IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC83680**
	)	
TERRANCE L. ANDERSON,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI
THIRTY-SECOND JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE WILLIAM L. SYLER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Terrance L. Anderson, was jury-tried on two counts of first-degree murder and sentenced to death for the death of Debbie Rainwater and life without probation or parole for the death of Stephen Rainwater, in Cape Girardeau County Circuit Court, on change of venue from Butler County. Since death was imposed, this Court has exclusive appellate jurisdiction. Mo.Const., Art.V,§§ 3,10.

STATEMENT OF FACTS

Terrance Anderson was born in 1975 to Linda Anderson(T1389). His biological father never married Linda, and she later married Robert Smith, who, until 1989, Terrance believed was his biological father(T1389-90). In 1989, Terrance's maternal grandfather, who had cared for Terrance while Linda was at work and to whom Terrance was close, died, and Terrance discovered that Robert was not his father(T1389-91). This discovery saddened Terrance (T1391) and contributed to his increasing depression(T1442;ExhEat29-31).

Terrance grew-up in Poplar Bluff and, from childhood, played basketball(T1673). Teammates and opponents recalled that Terrance was never physical or violent(T1412). Coaches recalled he was a good competitor, respectful and polite, never showing violent behavior, temper or fights and having good personality and demeanor(T1478-79,1506-07,1695-97). Donald Brandon, the father of Terrance's long-time best friend, Jason, said, "He was just like one of my family members."(T1396). Terrance was never in legal trouble, was peaceful and non- violent(T1403,1686).

Although Terrance could not read above a sixth grade level, he obtained a basketball scholarship at Missouri Valley(T1382,1430). He soon flunked-out and returned home(T1207). Coach Morgan, who helped obtain this scholarship, felt Terrance thought Morgan was disappointed in him(T1701).

In May, 1995, Donald Brandon hired Terrance as a forklift-operator at Rowe Furniture because he needed good, dependable employees(T1397-98). At first, Terrance

was that employee. (T1398). In 1996, his performance slipped, he missed work and was reprimanded for his girlfriend's excessive phone calls(T1399).

In February, 1996, Stacy Turner, a friend of Abbey Rainwater, introduced Abbey, a 16-year-old white girl, to Terrance, and they began dating(T1240,1347). Terrance's mother heard about their relationship through a friend(T1383). Abbey's parents discovered they had spent the night together at a hotel in March, 1996. They became angry and called police(T1242). When Abbey became pregnant in July, 1996, Terrance told his mother by asking her how she felt about becoming a grandmother(T1264,1383). Despite his mother's disapproval because of their racial differences, Terrance moved into the Rainwater home in September, 1996, with Abbey; her mother—Debbie; father—Stephen, and little sister—Whitney(T1264,1384).

At first, everything went relatively well(T1264). Terrance was excited about the baby and attended childbirth classes(T1273-74,1348). But, when Abbey and Terrance argued, she threatened to leave for California(T1357). Then Terrance stopped going to work; didn't come home until late, and didn't contribute to Rainwater family finances(T1264). He lost his job in November, 1996, and when, in December, the Rainwaters asked him to leave, he returned home(T1265-66,1385). Although his mother pushed him to obtain a job, he mostly stayed quietly in his room, watching television, listening to music(T1386). Terrance and Abbey's relationship deteriorated(T1281). Terrance once grabbed her throat and threw her against a wall; then apologized(T1266-68).

When Abbey went into labor, Terrance stayed throughout(T1273). After their daughter, Kyra, was born, they re-started their relationship(T1274). Fatherhood thrilled Terrance and, when Abbey brought Kyra to his house, Terrance always wanted to hold her(T1387). Terrance was especially proud that Kyra bore his surname, and he often cared for Kyra when Abbey worked (T1276,1387).

After Kyra's birth, Terrance and Debbie argued about Kyra, and Debbie obtained a restraining order prohibiting Terrance from coming to the house(T1274). Abbey and Terrance's relationship was inconsistent. They often saw each other—Terrance watched Kyra daily while Abbey worked(T1281). Abbey knew Kyra would be safe and well-cared-for with Terrance(T1282).

In early summer, Terrance once picked Abbey up from Wal-Mart and drove off while she was not completely in the car(T1280). Another time they argued while double-dating—he acted paranoid and thought she was cheating on him(T1280-81).

Shortly after Kyra's birth, Abbey changed Kyra's surname from Anderson-Rainwater to Rainwater(T1276-79). She didn't tell Terrance until later(T1279).

In early July, 1997, the Rainwaters, Terrance and his little sister picnicked(T1282-83). On July 21, Terrance confronted Abbey outside her house—he grabbed her hair and throat and kicked her(T1217). At trial, Abbey said Terrance threatened to kill her whole family and then himself(T1218,1285-86). On July 24th, Abbey told her parents about that incident, and, the next morning, she and Stephen obtained a restraining order(T1219).

Terrance believed Abbey was leaving Kyra with him on the 25th and awaited their arrival that morning(T1286,1388). He kept calling Abbey, who didn't return his calls

until later that day, when she told him about the restraining order(T1286). She said he couldn't see her and the court would establish his visitation rights after paternity testing(T1222, 1288). He responded, "I know what to do now"(T1223).

That afternoon, Terrance twice briefly visited Jason Brandon's home, going to his room and asking to use the telephone privately(T1200-01). The Brandons kept a handgun in Jason's room(T1202).

That evening, Stacy Turner and Amy Dorris, two of Abbey's friends, arrived at the Rainwaters' around 7 p.m., and the girls went into the basement to smoke(T1224-26,1297-99,1333-35). Twice they heard two knocks on the door, the first time checking through the peephole and mini-blinds to see who was there(T1226-27,1299,1336). They told Stephen, and, carrying a shotgun, he checked around the house(T1227-28,1300,1337,1362). Stephen then patrolled the neighborhood by car(T1228,1300,1337,1362).

Terrance rang the doorbell and stood outside, holding a gun(T1229-30,1301,1337-38,1363). The girls jumped back, and Terrance kicked the door, splintering the wood(T1230,1302,1338). Debbie told Abbey to run, which she did, out the back door and toward a neighbor's house(T1230-31). Whitney ran out also but stopped on the deck(T1364). Stacy crawled down the hallway, and Amy slid down next to the closet in the hall(T1303,1338). Terrance pointed the gun at Debbie, on her knees holding Kyra, and told her she would die(T1306). He shot her in the back of the head, killing her instantly(T1306,1187-88).

Amy ran into the front yard where Terrance told her to stop or he would shoot(T1306-07). Terrance grabbed Amy's ponytail and told her to yell for Abbey to come out(T1308-09,1232). Abbey didn't appear so Terrance and Amy re-entered the house(T1309,1232).

Upon hearing the shot, Whitney re-entered the house, heard Kyra crying, moved Debbie's body and picked up Kyra, who was under her(T1364-65). Whitney then hid with Kyra in the house. When Terrance and Amy returned, they found Whitney, Terrance took Kyra, and they all went outside, the girls yelling for Abbey to return(T1366,1309-11). Terrance took Kyra's arm and threatened to shoot her if Abbey didn't return(T1312,1367-68).

Stephen's car then approached, Amy moved away, and Terrance and Whitney walked toward the car(T1313-14,1369). Whitney heard Terrance and Stephen talking, she turned her head and heard a gunshot(T1370-71). Stephen died almost instantaneously from the wound to his forehead(T1183-90,1197). Amy ran into the woods, and Terrance, Whitney and Kyra returned inside(T1314,1372). Stacy was hiding in the shower, and Whitney, whom Terrance sent looking for Stacy, told him she didn't see her(T1342-43,1372).

Officers Clark and Wallace, who had received a prowler call from a home 500 feet away, received a message that a woman had been shot at the Rainwaters', and, as they approached the house, heard a shot(T1026-32,1065-67). They heard a window open, and they saw a man holding a baby in front of the window, and they saw a body in the

yard(T1040,1073-74,1092,1101-02). The man waved a gun, held the baby before him, and, when told to drop his gun, yelled for the officers to drop theirs(T1041-42,1075-76).

The front door then opened and Whitney and Terrance, holding Kyra, came out(T1045-46,1076-77). When the officers told him to give Kyra to Whitney, he complied, and the officers arrested him without incident(T1047,1077-78,11071374).

Shortly after Terrance's arrest, Larry Woods, a Public Defender investigator, saw him in jail(T1466,1478). Terrance remembered nothing of that night(T1473).

On March 17, 1999, defense counsel moved that the Court find Terrance incompetent to proceed or for a mental examination(LF815-18). The Court ordered Terrance be evaluated under Section 552.020RSMo and later ordered a second evaluation to determine Terrance's competency to understand the proceedings and to assist in his defense(LF821-29). Dr. Byron English, a counselor, evaluated Terrance for the Court, and Dr. Jonathan Pincus, a neurologist, and Dr. Dorothy Lewis, a psychiatrist, also evaluated Terrance (T(T352,1419,1489,1528).

Dr. English recommended that Terrance be found competent to proceed to trial, finding he suffered from no mental disease or defect under Chapter 552 and nothing interfered with his capacity to understand the proceedings or to assist in his defense(ExhQ-3at11-12).

Dr. Lewis, by contrast, found Terrance suffered from a mental disease or defect—paranoia—and was incapable of cooperating with his lawyers and thus lacked the ability to appreciate the nature of the charges or to assist in his defense(ExhE-1at7-10). She found Terrance was severely depressed and in an altered state on the night in question, all

of which caused him to be incapable of coolly reflecting(ExhEat46-47). Dr. Lewis saw Terrance several times, the last at his attorneys' request since "Terrance was extremely upset because he was still convinced that he had not shot Debbie Rainwater, that someone else had shot her, and that he was being set up by the perpetrator. Given this stance, the question of his competence to assist his attorney arose."(ExhE-4at2). Dr. Lewis noted, "During the course of all 3 of our interviews, Terrance's suspiciousness was so excessive as to reach paranoid proportions. He felt he could trust nobody, including me and his lawyers. He was especially wary of revealing anything about his family"(Exh3-4at3).

Dr. Pincus also found Terrance had a mental disease or defect at the time of the events: Depression and paranoia, with possible neurological damage(T1439-41,1444-45;LF926-29). Highlighting the paranoia was Terrance's "lack of trust in me, his lawyer, Dr. Lewis, and others who are involved in his defense"(LF927).

On January 22, 2001, immediately pre-trial, counsel again challenged Terrance's competency. They asked if the Court had found Terrance competent and a hearing not warranted(T351). The State challenged Drs. Pincus and Lewis's findings and asserted the "greater weight of evidence … indicates the defendant is competent to stand trial"(T353). Counsel noted Dr. English's deposition repudiated many of his original findings(T354). Judge Syler stated, "I don't know that I can, just from reading the reports and the depositions, make a determination one way or the other, to rule out his competency or to affirm it"(T357). He further stated:

> I'm not taking one side or the other. I'm saying that after looking at everybody—and these are not exact sciences. It's not like saying which way is north and then taking a consensus here. We have an expert for the State that says one thing that's opposed by two experts for the defense. It's a factual question as far as I'm concerned(T357-58).

The State noted competency is a question for the court, and Judge Syler then stated, "In which case I think we're going to proceed," finding Terrance "for these purposes" competent to proceed(T358).

During trial, Dr. Pincus testified that his testing revealed Terrance has probable frontal and left parietal lobe brain damage, affecting his insight, judgment, capacity to predict outcomes, motivation, initiative and creativity, that may have been caused by fetal distress sustained at birth(T1435,1444-45). Terrance's brain damage, especially given the stresses he was under at the time, made him unable coolly to reflect(T1453-54). He also noted that Terrance is paranoid and clinically depressed—a mental disease or defect(T1438-41).

Dr. Lewis testified by video-deposition that Terrance, who had probably undergone brain trauma at birth, causing a learning disability or central nervous system dysfunction, also had periodic extreme depression, including preceding the tragedy, when he obsessed about his father's abandonment and his determination not to abandon his daughter(ExhEat18-19,29-33,38,41).

In the months before these events, Terrance became increasingly suspicious. His paranoia led a nice, theretofore non-violent man, to deteriorate, becoming

violent(ExhEat35-36). Terrance, a "gentle, caring person, someone who wishes to be a good father who has never, except in the weeks prior to this episode, has not been violent who suddenly blows in this bizarre way," had a mental disease or defect making him unable to reflect coolly(ExhEat46-47).

Dr. Lewis also found Terrance was extremely paranoid, not trusting her or his lawyers(ExhE-1at6). He believed he didn't shoot Debbie and believed a conspiracy existed to frame him(ExhE-1at6). Dr. Lewis said this showed paranoia since he believed his lawyers were members of the conspiracy(ExhE-1at7). His paranoia rendered him incapable of cooperating with his lawyers(ExhE-1at9-10).

Dr. English testified, over objection, in rebuttal, that Terrance didn't demonstrate behaviors indicating a mental disease or defect(T1542). On cross, he admitted that he couldn't rule out that Terrance's paranoia was at a delusional level during the offenses; that Terrance has brain damage, and that a mental disease or defect manifests itself when Terrance is under severe stress(T1581-83).

The jury returned verdicts of first degree murder on both counts(T1642). Following penalty phase, it returned a death verdict on Debbie Rainwater and a life without parole verdict on Stephen Rainwater(T1751).

Pre-trial, counsel challenged jury selection procedures in Cape Girardeau County, asserting the methodology resulted in the exclusion of blacks from jury service.(LF122-29). Charles Hutson, the Circuit Clerk, testified that he obtains a list of 750 names for impaneling juries within each three-month term(T263-64). Hutson excuses people from service, without consulting any judges or lawyers, if they give a medical excuse; if they

have a doctor's appointment; if they are going on vacation and if they are working on the river(T278-80). The court noted that he hears excuses from those who don't want to serve all the time. He stated, "Logic says that would be a wonderful thing to do, but my response it, 'I'm sorry, but I can't,' and the word I always use is 'pack.' I can't pack jury panels. I can't pick and choose. I can't put people on just because it's convenient for them."(T291-92). The court denied the motion(T297).

Counsel also challenged the state's cause strikes of jurors, including Ms. Light and Ms. Irwin(T466-67,655-56;LF945).

Pre-trial and again during trial, the state referred to Public Defender billing records it had obtained from the Office of Administration(ExhD,E). Counsel objected to the references and usage on statutory and constitutional grounds(T1491-92;LF905-10). The court took no action and in closing, the state called defense experts "mercenaries"(T1628-29), based on the records that referenced many cases. The court then quashed Terrance's subpoenas that were intended to discover how the records were accessed(T1773,1785;LF1104).

On February 13, 2001, counsel moved that Terrance be transported to Barnes Hospital for an MRI and EEG since Drs. Lewis and Pincus had stated these tests were necessary to determine whether Terrance had brain damage and the court had earlier denied those requests(T1757-58). The testing also would have supported claims Terrance was incompetent, showing supporting evidence of brain damage(T1760-61). The court again denied the motion(T1761).

On May 16, 2001, Terrance's lawyers again raised his competence—to proceed and be sentenced, presenting evidence from Drs. Holcomb and Harry, a psychologist and a psychiatrist(T1790-91;ExhE-7). Holcomb documented Terrance's on-going, pre-existent depression that caused social withdrawal, lack of trust, and inability to concentrate(T1793-96). He also noted Terrance's paranoia, a character-trait that, under stress, became a psychosis(T1797). Since Terrance believed his lawyers were cooperating with the State, his paranoia affected his ability to interact with them(T1797). The depression magnifies the paranoia, making Terrance unable rationally to assist counsel(T1801-02). Counsel also presented Dr. Harry's affidavit, who found, as had Drs. Lewis, Pincus and Holcomb, that Terrance was depressed and therefore "lacks self-protective motivation…and, therefore, lacks ability to assist in his own defense"(ExhE-7at3). Dr. Harry also found Terrance hypervigilant and unwilling to look at him directly, confirming earlier findings of suspiciousness and paranoia(ExhE-7at 3-4). Dr. Harry found the stresses of trial and confinement would exacerbate Terrance's depression and paranoia(ExhE-7at4).

The Court denied the motion to find Terrance incompetent and sentenced him in accordance with the jury's verdicts(T1816,1849).

POINTS RELIED ON

I. JURY IMPROPERLY CALLED

The trial court erred in denying Terrance's motion to dismiss or preclude the State from seeking death based on improper jury selection methods because this denied Terrance's rights to equal protection, due process, a properly-selected, representative jury constituting a fair cross-section of the community, and freedom from cruel and unusual punishment under U.S.Const., Amends.V, VI, VIII, XIV and Mo.Const.,Art.I, §§2,10,18(a),21 in that Cape Girardeau County does not comply with §§494.400-.505 RSMo1994. It lets the Circuit Clerk and Presiding Judge release venirepersons *ex parte* based on improper or inadequate reasons, and it selects only 750 names of county residents, far less than the 5% of the population required by statute. This may result in pre-selection against certain groups—like African-Americans—since it lessens statutorily-mandated random selection.

State v. Henke, 820S.W.2d94(Mo.App.,W.D.1991);

State v. Gresham, 637S.W.2d20(Mo.1982);

State v. McGoldrick, 361Mo.737,236S.W.2d306(1951);

State v. Albrecht, 817S.W.2d619(Mo.App.,S.D.1991);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§2,10,18(a),2; and

§§494.400-.505RSMo1994.

II. TERRANCE WAS INCOMPETENT TO ASSIST COUNSEL

The trial court erred in failing to hold a competency hearing when counsel first questioned Terrance's competency; in finding Terrance competent to assist counsel, in failing to transport Terrance for additional testing, and in proceeding to trial and sentencing despite the substantial evidence presented that Terrance was incompetent because this violated Terrance's rights to due process and freedom from cruel and unusual punishment under U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§10,21 and §552.020RSMo in that Terrance has a history of episodic depression, paranoia, delusions, learning disabilities and neurological damage, all of which combined to impair substantially his ability to cooperate with his attorneys. The record showed that Terrance could not "consult with his lawyers with a reasonable degree of rational understanding, and did not possess a "rational as well as factual understanding of the proceedings against him." Terrance was prejudiced in that the record reveals that he was incompetent and that his incompetence affected his ability to consult with his lawyers at every critical stage of the proceedings, from pre-trial, through trial and sentencing.

State v. Tilden, 988S.W.2d568(Mo.App.,W.D.1999);

Drope v. Missouri, 420U.S.162(1975);

Godinez v. Moran, 509U.S.398(1993);

Dusky v. United States, 362U.S.402(1960);

U.S.Const.,Amends.V,VIII,XIV;

Mo.Const.,Art.I,§10,21; and

§552.020RSMo.

III. THE STATE RECEIVED TWO EXTRA PEREMPTORIES

The trial court abused its discretion in overruling Terrance's objections and striking Thelma Irwin and Lori Light for cause because this denied Terrance due process, a fair and impartial jury and freedom from cruel and unusual punishment, U.S.Const.Amends.V, VI,VIII,XIV, Mo.Const.Art.I,§§10,18(a)21, in that Ms. Irwin ultimately stated that she could set aside her beliefs and fulfill her duties as foreperson and, although Ms. Light initially stated she would require more evidence than beyond a reasonable doubt, upon hearing that she would have to be "firmly convinced," agreed to abide by that standard and fairly consider both punishments. Their initial difficulties would not prevent or substantially impair them from abiding by their oath and the instructions.

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

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

Gray v. Mississippi, 481U.S.648(1987);

State v. Smith, 32S.W.3d532(Mo.banc 2000);

U.S.Const.Amends.V,VI,VIII,XIV; and

Mo.Const.Art.I,§§10,18(a),21.

IV. BILLING RECORDS UNLAWFULLY ACCESSED

The trial court erred in denying defense motions to preclude use of confidential public defender billing records and for new trial; granting the state's motions to quash subpoenas of Messrs. Ahsens and Dresselhaus, and letting the state utilize those billing records to Terrance's detriment, because these rulings denied Terrance due process, equal protection, a fair trial, effective assistance of counsel and freedom from cruel and unusual punishment, U.S. Const.,Amends., V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),21, in that the Attorney General's Office obtained confidential billing records of the Public Defender System pertaining to Dr. Lewis throughout her association with the System. Such records were only available to the Attorney General's Office because Terrance and other similarly-situated persons are poor, within the meaning of Chapter 600 RSMo. No statutory authority permitted the release of those records and the Rules of Professional Responsibility were violated by their release. The state improperly used the information it gathered through those records to malign defense experts, calling them "mercenaries" and suggesting they should not be trusted and Terrance should be blamed for the money that, over the course of many cases, they had received from the Public Defender System.

State ex rel. Robinson v. Office of Attorney General, No. 01-CV-323933 (ColeCounty,October2,2001);

United States v. Abreu, 202F.3d386(1st Cir.2000);

State ex rel. King v. Turpin, 581S.W.2d929(Mo.App.,E.D.1979);

State ex rel. Chaney v. Franklin, 941S.W.2d790(Mo.App.,S.D.1997);

U.S.Const.,Amends.,V,VI,VIII,XIV;

Mo.Const.,Art.I,§§2,10,18(a),21; and

Chapter 600RSMo.

V. IMPROPER ARGUMENT INFECTED THE TRIAL

The trial court plainly erred in not *sua sponte* declaring a mistrial when the state improperly argued:

GUILT PHASE

1. "…and I'm sure the defense will argue to you the defendant is not guilty of anything because they're challenging whether he knew what he was doing was practically certain to cause death."(T1598);

2. "The only thing that is surprising in this incident is that the body count isn't any higher than it is. If he had more time, I think we would have had a lot more dead people there. But we got lucky."(T1604).

3. "…in order to find as the defendant just asked you to find, I want you to keep in mind what you must do. You have to believe the defendant. You have to believe the hired mercenaries from the East Coast." And "the idea that he has a mental disease is nonsense. Remember who you have to believe in order to find that one exists: the highly paid experts in the employ of the Public Defender's Office…."(T1628,1634).

4. "At least they admit it's second-degree murder. So, I suppose the instructions indicating he didn't know what he was doing are something that they don't believe you should consider too carefully." (T1629).

5. "He didn't support that baby's head, at least not good enough the way I was taught."(T1633).

6. "…I think one of the things that probably irritated me when I was listening was this reference to the defendant being broken."(T1634).

7. "…as I've said once before, the only surprise here is that we don't have more bodies on the floor than we did."(T1635).

PENALTY PHASE

1. "12 of you have been asked to make this decision, and that will be hard for the 12 of you, but if you can't make it, it falls to one man, the judge in this case, and as hard as it will be for you, let's not lay it on a single man's shoulders, okay?"(T1721);

2. "…one of the biggest factors you have to consider is what is the best way to protect society as a whole, and I submit to you that the best way to protect society as a whole is to place that man where he can do no more harm. That is on death row until he is executed. Put him beyond any ability to harm anyone else."(T1723);

3. "But I know those in my generation at 21 and 22 were wearing the same color clothes to work every day and leading men into a lot of situations, including combat."(T1723);

4. "…He is going to have repeated and daily contact with other prisoners and guards. What happens if he gets mad at one of them? The most restrictive environment possible and the safest with one we fear may do this again is death row until he's executed."(T1735);

5. over objection, "But have you been watching the defendant here? Have you seen a tear for Stephen or Deborah Rainwater?"(T1736);

6. "As a much smarter man than I once said, the only thing that is necessary for evil to triumph is for good men, and I suggest and good women, to do nothing. I suggest to you that you dare not do nothing."(T1738)

because these arguments denied Terrance due process, a fair trial and freedom from cruel and unusual punishment under U.S.Const., Amends.V,VI,XIII, XIV; Mo.Const.,Art.I §§10,18(a),21 in that they were contrary to the evidence and the law; were speculative; referred to facts not in evidence; converted the prosecutor into an unsworn witness; denigrated defense counsel and defense experts; suggested ultimate sentencing responsibility could lie elsewhere; referred to Terrance's failure to testify, and misstated the jury's duty.

State v. Storey, 901S.W.2d886(Mo.banc1995);

State v. Burnfin, 771S.W.2d908(Mo.App.,W.D.1989);

Doyle v. Ohio, 426U.S.610(1976);

Caldwell v. Mississippi, 472U.S.320(1985);

U.S.Const., Amends.V,VI,XIII,XIV; and

Mo.Const.,Art.I §§10,18(a),21.

VI. IMPROPER COMMENTS ON FAILURE TO MAKE STATEMENTS

The trial court erred and plainly erred in overruling defense objections and not *sua sponte* declaring a mistrial when the prosecutor elicited from Officers Clark and Jefferson that, after Terrance was *Mirandized* and while in custody, he told the officers nothing because this denied Terrance due process, a fair trial, the right to remain silent, and freedom from cruel and unusual punishment, U.S.Const.Amends., V,VI.XIII,XIV; Mo.Const.Art.1§§10,18(a),19,21, in that the testimony impermissibly referred to Terrance's invocation of his right to remain silent and suggested he remained silent because he had something to hide.

Doyle v. Ohio, 426U.S.610(1976);

State v. Dexter, 952S.W.2d332(Mo.banc1997);

State v. Zindel, 918S.W.2d239(Mo.banc1996);

Wainwright v. Greenfield, 474U.S.284(1986);

U.S.Const.Amends.,V,VI.XIII,XIV, and

Mo.Const.Art.1§§10,18(a),19,21.

VII. RACE PLAYED A ROLE

The trial court erred in denying Terrance's Motions to Dismiss the Information Due to Unconstitutional Discretion of Prosecutor in Seeking Death Penalty, to Preclude the State from Seeking the Death Penalty Because the Missouri Supreme Court's Proportionality Review is Unconstitutional; to Declare Imposition of the Death Penalty Unconstitutional As Racially Discriminatory and as Fundamentally Unfair; Challenging Cape Girardeau County's Jury Selection Procedures; to Submit a Jury Questionnaire; to Reconsider Submitting Jury Questionnaire and plainly erred in failing to declare a mistrial *sua sponte* when the prosecutor made gratuitous references to Terrance's race because these actions denied Terrance equal protection, due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),21, and §565.035.3RSMo in that the evidence shows that the state sought death against Terrance, and the death penalty has been imposed against him at least in part because he is a black man who killed a white woman. This Court, in the exercise of its independent proportionality review authorized under §565.035.3RSMo, must find that an arbitrary factor—race—played a role in the decision-making processes in this case and Terrance's death sentence should be reduced to life without parole.

Oyler v. Boles, 368U.S.448(1962);

J. Sorensen & D. Wallace, Capital Punishment in Missouri: Examining the Issue of Racial Disparity, 1*BehavioralSciences&theLaw61*(1995);

State v. McMillan, 783S.W.2d82(Mo.banc1990);

State v. Taylor, 18S.W.3d366(Mo.banc2000);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§2,10,18(a),21; and

§565.035.3RSMo.

VIII. AGGRAVATING CIRCUMSTANCES DUPLICATIVE

The trial court erred in overruling defense objections to Instruction 23 and in giving that Instruction because that denied Terrance's rights to due process and freedom from cruel and unusual punishment under U.S.Const., Amends.V,VIII,XIV; Mo.Const., Art.I,§§10,21, in that the aggravating circumstances were not supported by the evidence and were duplicative, thus rendering the death penalty arbitrary and capricious.

Wolff Shoe Co. v. Director of Revenue, 762S.W.2d 29(Mo.banc1988);

Engberg v. Meyer, 820P.2d70(Wyo.1991);

Willie v. State 585So.2d660(Miss.1991);

Woodson v. North Carolina, 428U.S.280(1976);

U.S.Const.,Amends.V,VIII,XIV; and

Mo.Const.,Art.I,§§10,21.

IX. JURY WAS MISLED

The trial court plainly erred in sustaining the state's objections and in not *sua sponte* declaring a mistrial when, on voir dire, the state :

1. told the jury that both sides would present evidence;

2. objected to defense questions about whether the jurors could consider life without parole even if he presented no evidence in mitigation;

3. told the jury that "no single factor" should be key to their decision because these arguments violated Terrance's rights to due process, a fair trial before a properly-instructed jury and freedom from cruel and unusual punishment, U.S.Const.,Amends V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21 in that the arguments told the jury that the defense would present evidence, despite there being no requirement that the defense ever adduce evidence and the burden of proof always rests with the State and suggested that some particular quantum of evidence—more than one thing—was necessary before they could consider imposing a life without parole sentence, although the defense is never required to adduce evidence and the jury may impose life in any case.

Williams v. Taylor, 529U.S.362(2000);

State v. McMillan, 783S.W.2d82(Mo.banc1990);

Mullaney v. Wilbur, 421U.S.684(1975);

Donnelly v. DeChristoforo, 416U.S.637(1974);

U.S.Const.,Amends V,VI,VIII,XIV;and

Mo.Const.,Art.I, §§10,18(a),21.

ARGUMENT

I. JURY IMPROPERLY CALLED

The trial court erred in denying Terrance's motion to dismiss or preclude the State from seeking death based on improper jury selection methods because this denied Terrance's rights to equal protection, due process, a properly-selected, representative jury constituting a fair cross-section of the community, and freedom from cruel and unusual punishment under U.S.Const., Amends.V, VI, VIII, XIV and Mo.Const.,Art.I, §§2,10,18(a),21 in that Cape Girardeau County does not comply with §§494.400-.505 RSMo1994. It lets the Circuit Clerk and Presiding Judge release venirepersons *ex parte* based on improper or inadequate reasons, and it selects only 750 names of county residents, far less than the 5% of the population required by statute. This may result in pre-selection against certain groups—like African-Americans—since it lessens statutorily-mandated random selection.

The trial court erred in denying Terrance's challenges to jury selection procedures in Cape Girardeau County. The methodology Cape Girardeau County uses does not comply with §§494.400-505 RSMo1994. Because of this non-compliance, it skews the random nature of the selection process intended by the Legislature. As a result, Terrance's state and federal constitutional rights to due process, equal protection, a representative jury drawn from a fair cross-section of the community, and freedom from

cruel and unusual punishment were violated. This Court must, therefore, reverse and remand for a new trial.

The Sixth and Fourteenth Amendments require that juries be selected from venires that represent a fair cross-section of the community and that jury selection procedures not violate the venirepersons' right to equal protection. The fair cross-section right is essential to fulfill the Sixth Amendment's guarantee of an impartial jury in criminal trials. *Taylor v. Louisiana*, 419 U.S. 522,526(1975). In part because venirepersons lack the opportunity to even lodge the challenge, defendants in criminal cases have standing to raise the excluded venirepersons' equal protection challenge. *Powers v. Ohio*, 499 U.S.400,415(1991).

Pre-trial, Terrance filed a *Motion Challenging Cape Girardeau County's Jury Selection Procedures Because African-Americans Are Being Excluded From Jury Service*(LF722-29). On November 18, 1998, Terrance presented evidence in support of that motion.

Charles Hutson, Cape County's Circuit Clerk and a member of the Board of Jury Commissioners, testified that, for every three month period, he obtains a list of 750 names for impaneling juries during that period(T263-64). The source list for those 750 individuals are drivers' licenses and voter registrations(T267). Hutson does not update the source lists within a term but only does so after the three month term has expired(T271).

Once Hutson has the 750-name list, he and the county clerk manually go through it, marking out anyone they know to be dead or to have moved from the county(T275).

They also eliminate people who they know to have been ill(T275); to be lawyers(T276) or to be convicted felons(T276). If the person returns a questionnaire and indicates a medical excuse, Hutson excuses him from service, without consulting the judge(T278). Hutson also "basically excused someone or deleted them from that particular panel" "if they're going to take a two-week vacation," "if they have a doctor's appointment," "if you're talking of someone that's on the river for here, there on some of them for two weeks and then off two, and a lot of them are on for 30 days and off 30 days, and we mark it that they will be home for a 30-day period of time and then call them during that time," thus taking people off the list for that period of time.(T278-80).

Hutson stated that, while the questionnaire and the computer program do not compile data about venirepersons' race, they compile it on age(T287-88). Judge Syler recalled three successive criminal trials in which the defendant was African-American, yet all jurors were white(T289-90). Defense counsel stated that, as alleged within the motion, "the numbers…speak for themselves…there is underrepresentation in Cape Girardeau County of African-Americans."(T292). For example, in 18 cases tried by the Public Defender's Office between 1996-98, eleven venire-panels contained no African-Americans(LF724); four panels contained only one African-American, and only thrice were African-Americans fairly represented—proportionately to their representation in the County (LF725).

Defense counsel argued that a duty exists to ensure that the jury represents a fair cross-section of the community(T291). Judge Syler acknowledged that duty. He noted that he often hears excuses from those who don't wish to serve at a particular time.

"Logic says that would be a wonderful thing to do, but my response is, 'I'm sorry, but I can't,' and the word I always use is 'pack.' I can't pack jury panels. I can't pick and choose. I can't put people on just because it's convenient for them."(T291-92).

The prosecutor maintained that the motion should be denied because there was no evidence of deliberate efforts to exclude a suspect class, like African-Americans, from service(T295). He noted that, while African-Americans are a suspect class, no showing was made that they were underrepresented on panels in a statistically-significant way(T295-96). He stated, "In this particular case, I think that if a large sampling is taken, and I'm sure that at least a hundred, if not more, veniremen will be presented, the opportunity for black members of the community to serve is there."(T297).

Judge Syler denied the motion(T297). As the venire was empaneled, counsel renewed the motion, which Judge Syler again denied(T364,382-83). Judge Syler's ruling was erroneous. He had recognized that **he** could not pack a jury; that **he** could not pick and choose who would be on a jury, based on whether it was convenient. That was not what the Legislature had authorized. Yet, that was precisely what his Circuit Clerk was doing. And, by limiting the pool of persons available within any given term to only 750, the selection process was skewed even further. As even Mr. Ahsens noted, by limiting the number to far below that which is statutorily-mandated, the opportunity for any person or group of persons to serve is substantially lessened.

Section 491.410.1RSMo requires that the county jury commissioner board compile a master jury list of potential jurors and their addresses, updating the list periodically.

> The master jury list shall be comprised of **not less than five percent of the total population** of the county…as determined from the last decennial census. In no event shall the master jury list contain less than four hundred names….The master jury list shall be the result of random selection of names from public records. *Id*.(emphasis added).

Jurors who are not qualified to serve, because of age, citizenship, residency, or felony conviction, *see §494.425RSMo*, are to be notified by the board that their service is not required. Then, "upon application by a prospective juror, the jury supervisor or board of jury commissioners, acting in accordance with written guidelines adopted by the circuit court, may postpone that prospective juror's service to a later date." *§494.415.3RSMo*.

Section 494.465RSMo provides the mechanism for challenging jury selection procedures if it is alleged they fail to comply substantially with the declared policy of §§494.400-.505RSMo. That policy is that no citizen may be excluded from jury selection because of race, color, religion, sex, national origin or economic status, and selection must be random, from a fair cross-section of the county's citizenry.*§494.400RSMo*. The Sixth Amendment right to a jury trial and the importance that the criminal justice system be and appear fair demonstrate that "creating a jury pool that represents a fair cross section of the community is a compelling governmental interest." *United States v. Ovalle*, 136 F.3d 1092, 1106(6th Cir. 1998).

The procedures followed in Cape County clearly violate the statutory mandate. The procedures affect the randomness of the selection process by their manipulation of

the available pool of names. As a result, groups such as African-Americans, among others, may be under-represented on petit juries such as Terrance's.

Cape Girardeau's total population in the 1990[1] census was 61,633(ExhP). To comply with the 5% requirement, §494.410RSMo mandates that the master list contain "not less than" 3,081 names. The circuit clerk testified, however, that his master list contains only 750 names—slightly more than 1.2% of the population(T.263-64)—or about 75% fewer than statutorily-mandated. Thus, Cape County ignores the sole parameter the Legislature established on how many names must be included on any list used to obtain juries. *See State v. Albrecht*, 817S.W.2d619,624(Mo.App.,S.D.1991).

Without consulting anyone and using no written protocols, Hutson also unilaterally removes names from the master list. He removes them if he believes that someone is ill, is out of town, or for any number of reasons cannot serve during that term(T275-80). The master jury list thus is diminished by procedures that violate the statutory mandate.

What does this mean? As §494.400 indicates, that Chapter's procedures are intended to ensure random selection so that citizens are not excluded based on, for example, their race. But, when the jury commissioner board uses only 1.2% of the population as the master list, rather than the 5% mandated by statute, the sample from

[1] The 1990 census was the "last decennial census" completed at the time of trial, as the 2000 census was not completed until March, 15, 2001.

http://mcdc.missouri.edu/census2000/oanews.html

which juries are drawn for that term is obviously smaller than the Legislature intended. Thus, the randomness of the sampling process is affected. As even Mr. Ahsens recognized, if the sample were larger, it is likely that more citizens of particular groups, like African-Americans, would have been on the list(T297). This is, of course, the pernicious result of non-compliance with the statute.

The sampling process is further skewed by Hutson's unilateral actions removing those people whom he believes may be unavailable for service during the term. The statute does not provide for such actions, since they also limit the available pool from which juries can be drawn during a term.

The board of jury commissioners in Cape County does not substantially comply with Chapter 494 in drawing up the master jury list. Because of this structural error, *Neder v. United States*, 527 U.S.1,8-9(1999); *Arizona v. Fulminante*, 499 U.S.279,309-10(1991), this Court must reverse and remand for a new trial.

State v. Henke, 820 S.W.2d 94 (Mo.App.,W.D.1991), demonstrated similar problems that required reversal. There, two members of the board convened to compile the master jury list. They obtained 5,400 names from the court administrator's office and they added 600 more names. *Id.*at94. Running them through a computer program, they obtained a list of 120 names, which they reduced to 85 by deleting those people they knew were "in nursing homes…deceased… moved… students away in college and such."*Id.* Holding that reversal was required, the Court noted that the board did not substantially comply with the statute. Candidates hadn't received the statutory summons and qualification forms; they were disqualified for reasons not enumerated in the statute;

board members used subjective knowledge in excusing people, and candidates never received notice of disqualification.*Id*.at96.

In *State v. Gresham*, 637 S.W.2d 20 (Mo.1982), this Court found substantial noncompliance with the statute, which, it held, warranted reversal and remand. There, the pool contained substantially less than the 400 names required by statute; the names were only on questionnaires, which contained other information; the names were not placed in a box and thoroughly mixed to ensure random drawings, and the procedures allowed board members to exclude persons based on their beliefs of how those persons might perform as jurors.*Id.*at26. This Court noted:

> We do not mean to say that there was any fraud practiced in this case. That is beside the point. The legislature has seen fit to prescribe the manner of selecting juries. The officers charged with this duty must at least substantially comply with the procedure prescribed. Courts are not authorized to ignore, emasculate, or set aside the statutory provisions.

Id.at26, citing *State v. McGoldrick*, 361 Mo. 737, 236 S.W.2d 306,308(1951).

Cape Girardeau County is not following the mandate of §§494.400-.505RSMo. It is allowing the Circuit Clerk unilaterally to remove people from the list based on his own criteria, information and beliefs. It is also drawing the names for any given term from a list that comprises only 1.2% of the County's population, far less than the 5% that the Legislature has demanded. The substantial non-compliance with §§494.400-.505 creates the possibility that cognizable groups, such as African-Americans, are being substantially underrepresented on juries in Cape County. Indeed, historical data, confirmed by Judge

Syler at the hearing on the motion, and Terrance's own panel, in which only seven African-Americans were called(T382-83,672), and the census data, which reveals that 4.5% of Cape County's population is African-American, suggest that African-Americans are significantly underrepresented. Were Cape Girardeau County to comply with the Legislature's mandate, it is more likely that the random selection process that the statute envisions would occur and that this under-representation would be rectified.

This Court must reverse and remand for a new trial.

II. TERRANCE WAS INCOMPETENT TO ASSIST COUNSEL

The trial court erred in failing to hold a competency hearing when counsel first questioned Terrance's competency; in finding Terrance competent to assist counsel, in failing to transport Terrance for additional testing, and in proceeding to trial and sentencing despite the substantial evidence presented that Terrance was incompetent because this violated Terrance's rights to due process and freedom from cruel and unusual punishment under U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,21 and §552.020RSMo in that Terrance has a history of episodic depression, paranoia, delusions, learning disabilities and neurological damage, all of which combined to impair substantially his ability to cooperate with his attorneys. The record showed that Terrance could not "consult with his lawyers with a reasonable degree of rational understanding, and did not possess a "rational as well as factual understanding of the proceedings against him." Terrance was prejudiced in that the record reveals that he was incompetent and that his incompetence affected his ability to consult with his lawyers at every critical stage of the proceedings, from pre-trial, through trial and sentencing.

From the outset, counsel questioned whether Terrance was competent. They repeatedly informed the court that he could not assist counsel because he did not trust them and because he could not rationally relate the facts or discuss how his case would proceed. Despite repeated requests, the court waited until **after** trial to hold a hearing about his competency. At that point, the damage had been done. Terrance, who was clearly incompetent and unable to assist counsel in the critical decisions facing them, had

been forced to proceed to trial. His convictions and sentences are the resulting prejudice. This Court must reverse and remand for a new trial, consistent with §552.020RSMo.

As early as September, 1998, counsel moved that Terrance be transported to Barnes Hospital for a battery of neurological and neuropsychological tests (LF733-39). The court denied the motion(LF740). In March, 1999, counsel moved that the court find Terrance has a mental disease or defect and lacks the capacity to understand the proceedings or to assist in his defense or that it order a mental examination under §552.020RSMo (LF815-18).

Although neither yet had made a finding on competence, both Drs. Pincus, a neurologist, and Lewis, a psychiatrist, had evaluated Terrance. They found him delusional, with major depression, and highly suspicious and distrustful of his lawyers—practically paranoid. Dr. Lewis's preliminary report, dated June, 1998, found Terrance's history showed recurrent depression, sometimes rendering him non-functional(Exh.E-3at7-9). She also found increasing levels of paranoia(Exh.E-3at11-12). She noted, "Terrance has for years suffered from a Major Depression with psychotic features (e.g. auditory deprecating hallucinations and paranoid ruminations)…."(Exh.E-3at13). He "was extremely suspicious and unwilling to share much with me."(Exh.E-3at14). She prepared an addendum in March, 1999, based upon subsequent interviews and record reviews. Terrance stopped speaking during the interview and, when asked why, he described a voice telling him, "Don't talk about family."(Exh.E-4at1). Dr. Lewis saw Terrance in February, 1999, at counsel's request since, "Terrance was extremely upset because he was still convinced that he had <u>not</u> shot Debbie Rainwater, that someone else

had shot her, and that he was being set up by the perpetrator. Given this stance, the question of his competence to assist his attorney arose." (Exh.E-4at2).

Dr. Lewis wrote, "During the course of all 3 of our interviews, Terrance's suspiciousness was so excessive as to reach paranoid proportions. He felt he could trust nobody, including me and his lawyers."(Exh.E-4at3). She further found,

> Terrance's unwavering perception that he is the victim of a set-up is consistent with paranoia. This kind of paranoia, which in this case culminated in the shootings of Debbie and Steve Rainwater, can be the manifestation of many different types of severe psychiatric disorders, including organic brain syndromes, schizophrenia and severe mood disorders. This paranoia, in my opinion, is the symptom that was increasing in severity and that most strongly influenced Terrance's violent aberrant behaviors.(Exh.E-4at3-4).

She concluded,

> At the end of our February 20, 1999 interview, it remained unclear whether or not Terrance would be able to take enough distance on his behaviors on the day of the shootings to realize that he had been in an altered state of mind at that time, to recognize that he was amnesic for the events witnessed by others, and to cooperate with his attorney in forging a realistic defense consistent with the facts of the case.(Exh.E-4at4).

Dr. Pincus's findings were consistent with Dr. Lewis's. In September, 1998, Dr. Pincus interviewed Terrance. He found,

> one of the dominant themes was his paranoia and his lack of trust in me, his lawyer, Dr. Lewis, and others who are involved in his defense… Throughout our three hour session he gave single word answers to questions and no elaboration. He seemed to hold back information and not trust me…he has severe paranoia, which may be of delusional proportions. Because of the guarded nature of his communication, it is difficult to tell.(LF927-929).

Based on counsel's representations, in March, 1999, Judge Syler ordered that Terrance be evaluated, pursuant to §552.020RSMo, to determine whether Terrance had a mental disease or defect and whether, as a result, he lacked "capacity to understand the proceedings against him or to assist in his own defense."(LF824).

In May, 1999, Byron English, Ph.D., a Psychologist with a degree in Counseling,(T1543;Q-18at8), evaluated Terrance pursuant to that order. English's interview took two hours, and he also did psychological testing—including the short form WAIS-R, the reading portion of the Wide Range Achievement Test, the Bender Gestalt and the MMPI(T1529-34). Unlicensed social worker Donna Augustine did a social service assessment by interviewing two people, Terrance's mother and a friend(T1550-1555). Dr. Chung did a physical examination.(T1536). English reviewed documents from witnesses, police, and Drs. Lewis and Pincus. English opined that Terrance does not suffer from a mental disease or defect that interferes with his ability to understand the proceedings or to assist counsel(ExhQ-3at9). Although he found that Terrance experienced depression and paranoia, he believed neither was serious.*Id.* English noted Terrance believed his attorney was Charles Scott and "he was somewhat uncomfortable

with Mr. Scott and was afraid to fully trust him because he has been hurt by others in the past. His mistrust is not due to any type of mental disease or defect, but is due to Mr. Anderson's basic operational style."(Exh.Q-3at10). English finally filed his report on September 22, 1999, and shortly thereafter, counsel requested a second evaluation under §552.020RSMo, which the court granted.(LF827-29).

On January 19, 2001, prior to trial, counsel requested that Judge Syler make his decision on Terrance's competence not just on the previously-filed written reports, because of information he had discovered during depositions of Drs. Lewis and English.(LF943-44).

Dr. Lewis last saw Terrance on February 20, 1999 in jail and he was extremely paranoid, trusting neither her nor his lawyers.(ExhE-1at6). He firmly believed that he didn't shoot Debbie Rainwater and a conspiracy was afoot to frame him(ExhE-1at6). Significantly, he believed his attorneys were part of that conspiracy(ExhE-1at7). Dr. Lewis found Terrance had a mental disease or defect—he was delusional, paranoid and had dissociated, periodically talking differently, with a different demeanor and a total lack of recall of Debbie Rainwater's death.(T1527-30;ExhE-1at7-8). Dr. Lewis determined that Terrance was so paranoid he couldn't cooperate with counsel and he had a global inability to appreciate the nature of events, the charges and evidence.(ExhE-1at9-12). Dr. Lewis also found "puzzling" Terrance's report to English that his attorney's name was "Charles Scott" since he had had the same attorneys—Charlie Moreland and Scott McBride—for three years. This, combined with his IQ of 84, suggested a deterioration in brain function(ExhE-1at18).

At English' s deposition, he acknowledged, "Part of his competency to proceed is that he has to be able to give, you know, give his attorney a relatively accurate description of what went on at the time." Moreland asked, "You're saying if the patient cannot give an accurate or rational description of what happened, that would indicate lack of competence?" English responded, "It may."(ExhQ-18at101). English also noted Terrance "basically doesn't trust other people," and shows paranoia.(Q-18at166-69).

English's deposition revealed that his evaluation, the physical examination, and the social service assessment were woefully inadequate. For starters, a surgeon did the physical.(ExhQ-18at14). Further, although "basically we want a broad perspective" from a social service assessment—interviews of a range of people and reviews of as many records as possible—the social worker talked only by telephone to Terrance's mother and friend Jason; obtained his school records post-evaluation, and never obtained information from Terrance's mother about his developmental history—including birth trauma—that would have affected his behavior, function and development(Q-18at72-81).

English made no attempt to obtain information about the family's history of mental illness—including that Terrance's aunt was civilly committed—although he would have found it important that such a history existed.(Q-18at90-91). Dr. Lewis's evaluation had discovered this information, as well as the family history of depression, that also manifested itself in Terrance (ExhEat27-30). English acknowledged it would have been important to know that Terrance had sustained fetal distress—if he had been premature; sustained substantial infection in the womb; had a low Apgar score; suffered

oxygen deprivation—because this might have affected brain function(ExhQ-18at94-95). Significantly, Dr. Lewis had discovered this information in her evaluation(ExhEat16-19).

English acknowledged that he administered the short form WAIS-R, because it gives a good estimate of intellectual function(ExhQ-18at130-31). But, if he believes the patient has neurological damage, he gives the whole battery of tests(ExhQ-18at133). English acknowledged that Terrance's scores, poorer on verbal than performance tests, might have indicated neurological damage, since such damage can affect memory, learning, perceptual organization, problem-solving, and abstract reasoning(ExhQ-18at134-40). He agreed the short form WAIS-R tends to provide "less information about a person's cognitive abilities, produce a wider band of error than a full administration, result in less clinical information, and [is] often of questionable accuracy…."(ExhQ-18at141). English acknowledged that, although he administered the Bender-Gestalt, it looks for severe brain damage only in the right parietal area of the right hemisphere(ExhQ-18at147). Dr. Pincus's testing, however, indicated frontal lobe damage existed(T1453-55). For instance, since Terrance had a "snout reflex"—the chin and lower lip contract when the upper lip is pressed—he has frontal lobe damage(T1433-35). Such contraction is only normal for babies who have yet to establish neural links to their frontal lobes, which control insight, judgment, capacity to predict outcomes, motivation, initiative and creativity(T1435).

English finally acknowledged that his findings of a 23-year-old high school graduate who reads like a 6th grader and has comprehension problems could indicate he is learning disabled or has neurological damage(ExhQ-18at153-54). He also said that

Terrance's inability to engage in abstract thinking could indicate neurological damage(ExhQ-18at174).

On January 22, 2001, immediately pre-trial, counsel tendered Drs. Lewis and Pincus's reports. They again asserted Terrance was incompetent, which the state contested(T352-53). Although Judge Syler did not hear evidence and did not then fully review those reports, he found "for these purposes" Terrance competent to proceed(T358).

During trial, over objection since he had only evaluated Terrance for competency(T1485,1524), the State called English, purportedly to rebut Drs. Lewis and Pincus's finding that Terrance couldn't deliberate.(T1527).

Post-trial, counsel again requested that Terrance be transported to Barnes Hospital for an MRI and EEG(LF1039-42). Counsel noted that Dr. Pincus had earlier stated it was "essential that he have the following tests: neuropsychological tests to include Halstead-Reitan Battery, Wisconsin Card Sorting test, Trail-making A and B, Rorschach, and Thematic, TAT. In addition, he should have an EEG and an MRI scan of the brain."(LF929).

Counsel asserted that, because Judge Syler had denied his earlier request, he and his experts had been unable to determine definitively whether Terrance had neurological damage and was mentally ill(T1758). Thus, Terrance's defense was stymied, as was his ability to respond to the state's claims that his experts' opinions were inaccurate(T1758). Had the requested testing been done, the doctors could have determined whether Terrance's problems stemmed from neurological damage, seizure disorder or something

entirely different(T1761). Counsel noted that this evidence might "affect the Court's decision concerning the competency of Mr. Anderson because that's still an issue that's been before the Court, and I'm not sure has ever been squarely addressed."(T1760).

The state responded, "the requested tests would not have been dispositive at trial and they would not have effected(sic) the outcome of this case. Such testing is highly impeachable. Similarly, such tests are of no value to this Court as sentencing looms. Nor would these tests interest any appellate court, short of some possible question in a federal habeas case."(LF1044). Judge Syler denied counsel's motion(T1761;LF1039).

Immediately before he proceeded with sentencing, Judge Syler let counsel adduce evidence about Terrance's competency to proceed or be sentenced. Counsel called Dr. Holcomb, a psychologist who evaluated Terrance to determine if he had a mental disease or defect and was competent to proceed(T1790-91). Holcomb found Terrance was depressed and said this Major Depression permeated his life, preceding the guilty verdicts (T1793-94). Holcomb's interview results were confirmed by other doctors' interviews, demonstrating the long-term nature of his depression(T1795-96). He noted Terrance was paranoid, something Dr. Lewis also documented, and found Terrance believed his attorneys were cooperating with the state.(T1797). Thus, his paranoia affected his ability to interact with them(T1797). Holcomb finally found, as had Dr. Lewis, that Terrance suffers from psychogenic amnesia, since he does not remember killing Debbie Rainwater(T1798). Consistent with English's findings, Holcomb did not find Terrance was malingering, since Terrance recalled killing Steven Rainwater(T1798-99,1810). The

combination of amnesia, paranoia and depression, one magnifying the other, rendered Terrance unable to assist counsel(T1800-02).

Dr. Harry's findings mirrored Dr. Holcomb's. Dr. Harry saw Terrance on March 25 and May 5, 2000(ExhE-7). After May 5, Dr. Harry found, based on "the aggregate of my observations…that he is depressed…[and] …, as a result of his depression, lacks self-protective motivation…and, therefore, lacks ability to assist in his own defense."(ExhE-7at3). Dr. Harry's finding of depression was consistent with findings made by Drs. Holcomb, Lewis and Pincus(ExhE-7at3). Terrance's hyper-vigilance and refusal to look at Dr. Harry except "askance" was "consistent with him being highly suspicious or paranoid, which observation is also consistent with the observations of others such as Dr. Lewis…, Dr. English…, Dr. Holcomb…, Dr. Nichols… and Dr. Pincus."(ExhE-7at3-4).

The Court denied counsel's motion to find Terrance incompetent and sentenced him to death on one count and life without parole on the other(T1816, 1849).

The State may not prosecute someone unless he is competent. *Pate v. Robinson,* 383U.S.375,378(1966). Defendants must be capable of understanding the nature and object of the proceedings, consulting with their attorneys and assisting in the preparation of their defense. *Drope v. Missouri,* 420 U.S.162,171(1975). A defendant is competent is he "has sufficient present ability to consult with his lawyer with a *reasonable degree of rational understanding* and has 'a *rational* as well as a factual understanding of the proceedings against him.'" *Godinez v. Moran*, 509U.S.398,396(1993)(emphasis added), *citing Dusky v. United States,* 362U.S.402(1960). Because this presents a sensitive

constitutional issue, "the application of the law to the facts of any given case often is very difficult." *State v. Tokar*, 918S.W.2d753,762-63(Mo.banc1996).

If a trial court makes a pretrial finding of competency, this Court must decide if substantial evidence supports that finding. *State v. Wise*, 879S.W.2d494,507 (Mo.banc1994); *State v. Tilden*, 988S.W.2d568,576 (Mo.App.,W.D.1999). Here, despite overwhelming evidence signaling the need for a competency hearing, the court did not hold one. Rather, based only on the written record, the court found Terrance competent.(T1358). This finding is not supported.

This Court must determine whether "a reasonable judge, in the same situation as the trial court, should have experienced doubt about [Terrance's] competence to stand trial." *State v. Tokar*, 918S.W.2dat762-63. Significantly, this Court is "not bound by and need not defer to [the trial court's] conclusion as to the legal effect of his finding of fact." *State ex rel. Sisco v. Buford*, 559US.2d 747,748(Mo.banc 1978). As the Court in *Drope* suggested, this Court may review the lower court's weighing of the evidence of competency to determine if substantial evidence supported its finding. *Drope*, 420U.S.at179. Since counsel voiced "serious doubts as to his client's competency to proceed, " and since the evidence supported counsel's position, the court should have conducted a competency hearing when counsel first requested one, and ultimately should have found Terrance incompetent. *Miller v. State*, 498 S.W.2d79,85 (Mo.App.,W.D.1973).

Almost no evidence supports the court's finding and this Court must doubt that Terrance was competent. Indeed, the sole evidence the court ever heard suggesting

Terrance was competent came from English. And his initial findings of competency were called into question not only by defense experts but by his own deposition. As English himself noted, a client must "be able to give…his attorney a relatively accurate description of what went on at the time" and the inability to do so may indicate incompetence.(ExhQ-18at101). Since Terrance denied killing Debbie Rainwater, despite clear evidence to the contrary, his competency was called into question. Moreover, even English acknowledged Terrance's paranoia(ExhQ-18at169-71), which impacted his relationship with his attorneys. This rendered him incapable of trusting them since he believed they were part of a conspiracy to frame him for Debbie's death(ExhE-1at8-10).

The available evidence supports that Terrance was incompetent. He was born prematurely and was in fetal distress from infection in the womb(ExhEat14-17). His APGAR score was very low, 6, corroborating that distress and itself suggesting brain damage.(ExhEat18). He may have experienced brain trauma due to the infection and his difficult delivery.(ExhEat19). At 16-17 months, Terrance swallowed rubbing alcohol, and, although he ultimately regurgitated it, rubbing alcohol is toxic to the central nervous system.(ExhEat19-20). Terrance's school performance further documents his brain dysfunction. He struggled there, testing in only the fifth to sixth percentile in reading, eighth to tenth in English, and 25th in mathematics, this despite IQ testing once placing him between 95 and 98(ExhEat23-24).

Terrance had organic problems and suffered from long-term depression. Other family members, like his mother and maternal aunt, also experienced depression(ExhEat27-30). His depression was cyclical, manifesting itself most

significantly when his beloved grandfather died; when he flunked out of college; when he was asked to leave the Rainwaters' home, and when he faced the prospect of never seeing his daughter again.(ExhEat29-31).

In the months preceding the Rainwaters' deaths, Terrance became increasingly suspicious, and, as he deteriorated into paranoia, he spiraled toward violence(ExhEat35-36). His paranoia continued post-offense, as he didn't trust those evaluating him or his lawyers(ExhE-1at6). He was also delusional, believing he did not shoot Debbie Rainwater and his lawyers were part of a conspiracy to frame him for it(ExhE-1at6-9). Since the evidence showed that Terrance had killed the Rainwaters, his insistence that someone else killed Debbie did not "give his attorney a relatively accurate description of what went on at the time."(ExhQ-18at101).

No evidence supports the Court's finding and it further erred in not holding a competency hearing when counsel initially raised the issue. Despite counsel's repeated insistence that Terrance was **not** competent, the court refused to hold a hearing on the matter until finally, post-trial, it heard evidence. Due process required that the court conduct a competency hearing, even on its own motion, upon a *bona fide* doubt of Terrance's competence. *Pate v. Robinson*, 383U.S.at385; *Drope*,420U.S.at180. Its essentially retrospective hearing about competency, held during the sentencing hearing, didn't solve the problem, *see Pate*; *Dusky*, 362U.S.at403, since Terrance had already been forced to proceed to trial, unable to assist counsel in any meaningful way. And, since Terrance was incompetent, his sentencing was also defective since he could not assist counsel during that critical stage either.

Terrance was incompetent to assist counsel and Judge Syler erred in not holding a competency hearing pre-trial. This Court must reverse and remand for a new trial, consistent with §552.020RSMo.

III. THE STATE HAD TWO EXTRA PEREMPTORIES

The trial court abused its discretion in overruling Terrance's objections and striking Thelma Irwin and Lori Light for cause because this denied Terrance due process, a fair and impartial jury and freedom from cruel and unusual punishment, U.S.Const.Amends.V, VI,VIII,XIV, Mo.Const.Art.I,§§10,18(a)21, in that Ms. Irwin ultimately stated that she could set aside her beliefs and fulfill her duties as foreperson and, although Ms. Light initially stated she would require more evidence than beyond a reasonable doubt, upon hearing that she would have to be "firmly convinced," agreed to abide by that standard and fairly consider both punishments. Their initial difficulties would not prevent or substantially impair them from abiding by their oath and the instructions.

Over objection, the court struck Jurors Irwin and Light for cause(T466-67,655-56;LF945). The State asserted Ms. Irwin's purported refusal to sign a death verdict disqualified her from service(T466). It asserted Ms. Light's "reluctance or inability to sign a death verdict" was never rehabilitated, and she would require more evidence than beyond a reasonable doubt(T655). Irwin and Light did not hold these views and they were not disqualified. The court abused its discretion in striking them for cause. This violated Terrance's state and federal constitutional rights to due process, a fair, impartial jury, and freedom from cruel and unusual punishment.

Cause challenges will be sustained if it appears that the venireperson can't consider the entire range of punishment, apply the proper burden of proof or follow the court's instructions. *State v. Smith*, 32S.W.3d 532,541 (Mo.banc2000); *State v. Rousan*,

961S.W.2d 831,839 (Mo.banc1998). These rulings won't be disturbed on appeal unless they are clearly against the evidence and constitute a clear abuse of discretion. *State v. Kreutzer,* 928S.W.2d 854,866(Mo.banc 1996).

When Ahsens asked if Irwin could vote for death, the following occurred:

A:I don't know. I've been a nurse for 40 years saving lives, and I just don't know if I could do that.

Q:…Are you telling me that you're going to want proof that is in excess of proof beyond a reasonable doubt before you could consider and vote for the death penalty?

A:I don't know. I just don't know if I could then or not. I just don't know how to answer it. I don't know if I could or not.(T443-44).

Later, Ahsens inquired:

Q:Could you sign a death verdict?

A:No, I could not do that.

Q:I take it that that is something that would not be, that has no bearing on what the evidence is. You just can't sign it no matter what the evidence might be?

A:Right.(T449).

During defense voir dire, the following occurred:

Q:Would you still be able to consider a life imprisonment sentence?

A:Life imprisonment, yes…..

Q:…but if you were to sit on this jury, could you set aside your personal views and follow the law and obey the law as given to you by his Honor, Judge Syler, and set aside your personal views if you're selected to serve on this jury?

A:I would have to.

Q:And you would be willing to do that?

A:Yes.

Q:And assuming you were sitting on, one of the final 12 who sat on this jury and your fellow jurors felt so much of you that they selected you as the foreperson, would you follow your duties as a foreperson even though you felt uncomfortable doing so?

A:Yes.

Q:And you would be willing to set aside your personal—Would you be able to set aside your personal views and fulfill your duties as foreperson if selected?

A:I would try very hard. I would have to.

Q:And I guess that's all that's asked of any juror, to do your best and follow the instructions of the Court. And you believe you can do that?

A:Yes.(T459-60).

Irwin never stated that she could not impose the death penalty or that she would require the State to prove its case by more than proof beyond a reasonable doubt(T443-44). And, although at first she said she could not sign the verdict as foreperson(T449), she ultimately stated that she would follow the law and instructions and "would have to" fulfill her duties by following the court's instructions(T459-60). Thus, the State's

assertion that she was disqualified because "she said she could not sign a death verdict"(T466) was erroneous.

Irwin was not disqualified from serving on Terrance's jury. She would only have been disqualified had her views prevented or substantially impaired her from following the law and abiding by her oath. *Wainwright v. Witt*, 469U.S.412,423(1985). Clearly, she expressed no inability to impose either sentence. And, as to her ability to sign the verdict, although initially she expressed hesitation, she ultimately stated she would follow the law and could sign the verdict.

This is not, as the State attempted to characterize Irwin's responses, a case of a juror who could not sign a death verdict. This Court's holding that an unequivocal statement that a juror could not sign a death verdict alone disqualifies her, *State v. Smith*, 32S.W.3d532,545 (Mo.banc2000), thus is inapplicable.

In *Smith*, this Court indicated that an inability to serve as foreperson "hints at an uncertainty" about her ability to consider both punishments. *Id.* at 545. Undoubtedly, the State will argue that Irwin's statements "hint at an uncertainty" about her ability to consider both punishments. Indeed, Irwin initially stated "I don't know" if she could impose death, although she ultimately clearly stated that she could follow the law and impose either punishment. And, if this Court chooses to look at her initial statements in isolation, and disregards the totality of her responses, *State v. Ervin*, 979S.W.2d149,155 (Mo.banc1998), it might conclude that her responses hint at uncertainty. Even were it to make this finding, Irwin is not properly challengeable for cause. A *hint* of uncertainty may warrant a peremptory strike but it doesn't meet the constitutional standards for

disqualification. After all, opposition to the death penalty "hints at an uncertainty" yet, not "all who oppose the death penalty are subject to removal for cause…." *Lockhart v. McCree*, 476U.S. 162,176(1986).

Disqualifying Irwin based on this record is akin to removing a juror because she would be "affect[ed]" by the possibility of imposing death. Removing that juror would be unconstitutional since her views merely demonstrated she "would view [her] task 'with greater seriousness and gravity.'" *Adams v. Texas*, 448 U.S. 38,49(1980). She is not unwilling or unable to follow the law or abide by her oath. *Id.*

Ms. Light poses similar issues. On the state's voir dire, the following occurred:

Q:Could you sign a death verdict?

A:God, I don't know…Probably no.

Q:…you have very severe reservations about the death penalty?…

A:Yes.

Q:…am I correct in my understanding that you do not think that you could vote for the death penalty upon reflection?

A:I just don't know. I just—I guess if it was bad enough, maybe I could, but—

Q:…Since you have some discomfort about the death penalty, would you want me to prove my case as to whether the defendant is guilty or not guilty by evidence that is more than evidence beyond a reasonable doubt? Because you know if you find him guilty, you then are going to have to face the death penalty question.

A:…Yes, I guess.(T605-06).

When defense counsel began his voir dire, he explained as follows:

Q:Were you able to hear the Court's instruction concerning the burden of proof that rests with the State?

A:(Nods head).

Q:And do you understand that meant to be firmly convinced?

A:(Nods head).

Q:…and if you were firmly convinced that indeed murder in the first degree was the crime committed, would under those circumstances you be able to consider either punishment?

A:Yes.

Q:…maybe I got the impression you had said you would want more than beyond a reasonable doubt, but so long as you understand the term "firmly convinced" to mean beyond a reasonable doubt. If you were firmly convinced, that would be adequate for you?

A:Yes.

Q:Okay. And you would hold the State to that same burden as in the penalty phase? That is, you would require the State to prove the existence of any aggravating circumstance so that you were firmly convinced as to their existence?

A:Yes.

Q:…So when you got to that third step, the weighing process, and then the fourth step, the decision, if you were holding the State to that burden of making sure you were firmly convinced, you'd be able to fairly—would you be able to fairly consider either punishment?

A:Yes.(T633-35).

The state moved to strike Ms. Light, saying she equivocated and "finally said that she would require more evidence than that required of the State. She said she probably could not sign a death verdict."(T655). Defense counsel noted that, upon clarification, Light said she wouldn't require more evidence and could consider either punishment.(T655-56). Counsel further noted that an inability to sign the verdict is not a basis for a cause strike under *Wainwright v. Witt*.(T656).

The record clearly demonstrates that, when the meaning of "beyond a reasonable doubt" was clarified, Light affirmed she would follow that standard. She was not, as the state asserted, a person unable to follow the law.

The state's reliance on Light's alleged inability to sign a death verdict is also insufficient to sustain its cause strike. This Court, in *State v. Smith, supra,* held that an unequivocal statement that a juror could not sign a death verdict alone disqualifies her from service. *Id*.at545. Light's statement that "probably" she couldn't sign a death verdict cannot in any way be styled an "unequivocal" statement to that effect. Further, were this Court somehow to call Light's statement unequivocal, it would nonetheless be insufficient to support a cause strike. In *Smith*, this Court indicated that an inability to serve as foreperson, and thus to sign the verdict, "hints at an uncertainty" about the ability to consider both punishments.*Id*.at545. Here, however, Light that she could consider both punishments. She told the state that, if the facts were "bad enough" she could impose death, and she told the defense that she could consider either punishment(T605-06,633-35).

Gray v. Mississippi, 481U.S.648(1987) is particularly instructive on the strikes of both women. There, Juror Bounds "[could not] make up her mind," she "[was] totally indecisive … say[ing] one thing one time and one thing another." *Id.*at655,n.7. She "ultimately stated that she could consider the death penalty in an appropriate case…." *Id.*at653. Her "somewhat confused" answers "hint[ed] at an uncertainty," and she probably would not have been the most helpful juror for the State. But, that did not make her subject to a cause challenge. "[She] was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria" *Id.*at659, since she was not irrevocably committed to vote against the death penalty, regardless of the facts and circumstances. *Id.*at657-58.

A juror who "opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Witherspoon v. Illinois*, 391U.S.510,519(1968). By removing jurors like Irwin and Light, the State creates a process in which the scales are deliberately tipped toward death. *Id.*at521-22,n.20. Defendants cannot "constitutionally be put to death at the hands of a tribunal so selected." *Id.*at522-23.

Irwin was not disqualified from service since, despite her initial hesitancy, she never indicated an inability to impose the death penalty and she ultimately stated she could sign a death verdict if she were chosen as foreperson. Light was not disqualified from service since, just like Juror Bounds, despite "equivocation"(T655) or being "totally indecisive," *Gray*,481U.S.at655n.7, she was not "irrevocably committed to vote against the death penalty, regardless of the facts and circumstances." *Id*.at657-58. The court's

strikes of Irwin and Light violated Terrance's right to an impartial jury. This structural error cannot be deemed harmless. *Gray*,481U.S.at668.

By improperly granting the State's cause challenges, the court "in effect afforded the prosecution [two] additional peremptory challenge[s]." *People v. Lefebre*, 5 P.3d 295,298(Colo.2000). This Court must reverse Terrance's death sentence and remand for a new penalty phase.

IV. BILLING RECORDS UNLAWFULLY ACCESSED

The trial court erred in denying defense motions to preclude use of confidential public defender billing records and for new trial; granting the state's motions to quash subpoenas of Messrs. Ahsens and Dresselhaus, and letting the state utilize those billing records to Terrance's detriment, because these rulings denied Terrance due process, equal protection, a fair trial, effective counsel and freedom from cruel and unusual punishment, U.S. Const.,Amends., V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),21, in that the Attorney General's Office obtained confidential billing records of the Public Defender System pertaining to Dr. Lewis throughout her association with the System. Such records were only available to the Attorney General's Office because Terrance and other similarly-situated persons are poor, within the meaning of Chapter 600 RSMo. No statutory authority permitted the release of those records, and the Rules of Professional Responsibility were violated by their release. The state improperly used the information it gathered through those records to malign defense experts, calling them "mercenaries" and suggesting they should not be trusted and Terrance should be blamed for the money that, over the course of many cases, they had received from the Public Defender System.

Because Terrance was poor and couldn't afford private attorneys, the Public Defender was appointed to represent him in this capital case. Little did he know that his poverty would be a sword used against him to encourage the jury to disregard and denigrate his defense. Since the Public Defender is a state agency, it must submit billing

requests, including for expert witnesses, to the Office of Administration. And, from that agency, the Attorney General's Office obtained the billing records from Terrance's case, and from many others. The state used those records against Terrance to destroy the credibility of his experts and his defense. The trial court took no action to stop the state's flagrant disregard for confidentiality, ethical responsibilities, and Terrance's state and federal constitutional rights to due process, equal protection, a fair trial, effective counsel and freedom from cruel and unusual punishment. Despite the state's obligation to do nothing to deny Terrance a fair trial and to ensure that justice be done, not just a conviction won, *Berger v. United States*, 295 U.S. 78,88(1935); *State v. Tiedt*, 357 Mo. 115, 206S.W.2d524,526-27(banc 1947), it committed misconduct by illegally accessing confidential billing records. This Court must grant Terrance a new trial.

On December 19, 2000, approximately one month pre-trial, the parties were taking Dr. Dorothy Lewis's deposition because she would not be personally available for trial. (ExhE). Charlie Moreland, Terrance's attorney, and Bob Ahsens, an Assistant Attorney General representing the state, were present. Over objection, Ahsens cross-examined Dr. Lewis about Exh100, a packet of documents that he had obtained from the Office of Administration "having to do with payments made to Dr. Lewis for her services in various cases including this one."(ExhEat62). On January 17, 2001, as the parties prepared for trial, Moreland filed a *Motion to Preclude Use of Confidential Public Defender Billing Records*(LF905-10). Co-counsel informed Judge Syler that the state had illegally accessed confidential records(T337-38).

Before Dr. Lewis's deposition was played for the jury, Moreland again objected to the state's having obtained the records and to any mention of them to the jury(T1490-91). Moreland also objected to the jury seeing the written documents, including the state's summary, since they contained confidential information about Terrance, and referred to many other Public Defender clients(T1491-92).

Dr. Lewis's video-deposition was played (T1499;ExhD) and the jury heard about the billing records in great detail. They heard the total amount that Dr. Lewis had billed the public defender—not just in Terrance's case but in all of her cases with the Public Defender. They heard that, from early 1998 through March, 2000, she had received over $142,000.00(ExhD).

In Ahsens' guilt phase final closing, he told the jury that it couldn't believe Terrance's defense. He said, to find for Terrance,

> [y]ou have to believe the hired mercenaries from the East Coast…what they're asking you to do is based on nonsense, and it's based on information that should not, and, I submit, you cannot believe. The reason I say that is simple. You heard Dorothy Lewis. She has a vested interest in coming to the right conclusions to the tune of about $70,000 a year. And Dr. Pincus gets about, up to $5,000 a case, and these two people are going to come to the right conclusions. And as you saw from the cross examination, they have done so many times. They are mercenaries, and they are not worthy of belief.(T1628-29).

After trial, because he had alleged in the new trial motion that Public Defender billing records were improperly obtained by the Attorney General's Office, counsel

noticed up his intent to depose Ahsens and Ahsens' investigator, Joe Dresselhaus(LF1084). Counsel stated that Ahsens should produce at the deposition a true and correct copy of State's Exhibit 100; copies of all warrant requests, bills and documents from the Public Defender to the Office of Administration in the possession of the Attorney General's Office and about any witness in Terrance's case; any correspondence—written, electronic or digital—with the Office of Administration from the Attorney General's Office requesting warrant requests and bills of the Public Defender, and the identity of the employee who obtained the documents. (LF1090-92).

In response, Ahsens moved to quash the notice of deposition and the subpoenas to attend(LF1095-97). Ahsens asserted that the defense had moved to preclude the state from using the billing records to "impeach [Dr. Lewis's] testimony"(LF1095). He noted the court had denied the motion and Dr. Lewis's video deposition, which was played for the jury, "included the impeachment with the records showing she had received from the Missouri Public Defender's Office payments in excess of $134,000.00 in this and other cases, in a period of less than two years."(LF1095). Ahsens asserted the documents were public record and disclosing how they were obtained would violate work product(LF1096).

Counsel responded that, since the right to depose witnesses is absolute in criminal cases, *State ex rel. King v. Turpin*, 581 S.W.2d 929,030 (Mo.App.,E.D.1979), the court could not preclude Terrance from deposing Ahsens and Dresselhaus(LF1098). Counsel further noted that Exh100 contained much more than billing records on Dr. Lewis. It also contained attorney performance reviews; an attorney's letter requesting reimbursement

for bus tickets in another case; a Missouri Lawyer's Weekly invoice, and mental health records and reports from *State v. Alis Ben Johns*(LF1099-1100). Moreover, counsel stated, despite Ahsens' claims that the documents were "public record," §§600.091 and 610.021(14)RSMo clearly demonstrate they were protected from disclosure(LF1100-01). Finally, he stated, despite Ahsens' assertion of work product protection, none of the information requested could even remotely be classified as such(LF1101-02).

At a hearing on April 9, the court considered Ahsens' motion to quash. After argument(T1767-71), it denied the defense request to take depositions and granted Ahsens' motion(T1773;LF1104).

In May, 2001, counsel again attempted to subpoena Dresselhaus for deposition(LF1105-06). The state again moved to quash(LF1107-09). Counsel responded by noting that the state's opinion that the billing records were "public records…available to the public" was just that—an opinion—and noted that the question was squarely presented to Judge Kinder in Cole County Circuit Court(LF1111).[2] After renewed argument, the court again granted the state's motion to quash(T1785).

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[2] On October 2, 2001, Judge Kinder ruled in favor of the Public Defender, ordering that, except as otherwise required by law, the Office of Administration not disclose to the Attorney General's Office or any other prosecuting authority "the invoices, billing statements, and records submitted to the Office of Administration by the Office of the State Public Defender for services rendered by experts made in connection with cases handled by the Office of the State Public Defender. Such records are hereby deemed

The trial court erred in repeatedly quashing the defense notices of depositions and subpoenas to attend depositions issued to Ahsens and Dresselhaus. Rule 25.12 provides, "A defendant in any criminal case pending in any court may obtain the deposition of any person on oral examination or written questions." "Without question, the right of a party to depose witnesses and as such adverse parties is an absolute one." *State ex rel. Von Pein v. Clark*, 526 S.W.2d 383, 385-86(Mo.App.,K.C.D.1975)(emphasis added). Indeed, it has been referred to as a "right" *State ex rel. Houser v. Goodman,* 406 S.W.2d 121,125 (Mo.App.,Spfd.D.1966).

The right to depose witnesses has been limited only if, to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, the court issues a protective order. *Id.* Even then, courts are hesitant to interfere with a party's right to take depositions. *State ex rel. Chaney v. Franklin,* 941 S.W.2d 790,793(Mo.App.,S.D.1997). Quashing subpoenas for deposition may deny due process, *Norkunas v. Norkunas*, 480 S.W.2d 92,94(Mo.App.,St.L.D.1972), and may implicate the right to present a defense and to rebut the state's case. *See Gardner v. Florida,* 430U.S.349(1977); *Green v. Georgia,* 442U.S.95(1979).

Here, the state's sole argument in support of its position was that the documents it had obtained were "public record." Thus, it asserted, the defense attempt to depose

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closed under Chapter 610, RSMo 2000, and Section 600.091 RSMo 2000." *State ex rel. Robinson v. Office of Attorney General,* No.01-CV-323933 (Cole County, October 2, 2001)(available on Case.net).

Ahsens and Dresselhaus was inappropriate. The state's argument and the court's ruling miss the point.

Rule 25.05 requires that, subject to protective orders and constitutional limitations, defendants disclose certain information to the state without court order. Among those items are "any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, which the defense intends to introduce into evidence at a hearing or trial…." If the state shows "good cause," and subject to constitutional limitations, the court may require the defense to disclose additional information not covered under Rule 25.05. *Rule 25.06.* Rule 25.06 sets forth how the defense is notified of the information that the state seeks so it can object to disclosure. Rule 25.10(A) provides that matters including "legal research, or records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of counsel" are not subject to disclosure.

The state's actions attempt to end-run Rules 25.06 and 25.10(A) since the information it obtained from the Office of Administration would not have been available absent court order. The records of expert invoices held by the Office of Administration may show more than just how much money was paid for work the Public Defender requested. They often reveal confidential information the State is not entitled to receive. For example, the mere fact that an expert was retained is privileged, unless that expert will be used at trial. Under Chapters 600 and 610, that information is protected from disclosure.

Section 600.091 mandates that "the files maintained by the state public defender office which relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, the commission, or the director." (emphasis added). Section 610.021 further provides that, "except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close … (1) any confidential or privileged communications between a public governmental body or its representatives and its attorneys…(14) Records which are protected from disclosure by law." Thus, the Legislature has ordered that documents such as those accessed by the Attorney General's Office in this case be considered confidential, not available without court order.

Terrance is represented by the Public Defender System because he is poor. The Public Defender System is required, as a state agency, to submit its bills for payment to the Office of Administration. *§33.030(3)RSMo* Only because Terrance is poor was the Attorney General's Office able to access confidential information without obtaining a court order. This violates equal protection. The bottom line is that the quality of justice available cannot depend on the defendant's pocketbook. "To require indigent defendants to [reveal their witnesses or defense] would penalize them for their poverty." *United States v. Abreu,* 202 F.3d 386,391 (1st Cir.2000).

Terrance's right to effective, conflict-free counsel is also denied by giving the Attorney General's Office unfettered access to Public Defender confidential records. Terrance is clearly entitled to the effective assistance of counsel, *Strickland v. Washington,* 466 U.S. 688 (1984); *Gideon v. Wainwright*, 372 U.S.335 (1963), and, if

that assistance is denied, so is due process. Allowing the state such access intrudes on counsel's ability to consult with expert witnesses—who must be paid. It also impacts counsel's decision, in the exercise of professional discretion, not to call them. This effectively and improperly requires disclosure of confidential experts consulted with but not called to testify. *State ex rel. Richardson v. Randall*, 660 S.W.2d 699 (Mo.1983). It also effectively destroys the right to *ex parte* consultation with experts by indigent defendants. *Ake v. Oklahoma*, 470U.S.68(1985). It leads counsel to second-guess whether they will consult with an expert at all, since that consultation alone will be an open-book to opposing counsel. This strikes at the very heart of the adversarial system.

The records the Attorney General's Office obtained were clearly not subject to disclosure, and Judge Syler erred in precluding the defense discovery request. The question becomes whether Terrance was prejudiced by the state's actions.

Ahsens told the jury to ignore Drs. Pincus and Lewis's testimony, not just because of the payments they received here, but also because of the payments they received over the years from the Public Defender System. They are "mercenaries" and will say anything for money. This is problematic on several levels.

First, while an expert witness may generally be cross-examined about how much she received for "testifying" in that particular case, the amount received in prior cases is generally not a proper subject for cross-examination unless it "bears materially on the interest of the witness in the case in litigation" and the prejudice from the questions doesn't outweigh its probative value. *Elam v. Alcolac, Inc*, 765 S.W.2d 42,199 (Mo.App.,W.D.1988). Suggesting Dr. Lewis's billing to the Public Defender over

several years, and encompassing work with several clients "bears materially" on her "interest" in this case is, to quote Mr. Ahsens, "spurious." Further, to suggest that physicians such as Dr. Lewis are unethical because they charge for their professional services is contrary to Rule 4—Appendix 2. It notes, "The physician is entitled to reasonable compensation" for her services, which are "proper and necessary items of expense in litigation involving medical questions." Thus, the argument is itself antithetical to the Rules of Professional Conduct.

Terrance's defense was critically damaged by the Attorney General's Office's actions accessing the Public Defender's confidential billing records. This Court must reverse and remand for a new trial, at which the State is precluded from using both those billing records and any information that it received as a result of its end-run of this Court's rules of discovery.

V. IMPROPER ARGUMENT INFECTED THE TRIAL

The trial court plainly erred in not *sua sponte* declaring a mistrial when the state improperly argued:

GUILT PHASE

1. "…and I'm sure the defense will argue to you the defendant is not guilty of anything because they're challenging whether he knew what he was doing was practically certain to cause death."(T1598);

2. "The only thing that is surprising in this incident is that the body count isn't any higher than it is. If he had more time, I think we would have had a lot more dead people there. But we got lucky."(T1604).

3. "…in order to find as the defendant just asked you to find, I want you to keep in mind what you must do. You have to believe the defendant. You have to believe the hired mercenaries from the East Coast." And "the idea that he has a mental disease is nonsense. Remember who you have to believe in order to find that one exists: the highly paid experts in the employ of the Public Defender's Office…."(T1628,1634).

4. "At least they admit it's second-degree murder. So, I suppose the instructions indicating he didn't know what he was doing are something that they don't believe you should consider too carefully." (T1629).

5. "He didn't support that baby's head, at least not good enough the way I was taught."(T1633).

6. "…I think one of the things that probably irritated me when I was listening was this reference to the defendant being broken."(T1634).

7. "…as I've said once before, the only surprise here is that we don't have more bodies on the floor than we did."(T1635).

PENALTY PHASE

1. "12 of you have been asked to make this decision, and that will be hard for the 12 of you, but if you can't make it, it falls to one man, the judge in this case, and as hard as it will be for you, let's not lay it on a single man's shoulders, okay?"(T1721);

2. "…one of the biggest factors you have to consider is what is the best way to protect society as a whole, and I submit to you that the best way to protect society as a whole is to place that man where he can do no more harm. That is on death row until he is executed. Put him beyond any ability to harm anyone else."(T1723);

3. "But I know those in my generation at 21 and 22 were wearing the same color clothes to work every day and leading men into a lot of situations, including combat."(T1723);

4. "…He is going to have repeated and daily contact with other prisoners and guards. What happens if he gets mad at one of them? The most restrictive environment possible and the safest with one we fear may do this again is death row until he's executed."(T1735);

5. over objection, "But have you been watching the defendant here? Have you seen a tear for Stephen or Deborah Rainwater?"(T1736);

6. "As a much smarter man than I once said, the only thing that is necessary for evil to triumph is for good men, and I suggest and good women, to do nothing. I suggest to you that you dare not do nothing."(T1738)

because these arguments denied Terrance due process, a fair trial and freedom from cruel and unusual punishment under U.S.Const., Amends.V,VI,XIII, XIV; Mo.Const.,Art.I §§10,18(a),21 in that they were contrary to the evidence and the law; were speculative; referred to facts not in evidence; converted the prosecutor into an unsworn witness; denigrated defense counsel and defense experts; suggested ultimate sentencing responsibility could lie elsewhere; referred to Terrance's failure to testify, and misstated the jury's duty.

The prosecutor's improper argument in both phases of Terrance's trial was unconstitutional because it "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637(1974). The prosecutor inflamed the jury by his argument, thus depriving Terrance of a fair trial, prejudicing the jury, ultimately leading to a wrongful death sentence. *Berger v. United States*, 295 U.S. 78,88(1935); *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524,536-37(banc1947). Because these arguments denied Terrance's state and federal constitutional rights to due process, a fair trial and freedom from cruel and unusually punishment, this Court should reverse and remand for a new trial.

Since Terrance's attorneys did not object to most of the prosecutor's outrageous arguments, although they challenged them pre-trial in a motion in limine, (LF278-93) and then referenced them in the new trial motion (LF1079,1081), plain error review is requested. Rule 30.20. A manifest injustice or a miscarriage of justice will result if these arguments are allowed to go uncorrected.

Guilt Phase

In guilt phase closing, Ahsens argued:

> The only thing that is surprising in this incident is that the body count isn't any higher than it is. If he had more time, I think we would have had a lot more dead people there. But we got lucky.(T1604)

Then, in final closing, he reiterated:

> …as I've said once before, the only surprise here is that we don't have more bodies on the floor than we did.(T1635).

Despite no evidence that Terrance intended or attempted to kill anyone else; despite evidence that, when he was told to put down the gun and surrender, he did so (T1047,1077,1095,1107), and despite that Terrance had only been charged with two counts of murder, the prosecutor suggested that only by the grace of God were more people not killed. His argument was pure speculation, invoked the spectre of other bad acts, and thus inflamed the passions and prejudices of the jury. *State v. Burnfin*, 771 S.W.2d 908,911 (Mo.App.,W.D.1989); *State v. Trimble*, 638 S.W.2d 726,732 (Mo.banc1982); *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc1995). Further, the argument was irrelevant since the sole issue in guilt phase was whether Terrance had

committed the charged offenses, not whether, given a chance, he might have committed other offenses. *See Stevinson v. Deffenbaugh Ind.*, 870 S.W.2d 851,860 (Mo.App.,W.D.1993); *Pernoud v. Martin*, 891 S.W.2d 528,538(Mo.App.,E.D.1995).

The prosecutor also argued, first in closing,

> …and I'm sure the defense will argue to you the defendant is not guilty of anything because they're challenging whether he knew what he was doing was practically certain to cause death.(T1598)

and then in final closing,

> At least they admit it's second-degree murder. So, I suppose the instructions indicating he didn't know what he was doing are something that they don't believe you should consider too carefully(T1629).

Ahsens knew full-well that the defense's theory throughout trial was that Terrance had committed the acts but could not deliberate(seeT1023-25). His arguments sought to mislead the jury about the issue that the defense had presented, suggesting that their argument was, contrary to the evidence, that Terrance had not participated in the offenses, and by telling the jury that the defense wanted them to ignore the instructions. *State v. Storey*, 901S.W.2d at 901; *Tucker v. Kemp*, 762 F.2d 1496,1507(11thCir.1985); *Drake v. Kemp*, 762 F.2d 1449,1458-59(11thCir.1985)(enbanc).

Ahsens also repeatedly inserted himself into the case, converting himself into an unsworn witness. He told them:

> He didn't support that baby's head, at least not good enough the way I was taught(T1633).

And

> …I think one of the things that probably irritated me when I was listening was this reference to the defendant being broken.(T1634).

A prosecutor may not personalize the case to himself. His statement of personal opinion tends to carry weight when it should not, just because he is acting as an elected official, and suggests that he has outside, additional knowledge. *State v. Storey,* 901 S.W.2dat901; *Brooks v. Kemp*, 762 F.2d 1383,1408 (11thCir.1986).

The prosecutor's comment about how Terrance held Kyra also improperly suggested Terrance committed other bad acts for which the jury should penalize him. *State v. Burnfin*, 771 S.W.2dat911.

Ahsens also argued repeatedly, denigrating the defense and defense experts,

> …in order to find as the defendant just asked you to find, I want you to keep in mind what you must do. You have to believe the defendant. You have to believe the hired mercenaries from the East Coast.(T1628)

and

> the idea that he has a mental disease is nonsense. Remember who you have to believe in order to find that one exists: the highly paid experts in the employ of the Public Defender's Office…. (T1634).

Ahsens had obtained Public Defender billing records from the Office of Administration without first obtaining a court order. He accessed information about this and a multitude of other cases on which experts in Terrance's case had worked(Exh100)(see Point IV infra). He adduced that Dr. Lewis had billed the Public Defender $142,767.19 from

January 1998 to March, 2000(Exh100;ExhEat62-68). Yet, as the records demonstrated, the vast majority of those charges were for other cases.

The prosecutor's references to Drs. Lewis and Pincus as "mercenaries" were contrary to the evidence, improperly suggesting that their total charges to the Public Defender were due to Terrance's case. *Tucker v. Kemp*, 762F.2dat1507; *Drake v. Kemp*, 762 F.2dat1458-59. They were also improper because they encouraged the jury to condemn Terrance for exercising his right to a trial—with attorneys who investigated issues, hiring experts to explain issues to judges and juries. *See Chapman v. California*, 386 U.S. 18(1967); *Darden v. Wainwright*, 106 S.Ct. 2464(1986); *Doyle v. Ohio,* 426 U.S. 610(1976); *State v. Elmore,* 467 S.W.2d 915(Mo.1971). Did the state honestly believe that these doctors should work for free? Or that a defendant should not obtain expert assistance?

Penalty Phase

Closing arguments in capital cases must undergo a "greater degree of scrutiny." *Caldwell v. Mississippi*, 472 U.S. 320,329(1985); *California v. Ramos,* 463 U.S. 992,998-99(1983).

Ahsens argued:

> 12 of you have been asked to make this decision, and that will be hard for the 12 of you, but if you can't make it, it falls to one man, the judge in this case, and as hard as it will be for you, let's not lay it on a single man's shoulders, okay?(T1721,emphasis added).

He thus planted the seed for the jury that the ultimate responsibility for sentencing lay, not with them, but with the judge. This rendered the sentencing process inconsistent with the Eighth Amendment's need for heightened reliability in determining punishment. *Caldwell v. Mississippi*, *supra.*

Ahsens argued:

> But I know those in my generation at 21 and 22 were wearing the same color clothes to work every day and leading men into a lot of situations, including combat.(T1723).

This argument improperly argued facts not in evidence, *State v. Storey*, 901 S.W.2dat901, made the prosecutor into an unsworn witness, and inflamed the jury's passions and prejudices against Terrance, causing them to compare him unfavorably to young men who served in the military. *State v. Raspberry*, 452 S.W.2d 169 (Mo.1970).

Ahsens also argued:

> …one of the biggest factors you have to consider is what is the best way to protect society as a whole, and I submit to you that the best way to protect society as a whole is to place that man where he can do no more harm. That is on death row until he is executed. Put him beyond any ability to harm anyone else.(T1723)

and

> …He is going to have repeated and daily contact with other prisoners and guards. What happens if he gets mad at one of them? The most restrictive environment possible and the safest with one we fear may do this again is death row until he's executed.(T1735).

These outrageous arguments improperly inserted facts not in evidence, painting a picture for the jury of conditions on death row. *Tucker v. Kemp*, 762 F.2d at 1507; *Drake v. Kemp*, 762 F.2d at 1458-59. They also misled the jury, by telling the jury to sentence Terrance to death because only there would he be isolated from prisoners and guards alike. Nothing is further from the truth. Missouri has no "death row." Capitally-sentenced defendants are in general population at the Potosi Correctional Center.

Ahsens also misled the jury about the law. *Tucker v. Kemp*, 762 F.2dat 1507; *State v. Storey*, 901 S.W.2dat901.

> As a much smarter man than I once said, the only thing that is necessary for evil to triumph is for good men, and I suggest and good women, to do nothing. I suggest to you that you dare not do nothing.(T1738).

Ahsens thus told the jury that sentencing Terrance to life without parole was "doing nothing," something clearly contrary to the statute and the instructions. He also improperly suggested that the jury would be weak if it failed to return a death verdict. *State v. Rousan*, 961 S.W.2d 831,851(Mo.banc1998).

Finally, he argued, over objection:

> But have you been watching the defendant here? Have you seen a tear for Stephen or Deborah Rainwater?(T1736).

The trial court overruled the objection that the argument commented on Terrance's lack of remorse (T1736), argument condemned in *Owen v. State*, 656 S.W.2d 458 (Tex.Crim.App.,1983); *State v. Hawkins*, 357S.E.2d 10(S.C.1987) and *State v. Diddlemeyer*, 371 S.E.2d 793(S.C.1988). The argument was also erroneous, however,

because it commented on Terrance's failure to testify. *Griffin v. California*, 380 U.S. 609, 615(1965); *State v. Parkus*, 753 S.W.2d 881(Mo.banc1988); *De los Santos v. State*, 918S.W.2d 565,570-71(Tex.App.,San Antonio1996).

The prosecutor's repeated, highly improper arguments rendered both phases of Terrance's trial unreliable. This Court must send a message, by reversing and remanding for a new trial or, at least, a new penalty phase. If not, prosecutors will continue to push the envelope of proper advocacy, viewing this Court's condemnation of improper argument merely as "empty threats." *State v. Santros*, 499 N.W.2d 815, 816-17(Minn.1993).

VI. IMPROPER COMMENTS ON FAILURE TO MAKE STATEMENTS

The trial court erred and plainly erred in overruling defense objections and not *sua sponte* declaring a mistrial when the prosecutor elicited from Officers Clark and Jefferson that, after Terrance was *Mirandized* and while in custody, he told the officers nothing because this denied Terrance due process, a fair trial, the right to remain silent, and freedom from cruel and unusual punishment, U.S.Const.Amends., V,VI.XIII,XIV; Mo.Const.Art.1§§10,18(a),19,21, in that the testimony impermissibly referred to Terrance's invocation of his right to remain silent and suggested he remained silent because he had something to hide.

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, and Mo.Const.Art.I,§19 protect criminal defendants against compelled self-incrimination. This privilege prohibits inquisitions that compel defendants to admit guilt or to disclose thoughts. *Doe v. United States,* 487 U.S.201, 210-12(1988). To enforce that right, defendants must be informed of their rights to silence and counsel if they are in custody. *Miranda v. Arizona,* 384 J.S. 436,467-73(1966). If a defendant chooses to remain silent at arrest and after receiving *Miranda* warnings, it is fundamentally unfair, violating due process, to use his silence against him. *Doyle v. Ohio*, 426 U.S. 610,619(1976); *Brecht v. Abrahamson*, 507 U.S. 619,628(1993). "This rule rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *State v. Dexter,* 952 S.W.2d332,337(Mo.banc1997); citing *Wainwright v. Greenfield,* 474 U.S. 284,291(1986). "Silence" means not only standing mute but also a

statement of a desire to remain silent or to remain silent until an attorney is consulted. *Id.*at295n.13. As the Supreme Court has noted, "Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle v. Ohio*, 426 U.S.at617.

Missouri courts have followed *Doyle* in holding that post-*Miranda* silence cannot be used against defendants. *State v. Dexter, supra*; *State v. Zindel,* 918 S.W.2d 239 (Mo.banc1996); *State v. Tims*, 865S.W.2d 881(Mo.App.,E.D.1993). Improper use of post-*Miranda* silence may cause a manifest injustice, resulting in plain error. *State v. Dexter, supra*; *State v. Zindel*, 918S.W.2dat241;*see also State v. Flynn*, 875S.W.2d931 (Mo.App.,S.D.1994);*State v. Benfield*, 522S.W.2d830(Mo.App.,Spr.D.1975).

In guilt phase, the State called Officer Clark, who was first on the scene. Clark testified that, once Terrance had handed Kyra to Whitney, he laid down and was handcuffed(T1047). Clark and another officer walked him to the patrol car, "patted him down, checked his pockets and everything that he had on him, and [Clark] advised him of his constitutional rights"(T1047). Clark said they didn't then have a conversation and Terrance was "just hot and all sweaty"(T1047). The State then asked, "Did he say anything?"(T1047). Defense counsel's objection was overruled, and Clark answered that he did not(T1048).

In penalty phase, the defense called Corporal Jefferson, who testified that he couldn't believe that Terrance had killed these people because it was so out-of-character(T1687). On cross, the State asked how Terrance was acting when Jefferson

saw him in the station that night(T1688). Jefferson responded, "Solemn. He wasn't saying anything."(T1688). Counsel did not object to this testimony, although both instances are alleged as erroneous in the new trial motion(LF1064). Thus, plain error review is requested. *Rule 30.20.*

Clark and Jefferson's testimony highlighted for the jury that Terrance chose to remain silent after being *Mirandized*. Because his silence is "insolubly ambiguous," and was potentially an invocation of the rights of which he had just been informed, the State and the jury were entitled to draw no conclusions from it. The record thus establishes a *Doyle* violation.

The question becomes whether plain error has occurred. It has. This Court has said the test for determining if plain error occurred is whether: (1)the State made repeated *Doyle* violations; (2)the court took any curative action; (3)the defendant's exculpatory evidence is transparently frivolous, and (4)the other evidence of guilt is not overwhelming. *State v. Dexter*, 954S.W.2dat340.

Both Clark and Jefferson referred to Terrance's failure to make a statement—both when initially arrested and later at the station. Thus, in both guilt and penalty phases, the jury heard that Terrance had not made a statement. Exacerbating this problem was the prosecutor's penalty phase closing argument—in which he asked the jury if they had seen a reaction from Terrance(T1736). He suggested that, if Terrance's defense that his actions were completely atypical, he would have expressed remorse and apologized.

The trial court took no curative action in response to the evidence or the argument. Instead, it overruled defense objections to Clark's testimony and Ahsen's argument, thereby giving his imprimatur to both(T1048,1736).

Terrance's evidence was not "transparently frivolous." His defense in this case was **not** that he did not do the shootings. Rather, it was that he could not deliberate because of the severe depression and neurological damage from which he suffered (T1441-42,1444-45,1454) and from the heightened pressures under which he was operating that day—culminating with Abbey's statements to him that he would not see his daughter again, except under court order(T1454). His history and records supported the existence of long-term depression and frontal lobe damage, which rendered him unable to deliberate(T1454). Through this evidence, the defense mounted a legitimate challenge to the element of deliberation in first degree murder. Thus, the evidence of his guilt of first degree murder is clearly not overwhelming.

The defense challenged Terrance's mental state at the time of the crime. This evidence went directly to that element. Through reference to his failure to make a statement, the state implied Terrance was cool, calm and collected—that he **could** deliberate—and, in that state of mind, he chose not to make a statement. The officers' testimony and Ahsens' argument had a substantial and injurious impact on the jury's verdicts—in both phases. This is startlingly similar to what occurred in *State v. Zindel, supra.* Here, as there, the prosecutor essentially equated Terrance's silence with an aspect of his mental state. *State v. Zindel,* 918S.W.2dat241. As in *State v. Zindel*, this Court must, therefore, reverse and remand for a new trial.

VII. RACE PLAYED A ROLE

The trial court erred in denying Terrance's Motions to Dismiss the Information Due to Unconstitutional Discretion of Prosecutor in Seeking Death Penalty, to Preclude the State from Seeking the Death Penalty Because the Missouri Supreme Court's Proportionality Review is Unconstitutional; to Declare Imposition of the Death Penalty Unconstitutional As Racially Discriminatory and as Fundamentally Unfair; Challenging Cape Girardeau County's Jury Selection Procedures; to Submit a Jury Questionnaire; to Reconsider Submitting Jury Questionnaire and plainly erred in failing to declare a mistrial *sua sponte* when the prosecutor made gratuitous references to Terrance's race because these actions denied Terrance equal protection, due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),21, and §565.035.3RSMo, in that the evidence shows that the state sought death against Terrance, and the death penalty has been imposed against him at least in part because he is a black man who killed a white woman. This Court, in the exercise of its independent proportionality review must find that an arbitrary factor—race—played a role in the decision-making processes in this case and Terrance's death sentence should be reduced to life without parole.

Terrance Anderson is a black man. Deborah Rainwater was a white woman. Despite the assurances, implicit and explicit, in our Constitutions that race may not play a role in the quality or nature of justice dispensed in this country, race has played a role in Terrance's case. It influenced the prosecutor's decision to seek death and not offer a deal; it influenced how the jury was selected, and it influenced the jury's ultimate decision to execute Terrance for Debbie

Rainwater's death. Terrance has therefore been denied his state and federal constitutional rights to equal protection, due process, a fair trial and freedom from cruel and unusual punishment. This Court must reverse and remand for a new trial in which race does not play a role, or, alternatively, pursuant to its independent duty, under §565.035.3RSMo, to review death sentences, order him re-sentenced on Count II to life without probation or parole.

Under §565.020.2RSMo, if the State charges a defendant with first degree murder, only two penalties are possible—death or life without probation or parole. The prosecutor's discretion to waive the death penalty is not limited by statutory authority §§565.004;565.030RSMo. It is limited, however, by the constitutional prohibition of arbitrarily or capriciously inflicted punishments *Furman v. Georgia*, 408U.S.238(1972). A prosecutor has broad discretion to prosecute or not and to choose what to charge—those decisions rest entirely with him *State v. Murray*, 925 S.W.2d492,493(Mo.App.,E.D.1996); *State v. Patino*, 12S.W.3d733,739(Mo.App.,S.D.1999); *Bordenkircher v. Hayes*, 434 U.S. 357,364(1978). The exercise of that discretion may not, however, be "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." *Id., quoting Oyler v. Boles*, 368U.S.448,456(1962); *Wayte v. United States*, 470 U.S.598,608(1985).

Pre-trial, counsel moved to dismiss the information because of the prosecutor's unconstitutional discretion in seeking death(LF334-48). The court denied that motion(LF425). Immediately pre-trial, counsel moved to preclude the state from seeking death because racial bias was influencing its decisions(LF921-42). The court denied that motion also(LF921). The record supports that, in general, and here, specifically, the defendant's race influences the prosecutor's decisions in capital cases.

Mr. Ahsens, the Assistant Attorney General charged with prosecuting Terrance, allowed race to play a role in the case. In preparing for trial, Ahsens "annotated" a copy of Dr. Lewis's report that he subsequently sent to Dr. English(T362). Dr. Lewis's report stated, "At the time of my evaluation, Terrance Anderson was extremely suspicious and unwilling to share much with me. He confided to an attorney that he, like his stepfather, did not trust white people."(LF942). Next to that text, Ahsens had written, "likes white girls though"(LF942). Ahsens claimed that he had written the comment as a potential cross-examination point for the witness(T361). The trial court denied the motion, stating, "I can only presume that even if Mr. Ahsens was displaying the racial prejudice that you suggest, and I'm not saying that he is, it was wasted on Dr. English…."(T363).

The court missed the point. It was irrelevant to the charging decision whether English had read Ahsens' comments. It was highly relevant that Ahsens had made them since, if race influenced Ahsens' decision, it was constitutionally infirm.

Ahsens' actions are not, unfortunately, out-of-the-ordinary. On the contrary, they are typical. Statistical evidence demonstrates that

> blacks killing whites are the group of arrestees most likely to be convicted of capital murder overall, and are also very likely to be [sic] proceed to penalty trial…The greatest disparity is between inter- and intra-racial homicides involving black offenders. Blacks killing whites were 3.7 times more likely than blacks killing blacks to be convicted of capital murder overall, and 52% more likely to result in charge-conviction among the felony homicides. Once convicted, blacks killing whites were also more likely to proceed to penalty trial than blacks killing blacks.

(LF756—J. Sorensen, D. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 11 Behavioral Sciences and the Law 61,68(1995)). Significantly:

> [m]ost overall racial differences in the capital punishment process result from the discretion of prosecutors. There appears to be disparity among racial combinations in the prosecutorial decision to charge with capital murder, and in the prosecutor's decision to proceed to penalty trial after conviction. In each instance, with the exception of whites killing blacks, in proceeding to penalty trial, cases involving white victims were treated more severely than cases involving black victims.

(LF757; Sorenson & Wallace at 69).

Professor John Galliher, a Sociologist with a specialty in criminology at the University of Missouri-Columbia, testified that he had been hired to consult on a project to review this Court's proportionality review process(T211-14). Counsel in this case also challenged this Court's proportionality review(LF430-697). Although Judge Syler denied counsel's motion (T255;LF769-70), Galliher's uncontroverted findings are significant.

Galliher studied sentencing patterns in first degree murder cases—both those resulting in the death penalty and those resulting in a life without parole sentence(T214-15). The factors he studied included aggravators, mitigators, race, sentence, gender, counsel and publicity(T216).

In studying race, Galliher found that if a black kills a white, the chances increase that a death sentence will result(T235). He also found it much more likely that the death penalty will be waived in white on white homicide cases than if the crime is black on white(T237). Specifically, he found that, for 94% of white defendants who received the death penalty, the

victim was white and, for 94% of white defendants who received life without parole, the victim was white(T236). However, while 97% of white defendants whose victims were white received death waivers, only 18% of black defendants whose victims were white received death waivers(T236-37). Thus, in Terrance's case, a black on white crime in which the death penalty was not waived, it is doubly significant that Ahsens made the racially-charged comment that Terrance, a black man, "likes white girls though." And Ahsens' comment, combined with other factors in this case suggesting that race played a role, take this beyond the situation in *McCleskey v. Kemp*, 481 U.S. 279(1987). There, the petitioner could not prove, nor did he even assert, that the decision-makers had purposefully discriminated against him. Here, Ahsens' comments and actions suggest differently.

Despite that Ahsens asserted, in defense of his race-based written comments, that race was a proper topic for cross-examination(T361), he certainly didn't want the defense to discover if jurors would be improperly influenced by this being a black on white crime or by the sexual relationship between Terrance and Abbey Rainwater.

Pre-trial, counsel moved to submit a jury questionnaire(LF405-14). Counsel requested the questionnaire because, if Terrance were to receive a fair trial and effective assistance of counsel, it was critical that the parties have accurate and thorough information about the jurors, their beliefs, biases and prejudices(LF406). As this Court has routinely held, counsel must be allowed wide latitude in exposing such biases, *State v. Brown*, 547S.W.2d797,799 (Mo.banc1977). Especially in death cases, "deep probing as to opinions held" is required to ascertain whether the full range of punishment will be considered under the facts of the

particular case. *State v. McMillan*, 783S.W.2d82,91(Mo.banc1990); *State v. Leisure*, 749S.W.2d366,373(Mo.banc1988). The court denied the request(T87).

Counsel subsequently moved that the court reconsider submitting the questionnaire and attached to that motion a proposed questionnaire(LF860-79). The questionnaire asked the respondents' views about the two potential sentences in a first-degree murder case. It began by noting, "Terrance Anderson is black (African American) and Steve and Debbie Rainwater were white (Caucasian). The witnesses in this case will be of diverse racial and ethnic backgrounds."(LF862). The next 11 questions asked the respondents about race, e.g., "1.Please describe what dealings you have, either personally or professionally, with people of different races; 4.If you are white, have you ever felt hostility from black people? If yes, please describe the circumstances and how you felt; 6. How do you feel about interracial dating?; 10. Do you believe blacks are involved in more crimes than whites?"(LF862-63).

Ahsens objected to the questionnaire, telling Judge Syler, "I have a number of problems with this. Start with the fact that I think the courts have generally been suspicious of these questionnaires, and I think with good reason…."(T303). Ahsens went on to complain that the questionnaire focused entirely on race, "questions [which] all go to, basically this issue and asks for a variety of opinions and experiences in a person's life which I think are clearly irrelevant, if nothing else"(T304-05).

Ahsens' statements were inaccurate and sought to mislead Judge Syler. First, this Court discussed a similar questionnaire in *State v. Taylor*, 18S.W.3d366,370(Mo.banc2000), yet never disparaged the trial court or counsel for using it. Second, while 11 of the questions dealt with race, the next 16 did not. Thus, Ahsens' statement that **all** of the questions dealt with race was

incorrect. Finally, the race questions were clearly relevant—especially since, if race were part of the jurors' decisional process, it would be rendered arbitrary and capricious. Counsel was entitled to discover if race were going to play a factor so that he could intelligently exercise his jury challenges. *See,* Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case,* 43 L.&Contemp.Probs.116,120(1980). And, since jurors often are reluctant publicly to admit beliefs that may cause embarrassment, *Groppi v. Wisconsin,* 400 U.S.505,510(1971); Broeder, *Voir Dire Examination: An Empirical Study*, 38 S.Cal.L.Rev. 503, 506-12 (1965), a mechanism to elicit that information must be used so that a fair trial before a fair and impartial jury can be obtained. After all, due process and the right to a jury trial require that jurors set aside their preconceived ideas and decide the case solely on the evidence presented at trial. *See Sheppard v. Maxwell,* 384 U.S. 333, 351(1966); *Irvin v. Dowd,* 366 U.S. 717,728(1961). Yet, counsel must first **discover** those ideas before he can effectively exercise his challenges.

While Ahsens claimed race wasn't relevant in terms of jury selection, he continually played the race card when examining witnesses. He repeatedly elicited that Terrance was black and the other parties were white.(T1045,1048,1049,1050,1074,1101-02). The court should have declared a mistrial *sua sponte* because of these gratuitous remarks. *Rule 30.20.* Their potential prejudice was enormous, especially since counsel was precluded from discovering, through the questionnaire, the jurors' intimately-held views on race.

Finally, as argued in Point I, *supra,* race has played a role in Terrance's case because of the way in which Cape Girardeau County selects juries. By pulling only 750 names from the total population for each term, only 1.2%, not the 5% statutorily-required, the likelihood of

random sampling is substantially minimized. And, as Ahsens himself suggested, if a larger sample were available, a greater likelihood would exist that minorities would be called(T297).

Race played a role in Terrance's trial. It influenced the most fundamental components of the process—the prosecutor, the witnesses, the jury. This "undermine[s] public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S.79,87(1986). To restore that confidence, this Court must either reverse and remand for a new trial, or, in the exercise of its proportionality review, order that Terrance be re-sentenced to life without probation or parole.

VIII. AGGRAVATING CIRCUMSTANCES DUPLICATIVE

The trial court erred in overruling defense objections to Instruction 23 and in giving that Instruction because that denied Terrance's rights to due process and freedom from cruel and unusual punishment under U.S.Const., Amends.V,VIII, XIV; Mo.Const., Art.I,§§10,21, in that the aggravating circumstances were not supported by the evidence and were duplicative, thus rendering the death penalty arbitrary and capricious.

The trial court overruled defense counsel's objections to Instruction 23(T1706). The jury returned its verdict as to Count II (referring to Debbie Rainwater) finding all three statutory aggravators (T1751;LF1037). These aggravators were not supported by the evidence and were duplicative. Thus, Terrance was denied his state and federal constitutional rights to due process and freedom from cruel and unusual punishment. This Court should reverse and remand for a new penalty phase on Count II.

At the instruction conference, counsel specifically objected to Instruction 23 because the aggravators submitted were duplicative(T1706). The court overruled the objection(T1713) and submitted the instruction. It reads, in pertinent part:

> In determining the punishment to be assessed against the defendant for the murder of Deborah Rainwater, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exist:
>
> 1. Whether the murder of Deborah Rainwater was committed while the defendant was engaged in the commission of another unlawful homicide of Stephen Rainwater.

3. Whether the murder of Deborah Rainwater 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 Deborah Rainwater as part of the defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life.

(LF1014).

The evidence does not support the first of these aggravators and further demonstrates their duplicative nature.

Amy Dorris was at the Rainwaters' that night and testified that, when Terrance entered the house, he went to Debbie, and, after they exchanged words, he shot her(T1298,1304-06). Stephen Rainwater was not present(T1228,1300,1337,1362). Whitney Rainwater testified that, later, while she and Terrance were in the front yard, Stephen returned, and Terrance shot him(T1371-72).

The facts clearly demonstrate that "the murder of Deborah Rainwater was [not] committed while the defendant was engaged in the commission of another unlawful homicide of Stephen Rainwater." Instead, Deborah Rainwater was killed while Stephen Rainwater wasn't even in the house, but was still riding around in his car, looking for a prowler. He didn't return until later, when Terrance and Whitney were out in the yard.

"While" means "during or throughout the time that" or "at the same time that" *Webster's NewWorld Dictionary* (3rd ed. 1991). Clearly, the first murder was not committed "while" the second was committed.

The interpretation of statutory language involves questions of law, not of judicial discretion. *Hadel v. Board of Education, School District of Springfield,* 990 S.W.2d 107,111(Mo.App.,S.D.1999). The primary rule in interpreting statutory language is to ascertain the Legislature's intent from the language and to give it effect, considering the language's plain and ordinary meaning. *Id., Wolff Shoe Co. v. Director of Revenue,* 762 S.W.2d 29,31(Mo.banc1988). If the language is clear and unambiguous, the courts are to give effect to it as written and must not resort to statutory construction. *Petet v. State Department of Social Services*, 32 S.W.3d 818,822(Mo.App.,W.D.2000).

Here, the language in the first aggravator derives from §565.032.2(2)RSMo. The Legislature decided that something a jury could consider aggravating was whether the defendant had committed one murder while committing or attempting to commit another homicide. The clear language of the statute demonstrates that only those homicides committed "during" or "at the same time" will fall within that aggravator. Here, since the homicide of Debbie Rainwater had been completed, and Stephen Rainwater wasn't even in the house at the time, that aggravator clearly doesn't apply. To apply the aggravator under these circumstances is contrary to express legislative intent. It also does not comport with due process, since aggravators must be supported by evidence and proved beyond a reasonable doubt. *In re Winship*, 397U.S.358(1970); *Jackson v. Virginia*, 443 U.S.307(1979).

The first and third aggravators submitted are also duplicative since they both allege that Terrance's conduct as to Debbie warranted death because he was also trying to

kill Stephen. They thus allowed the jury to double-count the same conduct in weighing aggravators against mitigators and deciding whether to impose death.

Because the death penalty is qualitatively different from a term of imprisonment, however long, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428U.S.280,305(1976). To adequately minimize the risk of a wholly arbitrary and capricious sentencing decision, the sentencer's discretion must be limited and channeled, through clearly defined aggravating circumstances. *Maynard v. Cartwright*, 486 U.S.356,362(1988). A capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862,877(1983).

Counsel challenged these two aggravators as duplicative(T1706), since they double-count exactly the same aspect of Terrance's conduct and thus do not adequately narrow the class of those defendants who are death-eligible. By duplicating the same aspect of his conduct as aggravators to be counted separately, the instruction unduly enhances their qualitative value. Although this Court has rejected this argument, *see e.g., State v. Griffin*, 756S.W.2d475,489 (Mo.banc1988), at least two other state Supreme Courts have overruled prior decisions and concluded that such duplication is constitutionally infirm. *See Engberg v. Meyer*, 820P.2d70(Wyo.1991); *Willie v. State*, 585So.2d660 (Miss.1991). This Court should re-visit its earlier decisions and find this duplication prejudicially erroneous.

The penalty phase instructions directed that the jury weigh aggravators and mitigators to determine whether to impose death or a life without parole sentence. Although death sentences based on multiple aggravators need not always be set aside if one aggravator is found to be invalid, that rule does not apply "in States in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty." *Tuggle v. Netherland*, 516U.S.10,11(1995). Because, in conformity with §565.030.4(3)RSMo, Terrance's jury was directed to "weigh" aggravators against mitigators, if even one aggravator is deemed invalid, his death sentence must be reversed. *Antwine v. Delo,* 54F.3d1357(8th Cir.1995); *but see Feltrop v. Delo*, 46F.3d766,770-71(8th Cir.1995); *State v. Storey,* 986 S.W.2d 462,464(Mo.banc1999)(the evaluation of aggravators and mitigators is much more complicated than merely asking who proved more).

This Court should reverse and remand for a new penalty phase before a properly-instructed jury or reverse and order that Terrance be re-sentenced to life without parole on Count II.

IX. JURY WAS MISLED

The trial court plainly erred in sustaining the state's objections and in not *sua sponte* declaring a mistrial when, on voir dire, the state :

1. told the jury that both sides would present evidence;

2. objected to defense questions about whether the jurors could consider life without parole even if he presented no evidence in mitigation;

3. told the jury that "no single factor" should be key to their decision because these arguments violated Terrance's rights to due process, a fair trial before a properly-instructed jury and freedom from cruel and unusual punishment, U.S.Const.,Amends V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21 in that the arguments told the jury that the defense would present evidence, despite there being no requirement that the defense ever adduce evidence and the burden of proof always rests with the State and suggested that some particular quantum of evidence—more than one thing—was necessary before they could consider imposing a life without parole sentence, although the defense is never required to adduce evidence and the jury may impose life in any case.

The trial court plainly erred[3] in sustaining the State's objections and in not *sua sponte* declaring a mistrial when the jury was told in voir dire that there would be

[3] Defense counsel did not include these claims in the new trial motion or object to the State's improper argument. Thus, review is for plain error. *Rule 30.20.* A manifest injustice or a miscarriage of justice will occur if it is left uncorrected.

evidence from both sides, that "no single factor" could be the deciding factor in penalty phase, and was told that the defense would have to adduce evidence for them to consider a life without parole sentence. This misstated the law and misled the jury about its duties. Because these misstatements, which denied Terrance's state and federal constitutional rights to due process, a fair trial before a properly-instructed jury and freedom from cruel and unusual punishment, may well have influenced the jury's decisions, this Court must reverse and remand for a new trial.

Voir dire was rife with misstatements by the prosecutor and with improper rulings by the court that misled the jury about the applicable law. Inexplicably, the court sustained the state's objections to defense counsel's questions that sought to discover the jurors' views about basic tenets of the law and did nothing when the state misled them about the law. Especially since, in capital cases, this Court has repeatedly acknowledged the need for "deep probing" as to opinions held, *State v. McMillin*, 783S.W.2d 82,91(Mo.banc1990), *citing State v. Leisure*, 749S.W.2d366,373(Mo.banc1988), the court's actions were improper.

The state repeatedly told the jury "there will be evidence from both sides"(T477); "the lawyers will put on evidence"(T598); "they (mitigators) may come up as put on by the defense"(T601); it "would hear all the evidence from both sides"(T684), and "it's very common for there to be some kind of evidence presented by both sides."(T761). In a similar vein, Ahsens objected when counsel attempted to ask if jurors could consider a life without parole sentence even if he presented no evidence in mitigation. He stated that counsel "has already indicated they will put on evidence. That has become highly

academic. Asking for a commitment to a hypothetical that will not exist."(567-70); *see also* (T723,729-33; *cf*T740-42). The court sustained Ahsens' objections.

The state bears the burden of proving, beyond a reasonable doubt, that the defendant is guilty. *In re Winship*, 397 U.S. 358,364 (1970); *Jackson v. Virginia,* 443 U.S. 307, 314-15(1979). And, both the statute and the instructions giving effect to it demonstrate that the burden of proof remains on the state in penalty phase. §565.032.1RSMo; (LF1007). The defense never bears the burden of adducing evidence *Mullaney v. Wilbur*, 421 U.S.684,701,704(1975). Especially in penalty phase, where mitigation evidence need not be adduced for a life verdict to result, §565.030.4 RSMo, the defense has no such burden. "The result in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous [death sentence]"*Id.*at701.

Despite these fundamental principles, the jury repeatedly heard, at times even with the court's imprimatur, after it sustained Ahsens' objection, that the defense would present evidence in both phases and that counsel was misleading the jury if he suggested that he might not. This placed counsel in the untenable position of having to present evidence in both phases—because the jury had been told that he would. Even if counsel had indicated an intent to present evidence in guilt phase, no such indication had been made as to penalty. Thus, the burden of proof—to prove that life verdicts should result—was shifted squarely, and improperly, to the defense.

Counsel asked the jury to "assume…you haven't heard anything from us, the defense, to persuade you that life imprisonment is the appropriate sentence. Would that

prevent you from even considering a sentence of life in prison without parole?"(T638). The state made a speaking objection that "the burden of persuasion goes both ways. I think that's a misleading question"(T639). The court sustained the objection(T639). This argument not only improperly placed the burden of proof on the defense, but it denigrated the question that attempted to discover if the jurors could properly apply the burden of proof, suggesting that it was incorrect or "misleading."

Finally, the state repeatedly told the jury that, as to penalty phase, "no single factor, regardless of how good or bad, should be the key to your decision." (T490,602,624,625,691,701). This misstated the law and may well have resulted in the death verdict. The statute and instructions clearly advise that a jury must return a life without parole verdict if it (a) does not find, beyond a reasonable doubt, at least one statutory aggravator; (b) does not find that the evidence in aggravation warrants imposing death; (c) concludes mitigation evidence outweighs aggravation evidence, or (d) decides under all the circumstances not to impose death. §565.030.4RSMo;(LF1012-24). Contrary to Ahsens' argument, one factor may tip the scales for the jury, away from death and toward life. *See e.g., Williams v. Taylor*, 529U.S.362,398(2000). Indeed, could one factor have made the difference here? Did the jury find one factor to sentence Terrance to life for the killing of Debbie Rainwater, yet, because of Ahsens' statements, believed that it could not render a life verdict? Ahsens' argument also contravened the principle that:

> In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 I.S. 280,

> 305(1976), the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the offense.

Penry v. Lynaugh, 492 U.S. 302,328(1989). Ahsens encouraged the jury to believe that it could not give effect to any mitigating evidence, unless it reached some hypothetical quantum—more than "one factor"—which he deemed necessary to affect their verdict. Conveniently, Ahsens got to duplicate one aggravator, to ensure that he would not be left with only "one factor." *see Point VIII.*

An accused is entitled to a fair trial and prosecutors must do nothing to deprive him of it. *State v. Tiedt*, 357 Mo.115, 206 S.W.2d 524, 526-27(banc1947). Voir dire, like argument, can be unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S.637(1974). That happened here. Terrance's jury was misled by the repeated misstatements of the law on critical issues—who bore the burden of proof, who had to adduce evidence, what it took to consider a specific punishment. Confidence in the outcome has been undermined. This Court must reverse and remand for a new trial.

CONCLUSION

For the reasons submitted above, this Court should reverse and remand for a new trial, for a new penalty phase, or should vacate Terrance's death sentence and re-sentence him to life imprisonment without probation or parole.

Respectfully submitted,

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Certificate of Compliance and Service

I, Janet M. Thompson, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13-point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 22,972 words, which does not exceed the 31,000 words allowed for an appellant's brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee AntiVirusScan program, which is updated regularly. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 26th day of November 2001, to John M. Morris, III, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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