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 REPLY BRIEF

Janet M. Thompson, MOBar #32260
Attorney for Appellant
3402 Buttonwood
Columbia, MO 65201-3724
Telephone: (573) 882-9855
FAX (573) 884-4921

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JURISDICTIONAL STATEMENT

Appellant, Terrance Anderson, incorporates the jurisdictional statement from his opening brief.

STATEMENT OF FACTS

Terrance incorporates the statement of facts from his original brief. He notes, however, that, while the trial judge specifically warned the prosecutor not to call how Terrance held Kyra on the night in question as a "shield," (T333), Respondent has included this highly inflammatory and argumentative statement as fact. (Resp.Br.17). Its inclusion violates Rules 30.06 and 84.04(c).

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. Gresham, 637 S.W.2d 20(Mo.1982);

State v. Henke, 820 S.W.2d 94(Mo.App.,W.D.1991);

State v. McGoldrick, 361 Mo. 737, 236 S.W.2d 306, 308(1951);

Vasquez v. Hillery, 474 U.S. 254(1986);

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

Mo.Const.,Art.I,§§2,10,18(a),21;

§§494.400-.505,494.410, 494.415, 494.425; and

Rule 30.20.

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.

Ake v. Oklahoma, 470 U.S. 68, 80,83-84(1985);

Drope v. Missouri, 420 U.S.162,183(1975);

Pate v. Robinson, 383 U.S.375,387(1966);

United States v. Abreu, 202 F.3d 386,390-91 (1st Cir.2000);

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.

People v. Lefebre, 5 P.3d 295,298(Colo.2000);

State v. Winfield, 5 S.W.3d 505(Mo.banc1999);

Wainwright v. Witt, 469 U.S. 412,423(1985);

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 (Cole County, October 2, 2001)[1],

[1] This case is currently on appeal to the Western District Court of Appeals, WD#60656.

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

Mo.Const.,Art.I,§§2,10,18(a),21; and

Chapter 600RSMo.

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, 368 U.S. 448,456(1962);

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

Mo.Const.,Art.I,§§2,10,18(a),21;

§565.035.3; and

Rules 30.06 and 84.04.

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 Respondent attempts to avoid the inevitable under this claim by misstating the facts pertinent to its resolution. First, while Respondent correctly notes that "no stipulation was made as to the correctness of that data [about jury selection procedures]"(Resp.Br.22), he neglects to point out that the state's attorney was present, cross-examined witnesses, and had the opportunity himself to call witnesses to rebut the claim. Second, Respondent asserts that the Board of Jury Commissioners "compiled a master jury list of about 42,000 names" and thereafter randomly selected 750 names from "the master jury list." (Resp.Br.22). The record clearly demonstrates that the 42,000

name list was **not** the master jury list. It was, in fact, according to Mr. Hutson, the source list from which the master jury list would be pulled. (T267). Third, while Mr. Hutson removed people statutorily-ineligible to serve, he also makes his own excuses, for instance, of people who work on the river. (T278-80).

Respondent asserts this claim must fail because it was not raised below (Resp.Br.26); the County complied with the statute (Resp.Br.26) and Terrance has not shown prejudice (Resp.Br.23-25). Respondent's assertions must be rejected.

Terrance's *Motion Challenging Cape Girardeau County's Jury Selection Procedures Because African-Americans Are Being Excluded From Jury Service* specifically challenges that the procedures being followed do not comply with §§494.410 et seq.(LF722-29). The evidence Terrance adduced demonstrated that non-compliance, specifically the failure to have at least 5% of the county's total population on the master jury list and Hutson's unilateral removal of persons from the list based on his own personal reasons. Thus, the claim is preserved. However, should this Court determine it inadequately preserved, in an abundance of caution, Terrance requests review for plain error. *Rule 30.20.*

The County did not comply with §494.410 et seq. Section 494.410 reveals that, to compile the master jury list, the Board must "consult one or more public records." The master jury list is **not** contemplated, therefore, to **be** the public records—such as the voter registration or drivers' license lists from which the master jury list is drawn. Instead, such larger lists are the "source" lists, of which Mr. Hutson testified.(T267). Indeed, Hutson's testimony refutes Respondent's claim that the "source lists" were the master

jury lists and thus Respondent's reliance on *State v. Albrecht*, 817 S.W.2d 619 (Mo.App.,S.D.1991) is misplaced. Hutson's testimony clearly demonstrates non-compliance with the statute since only 750 names comprise the master jury list from which he then draws "qualified jury lists" (§494.415).(T263-64). This is far less than the "not less than five percent of the total population" that is statutorily-mandated.

Respondent also asserts Terrance's claim must fail because he has not shown prejudice.(Resp.Br.23-25). The claim that a jury is constituted unlawfully, however, is not one subject to harmless error analysis. It is a claim of structural error. *Vasquez v. Hillery,* 474 U.S. 254 (1986). How the tribunal is selected is one of the most basic pillars of the judicial edifice. This Court and this State's Courts of Appeals have recognized that tinkering with that process is structural since, in reviewing similar claims, they have merely asked whether the procedure employed substantially complies with the statute, not whether prejudice resulted. *See e.g.,State v. Gresham*, 637 S.W.2d 20 (Mo.1982); *State v. McGoldrick*, 361 Mo. 737, 236 S.W.2d 306, 308(1951); *State v. Henke*, 820 S.W.2d 94 (Mo.App.,W.D.1991).

Respondent finally asserts that this claim must fail because the only removals Mr. Hutson made from the list were based on statutory ineligibility for service, under §494.425. (Resp.Br.27-29). While Hutson removes those who are ineligible for service under the statute (T275-76), he also removes people who are going on vacation, if they have a doctor's appointment and if they are working on the river. (T278-80). These removals clearly are based on no statutory ineligibility but are Hutson, acting unilaterally and unilaterally deciding that certain people need not serve. Thus, this case is similar to

State v. Henke, *supra*, where the Board excused nursing home residents and college students, despite their eligibility under the statute.

Cape County's procedures do not substantially comply with the statute. They affect the randomness of the selection process by manipulating the available pool of names and they limit the pool of names from which jurors may be drawn, thus decreasing the possibility of jury service. 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. This Court faces two issues on appeal. First, it must determine whether counsel was given adequate opportunity to demonstrate Terrance's incompetence. Second, it

must determine whether the evidence supported the trial court's conclusion that Terrance was competent. The answer to both questions is no.

As to the first issue, Respondent chooses to attack how Terrance's incompetence was placed before the court. In main, Respondent attacks counsel's attempts to proceed *ex parte* and obtain the testing his retained experts recommended. He asserts that this was properly denied because counsel didn't show how he would have used the evidence and what he expected to find. (Resp.Br.36-40).

Respondent ignores that, when counsel first requested permission to proceed *ex parte*, that request was denied. (T45-52). Respondent would require that indigent criminal defendants put on the record, with opposing counsel present, their theory of the case; what evidence they are attempting to find, and how they will use it. As in *United States v. Abreu*, 202 F.3d 386,390-91 (1st Cir.2000), here, by asking to proceed *ex parte*, counsel did not disclose to opposing counsel his theory and evidence prematurely. He was thus attempting to accomplish what a non-indigent defendant could accomplish—obtain testing without disclosing it to opposing counsel and then make a strategic decision about what course to take. Counsel's actions embodied the teachings of *Ake v. Oklahoma*, 470 U.S. 68, 80,83-84(1985), which set forth the right of an indigent defendant to expert psychiatric testing for sentencing. They further embody the twin principle of *Ake*—that "defendants who are able to fund their own defenses need not reveal to the government the grounds for seeking a psychiatrist who might potentially testify as to sentencing. To require indigent defendants to do so would penalize them for their poverty." *Abreu, supra*at390-91. If Respondent's assertions are correct, indigent

defendants will be forced to choose among their constitutional rights simply because they are indigent.

This case is far from clear procedurally. Respondent maintains that, pre-trial, the court examined the evidence filed and found Terrance competent to proceed. (Resp.Br.32). The record is far from clear that the court made any real finding based on the record, despite Respondent's claims. When counsel asked that the court consider all of the evidence, not just Dr. English's report, the court responded, "I'm saying I'm not taking one side or the other…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). When the state pushed the court to decide, the court responded, "In which case I think we're going to proceed." (T358). He stated, that "for these purposes" he would find Terrance competent to proceed. (T358). At sentencing, counsel again requested the opportunity to present evidence showing Terrance is incompetent, since counsel was unsure that the court had ever directly addressed the issue. (T1760,1790). Although the court then heard Terrance's evidence, this was not the kind of hearing contemplated by due process since it occurred **after** trial and thus the determination was essentially retrospective in nature. Chapter 552 provides the mechanism to ensure that a defendant has the current ability to understand the proceedings and assist counsel. The court should have availed itself of that mechanism and held the competency hearing pre-trial to ensure that Terrance could assist counsel throughout, not merely at sentencing. *State v. Tilden*, 988S.W.2d 568,580(Mo.App.,W.D.1999); *Pate v. Robinson*, 383 U.S.375,387(1966); *Drope v. Missouri*, 420 U.S.162,183(1975).

As to the second issue this case presents, Respondent suggests that this Court is without authority to determine if the competency finding was accurate and supported by the evidence. Respondent asserts that, since the trial court made a finding of competence, that finding is virtually unassailable. (Resp.Br.35). This ignores the teachings of *Drope v. Missouri*, 420 U.S. 162,175(1975). There, the Court found that the lower court hadn't given proper weight to evidence showing the defendant was incompetent to stand trial.

The record here, although stymied by the court's refusal to hold a competency hearing until after trial, is replete with evidence demonstrating Terrance's incompetence. It is also replete with evidence demonstrating that Dr. English's findings of competence must be viewed with a highly-critical eye. Drs. Lewis, Pincus, Holcomb and Harry found Terrance paranoid (ExhE-1,E-3,E-4,E-7;LF927-29;T1797). Even Dr. English, the state's expert, found Terrance is paranoid. (ExhQ-18at166-69). His paranoia contributed to his belief that he had been set-up for Debbie Rainwater's killing and he consistently asserted that he didn't recall killing her. (ExhE-1,E-4). Dr. English acknowledged that an inability to accurately or rationally describe what happened can show incompetence. (ExhQ-18at101). None of the experts, including English, found that Terrance was malingering. (T1798-99,1810). Judge Syler's ultimate finding at sentencing that no competent or credible evidence supported a finding of incompetence (T1845) is simply unsupported by the evidence.

Terrance was incompetent to assist counsel. Judge Syler erred in not holding a competency hearing pre-trial, and in ultimately finding him competent. 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.

Respondent ignores both the facts and the law in an attempt to salvage the state's improper strikes of Venirepersons Irwin and Light. The standard under which the state constitutionally may strike **for cause** is clear. Only if venirepersons' views prevent or substantially impair their ability to follow the law or abide by their oath may they be struck for cause. *Wainwright v. Witt,* 469 U.S. 412,423(1985). Neither Irwin nor Light met this standard.

Ms. Irwin initially stated "I don't know" when asked if she could impose death but ultimately clearly stated that she could follow the law and impose either punishment. (T443-44,459-60). She never stated that she could not impose death or that she would require more than proof beyond a reasonable doubt. (T443-44). Indeed, the only matter about which she gave contradictory answers was whether she could sign a death verdict.

(T449,459-60). Respondent likens Ms. Irwin to Venireperson Stokes in *State v. Winfield*, 5 S.W.3d 505 (Mo.banc1999). (Resp.Br.46-47). Stokes, however, stated that she could **not** impose death because she'd been a nurse. *Winfield* at510. Irwin never said that she could not impose death. Respondent would have this Court make a finding based on a **lack** of an initial negative response. Sustaining the state's strike for cause under these circumstances would turn *Witt, Gray v. Mississippi,* 481 U.S. 648 (1987), and *Adams v. Texas*, 448 U.S. 38 (1980) on their ears. That cannot be condoned.

Respondent's attempts to salvage the strike of Ms. Light are similarly convoluted. Yet again, Light never said that she wouldn't vote for the death penalty. (T605-06,633-35). Yet, Respondent would have this Court sustain the state's cause strike of her, apparently because she didn't initially tell the state that she **could** vote for death.

Even if both Irwin and Light had some "uncertainty" about the death penalty, this was an insufficient basis for a cause strike. *Gray v Mississippi, supra* at 659. If the state didn't want them as jurors under those circumstances, they should have used peremptories to remove them. As it was, the trial court's improper grant of the two cause strikes gave the state two extra peremptories. *People v. Lefebre,* 5 P.3d 295,298(Colo.2000). This Court must reverse and remand for a new trial.

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.

Significant, and conspicuous in its absence, is any mention by the Respondent in attempting to respond to this point of *State ex rel. Robinson v. Office of Attorney General,*

No. 01-CV-323933 (Cole County, October 2, 2001)[2], a case to which Respondent's office was a party. In that case, Judge Kinder held that the records are confidential, not subject to disclosure.

Public Defender billing records are closed records. They are not accessible absent court order because, despite Respondent's claims to the contrary, they may contain much more than merely how much an expert witness has been paid by a state agency. They may implicate counsel's strategic decisions through information about an expert initially hired but then not called as a witness. Clearly, this is not discoverable information. Yet, under Respondent's theory, billing records, and thus this information, is *a fortiori* discoverable. (Resp.Br.61). Not so.

Had the State wished to discover what Respondent terms "relevant impeachment evidence" about Dr. Lewis, it had an adequate mechanism without snooping through confidential records. It could have issued a subpoena duces tecum to Dr. Lewis, telling her to bring her tax records to a deposition. Respondent seems to understand this mechanism (Resp.Br.59), yet appears to believe that **everything** obtained from the Office of Administration would have been discoverable. While the amount of money that Dr. Lewis, or indeed any expert witness, receives may be relevant for cross-examination, the witness's actions in other cases are irrelevant. And, as Judge Kinder found, they are privileged, as work product.

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[2] This case is currently on appeal to the Western District Court of Appeals, WD#60656.

The Public Defender System represents Terrance because he is poor. Only because he is poor was the Attorney General's Office able to access confidential information. The records the Attorney General's Office obtained were not public records and the information they obtained far exceeded the scope of legitimate discovery. This Court must reverse and remand for a new trial, at which the State is precluded from using the billing records and any information it received from its improper fishing expedition.

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.

Respondent would have this Court ignore that an arbitrary factor—race—played a role in this case and contributed to Terrance's death sentence by claiming that this Point violates Rules 30.06 and 84.04. (Resp.Br.90). However, as clearly demonstrated by Appellant's opening brief, no violation has occurred. Rather, although the claim includes challenges to various rulings, they all point to one unalterable fact—that race played a role in this case. It

affected the most important components of the process—the prosecutor, the witnesses and the jury. Despite the assurances, implicit and explicit, in our Constitutions that race may not affect the quality or nature of justice dispensed in this country, *Oyler v. Boles*, 368 U.S. 448,456(1962), here, 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. Because race played a role, this Court, in the exercise of its independent proportionality review, §565.035.3, must, at the very least, reduce his death sentence to life without probation or parole.

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CONCLUSION

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

Respectfully submitted,

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Janet M. Thompson, MOBar #32260
Attorney for Appellant
3402 Buttonwood
Columbia, MO 65201-3722
573-882-9855
FAX: 573-884-4921
e-mail: jthompso@mspd.state.mo.us

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 4,832 words, which does not exceed the 7,750 words allowed for an appellant's reply 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 7th day of February 2002, to Breck Burgess, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Janet M. Thompson