App. A33). Gill went to great lengths to destroy the evidence that might have allowed for the recovery of fingerprints on the gun, including throwing the gun in the Mississippi River, never to be seen again (Tr. 1012, Def. App. A41-A43, 53).[5]

Perhaps most important, the jury knew that Gill lied in his confession to understate what had happened to the victim. Gill denied that Lape was beaten before his death (Tr. 849). Gill only admitted that Brown stomped on Lape's head in the grave after being shot (Def. App. A36). But Dr. Deidiker, the physician who performed the autopsy, testified that the victim Lape was beaten and received at least three blows to the head. He suffered a skull fracture in addition to the one caused by the bullet, a completely broken (not merely fractured) rib, and many bruises. The injuries were more severe that would have been sustained by a slap or a punch (Tr. 739-41, 749, 769-74). A post-shooting stomp on the head could not have caused all those injuries (Tr. 781-82). No scientific evidence contradicted Dr. Deidiker's testimony.

Gill's admission of deep involvement in the murder of Lape, plus the evidence showing that Gill lied in his confession, was more than sufficient to support the use of the

[5] Gill's statement was that "we junked it."

phrase "the defendant or" in the verdict director.

Another accomplice murder case similar to *Gilbert* and this case is *State v. Dulany*, 781 S.W.2d 52, 54-56 (Mo. banc 1989). The defendant Dulany was found guilty of a double-murder under an accomplice theory with no evidence that she directly caused the deaths of the victims. Another person bound the husband-wife victims together on their bed, killed the wife by striking her, covered them both with roofing cement, set it on fire, and fled. The defendant admitted holding a gun on the victims, getting rope to bind them, and carrying empty cans that had held the flammable roofing cement. There was no direct evidence that the defendant struck or burned the victims. Nevertheless, the verdict director, like the one here, stated in the alternative that the defendant or one of the accomplices caused the death of the victims by striking or burning them. *Id.* at 54-55.

The *Dulany* Court held that the use of the disjunctive was proper in that it was unclear who committed the acts. This Court held that the uncertainty could be derived from the defendant's involvement (holding the victims at gunpoint, getting rope to tie them, and carrying the empty roofing cement cans), inconsistent confessions (naming two different persons as the responsible person but exculpating herself), and the fact that the defendant fled the state after the murders. *Id.* at 55. Here, Gill, according to his own confession, not only obtained the tape that bound the victim Lape, Gill also was present during the murder, he disposed of the evidence, and he fled the state (Def. App. A31_A36).

As this Court stated in *Dulany*:

> The jury is not bound by defendant's self-serving explanation. They are entitled to accept or reject any part of her admission or her testimony. . . . It is within the jury's province to believe all, some, or none of the witnesses' testimony in arriving at their verdict.

Id. (citations omitted).

Moreover, "[t]here can be no prejudice [from the use of the disjunctive in an accomplice case] because the jury can find defendant guilty only if it finds she committed the crime or acted together with, or aided, the other person to commit the elements of the crime. *Gilbert*, 103 S.W.3d at 748, *citing Dulany*, 781 S.W.2d at 56. The jury was so required here (L.F. 194-95, State App. A9-A10).

Gill relies on decisions of intermediate appellate courts that purportedly limit *Dulany*. (Gill does not cite *Gilbert*.) But those cases are readily distinguishable. Gill cites *State v. Thompson*, 112 S.W.3d 57 (Mo. App. W.D. 2003)(Def. Br. 48-52), in which the appellate court reversed a murder conviction based on a disjunctive accomplice liability instruction. The Western District distinguished *Dulany*, but in ways that also distinguish *Thompson* from Gill's situation. In *Thompson* the court relied on the fact that there was **no** evidence of Thompson's involvement in the conduct element, there were not inconsistent confessions, Thompson was not present when the murder occurred, the verdict director treated Thompson only as an "aider" (rather than one who "acted together with or aided"), and the prosecutor argued to the jury only the defendant's version of

events (that the defendant did not engage in conduct elements). These facts, which were absent from *Thompson*, are present here. As noted above, Gill was present at the time of the shooting, gave inconsistent confessions, and was deeply involved by his own admission. The verdict director referred to Gill as one who "acted together with or aided" the accomplice (L.F. 194, State App. A9), and the prosecutor's arguments to the jury allowed for the possibility that Gill was the shooter (Tr. 1097, quoted in Def. Br. 47).[6] *Thompson* involved a highly unusual situation that has no application here.

The other case on which Gill relies is *State v. Puig*, 37 S.W.3d 373 (Mo. App. S.D. 2001)(Def. Br. 52-54). The court held that it was error to instruct the jury that the defendant "acted together with or aided" another person in the sale of marijuana when the evidence indicated only that he "aided" the other person, rather than "acted together with" that other person. *Id.* at 376-77. The defendant merely gave the other person a scale. Importantly, *Puig* did not address the issue of whether an instruction can leave open the possibility that either the defendant or the accomplice engaged in the conduct element (in Gill's case, the shooting). Thus, *Puig* has no relevance to Gill's objection to the "First" portion of the Gill verdict director using the phrase "the defendant or Justin M. Brown caused the death of Ralph L. Lape, Jr., by shooting him" (L.F. 194, State App.

[6] Although Gill argues that the prosecutor's failure to preclude the possibility that Gill was the shooter was prejudicial (Def. Br. 54-55), *Thompson* holds the opposite: that it was the prosecutor's failure to preclude the defendant as the shooter that made improper the use of the disjunctive instruction.

A9).

As to Gill's other objection to the verdict director, *Puig* is irrelevant because the facts are so different here. *Puig* merely stands for the proposition that the phrase "acted together with" cannot be used in the verdict director when there is no evidence that the defendant acted together with the accomplice in the conduct elements (in Puig's case, the transfer of marijuana or money). Puig merely delivered a scale.

But in Gill's case, the evidence was overwhelming, even by Gill's own confession, that Gill "acted together with" Justin Brown. By Gill's admission, he was just as involved as Justin Brown in everything that led to the killing other than pulling the trigger, including attacking the victim, binding the victim, transporting the victim, and digging his grave (Def. App. A31-A36). Gill himself said: "I knew **I** was going to kill him" (Def. App. A33)(emphasis added). Gill was not merely "aiding" Brown.

Moreover, there could be no prejudice here, as is required for a reversal based on an erroneous instruction. *Puig*, 37 S.W.3d at 378, *citing State v. Taylor*, 944 S.W.2d 925, 936 (Mo. banc 1997). In *Puig* the court found prejudice because the prosecutor argued that the defendant acted together with the accomplice in the sale of marijuana by directing the buyer to deal with the accomplice. But in fact, the defendant never directed the buyer to deal with the accomplice. It was the accomplice who spoke up offering to sell the marijuana. The prosecutor's closing argument was contrary to the evidence. *Id.*

Here, nothing could mislead or confuse the jury on this point. The prosecutor fairly described the court's instruction and accurately described the evidence.

Consistently with the instruction, he stated that it did not matter "if we don't know for sure which one of them pulled the trigger" (Tr. 1097). Nothing in the appellate court opinion in *Puig* suggests that there would be a reversal when the prosecutor accurately describes the evidence.

As noted above, *Thompson* stands for the proposition that when, as here, the disjunctive is used in identifying the killer, then consistency calls for using "acted together with or aided." The trial court's instruction was proper.

The other two substantive cases cited by Gill are also not applicable here (Def. Br. 53-54). In *State v. Scott*, 689 S.W.2d 758 (Mo. App. E.D. 1985), the disjunctive instruction was found to be error because there was "no evidence" to support the hypothesis that the defendant killed the victim. As noted above, there was sufficient uncertainty on that point here to warrant an alternative instruction, in accordance with *Gilbert and Dulany*. Finally, *State v. Perry*, 35 S.W.3d 397 (Mo. App. E.D. 2000), did not involve the disjunctive-instruction issue involved in Gill's case. *Perry* addressed the issue of joint possession of illegal drugs, a matter not at issue here.

Gilbert and *Dulany* also dispose of Gill's argument that the Missouri Approved Instructions (MAI) bar the use of the disjunctive here (Def. Br. 39-40, 45-47). The Approved Instruction for "Defendant's Responsibility for Conduct of Another Person" is found at MAI-CR 3d 304.04. Gill argues that the Notes on Use permit the use of the disjunctive phrase (defendant **or** other persons) only when it is not clear whether the conduct elements were committed by the defendant or another person, and here,

according to Gill, it was clear that Justin Brown committed the conduct elements. MAI_CR 3d 304.04, Note 5(c). But as explained above, in circumstances of comparable or less certainty than in this case that the non-party committed the conduct elements, this Court has held that the disjunctive instruction should be given.

Moreover, MAI-CR 3d does not state that the disjunctive instruction can "only" be given when there is uncertainty as to the conduct elements. In fact, the Notes on Use observe that "[t]here are almost an infinite number of variations in factual situations of accessorial liability." The trial court reasonably and properly gave an instruction in the disjunctive and avoided the risk of acquittal if the jury thought that Gill **might** have been the shooter.

Gill's position, if accepted, could have severe ramifications for the prosecution of the accomplice, Justin Brown, whose trial is set for October 31, 2005 (CR502-1695FX, Pulaski County). Justin Brown, too, confessed, but he accused Gill of being the shooter (Probable Cause Statement, L.F. 24, State App. A18). Thus, under Gill's theory, at the trial of Brown the jury would be asked to find beyond a reasonable doubt that **Gill** was the shooter, and at the trial of Gill another jury would be asked to find beyond a reasonable doubt that **Brown** was the shooter. This Court should not adopt the legal principle Gill advocates that would require two juries to find facts inconsistently in order to charge either one as an accomplice. Moreover, each jury could have its doubts that the absent accomplice was the shooter. Under Gill's theory, that would lead to the acquittal of both Gill and Brown because of difficulty in determining who actually pulled the

trigger.

Gill's arguments would also put prosecutors in ethical quandaries in situations in which two suspects name each other as the shooter or person who committed the act in question. The prosecutor here[7] knew that one of two defendants pulled the trigger, and knew that one of the two defendants lied in his confession by accusing the other of doing the shooting. Under Gill's position, the prosecutor would be required to ask two juries to find inconsistent facts–that a different person fired the single shot that killed the victim. If a prosecutor was unwilling or ethically barred from doing so, neither defendant could be convicted of murder because of the uncertainty as to who pulled the trigger. The trial court should be allowed to use the disjunctive so that different courts do not reach inconsistent verdicts, each one naming the absent party as the shooter.[8]

[7] H. Morley Swingle, Cape Girardeau Prosecuting Attorney.

[8] Gill argues that the failure to use his proffered instruction allowed for improper argument at the penalty phase. Gill's argument on this point is in Point Relied On IV of his brief, and is addressed in Section IV below. A typographical error in Gill's brief indicates that the "penalty" argument is in Point Relied On III (Def. Br. 57).

II. The trial court's armed criminal action verdict director was in proper form in all relevant aspects and referenced the rules of accomplice liability described in Section I .

Gill argues that the armed criminal action verdict director did not adhere to the MAI-CR 3d and its Notes on Use in failing to repeat the murder verdict director in the armed criminal action verdict director. In fact, the trial court adhered to the Notes on Use and the statute. There was no error or prejudice.[9]

The armed criminal action verdict director in relevant part stated:

> As to Count III, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that the defendant committed the offense of murder in the first degree, as submitted in Instruction No. 8,[10] and
>
> Second, that defendant committed the offense with the aid of a deadly weapon, then you will find the defendant guilty under Count III of armed criminal

[9] Gill does not and did not challenge the instruction on any other grounds, including the failure to explicitly refer to a mental state (Tr. 1041-44). *Cf. State v. Belton*, 153 S.W.3d 307 (Mo. banc 2005). Such an argument would have been unavailing, however, in the instructions here required the jury to attribute deliberation to defendant Gill in the accomplice instruction (Instructions 8 (¶Fourth) and 9, at L.F. 194_96, State App. A9_A11).

[10] Instruction 8 was the accomplice liability instruction described in Section I (L.F. 194-94, State App. A9-A10).

action.

(L.F. 203, State App. A12).

The precise modification in the instruction that Gill desired is unclear. Apparently Gill reads the "Notes on Use" as requiring the re-recitation of the murder/accomplice-liability instruction (No. 8) in the armed criminal action verdict director. Note on Use No. 6 for MAI-CR 3d 332.02 reads in part:

> Where it is alleged that a person other than the defendant employed a deadly weapon or dangerous instrument, the verdict director for armed criminal action must be in the form of MAI-CR 3d 304.04 [accomplice liability].[11]

But that part of the Notes on Use did not apply. Section 6 of the Notes on Use states:

> Where the defendant's liability for the underlying felony is premised on accomplice liability and where it is alleged that the defendant himself employed a deadly weapon or dangerous instrument in the commission of the offense, it is not necessary to submit the verdict director . . . in the form of Aider Liability (MAI_CR3d 304.04).

Even though Gill denied being the shooter, he did admit that he "employed a deadly weapon or dangerous instrument in the commission of the offense." Gill admitted that before he and Justin Brown jumped the victim in the garage:

"I [Gill] had already that 357 . . . . And we found a little silver 22, a little silver 22

[11] The heading for Point Relied On II refers to Note on Use 4, but the text correctly refers to Note 6 (Def. Br. 58, 62).

pistol and we uh started planning on where we was we goin [sic] get him at . . . . ”

* * * *

I opened the big [garage] door for Ralph to come in and it was almost like he know that something wasn’t right cause I had paused, and 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. . . . So we took it over by the uh, car cleaning material stuff and wrapped it in a towel put it in a towel . . . .

* * * *

We got uh, we got the gun, got in the truck, I was driving, and I backed out and he [Brown] shut the door and locked it.

(Def. App. A30-A33).

Gill’s argument is based on the assumption that he did not use a gun in the offense. But his confession shows that he “committed the offense with the aid of a deadly weapon.” Neither MAI-CR 3d nor the armed criminal action statute limit the “aid of a deadly weapon” to the shooting itself. The statute states that a person “who commits any felony . . . with [the] assistance or aid” of a dangerous weapon is also guilty of armed criminal action. § 571.015.1, RSMo 2000.

Gill cites one case for the proposition that the incorporation of the accomplice liability verdict director into the armed criminal action verdict director fails to satisfy Note on Use 6. *State v. Thomas*, 75 S.W.3d 788 (Mo. App. E.D. 2002). While that case

did indicate that it was error not to repeat the accomplice liability verdict director in the armed criminal action verdict director, that same court held that there could be no prejudice from that omission when the armed criminal action verdict director referred back to the accomplice liability verdict director. *Id.* at 791. Thus, Gill's best case is an intermediate appellate court case indicating there was a technical defect in the instruction that was harmless.

Moreover, the *Thomas* court did not explain why the cross-reference to the accomplice liability instruction in the armed criminal action instruction failed to satisfy Note on Use 6. Should this Court deem it necessary to address the point, it should not require courts to read the accomplice liability instruction twice.

The armed criminal action instruction was proper and not prejudicial.

III. There was neither error in nor prejudice from the prosecutor's description of accomplice liability during voir dire .

Gill complains of the prosecutor's reference to a "law school example" of accomplice liability, which, according to Gill, stated the law in absolutes (Def. Br. at 66). But the prosecutor did not state the law in absolutes, and the prosecutor's approach was proper.

Control of voir dire is within the trial court's discretion and will not be disturbed absent abuse. *State v. Ramsey*, 864 S.W.2d 320, 335 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1994). "[T]he trial court may permit parties to inquire whether potential jurors have preconceived notions on the law which will impede their ability to follow instructions on issues which will arise in the case," including inquiries on accomplice liability. *Id.* at 335-36. A prosecutor can use hypotheticals to make an inquiry on accomplice liability. When the prosecutor does not misstate the "basic concept" of accomplice or accessory liability, even if the description was incomplete, there is no error. *State v. Clemons*, 946 S.W.2d 206, 224-25 (Mo. banc 1997).

The prosecutor's comments were well within these standards. The key portions are set out below, which make the qualifications clear:

> PROSECUTOR SWINGLE: Now, the Judge will be reading you lots of instructions, and obviously it's impossible to be able to say with certainty that you would understand an instruction that hasn't even been given to you yet. But I

want to ask you a little bit about your thoughts on the law on accomplice liability and if you could follow what the Judge will read to you about that it [sic]. The Judge will tell you that 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. 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.

DEFENSE COUNSEL TURLINGTON: Judge, I'm going to object. He's not stating the law correctly.

THE COURT: Overruled.

MR. SWINGLE: And, again, that's just an example. The Judge will give you the exact law as to this case in the instructions.

* * * *

MR. SWINGLE: I'll go back to the other question. That, knowing what the law is, going to tell you that a person is responsible for the acts of another person, if they are participating together in that crime and have planned it together, is there anyone here who feels that, that you just don't agree with that, that you could not find a person guilty of committing a crime, unless he is the one who did every single aspect of that crime? Is there anyone feels that you just disagree with the accomplice liability that two people who have planned a crime and are doing it together are both responsible for that crime? I don't see any hands, so I take it that

> nobody feels, you disagree with that law, that accomplices acting together are both responsible. Now, another question I have for you is that if you had a homicide case where two people plan a crime, but one person actually pulls the trigger and fires the shot, is there anybody here who feels you simply could not find a person guilty of a homicide as an accomplice if he is not the person who actually fired the shot? Is there anyone here who feels this way, that no matter what the Judge instructs or would tell you about accomplice liability, that, unless that particular person is the one who fired the shot, you could certainly never find a person guilty of a homicide?

(Tr. 198-200).[12]

The voir dire shows that the prosecutor first made clear that the instructions would come from the judge. The prosecutor called his example one from law school, not a factual situation or a definitive declaration of the law. After the defense objection, the prosecutor emphasized that what he said was "just an example" and "the Judge will give you the exact law as to this case." The prosecutor then described accomplice liability in terms even more deferential to the defense than the law requires, asking if the prospective jurors could not find a person guilty "unless he is the one who did every single aspect of that crime" or "actually fired the shot." Everything the prosecutor said conformed to the "basic concept" of accomplice liability.

[12] The text is intended to be quoted as reflected in the transcript, which includes some non-substantive stenographic errors.

One response the prosecutor received shows how important it was for the prosecutor to ask the question. One prospective juror indicated that regardless of the judge's instruction, "if the person did not pull the trigger, [the prospective juror] would not find him guilty" (Tr. 200-01). That is the type of information the prosecutor was, quite properly, trying to discover.

Gill argues that the prosecutor's error in his hypothetical was ending it with "then both of them are guilty" rather than both of them "can be guilty" (Def. Br. 68). In the case Gill cites in support of his claim of error, the court upheld the prosecutor's use of the bank robbery example during voir dire. *State v. Cummings*, 134 S.W.3d 94 (Mo. App. S.D. 2004). This Court in *Clemons* specifically rejected the argument that the prosecutor must refer to other elements that were necessary for conviction. 946 S.W.2d at 224-25. The prosecutor in *Clemons* inquired, without qualification of other elements, whether the prospective jurors "would be able to sentence an accomplice to death where the evidence did not show that the accomplice committed the act that directly caused the victims' deaths." *Id.* at 224. Moreover, the prosecutor in this case provided numerous qualifiers to his hypothetical, twice calling it an example and repeatedly emphasizing that the judge would provide instructions.

Also, it is clear that there was no prejudice or misinterpretation by the prospective jurors. All four of the other jurors who commented on the inquiry stated that the determination would depend on the circumstances (Tr. 201-02).

There was no error or prejudice in the trial court allowing the prosecutor's use of

the accomplice hypothetical.

IV. Gill's objections to the statutory aggravator instruction do not support vacating Gill's death sentence because (1) the death sentence should be upheld so long as at least one of the aggravators existed, and Gill complains that only two of the three aggravators in the instruction were improper, (2) this Court has held that the murder-for-money aggravator applies to robberies, and this Court should not overrule its precedent interpreting the statute, and (3) the jury was free to conclude that Gill killed the victim Lape for the depravity aggravator, and (4) Gill's objection to the depravity aggravator was not preserved. This Court should decline Gill's invitation to overrule this Court's precedent .

Three statutory aggravators were submitted to the jury in the penalty phase:

1. Section 565.032.2(4) (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).

2. Section 565.032.2(11) (the murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate a felony of any degree of . . . kidnapping . . . .).

3. Section 565.032.2(7) (the murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind).

Gill objects to the instructions relating only to the first and the third of the aggravators. In Missouri, a death sentence should be affirmed even if one valid statutory aggravator is found. *State v. Morrow*, 968 S.W.2d 100, 117 (Mo. banc 1988), *cert.*

denied, 525 U.S. 896 (1998); *State v. Weaver*, 912 S.W.2d 499, 522 (Mo. banc 1995), *cert. denied*, 519 U.S. 856 (1996); *State v. Sloan*, 756 S.W.2d 503, 509 (Mo. banc 1988), *cert. denied*, 489 U.S. 1040 (1989). Defendant Gill does not, and could not, reasonably object to the instruction or finding that the murder was committed while the defendant was engaged in or aiding in a kidnapping. For this reason alone, Point IV should be denied.[13]

If this Court looks to Gill's substantive arguments on the statutory aggravators, they should be rejected. First, Gill argues that the first aggravator – that the offense is committed for the purpose of receiving money – only applies to murder-for-hire situations and not to robberies. Gill appropriately recognizes that this Court's controlling precedent has rejected that argument and held that Section 565.032.2(4) applies to robberies. *E.g., State v. Kenley*, 952 S.W.2d 250, 276 (Mo. banc 1997), *cert. denied*, 522 U.S. 1095 (1998); *State v. McDonald*, 661 S.W.2d 497 (Mo. banc 1983), *cert. denied*, 471 U.S. 1009 (1985).

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[13] Missouri is considered a "nonweighing" state because the fact-finder need find only one valid aggravating factor. In contrast, in "weighing" states, the presence of an invalid aggravator must be found to be harmless to uphold the sentence. The U.S. Court of Appeals for the Ninth Circuit recently held that California is a "weighing" state contrary to the view of the Attorney General. The United States Supreme Court recently granted certiorari to review the case. *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), *cert. granted*, ___ U.S. ___, 25 WL 153310 (3/28/2005).

The arguments made by Gill for another interpretation were previously considered by this Court and rejected. *See, e.g., McDonald*, 661 S.W.2d at 501-05 (analyzing statutes of 33 states). This Court should be particularly reluctant to overrule twenty-two years of precedent in a matter of statutory interpretation in which the legislature has not acted to modify the judicial interpretation of the statute because the precedent "has become woven into the fabric of the statute." *Medicine Shoppe International, Inc. v. Director of Revenue,* 156 S.W.3d 333 (Mo. banc 2005)(rejecting request to overrule 21-year-old decision construing revenue statute).

Moreover, Gill's argument is merely that the prosecutor should have used the "robbery" aggravator (included in Section 565.032.2(11)) rather than the "receiving money" aggravator (Section 565.032.2(4)). No prejudice could have come to Gill from the prosecutor choosing subsection (4) instead of (11). The prosecutor sought and the trial court gave an instruction for only one of the aggravators to which money received in a robbery could apply; there was no possibility that the jury would find two aggravators coming from one aggravating circumstance (Tr. 1398). If anything, prejudice might have fallen on the State, in the event the jury believed the "receiving money" instruction applied to a murder-for-hire only.

Gill's remaining argument as to this Point Relied On dealing with statutory aggravators is the inclusion of the phrase "the defendant killed Ralph L. Lape, Jr." in the aggravator instruction relating to depravity of mind as evidenced by the victim being rendered helpless (Def. Br. 81-85). That portion of the instruction reads as follows:

> 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 the defendant thereby exhibited a callous disregard for the sanctity of all human life.

(L.F. 228, State App. A13).

Gill asserts that the instruction "told the jury Mark [Gill] killed Ralph Lape" and that this instruction "attempted to eliminate all doubt" as to whether Gill killed the victim (Def. Br. 83). But the instruction prefaced the reference to defendant killing the victim with "only if you find" and that the finding must be made beyond a reasonable doubt (L.F. 228-29, State App. A13-A14). The jury was not "told" to find anything.

If there would have been any prejudice from a suggestion that Gill had to be the shooter for this aggravator to apply, the prejudice would have fallen on the State because that would have increased its burden. Section 565.032.2(7) does not require that the defendant be the person who committed the direct and final act causing death. It merely refers to circumstances surrounding "the murder." In the primary case on which Gill relies, this Court held that "a penalty phase instruction can properly state that an accomplice 'murdered' the victim." *State v. Rousan*, 961 S.W.2d 831 (Mo. banc), *cert. denied*, 524 U.S. 961 (1998) (Def. Br. 82-83). *Accord, State v. Gray*, 887 S.W.2d 369, 387 (Mo. banc 1994), *cert. denied,* 514 U.S. 1042 (1995). Thus, the instruction could

have used the word "murdered."[14] The jury may have equated "killing" with the "murder" they previously were instructed they could find. But the instructions were unmistakable in requiring that the jury attribute the act of binding the victim to "the defendant."

Finally, this argument was not properly preserved. The objection to this aggravator made by Gill's counsel was that he had been unbound by the time he was shot, rather than that Gill did not do the "killing" (Tr. 1400).

There was neither error nor prejudice in the statutory aggravator instruction.

[14] The word "killed" presumably was used because that is the phrasing in Notes on Use 8 in MAI-CR 3d 314.40. The notes do not preclude the use of the word "murdered" when appropriate.

V. In accordance with controlling precedent from this Court decided in 2004, the trial court properly refrained from requiring the jury to find beyond a reasonable doubt that evidence of aggravation was not outweighed by evidence of mitigation, and this Court should decline Gill's invitation to overrule this Court's precedent .

The trial court instructed the jury in accordance with the MAI-CR 3d 314.44. Gill appropriately acknowledges that the arguments he makes here were addressed and rejected by this Court in three unanimous opinions rendered just last year. *State v. Glass*, 136 S.W.3d 496 (Mo. banc 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 869 (2005); *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004), *cert. granted on other grounds*, ___ U.S. ___, 125 S.Ct. 360 (2004)(shackling of defendant in penalty phase); *State v. Taylor*, 134 S.W.3d 21 (Mo. banc 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 322 (2004). This Court's precedent is of no less force because it came on a plain error review because this Court carefully examined the arguments that Gill repeats here and found them "without merit." *Glass*, 136 S.W.3d at 521. This Court should deny Gill's Point Relied On and reject Gill's request to overrule controlling precedent.

This Court's prior opinions on this issue were correctly decided, and the instructions here were in accordance with (even though preceding) these decisions. The jury was instructed that in order to find aggravating circumstances, **all** jurors had to find **beyond a reasonable doubt** that **each** aggravator existed (L.F. 229, State App. A14). When it came to mitigation, unanimity on mitigating circumstances is **not** required. *Mills v. Maryland*, 486 U.S. 367 (1988). Each juror could conclude that different mitigating

circumstances outweighed the aggravators (L.F. 230, State App. A15).

Importantly, the jury was also instructed that even if the mitigating circumstances did **not** outweigh the aggravators, the jury was still free to refrain from imposing the death penalty. The jurors were told the "final decision rests with you" (L.F. 231, State App. A16). All the requisite findings were made by the jury. The instructions here were in accordance with MAI-CR 3d 314.40 and 314.44.

Apparently Gill's objection goes to the phrase: "[Y]ou must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment" (L.F. 230, State App. A15). See MAI-CR 3d 314.44. Gill argues that a "beyond a reasonable doubt" standard should work into the balancing.

Contrary to Gill's assumption, the standard does work into the balancing. The State must prove beyond a reasonable doubt the existence of aggravators. The defendant is not so burdened in proving mitigators. He merely needs to persuade the jury they exist, implicitly on a preponderance of the evidence basis. Once the jury has made its conclusions on aggravators and mitigators, it engages in the balancing.

The "beyond a reasonable doubt" standard (or lower standards for that matter) applies to a process for a finding of fact. It does not apply to a process of balancing facts that have been found. Gill's suggestion is actually a way of trying to require the State's aggravators to heavily outweigh the mitigators. Gill has not suggested precise language for a proposed instruction, perhaps because of the awkwardness of applying a fact-

finding standard to a balancing of found facts. The State has found no case that suggests a "heavy-outweighing" standard is statutorily or constitutionally required. Nor does MAI_CR 3d 314.48 contain any such requirement (Guilty of Murder in the First Degree: Verdict Mechanics, effective January 1, 2004).

At the end of the day, the defendant is further protected by the fact that even if the jury does not find the mitigators outweigh aggravators, it does not have to fix the punishment at death (L.F. 231, State App. A16).

The federal cases that Gill cites standing for the proposition that juries must make certain factual findings are irrelevant because all of the findings here were made by the jury. (Def. Br. 99-101, *citing Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004); *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005)).

This Court explicitly and unanimously stated in *Glass* that there was no "beyond a reasonable doubt" standard for the balancing of aggravators and mitigators. 136 S.W.3d at 521, *citing State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003). That conclusion should not be changed.

VI. The trial court properly refused to quash the information based on the failure to include statutory aggravators. This Court has repeatedly held that statutory aggravators need not be charged, and this Court should decline Gill's invitation to overrule this Court's precedent .

Gill argues in Point Relied on VI that the information should have been quashed because the statutory aggravators for the death penalty were not included in the information. Gill appropriately recognizes that this position is contrary to controlling precedent from this Court. *Deck*, 136 S.W.3d at 490; *Taylor* 134 S.W.3d at 30-31; *State v. Tisius*, 92 S.W.3d 751, 766-67 (Mo. banc 2002), *cert. denied*, 539 U.S. 920 (2003); *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc), *cert. denied*, 537 U.S. 865 (2002). *Accord Glass*, 136 S.W.3d at 512-13, and cases cited therein.

These cases are clear. There are not two separate offenses of first degree murder–aggravated and first degree murder–unaggravated. There is one offense, and depending on the circumstances, the maximum punishment can be death. Therefore, Gill's cases suggesting that facts that "increase" the maximum penalty must be charged are irrelevant (Def. Br. 103-04, *citing Ring*, 536 U.S. 584, and *Jones v. United States*, 526 U.S. 227 (1999)). Contrary to Gill's assertion in his brief, the State here did not "charge[] Mark [Gill] with unaggravated first-degree murder" (Def. Br. 112). There is no such charge, and no constitutional requirement that there be such a charge.

Moreover, there is no question that actual notice of the aggravators was provided to Gill. The prosecutor filed *State's Notice of Intent to Seek Death Penalty and*

Disclosure of Aggravating Circumstances on December 16, 2002, more than one year before the trial began on March 1, 2004 (L.F. 35-36). The aggravators disclosed in that document were the ones on which the jury was instructed. The fact that the death penalty would be sought was disclosed in the original Information (L.F. 29-31) and in a Second Amended Information filed February 25, 2004 (L.F. 138-42).

Likewise, Gill's cases standing for the proposition that juries must make fact-findings regarding punishment are also irrelevant. The jury here made all the factual findings leading to Gill's conviction and sentence (Def. Br. 105-06, *citing Ring,* 536 U.S. 584; *Apprendi*, 530 U.S. 466; *Blakely*,124 S.Ct. 2531).

This Court has rejected arguments like the one Gill makes in this Point many times, and the argument should again be rejected here.

VII. This Court has held that it will not overturn a conviction or sentence based on a trial court's failure to strike for cause a prospective juror who was not empaneled, and this Court should decline Gill's invitation to overrule the precedent of this Court on that issue. On the merits, the trial court properly refused to strike the prospective juror for cause based on the "death saves money" comment on a jury questionnaire when the prospective juror stated that his comment was directed to appeals for persons already on death row and he could not think of circumstances justifying the death penalty other than the killing of children .

The defense exercised a peremptory challenge as to the juror in question (Def. Br. 122, Tr. 562). Missouri law is clear that a conviction cannot be challenged based on the trial court's failure to strike for cause a prospective juror removed with a peremptory challenge:

> 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.

§ 494.480.4, RSMo 2000. *Accord*, *State v. Storey*, 40 S.W.3d 898, 904-05 (Mo. banc), *cert. denied*, 534 U.S. 921 (2001).

Gill argues that the statute is unconstitutional. While citing various constitutional

provisions, his arguments seem to focus on two points: (1) that the statute invades the province of the judiciary, and (2) that the statute's application exclusively to criminal cases violates the equal protection clause (Def. Br. 128-135). This Court and intermediate appellate courts in the state have found arguments like those made by Gill here to be completely meritless. The courts' analyses of the nature of peremptory challenges make clear that there is simply no constitutional right associated with their use.

This Court has specifically held that there is no constitutional right to have a pool of qualified jurors from which to make peremptory strikes. *State v. Gray*, 887 S.W.2d 369, 383 (Mo. banc 1994); *State v. Schnick*, 819 S.W.2d 330, 334 (Mo. banc 1991). The United States Supreme Court has reached the same conclusion. *Ross v. Oklahoma*, 487 U.S. 81, 101 (1988).

The Western District Court of Appeals analyzed constitutional claims like those made by Gill here and found them to be insubstantial and "at best, merely colorable," thereby allowing jurisdiction to remain in the intermediate appellate court to consider the constitutional claim. *State v. Lay*, 896 S.W.2d 693, 699-700 (Mo. App. W.D. 1995)(Stith, J.). The Western District relied on *Gray, Schnick*, and *Ross*. *Accord, State v. Clouse*, 964 S.W.2d 860, 863 (Mo. App. W.D. 1998)(Hanna, J., Stith and Riederer, JJ., concur), *citing State v. Whitfield*, 939 S.W.2d 361, 366 (Mo. banc 1997), *cert. denied*, 522 U.S. 831 (1997), *mandate recalled on other grounds*, 107 S.W.3d 253 (Mo. banc 2003).

This Court has subsequently summarily rejected constitutional attacks on Section 494.480.4. *State v. Storey*, 40 S.W.3d 898, 905 (Mo. banc 2001) (constitutional claim was abstract and waived); *State v. Deck*, 994 S.W.2d 527, 538 (Mo. banc), *cert. denied*, 528 U.S. 1009 (1999)(state and federal constitutional attack on failure to strike prospective juror for cause based on his indication he might automatically impose the death penalty was rejected in light of Section 494.480.4); *State v. Nicklasson*, 967 S.W.2d 596, 612 (Mo. banc 1998), *cert. denied*, 525 U.S. 1021 (1998)("The test under the statute and the **constitution** is whether the jury actually seated was impartial")(emphasis added); *State v. Hall*, 955 S.W.2d 198, 204 (Mo. banc 1997), *cert. denied*, 523 U.S. 1053 (1998)(rejecting argument that defendant was "unconstitutionally" required to use four peremptory strikes on persons who should have been stricken for cause).

The Eastern District Court of Appeals has also rejected the claim that the statute violates the equal protection clause on the grounds that there is no rational basis for the rule not applying to civil litigants (Def. Br. 129-31). The appellate court found the claim so meritless that it issued a *per curiam* opinion stating that "[n]o jurisprudential purpose would be served by a written opinion." *State v. Berry*, 92 S.W.3d 314 (Mo. App. E.D. 2002)(Russell, P.J., Ahrens and Crahan, JJ.).

Gill's assumption that civil and criminal litigants are treated differently is wrong. Civil litigants also have no right to challenge the failure of a court to strike a prospective juror for cause who did not sit on the jury. *Mo. Highway & Transportation Comm'n v. Sisk*, 954 S.W.2d 503, 508 (Mo. App. W.D. 1997), *cert. denied*, 524 U.S. 937 (1998);

Rodgers v. Jackson County Orthopedics, Inc., 904 S.W.2d 385, 389 (Mo. App. W.D. 1995).

Gill also argues that there is no rational basis for treating alleged juror empaneling errors that are cured by a peremptory challenge from other alleged jury empaneling errors. Gill asserts that the statute puts defense counsel in the difficult position of making a choice between trying to obtain a fair jury (by striking prospective jurors the defense believes are not qualified) or preserving the potential error and running the risk that the appellate courts will not find error (by not using a peremptory challenge on the potentially unqualified juror). It is extremely rare that any legislation classification fails the "rational basis" test. Erwin Chemerinsky, Constitutional Law 533 (2001) (stating that it is rare for the Court to find that a law does not meet the rational basis test); *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175_76 (1980) (exemplifying the deference that courts give to legislative determinations under the rational basis test). And there is a rational basis in the desire to avoid retrials that are emotionally draining for victims and cause the state to incur additional costs.[15] More importantly, the purpose of peremptory strikes is not for strategy, but to help ensure that unqualified jurors do not sit on the case. Gill does not contend, and could not in good faith contend, that the jury did not meet constitutional requirements. No one whom the defense asserted was not

[15] "The Equal Protection Clause does not demand for purposes of rational_basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

qualified to sit on the jury ended up on the jury. The fact that a party may not have any easy strategic choice does not a constitutional violation make.

Moreover, Section 494.480.4 is consistent with the requirement that Gill must show prejudice from the failure to strike the prospective juror. "Since [the defendant] does not claim that any member of the venire who ultimately served on the jury was biased, [he] does not meet his burden of showing 'a real probability that he was thereby prejudiced.'" *Nicklasson*, 967 S.W.2d at 613, *citing Gray*, 887 S.W.2d at 382. Thus, even if Section 494.480.4 did not exist, Gill could obtain a reversal of his conviction based on the trial court's failure to strike a certain juror only if he show "that any member of venire who ultimately served on the jury was biased." If the venireperson was not empaneled, this would be impossible.

If this Court addresses the merits on this Point, the standard of review is important. 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." *Storey*, 40 S.W.3d at 904. "The mere possibility of prejudice on the part of a prospective juror does not disqualify him, as actual bias against the interest of the litigant must be shown." *Cole*, 71 S.W.3d at 174.

When the voir dire portion of the transcript is examined, there was no clear abuse of discretion is denying Gill's request to strike the venireperson in question based on his questionnaire response. The phrase "death saves money" was ambiguous.[16] During the

[16] The questionnaire itself is not part of the legal file. It is the State's understanding that

death-qualification portion of the voir dire, defense counsel therefore questioned the prospective juror, and the questioning revealed that the concern was "just all the appeal," thereby rejecting defense counsel's leading question suggesting that the venireperson was making the point that execution saves money as opposed to housing people in jail (Tr. 535). The prospective juror emphatically said "no, no" to defense counsel's suggestion that the venireperson would "start out" with the death penalty and have to be pushed back (Tr. 536). Upon further questioning from defense counsel, he stated that his concerns were "confine[d]" to people already on death row, and that the only circumstance he could think of where any concern with costs would make him more inclined toward the death penalty was murdering children (Tr. 536-37). Upon further questioning from the trial court, the prospective juror said he had heard nothing about Gill's case in the courtroom to make him feel that death or life imprisonment was more appropriate without hearing more evidence (Tr. 540-41).

With the numerous qualifications made by the prospective juror, the Court acted well within its discretion in refusing to strike for cause. Indeed, given the prospective juror's comments that he could not think of any circumstances warranting the death

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defense counsel will seek leave to supplement the file. Because of the statutory concerns for confidentiality of the questionnaires, the State is not including the prospective juror's name in the State's brief, even though it is mentioned in the transcript. Mo. S. Ct. R. 27.09. In the event that the record is supplemented, the Court will find that the actual phrase in the questionnaire is "death save [sic] money."

penalty other than murdering children (Tr. 537), a reasonable defense strategy could have been not to strike him at all.

The trial court's action that Gill claims is error is not reviewable. In any event, there was no error or prejudice.

VIII. There was no error in the brief contextual comments made during the victim impact statements, and certain claims of error in those statements were not preserved .

The admission of victim impact evidence is authorized by statute. § 565.030.4, RSMo 2000. The State is entitled to present evidence showing "each victim's 'uniqueness as an individual being.'" *Storey*, 40 S.W.3d at 909, *quoting Deck*, 994 S.W.2d at 538.

The bar for reversing a sentence based on improper victim impact evidence is quite high. This Court will reverse "only if the error was so prejudicial that it deprived the defendant of a fair trial." *Storey*, 40 S.W.3d at 909. *Accord, State v. Taylor*, 18 S.W.3d 366, 377 (Mo. banc), *cert. denied*, 531 U.S. 901 (2000), *citing Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The trial court has broad discretion during the punishment phase of the trial to admit whatever evidence it deems helpful to the jury in assessing punishment. *Id.* at 908, *quoting State v. Winfield*, 5 S.W.3d 505, 515 (Mo banc 1999); *Deck*, 136 S.W.3d at 487. Unsubstantiated and speculative assertions of prejudice "are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered." *Deck*, 136 S.W.3d at 488. In the absence of an objection, review is only for plain error and manifest injustice if the error is not corrected. *State v. Williams*, 97 S.W.3d 462,470 (Mo. banc), *cert. denied*, 539 U.S. 944 (2003).

The testimony about which Gill complains consisted of passing comments which

were either appropriate or not unduly prejudicial.[17] Following are Gill's objections and a further factual and legal explanation:

1. Diane Miller (victim's sister) showed photographs of the victim and their house, while she was standing close to the jury box, while she was crying (Def. Br. 137_38). The photographs were part of an album the sister created on her own initiative the day after Gill's preliminary hearing to give to the prosecutor so he could "see the person that [the prosecutor was] defending" (Tr. 1171, 1184, State App. A22, A35). There was a direct victim impact in the sister being moved to create the photo album. The album had to be shown to the jury to make the point to help demonstrate how the victim's death caused her to create these memories. Photographs of the victim with family and friends are appropriate victim impact evidence and are not unduly prejudicial. *State v. Williams*, 97 S.W.3d at 470; *State v. Middleton*, 995 S.W.2d 443, 464 (Mo. banc), *cert. denied*, 528 U.S. 1054 (1999); *State v. Roberts*, 948 S.W.2d 577, 604 (Mo. banc 1997), *cert. denied*, 522 U.S. 1056 (1998); *State v. Basile*, 942 S.W.2d 342, 358 (Mo. banc), *cert. denied*, 522 U.S. 883 (1997). This is particularly true when the act of creating the compilation of the photographs has its own relevance.

The victim's sister stood near the jury to show the small photographs to the jurors, and there was no objection to that procedure as the first twenty-seven photographs were shown. She went through the photographs quickly (Tr. 1172-78, State App. A23-A29).

[17] To emphasize this point, the entire transcript of the testimony of the two witnesses about which Gill complains in attached in the Appendix (State App. A20–A50).

Once the objection as to where the witness was standing was made, the trial court required the witness to return to the witness stand (Tr. 1179, State App. A30).

The fact that she was crying is not unduly prejudicial. This Court found no error when testimony of a son of the victim left jurors and family members crying. *Deck*, 994 S.W.2d at 538-39. Nor was there undue prejudice when the victim impact witness (the victim's mother) began to cry and had to leave the courtroom. *Middleton*, 995 S.W.2d at 464. This Court held that the trial court has "broad discretion" in determining the effect of emotional outbursts on the jury. *Deck*, 994 S.W.2d at 539.

The trial court did the only thing that Gill asked of the court relating to the crying so close to the jury – the court had the witness sit down. After the objection to photographs, there were only ten more shown (Tr. 1181-83, State App. A32-A34).

2. Diane Miller (victim's sister) referred to their parents and especially their father being a Japanese POW during World War II (Def. Br. 138-39): Diane Miller read from a prepared statement her feeling of loss at the victim Ralph Lape's death. Her statement comprises 129 lines of the transcript, excluding objections (Tr. 1185-93, State App. A36_A44). Five lines referred to their father being a Japanese POW (Tr. 1187, State App. A38). When Gill objected, the trial court directed the prosecutor to skip the references to her father. The prosecutor and witness complied, and Gill made no objection to that procedure (Tr. 1187-88, State App. A38-A39).

In his brief, Gill objects to the reference to the importance of working hard and the removal of the breathing tube on their father shortly before he died. But there was no

objection to this part of the witness statement (Def. Br. 138-39, Tr. 1186, 1188-89, State App. A37, A39-A40). Proper victim impact evidence includes evidence that "the victims were hard-working people who cared for their families." *State v. Johnson,* 22 S.W.3d 183, 190 (Mo. banc), *cert. denied*, 531 U.S. 935 (2000).

In describing their father's death, the witness stated that Ralph Lape had to steady her hand to sign the consent form, making the point of how much she relied on the victim (Tr. 1189, State App. A40). The loss of someone who literally and figuratively steadied her is direct victim impact. Moreover, it is not essential that every piece of victim impact evidence relate to the **direct** impact of the victim's death on the witnesses. This Court found no undue prejudice when the victim's mother mentioned that the family lost another child who was crippled with cerebral palsy. *State v. Clay*, 975 S.W.2d 121, 132 (Mo. banc 1998), *cert. denied*, 525 U.S. 1085 (1999). There was no prejudice because that hardship was not attributed to the defendant. *Id.* Of course, here the passing comment regarding the victim's father's being a POW was not attributed to the defendant.

3. Mitch Miller (victim's brother-in-law and husband of Diane Miller) referred to his own upbringing and moral values (Def. Br. 139-40): Once the defense objected to this testimony, which comprised eighteen lines of testimony, the trial court stated it would "allow just a little bit more to show the framework of where his testimony is coming from" (Tr. 1196, State App. A47). At that point, there were only six more lines of testimony about Mitch Miller's background when the prosecutor interrupted him and

asked him "How did Ralph fit in, then, to your life" (Tr. 1196, State App. A47).

The comments about Mitch Miller's background were brief and not prejudicial. They merely provided his perspective for his subsequent testimony. Contrary to Gill's argument, there could be nothing prejudicial from Mitch Miller's comments about westerns and good valuable life lessons (Def. Br. 139-40, 144). Gill had confessed to working with another person causing a helpless man to be shot in the head, and the jury found beyond a reasonable doubt that he was guilty of first degree murder. When Mitch Miller was critical of two-against-one and shooting a man in the back, the jury was not learning anything new about society's morals that were not in the jury instructions. And criticism of cheating at cards was not going to inflame the jury. We have found no cases in which such victim impact testimony was deemed error or prejudicial.

As stated above, not every piece of victim impact evidence must directly relate to the impact of the victim's death on the witnesses. *Clay*, 975 S.W.2d at 132. This Court upheld the admission of a family tree of the victim's family, even though it contained persons not born at the time of the murder and spouses who were no longer part of the family. *Deck*, 136 S.W.3d at 487-88. Similarly, this Court has found that evidence with far more emotional potential than Mitch Miller's testimony was not prejudicial. This Court refused to vacate a death sentence even after finding error in the admission of a photograph of the victim's tombstone because "we simply can not conclude that the erroneous admission of an irrelevant photograph deprived [defendant] of a fair trial." *Storey*, 40 S.W.3d at 909. Also, the admission of evidence that "the victims were hard-

working people who cared for their families" is not error. *Johnson,* 22 S.W.3d at 190.

Moreover, Mitch Miller's reference to his own poverty growing up would not be prejudicial because it was obvious that that hardship was not attributed to Gill. *Clay,* 975 S.W.2d at 132.

4. Mitch Miller (victim's brother-in-law and husband of Diane Miller) was crying during two or three minutes of his testimony (Def. Br. 140-41): Once the objection was made that the witness was crying and that the questions were not specific, the trial court directed the prosecutor to help the witness with his testimony. The court noted that the break for the objection could allow the witness to compose himself. The prosecutor resumed the examination with a more specific question (Tr. 1197-98, State App. A48_A49). The trial court was responsive to Gill's objections.

As noted above, a witness crying during victim impact testimony is not error. *Deck*, 994 S.W.2d at 538-39; *Middleton*, 995 S.W.2d at 464. The trial court acted well within its discretion in dealing with this situation. See *Deck,* 994 S.W.2d at 539.

Finally, Gill's complaints about the victim impact testimony should be evaluated in the overall context. Here, Gill presented twelve mitigation witnesses whose testimony covered 148 pages of transcript plus a video witness whose testimony is not included in those pages. The State presented a total of five witnesses. The testimony of the two witnesses at issue in this Point Relied On comprised thirty-one pages in total (not just the objected-to portions) (Tr. 1169-1199, State App. A20-A50). By comparison, when this Court rejected the defendant's objection to victim impact testimony in *Taylor,* it noted

that the testimony of mitigation witnesses totaled 150 pages of transcript while the testimony of the witness whose testimony was the subject of the objection was only thirteen pages. 18 S.W.3d at 377 n.16. Nearly the identical proportion exists here.

The trial court acted within its discretion in dealing with those issues raised above that were the subject of objections. Gill's assertions of error are unsubstantiated and speculative. Taken in context, none of this testimony deprived Gill of a fair trial, and none of the unobjected-to portions constituted plain error causing manifest injustice.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the Circuit Court should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains no more than _____ words [less than the 27,900 permitted by the rule], excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this **13 day of April, 2005**, to:

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