No. SC83680

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

vs.

TERRANCE L. ANDERSON,

Appellant.

Appeal from the Circuit Court of Cape Girardeau County, Mo.
Thirty-Second Judicial Circuit, Division One
The Honorable William L. Syler, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from two conviction for murder in the first degree, § 565.020, RSMo 1994, obtained in the Circuit Court of Cape Girardeau County and for which the appellant was sentenced to death and life without eligibility for probation or parole. Because the appellant was sentenced to death, this appeal lies exclusively within the Missouri Supreme Court. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Terrance Anderson, was charged by indictment in the Butler County Circuit Court with two counts of murder in the first degree, two counts of armed criminal action, and one count of burglary in the first degree (L.F. 45-47). Appellant's motion for a change of venue was granted and the two counts of murder went to trial before a jury in the Cape Girardeau County Circuit Court on January 22, 2001, the Honorable William L. Syler presiding (L.F. 2, 87; Tr. 343).

The sufficiency of the evidence to support appellant's convictions is not in dispute. Viewed in the light most favorable to the verdicts, the following evidence was adduced: After appellant dropped out of college, he began hanging around his old high school in Poplar Bluff (Tr. 1439-1440, 1508, 1511). He started dating Abbey Rainwater, who was a student there, in February of 1996, when she was about 15 years old and he was about 21 years old (Tr. 1216, 1240, 1388, 1511).

In July of 1996, Abbey became pregnant with appellant's child (Tr. 1264). Her parents, Stephen and Debbie Rainwater, then invited appellant to live with them in their house (Tr. 1264). After appellant moved in, he began neglecting his job at Rowe Furniture Company and began staying out late at night (Tr. 1265, 1397-1400). He was fired from his job in December 1996 (Tr. 1401).

That same month, appellant grabbed Abbey by the neck and threw her against a wall (Tr. 1267). She talked to her parents about appellant moving out, and he was asked to move out (Tr. 1265). He then moved in with his mother (Tr. 1385).

After Abbey's and appellant's child, Kyra, was born on April 18, 1997, appellant violently assaulted Abbey on two occasions (Tr. 1217, 1275). During the second of these assaults, on July 24, 1997, appellant told Abbey that if she told anyone about what he did to her, he would kill everyone who lived, that he would make her watch as he killed the baby, and that he would then kill her and himself (Tr.

1218-1219).

The next morning, July 25, 1997, Abbey told her parents what had occurred (Tr. 1219). She went to the courthouse that morning and got a restraining order against appellant (Tr. 1219; State's Exhibit 38). After she got home from the courthouse, appellant arrived there (Tr. 1221). She went inside the house, while her father stayed outside and talked to appellant (Tr. 1221-1222).

At about 3:00 p.m. that day, appellant made a telephone call to Abbey and during their conversation they discussed the restraining order (Tr. 1222-1223). Abbey told appellant that she could not see him, and that his visitation of Kyra would be set up through the court (Tr. 1222). Appellant said that he knew what he had to do now (Tr. 1223).

Late that afternoon, appellant went to the home of his friend, Jason Brandon (Tr. 1199-1200). The Brandons' had a .357 caliber magnum handgun that was kept in Jason's room (Tr. 1200). Appellant went to Jason's room to see Jason, stayed for a short time, left for 10-15 minutes, returned to Jason's room for a short time, and then left again (Tr. 1200-1202).

That night, Abbey, who was then 17 years old, was at home at 1005 Montclair in Poplar Bluff with two of her friends who were also 17 years old, Stacy Turner and Amy Dorris (Tr. 1028, 1099, 1216, 1224; State's Exhibit 7). Also present in the home that night were Abbey's 3 month old daughter, Kyra, her 10 year old sister, Whitney, and her parents (Tr. 1224-1225).

Abbey, Stacy, and Amy were together in the downstairs section of the house when they heard knocking on the back door (Tr. 1225-1226). Stacy looked out the small windows by the side of the door, but did not see anyone (Tr. 1226-1227, 1299, 1336). The girls went upstairs and told Stephen Rainwater (Tr. 1227, 1336). He told them to go back downstairs and to see if it happened again, while he watched out a bay window that was right above that door (Tr. 1227). After about a minute, someone knocked on

the backdoor again (Tr. 1227). The girls went upstairs, but Stephen Rainwater told them that he had not seen anything (Tr. 1227). He picked up a rifle and walked around the yard to check to see who was out there (Tr. 1227, 1300, 1337). He came back without having found anyone (Tr. 1228, 1300, 1337). The .22 caliber rifle was placed in the northwest corner of the master bedroom (Tr. 1159).

Stephen Rainwater then got in a car and started driving around the neighborhood to see if he could see any vehicles or anyone (Tr. 1228, 1300, 1337). After he left, the doorbell rang (Tr. 1228, 1301, 1337). Abbey, Stacy, Amy and Whitney went to the door and looked out the small windows next to it (Tr. 1228, 1301, 1338, 1364; State's Exhibit 11). They saw appellant standing outside the window pointing a handgun at them (Tr. 1228, 1301, 1338, 1364). The girls screamed and backed away from the door (Tr. 1302). As appellant kicked in the door, splintering its frame, Debbie Rainwater told Abbey to run (Tr. 1143-1144, 1230; State's Exhibit 11). Abbey and Whitney ran out of the back of the house (Tr. 1084, 1143, 1230). Abbey ran to a neighbor's house and got a neighbor to call the police, while Whitney stopped fleeing after she got outside of her house (Tr. 1233, 1364). Stacy Turner stayed in that house, but hid in a closet in the master bedroom (Tr. 1339-1340). Amy Dorris stayed in the house near Debbie Rainwater (Tr. 1303).

Appellant went straight to Debbie Rainwater, who was standing by a couch and was holding Kyra (Tr. 1303-1304). Appellant yelled at her, telling her that she was going to die, and pointed the gun at her (Tr. 1306). She got down on her knees and begged for her life (Tr. 1306). Appellant placed the gun against the back of Debbie Rainwater's head and fired it (Tr. 1187-1194, 1306; State's Exhibits 22-23). The bullet blew her skull apart, removing most of her brain and killing her instantly (Tr. 1188-1190).

Amy Dorris, who had just seen appellant kill Debbie Rainwater, fled out the front door, but stopped when appellant came outside after her and told her that he would shoot her if she did not stop (Tr.

1306). He approached Amy, grabbed her by her ponytail, and told her to yell for Abbey "and them" to come out (Tr. 1307-1309). Amy yelled, as appellant requested, but no one came out of hiding (Tr. 1308-1309).

While appellant was out in front of the house, Whitney, who had heard the gunshot, went back into the house and heard Kyra crying (Tr. 1364). She found her mother, where she had been killed, lying on top of Kyra (Tr. 1365). She lifted the body of her mother off of Kyra, picked up Kyra, and hid with her in the laundry room (Tr. 1365-1366).

Whitney heard the telephone ring, so she went to the master bedroom and answered it (Tr. 1340, 1366). The person on the telephone was Amy's boyfriend, Robert, and she told him that appellant was there with a gun and was shooting (Tr. 1366).

Appellant came into the bedroom with the gun, hung up the telephone and took Kyra from Whitney (Tr. 1367). Appellant and Whitney walked out to the front yard, where Amy was still standing, and appellant, who was holding Kyra, yelled for Abbey (Tr. 1367). Appellant pointed the gun at the baby's head and yelled that he would shoot the baby if Abbey did not come out (Tr. 1367-1368).

Stacy came out of her hiding place in a closet and looked out through the blinds in the window in Abbey's bedroom (Tr. 1340-1341). Appellant looked up at her and said, "You might as well come out. Your time is coming" (Tr. 1341).

Appellant saw Stephen Rainwater driving towards the house (Tr. 1368). He took Kyra, Whitney and Amy around to the side of the house so that Stephen Rainwater could not see them, and he told them that he would shoot them if they ran (Tr. 1312-1313, 1368-1369). Appellant, who was holding Kyra, walked out in the front yard with Whitney (Tr. 1369-1370). Whitney did not try to run because she did not want to leave Kyra alone with appellant (Tr. 1314). Appellant approached Steven Rainwater and

began talking to him (Tr. 1370-1371). He then shot Stephen Rainwater in the forehead (Tr. 1173, 1184, 1373-1375). The bullet passed threw Stephen Rainwater's skull and caused almost instantaneous death as the result of severe trauma to the brain (Tr. 1184-1187; State's Exhibit 31).

Meanwhile, Stacy called 911 on the telephone in the master bedroom told the person on the phone that there was someone in the house with a gun and that she had just heard a second gunshot (Tr. 1342). She then hung up the telephone and hid in the shower in the master bedroom's bathroom (Tr. 1342).

Appellant sent Whitney around the house looking for people, and Whitney saw Stacy in the bathroom (Tr. 1343, 1372). However, Whitney told appellant that there was no one in the bathroom (Tr. 1343, 1372).

Meanwhile, Officers Paul Clark and Charles Wallace, of the Poplar Bluff Police Department, arrived at the victims' residence and saw Stephen Rainwater lying without any visible signs of life in the front yard (Tr. 1026, 1040, 1065, 1069, 1103). They saw appellant, who was in Abbey's bedroom, open a window shade of a window over the garage of that residence and then open that window (Tr. 1073-1074, 1090, 1373). Appellant, who was holding the baby in front of him as a human shield and was waiving a handgun in the direction of the officers, yelled to the officers, "Put down your fucking guns" (Tr. 1041, 1046, 1074-1076, 1103). Officer Charles Wallace repeatedly told appellant to put down his weapon, and appellant repeatedly responded by telling Officer Wallace to put down his "fucking gun" (Tr. 1042, 1075-1076).

After other officers arrived and surrounded the house, appellant, who was still holding Kyra up in front of him, came out on the front porch of the house without the pistol that he had been brandishing (Tr. 1045-1046, 1049, 1076-1078, 1104-1106). Whitney followed appellant onto the porch (Tr. 1077, 1374). The officers ordered appellant several times to give the baby to Whitney, and he eventually

complied with their orders (Tr. 1077, 1106-1107, 1374).

Appellant then walked towards the officers and was placed under arrest (Tr. 1077-1078). The officers searched appellant and found six live Winchester Super Magnum .357 cartridges in his pants pockets, and Debbie Rainwater's blood was on appellant's pants (Tr. 1116-1118, 1121, 1292-1294). Appellant was informed of his constitutional rights and was placed in a patrol car without the officers having a conversation with him (Tr. 1047). Meanwhile, Whitney told the officers that the appellant shot her mother (Tr. 1049). The officers conducted a protective sweep of the house (Tr. 1049). On a banister immediately inside the front door, they saw a cocked and loaded Colt .357 magnum revolver, which appeared to be the gun that had been taken from the Brandons' residence (Tr.1049, 1078, 1083, 1202-1203). Its cylinder contained four live rounds and two spent rounds (Tr. 1141-1142). All were Winchester Super Magnum .357 cartridges (Tr. 1147-1148).

They next saw Debbie Rainwater's body on the floor (Tr. 1089). Near her body was a baby blanket that had blood and bullet fragments on it (Tr. 1084, 1157). Stacy heard the police in the house and she came out of her hiding place in a shower (Tr. 1050, 1342-1343). Abbey stayed at a neighbor's house until the police arrived there (Tr. 1233).

The police found the car that appellant drove to get to the crime scene (Tr. 1063). It was parked on the corner of Montclair and Mill Street, about a block from the Rainwater's house (Tr. 1063). On the console between the seats, officers found an empty box for Winchester Super X Magnum .357 cartridges (Tr. 1150-1151; State's Exhibit 28).

Appellant did not testify in his own behalf. He presented the testimony of witnesses who said that he had always been a peaceful, nonviolent person (Tr. 1390, 1403-1404, 1412-1415). He presented testimony of Dr. Pincus, a neurologist, who said that appellant could not deliberate because he had suffered

brain damage at birth (Tr. 1419-1464). Pincus acknowledged, though, that appellant had the ability to plan things in advance, and he said that appellant had no history of fighting (Tr. 1457, 1461). Dr. Dorothy Lewis, a psychiatrist, testified that appellant suffered brain damage at birth, but that he had no history of violence other than the violence that he had directed at Abbey in the months leading up to the murders (Defense Exhibit D). Lewis concluded that he could not deliberate on the day that he committed the murders because he was acting differently than he normally acted in that he was severely depressed, paranoid, and in an altered state (Defense Exhibit D). She testified that appellant told her that he could not remember what happened when Debbie Rainwater was killed, that he believed that he knew who killed her, but that he could not say who did it (Defense Exhibit D). Appellant told Lewis that he shot Stephen Rainwater in order to protect himself (Defense Exhibit D). She said that she believed that appellant was not lying because he had maintained the same story for a long time (Defense Exhibit D).

As rebuttal evidence, the State presented the testimony of Dr. Byron English, a psychologist and forensic examiner with the Department of Mental Health (Tr. 1527). He testified that his testing and examination of appellant revealed that appellant had an IQ of 84 and that appellant did not suffer from a mental disease or defect (Tr. 1528-1570). He said that appellant also denied having any symptoms indicating depression, brain damage, or any other mental disease or defect (Tr. 1588-1589).

At the close of the evidence, instructions and argument, the jury found that appellant was guilty of two counts of murder in the first degree (L.F. 1005-1006).

In the penalty phase, the State presented the victims' daughters who testified about the victims (Tr. 1650-1667). Appellant presented the testimony of five witnesses in an attempt to mitigate punishment (Tr. 1670-1702).

At the close of the evidence, instructions and argument, the jury recommended that appellant be

sentenced to death for the murder of Debbie Rainwater and life without eligibility for probation or parole for the murder of Stephen Rainwater (L.F. 1036-1037). As to the murder of Debbie Rainwater, the jury found as statutory aggravating circumstances (1) that the murder occurred while appellant was engaged in the commission of another unlawful homicide, (2) that appellant by his act of murder knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, and (3) that the murder was outrageously or wantonly vile, horrible or inhuman because it involved depravity of mind in that appellant killed Debbie Rainwater as part of a plan to kill more than one person and, thereby exhibited a callous disregard for the sanctity of all human life (L.F. 1037). § 565.032.2 (2), (3) and (7), RSMo 2000. The trial court imposed the sentences that were recommended by the jury (Tr. 1848-1849).

ARGUMENT

I.

The trial court did not err or commit plain error when it denied appellant's motion to dismiss or to preclude the State from seeking the death penalty because (1) appellant waived his claim that the master jury list did not contain the names of at least 5% of the population of Cape Girardeau and it is refuted by the record; (2) appellant failed to show that the members for the Board of Jury Commissioners relied on inadequate or improper reasons for removing jurors from the list or excusing them from service; (3) appellant failed to prove that it was improper for the board members to act ex parte in excusing potential jurors from service before trial; and (4) appellant waived his claim that the Circuit Court Clerk did not use written protocols when he excused potential jurors and appellant failed to prove this claim. Additionally, appellant failed to show that he was prejudiced or suffered manifest injustice from the actions in question because he failed to prove that he was denied his right to a jury selected from a fair cross-section of the community, that the randomness of the jury selection process was effected by the procedures that were used or that a biased person actually sat on his jury.

Appellant claims that the trial court erred when it denied his motion to dismiss or to preclude the State from seeking the death penalty that alleged that African-Americans were being systematically excluded from the venire panel in violation of appellant's constitutional right to a jury that was selected from a fair cross-section of the community (App.Br. 36; L.F. 722-729; Tr. 297). He claims in his point relied on that this was accomplished by the Cape Girardeau County Board of Jury Commissioners who allegedly were not following the requirements of Chapter 494, RSMo 2000, because they allegedly failed to put the names of 5% of the community on the master jury list, and they released potential jurors ex parte based on

improper or inadequate reasons (App.Br. 36).

A. Relevant facts

At the hearing on this matter, it was stipulated that the data in appellant's motion could be considered as evidence, but no stipulation was made as to the correctness of that data (Tr. 153-154). Appellant's motion stated that 4.5 % of the people in Cape Girardeau County were African-American (Tr. 153-155, 295; L.F. 724). However, about 5.2 % of the venirepersons who appeared for appellant's case, that is about 7 out of about 133, were African-American (Tr. 382-383, 672; L.F. 951-961). Appellant's motion examined selected cases, about 18 cases that were tried in Cape Girardeau County between 1996-1998, and alleged that African-Americans were "fairly represented" in 16.6% of the "petit jury panels" in these cases (L.F. 725).

Other evidence showed that the Board of Jury Commissioners in that county consisted of the Honorable John Grimm, who was the presiding judge, Rodney Miller, the County Clerk, and Charles Hutson, the Circuit Court Clerk (Tr. 263). The board compiled a master jury list of about 42,000 names from voters registration lists and driver's license records (Tr. 267, 281-283). It loaded those names into a computer, which had no information pertaining to the race of the potential jurors, to randomly select 750 names from the master jury list (Tr. 264, 287). From this list, the Circuit Court Clerk removed the names of people who were ineligible for jury service under § 494.425, RSMo 2000, due to factors such as their age, citizenship, residency outside the jurisdiction, felony convictions, and being a licensed attorney or a judge of a court of record (Tr. 275-276). Each potential juror received a summons, a questionnaire, and a letter from the circuit court judges (Tr. 277).

If the questionnaire was returned with reasons why a person should be excused from service due to a hardship or other reasons set out in § 494.430, RSMo 2000, the presiding judge made a determination

as to whether the individual should be excused (Tr. 278-279, 285). The exception for this involved medical reasons (Tr. 285). The policy instituted by the presiding judge was that the Circuit Court Clerk was to excuse a person from service for medical reasons if that person had submitted a statement from a doctor indicating that they were unable to serve (Tr. 278, 285). However, the clerk could refer the medical excuses to the presiding judge for his review (Tr. 285).

B. Fair cross-section claim

Appellant's claim that the Cape Girardeau County procedures prejudiced him by denying his right to a jury that was selected from a fair cross-section of the community is not supported by the evidence. "To establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process." State v. Kinder, 942 S.W.2d 313, 337 (Mo.banc 1996), cert. denied 522 U.S. 854 (1997). "Unless it is shown that the difference between the percentage of the individuals in the identifiable group and those within the venires as a whole is greater than 10%, a prima facie case has not been made." State v. Hofmann, 895 S.W.2d 108, 111 (Mo.App., W.D. 1995); State v. Davis, 646 S.W.2d 871, 876 (Mo.App., W.D. 1995), cert. denied 464 U.S. 962 (1983); see also Singleton v. Lockhart, 871 F.2d 1395, 1398-1399 (8th Cir. 1989), cert. denied 493 U.S. 874 (1989). "To demonstrate systematic exclusion, a defendant must prove unfair underrepresentation of the excluded group on his venire and in general on other venires in the relevant judicial system near the time of his trial." Id. at 1398.

In the case at bar, appellant failed to present statistical analysis of the venires showing that

systematic-underrepresentation occurred and that such an alleged discrepancy was large enough to be unconstitutional. His motion did not examine all of the venires that had been assembled near the time of his trial. It did not state that it included civil cases in that time period, or all criminal cases in that time period, or even all cases in which the Public Defender's Office was involved during that time period (L.F. 724-725). It was simply a selection of some cases tried by the Public Defender's Office that had no statistical validity and that permitted the manipulation of figures (Tr. 289, 295). Moreover, appellant's representation that African-Americans were underrepresented in this case is false (App.Br. 44). As was discussed above, the record showed that about 5.2% on the venire were African-Americans, while only about 4.5% of people in Cape Girardeau County were African-Americans (L.F. 951-961; Tr. 382-383, 672).

C. Compliance with jury-selection statutes claims

Although the above refutation of appellant's fair-cross section claim eliminates appellant's claim of prejudice from the alleged failure to follow jury selection statutes (App.Br. 36), an analysis of the record shows that the Board of Jury Commissioners substantially complied with those statutes.

Jury selection statutes are directory only, and an appellant must show that he was prejudiced by a substantial deviation from the statutory selection process. State v. Gilmore, 661 S.W.2d 519, 523 (Mo.banc 1983), cert. denied 466 U.S. 945 (1984)(no prejudice resulted from the excuse from jury service of a police officer before trial for reasons not listed in statutes); State v. Jones, 714 S.W.2d 201, 202 (Mo.App., S.D. 1986)(no prejudice resulted from excuse from jury service of individuals who did not want to serve because of business commitments and from the failure to remove from the list the names of persons who served the year before); State v. Murray, 744 S.W.2d 762, 771 (Mo.banc 1988), cert. denied 488 U.S. 871 (1988)(no prejudice from excuse from jury service of a special education teacher who was scheduled to test a child during the time of the trial) .

1. Size of the master jury list

Appellant claims for the first time on appeal that the board failed to comply with § 491.410.1, RSMo 2000, because the master jury list allegedly failed to contain not less than 5% of the total population of the county in that it allegedly only contained 750 names, which is less than the 3,081 names that are required (App.Br. 41).

However, appellant's failure to raise this claim below is fatal on appeal. "One who would challenge a jury panel must do so before trial by pleading and proving fatal departures from the basic procedural requirements." State v. Sumowski, 794 S.W.2d 643, 647 (Mo.banc 1990). On appeal an accused may not broaden the objection made at trial. State v. Clark, 26 S.W.3d 448, 457 (Mo.App., S.D. 2000). "The failure to make a timely and proper objection constitutes a waiver." State v. Sumowski, supra.

Moreover, appellant does not request plain error. Id. at 648. Nor does he attempt to show that manifest injustice occurred by alleging that the trial court's actions resulted in a biased juror serving on his case. See Morrow v. State, 21 S.W.3d 819, 827 (Mo.banc 2000), 121 S.Ct. 1140 (2001).

In any event, appellant's claim is based on a misrepresentation of the record. It shows that the master list contained about 42,000 names, which was well above the required 5%, and that the board randomly picked 750 names from that list and then used those names to form the venire panels (Tr. 264, 267, 281-283, 287).

In fact, the defendant in State v. Albrecht, 817 S.W.2d 619, 623 (Mo.App., S.D. 1991), which is relied on by appellant, committed the same mistake as appellant. In that case, the Court of Appeals found that the defendant's claim rested on the erroneous premise that the master list only contained 200 names when in fact it contained the names of 12,000 licensed drivers. Id. The court stated that § 494.410

did not prohibit the jury commissioners from using its entire list of 12,000 licensed drivers as its master jury list. Id.

2. Alleged improper reasons for releasing venirepersons

Appellant alleges that the Circuit Court Clerk and the Presiding Judge improperly removed names from the venire list based on "improper or inadequate reasons" (App.Br. 36). He argues that the clerk removed people from the list if he "believe[d] that someone [was] ill, [was] out of town, or for any number of reasons cannot serve during that term" (App.Br. 41). This is not accurate.

What really happened was that the clerk removed the names of people who were ineligible for jury service under § 494.425, RSMo 2000, due to factors such as their age, citizenship, nonresidency, felony convictions, and being a licensed attorney or a judge of a court of record (Tr. 275-276). Each potential juror received a summons, a questionnaire and a letter from the circuit court judges (Tr. 277).

If the questionnaire was returned with reasons why a person should be excused from service due to a hardship that is listed in § 494.430, RSMo 2000, the presiding judge made a determination as to whether the individual should be excused (Tr. 278-279, 285). The exception for this involved medical reasons, which were permitted as an excuse by § 494.430 (4), RSMo 2000 (Tr. 285). The policy instituted by the presiding judge was that the Circuit Court Clerk was to excuse a person from service for medical reasons if that person had submitted a statement from a doctor indicating that they were unable to serve (Tr. 278, 285). However, the clerk could refer the medical excuses to the presiding judge for his review (Tr. 285).

This is nothing like what occurred in State v. Henke, 820 S.W.2d 94, 96 (Mo.App., W.D. 1991), which is relied on by appellant. In relevant part, the Board of Jury Commissioners in that case excused

residents of nursing homes and students who were away at college even though those individuals were not statutorily excluded and may have been able to serve on the jury. Id. Here, the clerk only removed the names of individuals who were disqualified by § 494.425, and the trial court only excused people who were eligible to be excused under § 494.430.

Moreover, other cases show that the exclusion of a prospective juror on grounds not listed in the statutes is not grounds for reversal "absent a showing that the defendant's interests were adversely affected by failure to strictly observe the statutory provisions for excuse...." State v. Gilmore, supra at 523 (case affirmed even though prior to trial the presiding judge excused from jury service a police officer who indicated that he wanted to bring his gun to the trial, even though this reason for excusing the officer did "not fit precisely within any of the categories" listed in the statute "pertaining to persons entitled to be excused"); see also State v. Cross, 887 S.W.2d 789, 791-792 (Mo.App., W.D. 1994)(case affirmed even though all individuals from two zip codes were accidentally excluded from the master list because the jury was still selected from a fair cross-section of individuals from the county).

Appellant did not show that anyone was improperly excused in this case. Nor did he show that a departure of the jury selection statutes prejudiced him by "taint[ing] the randomness of the procedure in these particular circumstances." State v. Boston, 910 S.W.2d 306, 313 (Mo.App., W.D. 1995)(case affirmed even though the jury panel for a case was picked by selecting the first 45 members of the qualified jury list who showed up at the courthouse because it did not affect the randomness of the jury).

3. Circuit Court Clerk and Presiding Judge acting "ex parte"

Appellant claims, without any authority, that members of the board may not excuse potential jurors from service prior to the trial without the parties being present (App.Br. 36). However, this is contrary to §§ 494.425 and 494.430, RSMo 2000, which list persons who are ineligible for jury service and persons

who may be excused from jury service and does not require that a hearing be held in the presence of the parties. See State v. Gilmore, supra at 523 (No abuse of discretion occurred when presiding judge "took it upon himself to excuse one of the individuals who was scheduled to be on the jury panel" "without notice."); State v. Bannister, 680 S.W.2d 141, 144-145 (Mo.banc 1984), cert. denied 471 U.S. 1009 (1985)(The trial court did not abuse its discretion by refusing to quash the jury panel after a single member of the Board of Jury Commissioners acted alone and for undisclosed reasons excused eleven persons from jury service. This procedure substantially complied with jury selection statutes, and the defendant did not show that the jurors were excused for unlawful reasons or that he was prejudiced.).[1]

4. Written protocols

Appellant alleges for the first time on appeal in the argument portion of his brief, but not in his point relied on, that the Circuit Court Clerk was not using any written protocols (App.Br. 41). Appellant has neglected to develop this argument, but respondent assumes that appellant is basing his claim on § 494.415.3, RSMo 2000, which states that upon an application by a prospective juror, the Board of Jury Commissioners "acting in accordance with written guidelines adopted by the circuit court, may postpone

[1] Appellant did not allege in his motion and it does not appear that he is alleging on appeal that the board did not give individuals notice after it was observed that they were not qualified to serve as jurors as is required by § 494.415.2, RSMo 2000. No evidence was adduced on this matter at the hearing.

that prospective juror's service to a later date."

However, this claim must fail because appellant failed to plead it in his motion. See State v. Sumowski, supra at 647. He also failed to present any evidence as to whether the policies that were utilized in addition to those that were found in the statutes were in writing. See Id. In any event, as was shown in section C.1. of this argument, the clerk was following the procedures set out in the statutes and that were set by the presiding judge. Moreover, even if those procedures were not in writing appellant failed to show that they prejudiced him by denying him a random selection of jurors from a fair cross-section of the community. Nor did he show that manifest injustice resulted from this unpreserved claim because he failed to show that biased jurors sat on his jury. Thus, his first point on appeal must fail.

II.

A. The trial court did not commit plain error "in failing to hold a competency hearing when counsel first questioned [appellant's] competency," because the trial court held a hearing before appellant's trial, as required by § 552.020, RSMo 2000, when it had reasonable cause to believe that appellant did not have fitness to proceed and it held a second hearing on this issue after appellant's trial even though no new cause existed for holding a second hearing.

B. The trial court did not err by finding that appellant was competent to proceed because that finding was supported by substantial evidence.

C. The trial court did not abuse its discretion by denying appellant's secret motion to be transported to Barnes Hospital in St. Louis for tests because appellant failed to plead facts and offer evidence showing that at that time appellant's mental condition was seriously in dispute and that the tests in question were necessary for him to have a fair trial, appellant failed to serve the motion on the State, his motion to be transported was not renewed at a relevant time, and appellant was not prejudiced.

Appellant alleges that the trial court should have held an evidentiary hearing when counsel first questioned his competency, apparently rather than following the procedures set out in Chapter 552 and in relevant cases (App.Br. 45). He claims that the trial court erred in finding that he was competent to be tried and sentenced because his evidence on this issue was allegedly more credible than the State's evidence (App.Br. 45-58; Tr. 358, 1845). He also alleges that the trial court should have granted an ex parte motion that he filed and transported him to St. Louis "for additional testing" (App.Br. 45).

A. Alleged failure to hold a hearing when counsel first questioned competency

Appellant alleges for the first time on appeal that the trial court erred "in failing to hold a

competency hearing when counsel first questioned [his] competency" (App.Br. 45).

However, as to this unpreserved claim, it is obvious that the trial court is not required to hold a competency hearing when defense counsel first has concerns which may or may not have been enunciated at that time. According to § 552.020.2, RSMo 2000, the trial court was required to initiate proceedings under when he had "reasonable cause to believe that the accused lacks mental fitness to proceed...." See also State v. Johns, 34 S.W.3d 93, 104 (Mo.banc 2000), cert. denied 121 S.Ct. 1745 (2001). That was done in the case at bar. The trial court ordered two mental examinations of the appellant (L.F. 20-21, 821-826, 827-829). The first of these was ordered only about 12 days after appellant filed a motion that asserted that he was incompetent (Tr. 815-818, 821-826).

The trial court then held a pretrial hearing on the issue of appellant's competency (Tr. 351). Appellant did not appear with any witnesses at the hearing, but asked for the court to decide the matter based on the report of Dr. Byron English that had been formally filed with the court and on the reports and other matters from Dr. Jonathan Pincus and Dr. Dorothy Lewis that had been previously submitted to the court but had not been formally filed (Tr. 351-357). See § 552.020.7, RSMo 2000. After examining the evidence that was presented, the trial court found that appellant was competent to proceed (Tr. 352-358, 1813).[2]

At the hearing on appellant's motion for a new trial, he again raised the issue of his competency

[2] Appellant cites Tr. 358 for the proposition that the trial court did not fully review the reports that had been submitted, but nothing on that page or any other page supports this assertion (App.Br. 52).

through the presentation of the testimony of Dr. Robert Holcomb (Tr. 1788). Counsel also presented the court with an affidavit from Dr. Bruce Harry (Tr. 1812-1813). The trial court again found that appellant was competent (Tr. 1845). It stated that there was no competent or credible evidence to the contrary (Tr. 1845).

As can be seen from the above, the trial court did not commit error because it was not required to be clairvoyant and hold a hearing when counsel had concerns about appellant's competency, but when the court itself had concerns. It did hold a hearing when the issue of appellant's competency was brought to its attention.

B. Competency

Appellant's claim that the trial court erred in finding that he was competent to proceed is also without merit. The trial court found that appellant failed to present any credible evidence that he was incompetent and that appellant was competent (Tr. 1845). Viewed in the light most favorable to the trial court's findings, the following evidence was adduced: Dr. English, a psychologist, found that appellant was competent to be tried (State's Exhibit 52 at 12). He found that appellant did not suffer from a mental disease or defect, and that no such disease or defect interfered with appellant's capacity to understand the proceedings against him or to assist in his defense (State's Exhibit 52 at 9, 11).

He said that appellant had a full scale IQ of 84, which is in the average range of intelligence, and that there was no indication of brain damage or an organic condition (State's Exhibit 52 at 7, 9). Appellant answered questions in a rational, reality-based and goal directed manner (State's Exhibit 52 at 7). He exhibited no pathological paranoia or delusional thinking (State's Exhibit 52 at 9). He was evasive and manipulative in some responses (State's Exhibit 52 at 7).

Appellant was oriented in time, place, and person and understood the purpose of the evaluation

(State's Exhibit 52 at 8). He was able to concentrate and do abstract thinking (State's Exhibit 52 at 8). He had feelings of depression that would last a few hours or a day or two, but this did not meet the criteria for dysthymic disorder or for a major depressive episode (State's Exhibit 52 at 8). There was some paranoia in his thinking based on the way he was treated in the past rather than on a psychotic thought process (State's Exhibit 52 at 9).

Appellant understood the charges he faced, the potential sentences or commitment in the custody of the Department of Mental Health that he faced, the role of the prosecutor, the roles of the judge and jury, and the process of plea bargaining (State's Exhibit 52 at 9-10).

Defense psychologist Dr. Holcolm, who interviewed appellant after the trial, testified that appellant could be faking having amnesia as to part of his conduct (Tr. 1792, 1806). He said that appellant was able to articulate specific complaints about the conduct of his counsel and that he could be angry with his counsel simply because he thought that they had performed poorly or because he does not like attorneys (Tr. 1804). He indicated that appellant understood the role of his counsel, the judge, the prosecutor, the potential sentences, and his right to appeal (Tr. 1803-1804).

"A defendant is competent when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." State v. Johns, supra at 104 (internal quotation marks and citations omitted); § 552.020.1, RSMo 2000. At a hearing on this issue, the defendant is presumed to be competent and has the burden of proving his incompetency by a preponderance of the evidence. § 552.020.8, RSMo 2000.

Appellant does not dispute that there was substantial evidence to support the trial court's finding that he was competent (App.Br. 29). Instead, he argues that this Court should reweigh the evidence that was presented and make new credibility determinations (App.Br. 45). However, that is not the

appropriate standard of review.

> [T]he trial judge's determination of competency is one of fact and must stand unless there is no substantial evidence to support it. . . . In testing sufficiency of the trial court's determination of the defendant's competency, "the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding."

State v. Petty, 856 S.W.2d 351, 353 (Mo.App., S.D. 1993)(citation omitted); see also State v. Hampton, 959 S.W.2d 444, 449 (Mo. banc 1997). "[I]t is the duty of the trial court to determine which evidence is more credible and persuasive." State v. Johns, supra at 105. Thus, appellant's argument is without merit.

C. Alleged failure to transport appellant from the Madison County Jail to Barnes Hospital in St. Louis for additional testing

1. Pretrial request for transportation

Nor did the trial court abuse its discretion when it denied appellant's ex parte motion to be transported to Barnes Hospital in St. Louis (App.Br. 45).

In an attempt to circumvent the procedures in § 552.020.2, RSMo 2000, which start off with the use of a court-appointed psychologist or psychiatrist instead of an expert hired by a party, on September 8, 1998, appellant filed under seal an "Ex parte motion to transport defendant for examinations," before he filed any request to proceed under § 552.020 (L.F. 733). Appellant wanted to be secretly transported from the Madison County Jail to Barnes Hospital in St. Louis for an E.E.G. and a M.R.I. (L.F. 733-734). That motion was denied by the trial court on September 21, 1998 (L.F. 740).

It was properly denied because no proceedings under § 552.020 had been initiated and appellant did not plead specific facts and present evidence showing that appellant's mental capacity was seriously

at issue and that the requested testing was necessary. The conclusory statement in his motion that "there may be issues surrounding the defendant's mental capabilities that require thorough neurological and neuropsychological examinations by a specialists [sic] qualified to administer such examinations" did not show that the additional tests in question were required (L.F. 734).

> A mere allegation that a defendant's mental capacity is at issue does not make it so. Facts supporting the allegation are necessary to show the seriousness of the allegation and its relevancy to the issues before the trial court.

State v. Clemons, 946 S.W.2d 206, 222 (Mo.banc 1997), cert. denied 522 U.S. 968 (1997)(trial court did not abuse its discretion by denying the defendant funds for mental health experts).

Appellant failed to plead facts in his motion and then prove facts demonstrating to a "reasonable probability" that the tests would aid in the defense and that the denial of the tests "would result in an unfair trial." See Guinan v. Armontrout, 909 F.2d. 1224, 1227 (8th Cir. 1990), cert. denied 948 U.S. 1074 (1991)(case dealt with denial of a pretrial psychiatric evaluation and analysis under Ake, which is discussed below, that has not been extended by the United States Supreme Court to specific testing). It should be kept in mind that this motion was filed after two defense experts, that is Pincus and Lewis, had examined appellant and extensively tested him, and appellant had the ability to express, in detail, any need for the additional tests if one really existed (Tr. 1423; Defense Exhibit E-3). Nor did his motion allege that he would present such testimony at a hearing on this matter, see State v. Smith, 944 S.W.2d 901, 921 (Mo.banc 1997), cert. denied 522 U.S. 953 (1997)(factual allegations in a motion are not self-proving), or support his allegations with affidavits from psychiatric experts. See State v. Mercado, 787 S.W.2d 848, 851-852 (Mo.App., E.D. 1990). Appellant also did not have the constitutional right to be transported across the State to have any imaginable test performed. He simply had the right to adequate tools to assist

in his defense.

Moreover, appellant's motion was properly denied because appellant failed to comply with Rule 20.04, which requires service to opposing counsel of most motions, in that it he failed to serve a copy of his motion to transport on the State even though the granting of the motion would have required the State to expend resources to transport appellant to St. Louis and to provide law enforcement officers to guard him so that he would not escape. On appeal, appellant does not attempt to defend this violation of Rule 20.04. His trial counsel, though, alleged that Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), permitted the filing of an ex parte request for transportation (L.F. 733-739). However, it does not.

Ake has nothing to do with whether a defendant has the right to an ex parte motion for transportation. In that case, the United States Supreme Court stated:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Id., 470 U.S. at 74. Although it recognized that some jurisdictions may allow some proceedings to be ex parte, it did not hold that a defendant had a right to ex parte proceedings. It certainly did not hold that defendants had the right to ex parte proceedings on matters such as the transportation and security issues concerning a defendant. It has nothing to do with this case because appellant was given adequate tools to prepare his defense.

In fact, in State v. Tokar, 918 S.W.2d 753, 765 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996), this Court found that a defendant was not entitled to ex parte hearing on his request for a

continuance so that he could pursue a mental defense. This Court found that "Ake did not create a shield behind which the defense could obtain ex parte rulings on the merits of the case or on contested issues," and that the State had a right to be heard on whether a continuance should be granted. Id. Similarly, in the case at bar the State had the right to be heard on the issue of whether it was going to be required to transport appellant across the State and provide security for him.

2. No request for transportation after § 552.020 proceedings were initiated, but before appellant was convicted

Appellant persisted in operating outside of the procedures of § 552.020 and submitted to the court, on March 18, 1999, his "Motion for court to make a finding of incompetency pursuant to section 552.020" (L.F. 815). This motion asked for the trial court to find that appellant was incompetent based on psychological opinions of defense experts who were selected and paid by appellant (L.F. 815-818). In the alternative, it asked the court to initiate proceedings pursuant to § 552.020 by ordering a court-appointed expert to perform an examination (L.F. 818).

The trial court then began the proceedings under § 552.020, which are not done in secret as appellant was attempting to do, by appointing a psychologist to examine appellant (L.F. 821-826). As the proceedings under § 552.020 went on, appellant did not renew his earlier motion to be transported to St. Louis for testing. Thus, it did not appear that he still wanted to be transported for testing and the trial court was not required to have him transported on its own motion.

3. Request after conviction

After appellant had been found to be competent and had been convicted of his offenses, he again asked to be transported to Barnes Hospital in St. Louis for additional testing (Tr. 1039). However, this request was untimely and was not accompanied by pleadings and evidence indicating the need for additional

testing before appellant was sentenced. Additional testing is not required after a finding of competency unless a judge has reasonable grounds to believe that the defendant has become incompetent since the time of the first competency hearing. See State v. Johns, supra at 106. No such grounds existed in the case at bar. Nor has appellant shown that he had a constitutional right to have any specific testing done. He was able to adequately litigate his competency with the experts who were presented and the numerous tests that were performed on him. Thus, appellant's second point must fail.

III.

The trial court did not abuse its discretion when it struck for cause venirepersons Irwin and Light because those venirepersons were not qualified to serve as jurors in that they held views on the death penalty that would have substantially impaired the performance of their duties as jurors.

Appellant claims that the trial court abused its discretion when it struck for cause venirepersons Thelma Irwin and Lori Light who gave answers indicating that they were not qualified to sit on a death-penalty case, because the trial court was allegedly required to find that they were qualified in light of their later contradictory answers (App.Br. 59).

The trial court is in the best position to evaluate a venireperson's commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors. State v. Clayton, 995 S.W.2d 468, 475 (Mo.banc 1999), cert. denied 528 U.S. 1027 (1999). Its ruling will not be disturbed on appeal unless it is clearly against the evidence and constitutes an abuse of discretion. Id.

"While a trial court cannot exclude a juror from a capital punishment case simply because of a conscientious objection to the death penalty, a juror may be excluded if his views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" State v. Clemons, 946 S.W.2d 206, 225 (Mo.banc 1997), cert. denied 522 U.S. 968 (1997)(citation omitted). A venireperson is not qualified to sit as a juror in a death penalty case if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, sign a death verdict if picked as a jury foreman, or otherwise follow the court's instructions. State v. Clayton, supra at 475-476.

"The applicable standard does not require that a juror's bias be proven with 'unmistakable

clarity.'" State v. Winfield, 5 S.W.3d 505, 511 (Mo.banc 1999), cert. denied 528 U.S. 1130 (2000)(citation omitted).

> "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . [T]his is why deference must be paid to the trial judge who sees and hears the juror."

State v. McMillin, 783 S.W.2d 82, 91 (Mo. banc 1990), cert. denied 498 U.S. 994 (1990)(citation omitted). It is for the trial court, not the venireman, to determine whether a challenged member of the panel could be an impartial juror, but the testimony of the member concerning his ability to act impartially is evidence to be considered by the trial court. State v. Walton, 796 S.W.2d 374, 377-378 (Mo. banc 1988).

When faced with contradictory responses from a venireperson as to his or her qualifications to serve on the jury, the trial court is not required to accept the responses favorable to the defendant and it is well within the discretion of the trial court to strike the venireperson for cause. State v. Kinder, 942 S.W.2d 313, 324-325 (Mo.banc 1996), cert. denied 522 U.S. 854 (1997); State v. Ringo, 30 S.W.3d 811, 818 (Mo.banc 2000), cert. denied 121 S.Ct. 1381 (2001); State v. Clayton, supra at 476.

A. Venireperson Irwin

When first questioned by the prosecutor on her ability to impose a death penalty, venireperson

Thelma Irwin gave answers indicating that she was unqualified to sit on a death-penalty case because she was unable to state that she could impose that punishment on account of the fact that she was a nurse. The following occurred:

> MR. AHSENS: Could you vote for the other alternative of death?
>
> PANELIST IRWIN: I don't know. I've been a nurse for 48 years saving lives, and I just don't know if I could do that.
>
> MR. AHSENS: I understand. Do you understand, however, I'm obligated to put you on the spot and try to get you to give me a yes or no answer?
>
> PANELIST IRWIN: I know.
>
> MR. AHSENS: Would it help you to think about it a bit before I ask you more questions, or do you think – Well, the question, I suppose, that I've asked the other ladies is, you know, I have to prove the defendant guilty beyond a reasonable doubt, and if we get to the second part of the trial, there are other matters which I have to prove beyond a reasonable doubt. You obviously have reservations about the death penalty that you do not have about the other alternative of life without parole. 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?
>
> PANELIST IRWIN: 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.

(Tr. 443-444).

The prosecutor questioned other venirepersons, but then again questioned Irwin (Tr. 444-449). In this exchange, Irwin showed that she was not qualified to sit on a death-penalty case because she could not sign a death verdict (Tr. 449). The following occurred:

> MR. AHSENS: I understand. Ms. Irwin, you were very uncertain. Now we're going to put you on the spot. You know I was coming back to you. Could you sign a death verdict?
>
> PANELIST THELMA R. IRWIN: No, I could not do that.
>
> MR. AHSENS: 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?
>
> PANELIST IRWIN: Right.

(Tr. 449).

Without any mention of the death penalty, defense counsel elicited from Irvin that she would try to set aside her views and follow the law that she was "uncomfortable" with:

> MR. MORELAND: Now, understanding – Under the law, I think it's almost universal that there's always laws out there that if you choose any person, there will probably be some law that they don't agree with or some law that they're uncomfortable with, and that's almost a universal feeling, 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?

PANELIST IRWIN: I would have to.

MR. MORELAND: And you would be willing to do that?

PANELIST IRWIN: Yes.

MR. MORELAND: 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?

PANELIST IRWIN: Yes.

MR. MORELAND: 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?

PANELIST IRWIN: I would try very hard. I would have to.

MR. MORELAND: 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?

PANELIST IRWIN: Yes.

(Tr. 459-460).

The prosecutor asked for Irwin to be stricken for cause (Tr. 466). The trial court sustained the prosecutor's motion (Tr. 467).

The trial court was acting well within its discretion when it determined that Irwin's most credible

answers were those that she gave that indicated that she was not qualified to sit on the jury. State v. Kinder, supra at 324-325; State v. Ringo, supra at 818. The trial court was entitled to believe her response that she could not sign a verdict of death and she did not know if she could vote for death in light of the fact that she had been a nurse for 40 years (Tr. 443-444, 449). This is similar to what occurred in State v. Winfield, supra at 510-511. In that case, venireperson Stokes indicated that she could not impose the death penalty because she had been a nurse for 35 years. Id. at 510. She later indicated that she could consider both penalties. Id. at 511. This trial court struck her for cause because he believed her first response, rather than her second response. Id. This Court found that the record did not reflect an abuse of discretion.

Moreover, even though defense counsel got Irwin to say that she would do her best to set aside her views and follow the law and her duties as a foreperson if selected, she did not say that she could actually impose the death penalty or sign a death verdict. Thus, the trial court did not abuse its discretion.

B. Venireperson Light

Under examination from the prosecutor, venireperson Lori Light said that she did not know whether she could impose the death penalty, that she probably could not sign a death verdict, that she wanted the State to prove appellant's guilt beyond a reasonable doubt, and that she probably could not follow the instructions of the court. She stated:

> MR. AHSENS: . . . . Could you vote for the death penalty?
>
> PANELIST LORI A. LIGHT: I don't know.
>
> MR. AHSENS: Could you vote for the other option of life in prison without probation or parole?
>
> PANELIST LIGHT: Yes.

MR. AHSENS: Okay. So I take it then that your reservations are with the death penalty and not the other option. Would that be true?

PANELIST LIGHT: Yeah.

MR. AHSENS: Let me ask you a couple other questions. I will tell you that while the verdict must be unanimous as to what the penalty should be, either way, must be unanimous, that the jury would come back into open court and in front of whoever's present, including the defendant, of course all the lawyers and the judge, and the fact that your verdict, that is you and the rest of the jury, it would be read that you had sentenced the defendant to death. Could you do that?

PANELIST LIGHT: I don't know. I don't know.

MR. AHSENS: Let me ask you another question, and the reason I go through these questions is to see if I can help you focus your thinking on the issue, okay? This may be something that you've not thought about squarely before in your life.

PANELIST LIGHT: We haven't.

MR. AHSENS: We don't sit around the coffee table on Sunday evenings and talk about this sort of thing. Let's assume that you are elected as the foreperson of the jury, not anybody on the jury could be selected as a foreperson. I will tell you that while the verdict must be unanimous, it is signed by the foreperson alone. Could you sign a death verdict?

PANELIST LIGHT: God, I don't know.

MR. AHSENS: All right. Do you think you – You know, I'm kind of obligated to try and get you to say yes or no.

PANELIST LIGHT: Probably no.

MR. AHSENS: Probably no?

PANELIST LIGHT: Yes.

MR. AHSENS: And would it be fair to say that you have no problems with life in prison without parole, but you have very severe reservations about the death penalty? Would that be fair?

PANELIST LIGHT: Yes.

MR. AHSENS: If it's not, please say so.

PANELIST LIGHT: Yes, that's true.

MR. AHSENS: Okay. Folks, please understand. There's no right or wrong answer here. There's just the truth. That's all we're trying to get to here. Ms. Light, you have struggled mightily with me. I'm going to leave you alone, but if I – am I correct in my understanding that you do not think that you could vote for the death penalty upon reflection?

PANELIST LIGHT: I just don't know. I just – I guess if it was bad enough, maybe I could, but –

THE COURT: Ms. Light, I'm having a little trouble hearing you.

PANELIST LIGHT: I said maybe if it was bad enough I could, but –

MR. AHSENS: And understand, I have to prove the defendant guilty beyond a reasonable doubt.

PANELIST LIGHT: (Nods head).

MR. AHSENS: 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.

MR. MORELAND: Object to the form of the question, Your Honor.

THE COURT: Overruled.

MR. AHSENS: You may answer, if you know.

PANELIST LIGHT: Yes, I guess.

MR. AHSENS: All right. So you would want more evidence than just evidence beyond a reasonable doubt. Is that correct?

PANELIST LIGHT: Yes.

MR. AHSENS: If any questions don't make sense to you, would you please say so? I want to make sure that my questions are clear.

PANELIST LIGHT: (Nods head).

MR. AHSENS: You understand where we're going with this?

PANELIST LIGHT: (Nods head).

MR. AHSENS: If you want more from me because of your

discomfort than the law requires of me, then perhaps you would have difficulty being a juror in this kind of case.

PANELIST LIGHT: Probably.

MR. AHSENS: Is that what you're telling me?

PANELIST LIGHT: Probably.

MR. AHSENS: I need a yes or a no, please.

PANELIST LIGHT: Yes.

MR. AHSENS: Okay. Thank you. Again, I'm sorry that this has been so hard, but I need to try and get a yes or no, and I take it from what you're telling me, it doesn't sound like this is a case for you or that you could follow the instructions of the Court, does it?

PANELIST LIGHT: Probably not.

(Tr. 604-607).

Defense counsel then got Light to state that she would be able to convict based on proof beyond a reasonable doubt and that she could fairly consider either punishment (Tr. 633-635). But she never stated that she could sign a verdict of death or that she could actually recommend the death penalty.

The prosecutor moved to strike Light (Tr. 655). The trial court stated:

There was an awful lot of body language that goes into these responses, and frankly, Ms. Light is not someone, I think, who can sit on this particular jury. I'm going to strike her. She's more of a follower than anything else. I think she's if we spent the rest of the afternoon taking turns, she'd agree with whoever asked her last.

(Tr. 656).

Again, the trial court was entitled to believe that Light's first responses, indicating that she was not qualified to be a juror, were an accurate statement of her true views. He was not required to believe her later contradictory views which he believed, based on demeanor, were simply her stating what she believed defense counsel wanted to hear (Tr. 656). See State v. Kinder, supra at 324-325; State v. Ringo, supra at 818. She also never stated that she could sign a death verdict or actually recommend the death penalty. Thus, appellant's third point must fail.

IV.

The trial court did not commit plain error or abuse its discretion when it allowed the prosecutor to use in a deposition the records from the Office of Administration about money paid to Dr. Lewis for her assistance to the Public Defender's Office in this case and other recent cases, because those records were relevant impeachment evidence, they were not confidential, the information in the records could have been obtained from other sources, the release of the records did not deny appellant equal protection or effective assistance of counsel, and their release remedied a violation of the discovery rules by appellant.

The trial court did not commit plain error when it permitted the prosecutor to argue, without objection, that Lewis was biased based on her financial relationship with the Public Defender's Office because this argument was based on a reasonable inference from the evidence and did not violate the Rules of Professional Conduct.

The trial court did not abuse its discretion when it quashed appellant's post-trial subpoenas of the prosecutor and his investigator so that they would not have to be deposed because it was proper to grant the State's request for protective relief in that the depositions were harassment, did not pertain to a relevant matter, were untimely, and appellant failed to show that fundamental unfairness resulted from the trial court's actions.

Appellant alleges that the trial court erred by refusing to let him hide relevant impeachment evidence from the State (App.Br. 68). He claims that the trial court should not have allowed the prosecutor to impeach defense expert Dorothy Lewis with records that showed the large sums of money that the Public Defender paid for her services in this and other cases because the prosecutor should not have been allowed to get those records from the Office of Administration (App.Br. 69). He admits, though, that the trial court

had the authority to authorize the State to obtain that information (App.Br. 74). He also alleges that the prosecutor should not have been allowed to argue this evidence, that he was denied effective assistance of counsel, and that the trial court should have allowed him to conduct depositions of the prosecutor and an investigator after the trial (App.Br. 74).

A. Relevant facts

On September 16, 1997, the State filed a request for disclosure pursuant to Rule 25.05 that requested, in relevant part, the statements of experts made in connection with this case (L.F. 50). After appellant failed to disclose statements made by Dr. Lewis about the number of hours that she worked in this case and the fee that she was charging in this case, the State obtained records from the Office of Administration on the fees charged by Dr. Lewis in this case and other cases where she worked for the Public Defender's Office (Defendant's Exhibit RR-100).

At the deposition of Dr. Lewis, which occurred about a month before appellant's trial, the prosecutor indicated that he was going to use records from the Missouri Office of Administration having to do with payments to Dr. Lewis in cases including this one, that is State's Exhibit 100 (Defense Exhibit E at 62). Appellant's counsel objected on the ground that those records would embarrass Dr. Lewis, they were irrelevant, they were hearsay, and they were attorney work product (Defense Exhibit E at 63).

Dr. Lewis testified on cross-examination that she did not know how much she had charged for her services on appellant's behalf up to that point (Defense Exhibit E at 66). The prosecutor showed her State's Exhibit 100, which is the billing records from the Office of Administration that were never admitted into evidence in appellant's trial, and she said that she did not disagree with the figure in that document that showed that she had billed $34,757.04 up to that point (Defense Exhibit E at 66). When the prosecutor asked her whether the Public Defender's Office had paid her $142,000 for the time period of early 1998

through March of 2000 for her work on cases, Lewis said that she had no reason to disagree with that number that was contained in State's Exhibit 100 (Defense Exhibit E at 203).

On January 17, 2001, which was five days before appellant's trial, appellant first raised his claim that the billing records were confidential in his "Motion to preclude use of confidential public defender billing records." The trial court did not rule on it at the hearing that was held that day because the trial court and the prosecutor had not been given an opportunity to read it before the hearing (Tr. 338). During the defendant's case-in-chief, the defendant offered a videotape of Dr. Lewis' deposition, Defense Exhibit E, and a transcript of that deposition, Defendant's Exhibit D, and he objected to his own exhibits on the ground that they contained references to confidential records (Tr. 1488-1499). The prosecutor explained that the records in question were public records (Tr. 1493). The trial court then admitted appellant's exhibits (Tr. 1489, 1499).

During the State's guilt-phase closing argument, the prosecutor argued without objection that Dr. Lewis was not credible because she had a vested interest of about $70,000 a year for coming to the right conclusion for appellant (Tr. 1628-1629).[3]

After the trial, appellant subpoenaed the prosecutor and his investigator for the purpose of deposing them on this issue (L.F. 1084-1094). The prosecutor filed a motion to quash the subpoenas (L.F. 1095). At a hearing, on April 9, 2001, the prosecutor pointed out that the records were not confidential records from the Public Defender's Office, but were public records that had been obtained from the Office of Administration and that the depositions would serve no valid purpose and would uncover no relevant

[3]He also made the same argument as to Dr. Pincus, but his billing records are not at issue in this point (Tr. 1628-1629).

evidence (Tr. 1768-1770; see also Tr. 1781). Appellant argued that they were confidential because they pertained to the Public Defender's Office (Tr. 1770-1771). The trial court found that the documents were discoverable and stated that he could not imagine how appellant could preclude the State from cross-examining an expert with payment records (Tr. 1770). The trial court said that he would have ordered the Public Defender to disclose the information in the records if he had been asked (Tr. 1772). He granted the State's motion to quash the subpoenas (Tr. 1773-1774; see also 1785).

B. Use of evidence during a deposition

Appellant's claim that the trial court erred in allowing the prosecutor to "use" the Office of Administration records during the deposition to get Lewis to admit to how much she was paid by the Public Defender's Office in this case and other recent cases is not preserved for appeal because appellant did not raise his objection on appeal at the deposition when the records were "used" and the records were not admitted into evidence during appellant's trial. Nor did he object when the prosecutor argued that Lewis was biased based on her monetary relationship with the Public Defender's Office (Tr. 1628-1629).

Appellant does not request plain error review and such review is not required. In any event, plain error only occurs when an appellant shows that an improper action had a decisive effect on the outcome of the trial and resulted in manifest injustice. State v. Clayton, 995 S.W.2d 468, 479 (Mo.banc 1999), cert. denied 528 U.S. 1027 (1999).

Should this Court choose to review appellant's claims, it cannot reasonably be disputed that the evidence about what Lewis was paid in this case and other cases involving the Public Defender's Officer was relevant and admissible to show bias. State v. Love, 963 S.W.2d 242-244 (Mo.App., W.D. 1997)(defense DNA expert impeached with her earnings in that case and in other cases where she worked for the Public Defender's Office); State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 65-67 (Mo.App., W.D.

1992)(a witness may be cross-examined about fees earned in prior cases, that he is regularly employed by a particular category of a party, and about and his previous employment by the same party). This is because the pecuniary interest, bias or prejudice of a witness can always be shown. State v. Long, 698 S.W.2d 898, 901 (Mo.App., E.D. 1985); Callahan v. Cardinal Glennon Hosp., 963 S.W.2d 852, 869 (Mo.banc 1993). In the case at bar, evidence of the enormous amount of money that the Public Defender paid Lewis for her services in this case and other recent cases is evidence that the Public Defender's Office was a cash cow for this witness and that she may be biased to testify favorably for that office in order to continue successfully milking it.

Appellant appears to concede that the billing information would be discoverable under Rule 25.06 (App.Br. 74), which states:

> If the court finds the request to be reasonable, the court shall order the defendant to disclose to the state that material and information requested which is found by the court by be relevant and material to the state's case.

The evidence would also be discoverable through the use of a subpoena duces tecum, State v. Love, supra at 243; State ex rel. Lichtor v. Clark, supra at 65-67; State ex rel. Creighton v. Jackson, 879 S.W.2d 639 (Mo.App., W.D. 1994), and the trial court specifically found that it would have ordered the disclosure of the impeaching evidence if it had been asked (Tr. 1772). Thus, appellant cannot show that he was prejudiced by the prosecutor's use of information that was discoverable and admissible.

Appellant attempts to avoid the above by arguing that the procedures used in this case to get the impeaching information were improper because the Office of Administration's records were confidential (App.Br. 75). He relies on § 60.091, RSMo 2000 (emphasis added), which states:

> 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.

However, this statute is inapplicable because records in question were not maintained by the Public Defender's Office. They were maintained by the Office of Administration. Moreover, this statute recognizes that the records can be disclosed by court order and the trial court in this case indicated that it was willing to authorize the disclosure and use of the records (Tr. 1770-1772).

Appellant next relies on § 610.021, RSMo 2000 (emphasis added), which states, "Except to the extent disclosure is otherwise required by law ***a public governmental body is authorized*** to close...records... to the extent they relate to the following...." This statute then goes on to list matters that ***may*** be closed. However, this statute does not state that anything must be declared confidential. It merely gives government bodies ***authorization*** to close records if they determines that the records should be closed and the records fall within listed classifications. Thus, under this statute the decision as to whether the records should be kept closed is up to the Office of Administration and that body exercised it in favor of open government.

It should be kept in mind that § 610.011.1, RSMo 2000 (footnote omitted), states:

> It is the public policy of this state that...records...of governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.28 shall be liberally construed and their exceptions strictly construed to promote this public policy.

Also, the public interest in an open government "may be at its greatest... where...public funds are spent." State ex rel. Missouri Local Government Retirement System v. Bill, 935 S.W.2d 659, 665 (Mo.App., W.D. 1996).

Appellant seeks to utilize the provision in § 610.021(1) that allows a public government body to

close "any confidential or privileged communications between a public governmental body or it representatives and its attorneys" (App.Br. 75). However, billing records are not communications between the Office of Administration and its attorneys because the Office of Administration is not represented by the Public Defender's Office and the bills are not confidential. See Tipton v. Barton, 747 S.W.2d 325 (Mo.App., E.D. 1988)(itemized billing statements submitted by city attorney to the city for payment were public records that had to be disclosed under Chapter 610).

Appellant also alleges that the billing information was confidential because of § 610.21(14) which allows a government body to close "[r]ecords which are protected by law" (App.Br. 75). However, as was shown above, the billing records are not protected by law.

Appellant next alleges that the Equal Protection Clause was violated by the Office of Administration releasing Lewis' billing records because it would not have had the billing records of a non-indigent defendant and in such a case the prosecutor would have to get a court order to get billing records (App.Br. 75). While appellant's own argument demonstrates that the billing records of witnesses who are endorsed to testify for indigent and non-indigent defendants will be disclosed, though through different means, it does not show that the Office of Administration treats individuals differently based on their wealth. A State agency is obligated to release all open records it possesses regardless of wealth.

Moreover, even if there was a distinction based on indigency, there is no fundamental right or suspect class at issue and, thus, the State need merely establish a rational basis for the alleged distinction. State v. Hall, 955 S.W.2d 198, 203 (Mo.banc 1997), cert. denied 523 U.S. 1053 (1998). Here, the public policy of openness in government and particularly in the expenditure of public funds, is a legitimate interest and provides a rational basis for making billing records of an endorsed witness open to the public.

Appellant next claims that it was wrong for the Office of Administration to disclose Lewis' billing

records because it is allegedly improper to disclose witnesses who "are consulted with but not called to testify" (App.Br. 76). However, this overlooks the fact that Lewis did testify.

Moreover, appellant fails to cite any cases holding that he may hide such relevant impeaching evidence. He cites United States v. Abreu, 202 F.3d 386 (1st Cir. 2000). But it does not suggest that there is any constitutional obligation to keep the records of the Office of Administration closed. It dealt with procedural laws pertaining to federal prosecutions and not Missouri's Sunshine Law. It simply ruled that pursuant to a federal statute an application to the court for funding to conduct an examination of a defendant should be handled on an ex parte basis. Id. at 389. The case did not address billing records; rather its concern was that under that statute the defendant not be required to reveal the grounds for seeking a psychiatrist. Id. at 388-391. The case at bar does not pertain to a federal statute or the revealing of grounds for seeking a psychiatrist. It simply deals with the discovery of public records that contain relevant impeaching evidence.

Appellant also cites Ake v. Oklahoma, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), but it does not hold that he has the right to hide impeaching information or experts that he has consulted with. It merely holds that if a defendant makes a showing that his sanity is likely to be a significant factor in his defense, he is entitled to "access to a competent psychiatrist who conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." It does not state that the defense has a constitutional right to hide the name of the expert or the expert's past history of receiving payments. In fact, Missouri's procedures in litigating sanity and competency, which comply with Ake, do not envision the hiding of experts in that the experts are appointed by the Court and both parties are provided with copies of the resulting reports. § 552.020.2, RSMo 2000; § 552.030.3, RSMo 2000.

Nor is this contrary to State ex rel. Richardson v. Randall, 660 S.W.2d 699 (Mo.banc 1983). In

that case, the prosecutor did not know whether the defense had retained an expert and moved pursuant to Rule 25.06 to require the defendant to disclose the name of any expert retained to review documents that were allegedly forged. This Court declined to require disclosure of the name of an expert that the defendant retained but did not intend to call at trial. Id. at 700-701. That opinion states that its ruling applies to its "particular and narrow circumstances" and acknowledges that the name of a defendant's retained but undisclosed expert may be "serendipitously stumbled upon by the state in its own investigation." Id. at 701. Thus, Richardson does not address a situation where a prosecutor is conducting his own investigation of a disclosed witness by examining public records.

Appellant also alleges that his counsel could not be effective unless they were allowed to hide the evidence in question (App.Br. 74-75). However, the right to effective assistance of counsel is not impacted by the disclosure of non-confidential information and, as was discussed above, it appears to be undisputed that the State could have obtained the information in question from other sources if it had not obtained it from the Office of Administration.

Moreover, appellant is not well-situated to complain in light of the fact that the prosecutor's need to go to the Office of Administration for records was brought on by appellant's failure to comply with the prosecutor's discovery request, pursuant to Rule 25.05, for statements of experts that were made in connection with the case (L.F. 50). Any statement by Lewis about her bill in this case was a statement of an expert made in connection with the case that should have been disclosed.

C. Alleged improper argument

Appellant alleges that the prosecutor violated Rule of Professional Responsibility 4, Appendix 2, by arguing, without any objection from appellant, that Dr. Lewis was not credible because she had a vested interest of about $70,000 a year for coming to the right conclusion for appellant (Tr. 1628-1629).

Should this Court choose to conduct plain error review of this unpreserved claim, the portion of the rule cited by appellant states: "The physician is entitled to reasonable compensation" for services which "are proper and necessary items of expense in litigation involving medical questions. The amount of the physician's fee should never be contingent upon the outcome of the case or the amount of damages awarded" (App.Br. 77). This does not state that counsel is prohibited from arguing the bias of a physician based on fees. As was discussed above, such is a relevant matter for the jury's consideration. State v. Love, supra at 242-244. The rule in question is simply a prohibition against attorneys entering into unscrupulous fee arrangements with physicians. Thus, it has nothing to do with the prosecutor's conduct this case.

D. Quashing of subpoenas for post-trial depositions

Finally, appellant claims that the trial court erred by quashing his subpoenas of the prosecutor and the prosecutor's investigator and not allowing him to conduct depositions of them after the trial was over (App.Br. 74; Tr. 1773-1774, 1785). He appears to claim that he is entitled to depose anybody at any time (App.Br. 73).

However, the right to take depositions "is subject to the power of the trial court to issue protective orders to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including an order that discovery not be had." State ex rel. Chaney v. Franklin, 941 S.W.2d 790, 792-793 (Mo.App., S.D. 1997). An attempt to depose an opposing counsel calls for special scrutiny because "such depositions inherently constitute an invitation to harass the attorney and parties...." Id.

In the case at bar, the trial court did not abuse its discretion when it quashed the subpoenas because they constituted improper annoyance and harassment of the State's counsel and investigator and could not have revealed any information that was necessary for the litigation of any claim. Exactly how the

State obtained the information from the Office of Administration was irrelevant.

Moreover, appellant knew of use of the billing records before the trial and should have made his complete record concerning the use of the records before the evidence was admitted in his trial. Making a record after the evidence has been admitted and appellant has been convicted is a form of sandbagging.

Moreover, appellant has not shown that the trial court's action resulted in "fundamental unfairness" to him. See State v. Sullivan, 935 S.W.2d 747, 756 (Mo.App., S.D. 1996). The deposition itself would have been hearsay that would not have been admissible pursuant to Rule 25.13. Appellant does not show that a post-trial deposition of the prosecutor and his investigator would have changed the outcome of the proceedings. Nor does he explain why he waited until after the trial to ask for the prosecutor and his investigator to be deposed, even though he knew about the claim in question before the trial occurred. Thus, his claim is without merit.

V.

The appellant's claim that the trial court committed plain error by failing to grant a mistrial on its own motion at numerous points during the State's closing arguments should be denied without explication because a mistrial that was not requested by appellant would have interfered with appellant's right to have the case completed by the jury that was sworn to hear the case and appellant did not waive that right, appellant's failure to object is presumed to be a matter of trial strategy, and appellant has failed to justify why plain error review should be conducted in this case.

Moreover, appellant's claims of plain error are without merit because the prosecutor's arguments were proper or appellant failed to show that the alleged errors could not have been cured by means other than a mistrial or that the alleged errors had a decisive effect on the verdicts.

Appellant alleges that the trial court should have declared a mistrial on its own motion at numerous times during the State's closing arguments for multiple reasons (App.Br. 78-79).

A. Uninvited intervention is dangerous and was unwarranted

The appellant appears to concede that none of his claims are preserved for appeal because he did not object to the arguments at trial, or did not ask for the trial court to declare a mistrial, or did not raise the claims in his motion for a new trial (App.Br. 81). Appellant's failure to raise his claims below should be fatal to them because a trial court should avoid granting a mistrial on its own motion in that a defendant has the right to have his trial completed by the jury that was sworn to hear his case and a retrial would be barred by the Double Jeopardy Clause if any prejudice could have been cured by less drastic remedy. State v. Marlow, 888 S.W.2d 417, 420 (Mo.App., W.D. 1994); State v. Weeks, 982 S.W.2d 825, 838

n. 13 (Mo.App., S.D. 1998).

Moreover, this Court has stated that it will not review the claims not preserved for appeal, and relief should be rarely granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication. State v. Clay, 975 S.W.2d 121, 134 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999). The failure to object during closing argument is more likely a function of trial strategy than of error. State v. Boyd, 844 S.W.2d 524, 529 (Mo.App., E.D. 1992). See also State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc 1996), cert. denied 519 U.S. 933 (1996).

Additionally, in the absence of an objection, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. State v. Clemmons, 753 S.W.2d 901, 907-908 (Mo. banc 1988), cert. denied 488 U.S. 948 (1988). Had objection been made, the trial court could have taken appropriate steps to make corrections. State v. Kempker, 824 S.W.2d 909, 911 (Mo. banc 1992). A party cannot fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. State v. McGee, 848 S.W.2d 512, 514 (Mo.App., E.D. 1993).

B. Guilt-phase argument

1. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor made the following statement in the opening portion of the State's closing argument:

- - 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.

(Tr. 1598). Appellant alleges that this argument "sought to mislead the jury about the issue that the defense had presented, suggesting that their argument was, contrary to the evidence, that [appellant] had not participated in the offenses, and by telling the jury that the defense wanted them to ignore the instructions" (App.Br. 82).

However, nothing in this argument suggested that the jury should ignore the instructions and the prosecutor did not argue that the defense was that appellant was not involved in the offenses. The prosecutor's argument reasonably followed from appellant's evidence about how because of brain damage appellant could not remember what he did, lacked the ability to cooly reflect, and that he might not have known that he was doing anything wrong when he killed the victims (Tr. 1444, 1454, 1464; Defendant's Exhibit D). Additionally, appellant has not shown that plain error resulted from the lack of a mistrial because he has not shown that the alleged error could not have been cured by measures short of a mistrial such as an instruction to disregard, See State v. Nolen, 872 S.W.2d 660, 662 (Mo.App., S.D. 1994), or that it had a decisive effect on the outcome of the trial and resulted in manifest injustice. State v. Clayton, 995 S.W.2d 468, 479 (Mo.banc 1999), cert. denied 528 U.S. 1027 (1999). Appellant's counsel had the opportunity to clearly state appellant's defense during the defense argument that followed the prosecutor's statements (Tr. 1607-1620).

2. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor 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 would have had a lot more dead people there. But we

got lucky.

(Tr. 1604). Appellant alleges that this was improper because there was no evidence that he intended to kill anyone else and that the evidence showed that he put down his gun (eventually) after he was ordered to surrender (AppBr. 81).

However, the prosecutor's argument was based on reasonable inferences from the record. State v. Christeson, 50 S.W.3d 251, 270 (Mo.banc 2001), cert. denied 122 S.Ct. 406 (2001). The transcript that shows that appellant revealed his plan of mass murder in a threat that he made to Abbey Rainwater about what would happen if she told anyone that he beat her (Tr. 1217-1218). She testified:

> [Appellant] said he would kill everyone who lived, make me watch and kill the baby and me, too, and then kill himself.

(Tr. 1218). He was trying to carry out that plan when he killed the victims after Abbey told what appellant had done and had gotten a restraining order against him (Tr. 1219). Additionally, while appellant was at the crime scene he specifically threatened to kill Abbey's sisters (Kyra and Whitney) and her friends (Stacy Turner and Amy Doris) (Tr. 1312-1314, 1341, 1367-1368).

Moreover, appellant did not simply put down his gun and surrender when the police showed up, as appellant suggests on appeal. When officers arrived at the house, appellant, who was holding the baby in front of him as a human shield and was waiving a handgun in the direction of the officers, yelled to the officers, "Put down your fucking guns" (Tr. 1041, 1046, 1074-1076, 1103). An officer repeatedly told appellant to put down his weapon, and appellant repeatedly responded by telling the officer to put down his "fucking gun" (Tr. 1042, 1075-1076). It was only after appellant was surrounded by numerous armed officers and appellant saw that he could not escape that he surrendered himself to the officers (Tr. 1045-1046, 1049, 1076-1078, 1104-1106). The officers were lucky that none of them were shot by appellant.

Appellant does not claim that the above cited evidence pertaining to his charged offenses was irrelevant and inadmissible, but he suggests that the arguments about that evidence was irrelevant. However, it is clear that arguments about the circumstances surrounding the murders that pertained to appellant's planning and intent at the time of the crimes were relevant. See State v. Roberts, 948 S.W.2d 577, 590 (Mo.banc 1997), cert. denied 522 U.S. 1056 (1998). Moreover, appellant has not shown that plain error resulted from the lack of a mistrial because he has not shown that the alleged error could not have been cured by measures short of a mistrial, or that it had a decisive effect on the outcome of the trial and resulted in manifest injustice.

3. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor argued:

> ...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.
>
> * * *
>
> ...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...

(Tr. 1628, 1634).

Appellant argues that this argument improperly denigrated his experts because they were entitled to paid, and the evidence that Dr. Lewis was paid over $142,000 by the Public Defender's Office did not mean anything because the vast majority of that money was for her services to the Public Defender's Office in other cases (App.Br. 83-84).

However, this is simply a rehash of a claim that was discussed in Point IV of this brief and it is without merit because the Public Defender's Payments to Lewis in this case and other cases were relevant to show bias. State v. Love, 963 S.W.2d 242-244 (Mo.App., W.D. 1997); State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 65-67 (Mo.App., W.D. 1992). Moreover, appellant has not shown that plain error resulted from the lack of a mistrial because he has not shown that the alleged error could not have been cured by measures short of a mistrial, or that it had a decisive effect on the outcome of the trial and resulted in manifest injustice.

4. Appellant claims that the trial court should have declared a mistrial on its own motion in the State's rebuttal argument when the prosecutor argued:

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

(Tr. 1629). Appellant argues that this argument was improper because it told the jury that the defense wanted them to ignore the instructions (App.Br. 82).

However, this argument did not tell the jury that the defense wanted them to ignore the instructions. It merely pointed out that when the defense argued that appellant was guilty of murder in the second degree they were indicating the lack of importance of the converse instructions for murder in the second degree, Instructions 9 and 13, that focused on whether appellant had the mental intent for murder in the second degree (Tr. 1627; L.F. 989, 993). Moreover, appellant has not shown that plain error resulted from the lack of a mistrial.

5. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor argued the following as part of an argument that appellant was using the baby as a human shield,

instead of simply holding the baby as he surrendered:

> He didn't support that baby's head, at least not good enough the way I was taught. That baby is held with its head right under its chin...

(Tr. 1633).

Appellant argues that this was improper because it turned the prosecutor into an unsworn witness (App.Br. 82). However, a prosecutor may properly argue a matter of common knowledge. See State v. Christeson, supra at 269.

Appellant also argues that this argument was improper because showing that appellant improperly held the baby as a human shield instead of as someone would properly hold a baby made appellant look bad (App.Br. 83). However, it is undisputed that evidence on that subject legally relevant, see State v. Johns, 34 S.W.3d 93, 101, 112 (Mo.banc 2000), cert. denied 121 S.Ct. 1745 (2001)(evidence of use of a human shield was admissible). Proper argument about legally relevant evidence cannot be unduly prejudicial.

Additionally, appellant neglects to mention that the prosecutor's argument directly responded to appellant's argument that he was not using the baby as a human shield. There, his counsel argued:

> He's holding the baby. Of course, again common experience, a three-month baby can't support its head. He's got to hold the baby close to him, but when he comes out of the house.... ...he's holding the baby in an act of surrender.

(Tr. 1626-1627). A prosecutor has considerable leeway to make retaliatory arguments in closing. State v. Middleton, 998 S.W.2d 520, 528 (Mo.banc 1999), cert. denied 528 U.S. 1167 (2000). Moreover, appellant has not shown that manifest injustice resulted from the lack of a mistrial.

6. Appellant claims that the trial court should have declared a mistrial on its own motion when the

prosecutor argued:

> ...I think one of the things that probably irritated me when I was listening was this reference to the defendant being broken. Look at him. He's just fine.

(Tr. 1634). Appellant argues that this was improper because the prosecutor was suggesting that he had additional outside knowledge (App.Br. 83). However, it can be seen from the above that the prosecutor was not suggesting that he had personal knowledge that appellant was not broken, but was arguing based on the evidence and appellant's appearance in the courtroom. See State v. Black, 50 S.W.3d 778, 791 (Mo.banc 2001). Moreover, appellant has not shown that plain resulted from the lack of a mistrial because he did not show that the alleged error could not have been cured by a less drastic remedy or that manifest injustice resulted.

7. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor argued:

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

(Tr. 1635). Appellant raises the same claim as to the argument addressed in section B2 above, and this claim fails for the same reasons as the claim in section B2.

C. Penalty-phase argument

1. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor 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 hard as it will be for you, let's not lay it on a single man's shoulders, okay?

(Tr. 1721). Appellant argues that this is improper because it informed the jury that the judge could do the sentencing (App.Br. 85). He neglects to mention that penalty-phase Instruction 28 informed the jury of this same matter (L.F. 1021). Additionally, correct statements of law cannot improperly diminish the jurors' sense of responsibility. State v. Richardson, 923 S.W.2d 301, 321 (Mo.banc 1996), cert. denied 519 U.S. 972 (1996)(argument regarding executive clemency was proper).

2. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor argued about the best way to prevent appellant from being a danger to others. The prosecutor 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.

(Tr. 1723). Appellant's counsel responded to this by improperly attempting to make the jury think

> that appellant would never get out of his cell if he was incarcerated. He argued: That is a day-to-day existence in a jail cell about the size of your bath. Think about locking yourself in your bathroom and never leaving for the rest of your life. That is punishment, and that is co-equal with the punishment in the statutes of Missouri.

(Tr. 1725). The prosecutor responded to this argument by stating:

> The defendant is not going to spend the rest of his life in your bathroom. He's going to be in a cell out of which he is allowed to go on may occasions. 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 is executed.

(Tr. 1725).

On appeal, appellant claims that the prosecutor's argument was improper because Missouri does not have a "death row" (App.Br. 86). While the prosecutor was technically incorrect for using that term, it was part of a proper argument for "societal self-defense," see State v. Kreutzer, 928 S.W.2d 854, 876 (Mo.banc 1996), cert. denied 519 U.S. 1083 (1997), and future dangerousness. Simmons v. South Carolina, 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 2187 (1994). That argument conveyed the accurate idea that if appellant was sentenced to death and executed, his ability to harm others in prison would be restricted. This is because he would have no opportunities to harm others after he was executed.

Moreover, if appellant had objected the trial court could have had an opportunity to get the prosecutor to use more proper language and cured the inaccuracy. Thus, appellant has failed to show that a mistrial was required because the alleged error could have been cured by lesser relief. Appellant has also failed to show that the remark in question had a decisive effect on the jury's verdict.

3. Appellant claims that the trial court should have declared a mistrial on its own motion when the prosecutor 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.
>
> So this was no boy. This was a man.

(Tr. 1723). Appellant alleges that this was improper because the prosecutor was arguing facts outside of the record and comparing him "unfavorably to young men who served in the military" (App.Br. 85). However, it is proper for a party to argue facts of common knowledge, State v. Christeson, supra at 269, and it is common knowledge that 21 and 22- year-olds serve in the military. It is also proper for the

prosecutor to argue that appellant's age is not particularly mitigating in light of the fact that other people who were his age, who were in the military, were bearing great responsibilities. The fact that appellant compares "unfavorably" to others is the point of the argument and has nothing to do with appellant's constitutional rights. Moreover, appellant has not shown that plain resulted from the lack of a mistrial.

4. Appellant argues that the trial court committed plain error when it denied his motion for a mistrial after the prosecutor argued:

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

(Tr. 1737).[4] Appellant argues that this argument about lack of remorse improperly commented on his failure to testify.

This argument, though, is similar to one that was approved of in State v. Tokar, 918 S.W.2d 753, 769 (Mo.banc 1996), cert. denied 519 U.S. 933 (1996)(The prosecutor argued, "There has been absolutely no remorse exhibited"). It was not a direct comment on appellant's failure to testify or an indirect comment that was calculated to draw the jury's attention to appellant's failure to testify. See State v. Clemons, 946 S.W.2d 206, 228 (Mo.banc 1997), cert. denied 522 U.S. 968 (1997). It was directed at appellant's lack of emotion as he sat in court in front of the jury, not at his failure to take the stand.

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[4]This claim is not preserved for appeal because appellant did not raise it in his motion for a new trial and his only objection at trial stated no legally recognizable reason in that he merely stated that it was improper to comment on a defendant's demeanor. See State v. Morrow, 968 S.W.2d 100, 118 (Mo.banc 1998), cert. denied 525 U.S. 896 (1998)("Objection, improper evidence" was not specific enough to raise a claim).

Moreover, appellant has failed to show that the alleged error could not have been corrected by relief short of a mistrial or that it had a decisive impact on his trial.

5. Finally, appellant alleges that the trial court should have declared a mistrial on its own motion when the prosecutor argued:

> 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.

(Tr. 1738). Appellant alleges that this argument was improper because it suggested that the jury was weak if it failed to return a death verdict. However, this argument does no such thing. It really just asks the jury to avoid doing nothing, that is to deadlock and not reach a decision on punishment. Moreover, appellant has not shown that plain error resulted from the lack of a mistrial because he has not shown that the alleged error could not have been cured by measures short of a mistrial, or that it had a decisive effect on the outcome of the trial.

VI.

The trial court did not commit plain error by overruling a general objection at one point and and by refusing to declare a mistrial on its own motion when the prosecutor elicited evidence that appellant did not make a statement to Officers Clark and Jefferson, who did *not* attempt to question him, because the trial court was not required to intervene in the case and to declare a mistrial on its own motion, this evidence was not an impermissible comment on appellant's post-Miranda silence in that the fact that appellant did not make a statement to those two officers was not used as affirmative evidence of appellant's guilt or to impeach his testimony, and appellant failed to show that manifest injustice resulted from this evidence.

Appellant claims that the trial court erred and plainly erred by overruling objections and failing to declare a mistrial on its own motion when the prosecutor allegedly elicited from Officers Clark and Jefferson comments on appellant's exercise of his right to remain silent (App.Br. 88).

A. Preservation

Appellant appears to concede that his claims are not preserved for appeal (App.Br. 90). He claims that the trial court should have granted a mistrial on its own motion because he did not ask for the court to do so during his trial. Further, the only objection that was raised as to the matters in question was simply the word "Objection" during the testimony of Officer Clark (Tr. 1048). Such an objection preserves nothing for appeal because it lacks specificity. State v. Morrow, 968 S.W.2d 100, 118 (Mo.banc 1998), cert. denied 525 U.S. 896 (1998)("Objection, improper evidence" was not specific enough to raise a claim).

B. No plain error review of sua sponte mistrial claim should occur

Since there was no valid objection to any of the evidence in question, there is only appellant's claim

that the trial court committed plain error by failing to grant a mistrial on its own motion when the evidence was adduced. However, appellant's failure to raise his claims below should be fatal to them because a trial court should avoid granting a mistrial on its own motion in that a defendant has the right to have his trial completed by the jury that was sworn to hear his case and a retrial would be barred by the Double Jeopardy Clause if any prejudice could have been cured by less drastic remedy. State v. Marlow, 888 S.W.2d 417, 420 (Mo.App., W.D. 1994); State v. Weeks, 982 S.W.2d 825, 838 n. 13 (Mo.App., S.D. 1998). Moreover, had an objection been made, the trial court could have taken appropriate steps to make corrections. State v. Kempker, 824 S.W.2d 909, 911 (Mo. banc 1992). A party cannot fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. State v. McGee, 848 S.W.2d 512, 514 (Mo.App., E.D. 1993). Thus, this Court should refuse to review appellant's claims.

C. Appellant's claims are without merit

1. Relevant facts

Should this Court choose to ignore appellant's failure to waive his right to be tried by the jury that was sworn to hear the case and his failure to raise any relevant objection or request a mistrial, respondent will address the substance of appellant's claims.

During the guilt phase, State's witness Officer Paul Clark testified on direct examination as follows:

Q. After you got [appellant] to the car, what did you do?

A. We patted him down, checked his pockets and everything that he had on him, and I advised him of his constitutional rights.

Q. Did you have a conversation with him then?

A. No.

Q. During the time that you were with him, how was he acting?

A. He was just hot and all sweaty.

Q. Did he say anything?

MS. JIRARD: Objection.

A. No.

THE COURT: Overruled.

Q. Did he appear to be calm?

A. Yes.

(Tr. 1047-1048).

In the penalty phase, appellant called Officer Ralph Jefferson as a witness (Tr. 1684). During the cross-examination of Jefferson, the prosecutor asked how appellant was acting when he was first brought to the police station (Tr. 1687-1688). Officer Jefferson said, "Solemn, he wasn't saying anything. He didn't appear to be angry. He really did not have much of an expression on his face" (Tr. 1688).

However, the evidence at the hearing on appellant's motion to suppress appellant's post-arrest statements showed that appellant was not silent after he was arrested. It showed that as appellant was being placed in the patrol car by Officer Corey Mitchell, after he took custody of appellant from Officers Clark and Gerber, Officer Corey said to appellant, "Terrance, I can't believe you would do something like this" (L.F. 773-774). Appellant replied, "Mitch, have you ever had enough to where you just snap?" (L.F. 774). Officer Corey replied, "No, not to that point" (L.F. 774). He then placed appellant in the patrol car (L.F. 774).

After appellant arrived at the police station, he was taken to the narcotics office, again informed of his Miranda rights, indicated that he understood his rights, and he agreed to talk to Detective Michael Elliott

(Tr. 107-113). Appellant said that he would talk about anything except for the incidents that resulted in his arrest (Tr. 113). He spoke to Detective Elliott about numerous subjects including that he was looking for work and that he had lost a scholarship (Tr. 113). When Detective Elliott attempted for the last time to get appellant to talk about the shootings, appellant said that he would not talk about the incident without his attorney (Tr. 115). Detective Elliott concluded the interview and left the room (Tr. 115).

While appellant was sitting in the room with Officer James Mooty, appellant volunteered to Officer Mooty that this might be a homicide now (Tr. 132). Officer Mooty asked why appellant thought that (Tr. 132). Appellant dropped his head and said, "I don't know" (Tr. 132). After a few seconds had passed, appellant looked up and asked if Officer Mooty knew why he had done what he had done (Tr. 132). Officer Mooty asked appellant what he had done (Tr. 132). Appellant dropped his head and said, "I don't know" (Tr. 132-133). After a few more seconds, appellant looked up at Officer Mooty, grinned, and said that he could have gotten away with it if he had wanted to (Tr. 133). Officer Mooty asked appellant why didn't he (Tr. 133). Appellant again dropped his head and said that he did not know (Tr. 133).[5]

2. Analysis

a. No improper use of appellant's "silence"

Plain error could not have resulted from the trial court failing to declare a mistrial on its own motion after the prosecutor elicited evidence that showed that appellant was not questioned about the murders by

[5]It is unclear why the trial court sustained appellant's motion to suppress because the motion was refuted by the evidence and trial court did not issue specific findings on this issue (L.F. 775). If appellant's statements were suppressed because the court did not believe that appellant had been informed of his Miranda rights, this case does not pertain to post-Miranda silence.

Officers Clark and Jefferson and never made statements about the offenses to them because the State did not use this evidence of appellant's silence to prove that appellant committed the murders or to impeach appellant. Since appellant was not questioned by these officers and neither officer confronted appellant with facts which would incriminate appellant if he was silent, this evidence did not raise an inference that appellant was guilty. Moreover, as was discussed above, appellant did in fact make many incriminating statements to the police.

While it is true that it is improper to use a defendant's post-arrest post-Miranda silence "either as affirmative proof of a defendant's guilt or to impeach his testimony," State v. Howell, 838 S.W.2d 158, 161 (Mo.App., S.D. 1992); Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), a defendant's silence can be mentioned if it is not used for those improper purposes. State v. Mathenia, 702 S.W.2d 840, 842 (Mo.banc 1986), cert. denied 477 U.S. 909 (1989)(the State properly elicited evidence that the defendant did not make a statement at the time of his arrest, but later made a statement because the defendant's silence was not used as affirmative proof of the defendant's guilt or to impeach him).

"A survey of the case law addressing impermissible comments on a defendant's invocation of his fifth amendment rights reveals the situation arises almost exclusively in the context of police interrogation." State v. Johnson, 943 S.W.2d 837, 840 (Mo.App., E.D. 1997). This is because the admission of evidence of a defendant's post-arrest silence is improper when it is shown that the defendant stood mute in the face of an accusation or has failed to volunteer a statement when he was confronted with incriminating evidence. Id.

Many cases hold that evidence similar to that in the case at bar may be properly elicited. See State v. Howell, supra at 160-163 (evidence properly admitted because no reasonable inference of guilt could be drawn from the fact that the defendant was informed of his rights and then was silent where no one was

questioning him when he invoked his rights); State v. Johnson, supra at 839-841 (no reasonable inference of guilt could be drawn from evidence that the defendant was informed of his rights and then exercised them where he was not being questioned when he invoked his rights); State v. Green, 798 S.W.2d 498, 501-503 (Mo.App., S.D. 1990)(no reasonable inference of guilt could be drawn from evidence that the defendant was arrested, informed of his rights, made a short statement, invoked his rights, and later made another statement); State v. Starks, 459 S.W.2d 249, 251-253 (Mo.1970)(evidence that the defendant was arrested, informed of his rights, answered some questions, and then would not say anything further was proper because "[t]his was not a case where an accused clams up in the face of a charge of guilt, *made under the circumstances calling imperatively for an admission or denial*").

State v. Dexter, 954 S.W.2d 332, 338-340 (Mo.banc 1997), which is relied on by appellant, is nothing like the case at bar. In that case, the State adduced evidence that appellant invoked his rights and refused to speak during a custodial interrogation when he was being confronted by a detective with a summary of the evidence and with the defendant's statement, and the detective told the defendant that he did not think that the defendant was truthful in his statement. Id. at 338. In the case at bar, the statements did not pertain to an interrogation and appellant was not confronted with evidence by Officers Clark and Jefferson. In Dexter, unlike the case at bar, the prosecutor improperly impeached the defendant by cross-examining appellant about things that appellant did not tell the police *after* the defendant had invoked his rights. Id. at 339. Also, unlike the case at bar, the prosecutor then emphasized these matters in closing argument. Id.

In State v. Zindel, 918 S.W.2d 239, 239 (Mo.banc 1996), which is also relied on by appellant, the prosecutor repeatedly adduced evidence and argued in an attempt to show that the appellant was guilty because he had invoked his right to counsel during custodial interrogations. The prosecutor used the

defendant's invocation of his rights to show that the defendant was not insane because such an action showed that the defendant was lucid. Nothing of the sort happened here. Here, there was no evidence of interrogation, or invocation of rights, or evidence that the defendant invoked those rights and stood mute in the face of an accusation.

b. No manifest injustice

Additionally, appellant has failed to show that manifest injustice occurred from the trial court not granting a mistrial on its own motion, even if the evidence in question was inadmissible. As was mentioned above, it would have been improper for the trial court to grant a mistrial if the alleged error could have been cured with less drastic relief. State v. Marlow, supra at 417. Appellant could have cured the alleged error by raising a proper objection and getting the court to instruct the jury to disregard the evidence. State v. Prince, 903 S.W.2d 944, 948-949 (Mo.App., S.D. 1995); State v. Hlavaty, 871 S.W.2d 600, 606 (Mo.App., E.D. 1994).

Moreover, "[t]o determine whether manifest injustice exists, it is necessary to review in some detail the manner and extent to which the improper evidence was used." State v. Zindel, supra at 241. In the case at bar, the evidence was not used to show that appellant was guilty of an offense. Appellant conceded that he was guilty of murder in the second degree (Tr. 1627), and the prosecutor did not attempt to show that appellant deliberated in the murders because he invoked his rights and refused to speak to officers when questioned. In fact, he could not have done so because the evidence in question did not pertain to any questioning of appellant and because appellant was not in fact silent in that, as was discussed above, he made many statements to other officers about his involvement in the murders. Also, manifest injustice could not have occurred because there was overwhelming evidence of appellant's guilt and that the sentences that were imposed were appropriate. Appellant's defense that he had a brain injury from birth

that somehow had no effect on his life until shortly before the murders and that impaired his ability to deliberate was not impacted by the evidence in question and was incredible. Thus, appellant's sixth point must fail.

VII.

The trial court did not commit plain error or any other type of error when it did not declare a mistrial on its own motion or rejected appellant's claims concerning (A) the constitutionality of the death penalty, (B) the prosecutor's motivation for seeking the death penalty, (C) the Cape Girardeau County jury selection procedures, (D) the decision not to submit a second questionnaire to the jury, and (E) the mentioning of the races of individuals because appellant's claims are without merit and appellant failed to prove that manifest injustice or prejudice occurred.

(F). This Court should, in the exercise of its independent statutory review, affirm appellant's sentence of death because (1) this sentence was not imposed under the influence of passion prejudice or any or arbitrary factor; (2) the evidence supports the jury's finding of aggravating circumstances, and (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.

In appellant's seventh point, he dumps before this Court a conglomeration of multifarious claims in violation of Rules 30.06 and 84.04. State v. Thompson, 985 S.W.2d 779, 784 (Mo.banc 1999); State v. Markham, No. SD24021, slip op. at 8, n. 2 (Mo.App., S.D. January 10, 2002)("Arguably, defendant's inclusion of two separate claims of error in Point I is multifarious and, therefore, contrary to Rule 84.04"). Thus, none of these claims are preserved for appeal.

A. Constitutionality of the death penalty

Appellant raises the often rejected claims that the death penalty is unconstitutional because the prosecutor has discretion and because this Court allegedly conducts unconstitutional proportionality review

(App.Br. 92). However, the prior decisions rejecting these claims are valid should be followed. See State v. Barnett, 980 S.W.2d 297, 308-309 (Mo.banc 1998), cert. denied 525 U.S. 1161 (1999); State v. Rousan, 961 S.W.2d 831, 854-855 (Mo.banc 1998), cert. denied 524 U.S. 961 (1998); Murry v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994), cert. denied 515 U.S. 1136 (1995).

B. Allegation that the prosecutor sought the death penalty because of appellant's race, instead of the fact that appellant committed a heinous double murder

On September 16, 1997, the Butler County Prosecutor, Carl E. Miller, II, gave notice of the State's intent to seek the death penalty (L.F. 54). He withdrew from the case on November 17, 1997, and Assistant Attorney General Robert Ahsens, III, was assigned to the case (L.F. 4).

On the day before the trial started, appellant filed a motion to preclude the State from pursuing the death penalty on the ground that Ahsens had allegedly sought the death penalty because of appellant's race (L.F. 921-924). Appellant neglected to mention in the motion that Ahsens was not the person who made the decision to pursue the death penalty in this case.

Appellant's motion alleged that Ahsens was racially biased against appellant because of something that he had written in the margin of a report of a defense expert, Dr. Pincus, that had been sent to Dr. English (L.F. 921). Dr. Pincus wrote about appellant being racially biased against whites. He stated:

He confided to an attorney that he, like his stepfather, did not trust white people.

(L.F. 942). Ahsens had written in the margin of this report that appellant, "Likes white girls though" (L.F. 942).

At the hearing on this matter, Ahsens explained:

Those notes are mine. Notes written parenthetically in the margin of Dr. Lewis's report for the purpose of prompting possible cross examination of her during her deposition which

was taken for the purpose of preserving her testimony.

However, I think Mr. Moreland is making this point up out of whole cloth. The fact of the matter is that part of the mental status in this case is attributed to the defendant's extreme distrust of whites. My note there, "Likes white girls, though," is a possible cross examination point that if he distrusts whites, then perhaps his relationship with Abbey Rainwater was inconsistent with this alleged dislike. The fact that that would somehow brand me or anyone else in my office a racist, I think, is frankly a good imagination and nothing more.

(Tr. 361). The trial court then denied appellant's motion (L.F. 363).

The discretion of the prosecuting authority, while broad, cannot be deliberately based upon race or other arbitrary classifications. Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 524 (1985). In order to establish an equal protection violation, the proponent bears the burden of showing not only a discriminatory effect in his case, but also that it was motivated by a discriminatory motive. State v. Taylor, 18 S.W.3d 366, 376-377 (Mo.banc 2000), cert. denied 531 U.S. 901 (2000). Because discretion is essential to the criminal justice process, "exceptionally clear proof" is required before a court should find that the prosecutor's discretion was abused. Id. at 377.

From the above, it is clear that the trial court was entitled to find that the prosecutor was credible and that appellant failed to provide exceptionally clear proof that the decision to pursue the death penalty was racially motivated. As was explained by the prosecutor, his notations did not pertain to racial bias, but referred to areas of fruitful cross-examination. Why did Dr. Pincus believe appellant's assertion that appellant distrusted white people in light of the fact that appellant dated Abbey Rainwater who was a white person? The trial court was entitled to believe that the prosecutor pursued the death penalty because

appellant executed two individuals as part of a plan to wipe out an entire family and because of the strength of the State's case. See State v. Brooks, 960 S.W.2d 479, 499 (Mo.banc 1997), cert. denied 524 U.S. 957 (1998).

C. Claim as to Cape Girardeau jury selection practices

Appellant recycles the claim of improper jury selection practices that was refuted in Point I of this brief. It is just as non-meritorious in this point as it was in Point I.

D. Claim that the trial court should have submitted a second jury questionnaire

Appellant claims that the trial court erred by not submitting his jury questionnaire to the venirepersons (App.Br. 92). The record shows that on December 17, 1997, appellant filed a motion to submit a jury questionnaire to the venirepersons (L.F. 405). At a hearing on February 10, 1998, appellant indicated that he had not prepared the questionnaire (Tr. 80). The trial court said that it was going to send out its own questionnaire and that the venirepersons' answers to the questions would be made available to the parties before the trial (Tr. 82). He indicated that he was reluctant to tip off the venirepersons in advance that they were being considered for service on a death-penalty case (Tr. 85). He said that he would deny appellant's motion, but would reconsider it if appellant put together a questionnaire (Tr. 87-89).

On January 10, 2001, appellant filed a motion to reconsider the submission of a jury questionnaire and a proposed questionnaire (L.F. 860-869). That questionnaire contained many improper open-ended questions about how jurors felt or thought about matters (L.F. 862-868). See State v. Kreutzer, 928 S.W.2d 854, 864 (Mo.banc 1996), cert. denied 519 U.S. 1083 (1997). At a hearing on January 17, 2001, the prosecutor objected to the questionnaire on the ground that it contained many open-ended

questions that did not address the ability of the venirepersons to follow the instructions of the court (Tr. 303). Appellant's counsel explained that he wanted the venirepersons to take time to fill out the questionnaires after they arrived at the courthouse, that the about 150 questionnaires would then be photocopied and could used by the parties and the court during voir dire (Tr. 305). The trial court decided that this process would be cumbersome and would be an inefficient use of the court's time, and it denied appellant's motion (Tr. 305-306).

Appellant fails to acknowledge the cases holding that there is no constitutional right to the submission of written questions to a jury panel. See State v. Brooks, supra at 498; State v. Parker, 886 S.W.2d 908, 921 (Mo.banc 1994), cert. denied 514 U.S. 1098 (1995); State v. Carter, 955 S.W.2d 548, 561 (Mo.banc 1997), cert. denied 523 U.S. 1052 (1998)("trial court properly refused request to submit a questionnaire because, the trial judge's experience, such questionnaires did not expedite voir dire, caused more problems than they solved, and were too much paper"). "[I]ndeed, oral voir dire is preferred because it reveals credibility. State v. Parker supra. Moreover, appellant has failed to show that the trial court prohibited him from orally asking the jurors any necessary questions. See State v. Taylor, 944 S.W.2d 925, 939 (Mo.banc 1997). Thus, appellant's claim is without merit.

E. Claim for mistrial on court's own motion when race was mentioned

Appellant alleges that the trial court should have granted a mistrial on its own motion when the prosecutor repeatedly elicited the race of appellant and the other parties because this was prejudicial (App.Br. 98; Tr. 1045, 1048-1050, 1074, 1101-1102).

Appellant presents no real argument showing that a mistrial on the court's own motion was required. See State v. Marlow, 888 S.W.2d 417, 420 (Mo.App., W.D. 1994). Nor does he specifically address any of the claimed errors. Respondent will examine one of them in order to expose the specious

nature of appellant's claims.

In the first instance cited by appellant, the following occurred during the direct examination of Officer Paul Clark in the guilt phase as to what he observed after he arrived at the crime scene. The following occurred:

A. After Lieutenant Wallace advised that he had moved away from the window, after that a subject came to the front door.

Q. You say a subject. Did this appear to be the same person, or could you tell?

A. I could not tell, no.

Q. Who, if anyone, was with him?

A. He was still holding the baby in front of him, and there was another young female that was behind him.

Q. When the man - - When this person had been at the window, could you tell if it was a man or a woman?

A. No.

Q. Could you tell whether they were black or white?

A. Black.

Q. When the person came to the door, could you tell whether it was a man or a woman?

A. As he came out the door.

Q. And what then - - You say he, so you must have decided it was a man?

A. Yes.

Q. And did this person appear - - Did this person appear to be black or white,

the person who came out the door?

A. A black male.

(Tr. 1044-1045).

As can be seen from the above, the prosecutor was not attempting to get the jury to convict and punish appellant based on appellant's race. He was merely adducing evidence of race as an identifying feature. Appellant has not shown that it is improper to identify persons based, in part, on matters such as race and gender. The other testimony complained of consists of witnesses using race as an identifying feature, such as in the above example (Tr. 1048-1050, 1074, 1101-1102). Appellant has not proven that any inadmissible evidence was adduced or that a mistrial on the court's own motion was required. Thus, his claims are without merit.

F. Proportionality review

Under the mandatory independent review contained in §565.035.3, RSMo 2000, this Court has to determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime the strength of the evidence and the defendant.

This Court's proportionality review is designed to prevent freakish and wanton application of the death

penalty. State v. Ramsey, 864 S.W.2d 320, 328 (Mo. banc 1993), cert. denied 511 U.S. 78 (1994).

1. Sentence was not imposed under the influence of passion, prejudice, or any other improper factor

The record shows that appellant's sentence was not imposed under the influence of prejudice, passion or any other improper factor. Appellant's argument on this matter is just a rehash of the arguments that were shown to be without merit in other parts of this brief.

2. Statutory aggravating circumstances were supported by the evidence and are valid

As is discussed in Point VIII, the evidence supports jury's findings of the statutory aggravating circumstances (1) that the murder occurred while appellant was engaged in the commission of another unlawful homicide, (2) that appellant by his act of murder knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, and (3) that the murder was outrageously or wantonly vile, horrible or inhuman because it involved depravity of mind in that appellant killed Debbie Rainwater as part of a plan to kill more than one person and, thereby exhibited a callous disregard for the sanctity of all human life § 565.032.2 (2), (3) and (7), RSMo 2000, and the findings of these statutory aggravating circumstances and are valid (L.F. 1037).

3. Sentence is not disproportionate

Appellant does not appear to dispute that his sentence is not disproportionate to the penalty imposed in other similar cases, considering the crime, the strength of the evidence, and the defendant. The murder of Debbie Rainwater resembles the crimes committed in State v. Wolfe, 13 S.W.3d 248, 265 (Mo.banc 2000), cert. denied 531 U.S. 845 (2000); and State v. Roberts, 948 S.W.2d 577, 607 (Mo.banc 1997), cert. denied 522 U.S. 1056 (1998), in that the murder was committed after appellant invaded a home for the purpose of committing a crime, in this case the murder of Debbie Rainwater and

her family. As in such cases as State v. Barton, 998 S.W.2d 19, 29 (Mo.banc 1999), cert. denied 528 U.S. 1121 (2000); and State v. Clayton, 995 S.W.2d 468, 484 (Mo.banc 1999), cert. denied 528 U.S. 484 (1999), appellant murdered a person who was defenseless: Debbie Rainwater was on her knees, holding a baby, and begging for her life when appellant stood behind her and shot her - - execution style - - in the back of the head (Tr. 1187-1194, 1306; State's Exhibit 22). "There are also numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person." State v. Barnett, supra; State v. Johnston, 968 S.W.2d 123 (Mo.banc 1998), cert. denied 525 U.S. 935 (1998); State v. Clemons, 946 S.W.2d 206 (Mo.banc 1997), cert. denied 522 U.S. 968 (1997); State v. Ramsey, supra; State v. Hunter, 840 S.W.2d 850 (Mo.banc 1992), cert. denied 509 U.S. 926 (1993). Appellant was also a violent person who repeatedly beat the mother of his child, and there was strong evidence of his guilt. Thus, his sentence was not excessive or disproportionate and appellant's seventh point must fail.

VIII.

The trial court did not err in the penalty phase by submitting Instruction 23 to the jury because the statutory aggravating circumstances set out in that instruction were supported by the evidence, were not improperly duplicative, and did not result in prejudice to appellant.

Appellant alleges that the trial court erred in the penalty phase when it submitted Instruction 23, on statutory aggravating circumstances, to the jury in that the aggravating circumstances "were not supported by the evidence and were duplicative..."(App.Br. 100). However, a review of the argument portion of appellant's brief reveals that he is only challenging two of the three circumstances that were found by the jury, that is the first and third circumstances (App.Br. 104; L.F. 1037). He even omits the second circumstance from his quotation of Instruction 23 (App.Br. 100-101).

The statutory aggravating circumstances that were found by the jury are: (1) that the murder of Debbie Rainwater occurred while appellant was engaged in the commission of the unlawful homicide of Stephen Rainwater, (2) that appellant by his act of murder knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person, and (3) that the murder of Debbie Rainwater was outrageously or wantonly vile, horrible or inhuman because it involved depravity of mind in that appellant killed her as part of a plan to kill more than one person and, thereby exhibited a callous disregard for the sanctity of all human life (L.F. 1037). § 565.032.2 (2), (3) and (7), RSMo 2000.

A. Only one circumstance need be valid

In Missouri, a statutory aggravating circumstance is a legal conclusion whose only function is to limit the discretion of the sentencer in a capital case by premising a defendant's eligibility for the death penalty upon the proof of specifically-defined facts. Tuilaepa v. California, 512 U.S. 967, 971-972, 114 S.Ct.

2630, 129 L.Ed.2d 750 (1994); State v. Worthington, 8 S.W.3d 83, 88 (Mo. banc 1999), cert. denied 529 U.S. 1116 (2000). In "non-weighing" states such as Missouri, "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 873-874, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); see State v. Brooks, 960 S.W.2d 479, 496 (Mo. banc 1997), cert. denied 524 U.S. 957 (1998) (Missouri is a "nonweighing" state). Instead, the sentencer considers all of the evidence in arriving at a decision on punishment. Stringer v. Black, 503 U.S. 222, 229-230, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); State v. Worthington, supra, 8 S.W.3d at 88; §565.030.4(2) and (3), RSMo 1994.

For this reason, the invalidity of some but not all of the statutory aggravating circumstances found by a capital sentencer does not affect the validity of a sentence of death. State v. Taylor, 18 S.W.3d 366, 377-378 (Mo. banc 2000); State v. Clay, 975 S.W.2d 121, 145 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999); State v. Black, 50 S.W.3d 778, 791 (Mo.banc 2001).

In light of the fact that appellant does not attack all of the statutory aggravating circumstances that were found by the jury and in light of the fact, which is discussed below, that there is at least one valid statutory aggravating circumstance, appellant's claims attack on his sentence of death must fail. Nevertheless, respondent will address each statutory aggravating circumstance that was found by the jury.

B. Statutory aggravating circumstances were supported by the evidence

1. Appellant argues that the first statutory aggravating circumstance, that the murder of Debbie Rainwater occurred while appellant was engaged in the commission of the unlawful homicide of Stephen Rainwater, is not supported by the evidence because appellant did not shoot both of those people at the exact same time (App.Br. 101-102). However, the shootings did not have to occur at the exact same time

for appellant to be engaged in the commission of them at the same time. See State v. Johnston, 968 S.W.2d 123, 125-126,135 (Mo.banc 1998), cert. denied 528 U.S. 935 (1998); State v. Smith, 944 S.W.2d 901, 909,925 (Mo.banc 1997), cert. denied 522 U.S. 954 (1997). The shooting of the Debbie Rainwater occurred while appellant was engaged in the commission of the murder of Stephen Rainwater because as is discussed in subsection 3. below both murders were committed pursuant to a common scheme which was to lure Stephen Rainwater out of the house, away from his gun, so that appellant could begin his planned extermination of the Rainwater family, including the murder of Stephen Rainwater when he returned to the house and was defenseless (Tr. 1159, 1217-1219, 1227).

2. As was mentioned above, appellant does not specifically dispute that there was sufficient evidence to support the second statutory aggravating circumstance, which was that appellant by his act of murder knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person. Respondent gratuitously notes that this circumstance was supported by the evidence that showed that appellant created a great risk of death to baby Kyra when he shot Debbie Rainwater, who was holding Kyra in her arms, in the back of the head as Debbie Rainwater was on her knees begging for her life (Tr. 1187-1194, 1303-1306). See State v. Franklin, 969 S.W.2d 743, 745 (Mo.banc 1998).

3. The circumstance that the murder of Debbie Rainwater was outrageously or wantonly vile, horrible or inhuman because it involved depravity of mind in that appellant killed her as part of a plan to kill more than one person and, thereby exhibited a callous disregard for the sanctity of all human life was also supported by the evidence. Appellant revealed his plan of mass murder in a threat that he made to Abbey Rainwater about what would happen if she told anyone that he beat her (Tr. 1217-1218). He was trying to carry out that plan when he killed the victims after Abbey told what appellant had done and had gotten a restraining order against him (Tr. 1219).

C. Alleged duplication

Appellant's claim that the first and third statutory aggravating circumstances are improperly duplicative has been rejected by this Court. State v. Christeson, 50 S.W.3d 251, 270 (Mo.banc 2001), cert. denied 122 S.Ct. 406 (2001). Moreover, since statutory aggravating circumstances merely open the door to consideration of capital punishment, at which point the jury considers all the evidence, appellant's "duplication" theory is meaningless. State v. Brown, 902 S.W.2d 278, 293 (Mo. banc 1995), cert. denied 516 U.S. 1031 (1995); State v. Ramsey, 864 S.W.2d 320, 337 (Mo. banc 1993) cert. denied 511 U.S. 78 (1994). Even if duplication occurred, it would not be prejudicial. State v. Brown, supra at 293. Thus, appellant's eighth point must fail.

IX.

The trial court did not commit plain error during voir dire when it did not declare a mistrial on its own motion when (A) the prosecutor said that both sides would present evidence, (B) appellant was limited to asking proper and relevant questions concerning the ability of the venirepersons to consider a sentence of life, and (C) the prosecutor stated that the venirepersons should consider all of the evidence rather than one single factor, because the trial court's actions were proper, appellant failed to show that the alleged errors could not have been cured by relief less drastic than a mistrial, and manifest injustice did not result from the trial court's actions.

Appellant alleges that the trial court committed plain error by not declaring a mistrial on its own motion and by sustaining some of the State's objections during voir dire (App.Br. 105). He concedes that none of his claims are preserved for appeal because he failed to request a mistrial, failed to object and/or failed to include his claims in his motion for a new trial (App.Br. 105).

A. Both sides would present evidence

Appellant alleges that the trial court should have granted a mistrial on its own motion when the prosecutor told venirepersons: "There will be evidence from both sides" (Tr. 477); "The lawyers put on evidence" (Tr. 598); "[mitigating circumstances] may come up as put on by the defense" (Tr. 601); "The jury would hear evidence from both sides" (Tr. 684); and "its very common for there to be some kind of evidence presented by both sides" (Tr. 761). Appellant alleges that these statements were improper because they told the jury that the defense would present evidence - - as it in fact did - - and that he was prejudiced because he was not required to present any evidence (Tr. 105). However, these statements accurately stated what was going to happen in the case, which is that both parties were going to present evidence. Thus, they did not mislead the jurors and did not have a decisive impact on the proceedings.

Moreover, appellant's claim must fail because appellant failed to show that any error could not have been cured by relief less drastic than a mistrial. State v. Marlow, 888 S.W.2d 417, 420 (Mo.App., W.D. 1994).

B. Consideration of life even if no mitigation evidence

Appellant claims that the trial court should have declared a mistrial on its own motion and not sustained the prosecutor's objection at several points when the prosecutor allegedly objected when appellant asked whether some venirepersons could consider life if appellant did not present any mitigating evidence (App.Br. 107). However, this inquiry was irrelevant in light of the fact that appellant did in fact present mitigating evidence. As is discussed below, the trial court properly had appellant rephrase his questions so that they were directed at the State's burden of proof on the issue of punishment and about the ability of venirepersons to consider the full range of punishment.

The record shows that the first time the inquiry was asked, the prosecutor indicated that appellant had already stated that he was going to present evidence, the question was in fact answered by the venireperson in question, Josephine Williams, and she did not sit on appellant's jury (Tr. 566-567; L.F. 949). Appellant has failed to show that relief short of a mistrial would not have cured an error if an error occurred or that manifest occurred.

He also does not show that manifest injustice occurred when the trial court sustained the prosecutor's objections to appellant's questions to venirepersons Donna Aufdenberg, Ladonna Seabaugh, and Bryan Sickrey, on this subject because appellant was permitted to ask them questions that were more relevant concerning whether they would put a burden on the defense to prove that life in prison was the appropriate punishment before they would consider it, and because they did not serve on appellant's jury

(Tr. 638-645, 723, 728-734; L.F. 950). Appellant also does not show that relief short of a mistrial would not have cured an error if an error occurred.

Appellant also cites to transcript pages 740-742, which pertain to the questioning of venireperson Fred Glueck (App.Br. 107). However, the prosecutor did not object to any questions on those pages and did not make any statements to the venirepersons on those pages. Nor did Glueck sit on appellant's jury (L.F. 949). Appellant has failed to show that manifest injustice occurred.

C. No single factor comment

Appellant also alleges that the trial court should have declared a mistrial on its own motion during voir dire when the prosecutor repeatedly stated that the jury should consider all of the evidence, rather than just looking at a single factor (App.Br. 108; Tr. 490, 602, 624-625, 691, 701). He alleges that this suggested: that the jury could impose the death penalty even if it did not find a statutory aggravating circumstance; that the jury could impose death even if it did not find that the evidence in aggravation outweighed the evidence in mitigation; and that it could impose death even if it "decid[e]d under all of the circumstances not to impose death" (App.Br. 108). These allegations are incorrect. Viewed in context, it is clear that the prosecutor's questions did not imply these matters and were part of an inquiry that was designed to determine whether venirepersons could fairly consider all of the evidence.

Moreover, appellant has failed to show that the trial court was required to grant a mistrial on its own motion because he failed to show that the alleged errors could not have been cured by relief short of a mistrial, State v. Marlow, supra at 420. Nor has he shown that they had a decisive impact on the result of his trial in light of the fact that the jury was properly instructed on any issues that were relevant to the prosecutor's remarks. See State v. Smith, 32 S.W.3d 532, 553 (Mo.banc 2000). Thus, appellant's ninth point must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of January, 2002, to:

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