IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
VS.	)	NO. SC85128
	)	
TRAVIS E. GLASS,	)	
	)	
APPELLANT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY
THE HONORABLE FRANK CONLEY, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

After trial in Boone County, a Callaway County jury convicted appellant Travis Glass of one count of first degree murder, §565.020, RSMo 2000.[1] Adopting the jury's penalty phase verdict, the trial court, the Hon. Frank Conley, sentenced Travis to death. This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

Travis Glass was born July 25, 1979 (T1334-35).[2] One week later, his mother, Sandy Glass, left him with his grandparents, George and Wanetta Patre, who raised Travis and his older sisters Tonya and Tina (T1225-27, 1304). Sandy traveled with her second husband, a musician and saw Travis only on rare visits home (T1258-59, 1343-44, 1271). Sandy admitted: "I've seen him more since he's been locked up than I've seen him his whole life" (T1343-44).

Travis grew up believing his father was Sandy's first husband Charles

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[1] All statutory references are to RSMo. 2000 unless otherwise noted.

[2] Appellant citations to the record are as follows: T-Transcript; LF-Legal File; StEx-State's Exhibit; DefEx-Defendant's Exhibit; A-Appendix.

Glass (T1337-42). Before trial, Sandy went to see Travis in the Callaway County Jail and told him he was the product of "a one-night stand" (T1341). She never identified Travis' true father (T1341).

Travis contracted spinal meningitis when he was about two years old (T1238-39). He had a seizure at home and his Aunt Connie took him to the hospital (T1302). At the emergency room, Travis' temperature was 107º (T1303). He had two more seizures at the hospital where he remained for two weeks (T1303). Connie was told Travis could have brain damage "[b]ecause his temperature went so high" (T1303).

The Patres owned three houses at the bottom of a hill, at the dead end of a road, in Palmyra (T1227-28). Travis, his two sisters, and their grandparents lived in one of the houses (T1229). Travis slept in his grandparents' room in his own bed until Tonya moved out (T1227-28, 1236). Patre family members lived in the other two houses and nearby (T1228,1255,1270,1284-85,1314).

Everyone in the Patre family had weight problems (T1231,1261). Travis weighed 11 pounds at birth and remained large growing up; kids on the school bus called Travis "pork chop" (T1230,1232,1261; DefEx 27). A year before trial, Travis weighed 350 pounds (T1230).

Travis grew up something of "a loner" and shy (T1271-72, T1285). He was a "normal kid," a "good kid," who did "ordinary" or "normal boy

things": he watched cartoons, played video games, and listened to music with his cousins (T1229,1271-72,1300,1315,1318). Once, playing "Superman," he used a towel for a cape and jumped off the top of a wood pile hitting, and permanently indenting, his head (T1260).

Travis helped with family chores – working in the garden, mowing the yard, splitting wood, and waxing his aunt and uncle's mobile home (T1290, 1305). He helped his uncle and grandfather with plumbing and heating repair jobs (T1290).

Travis was not violent growing up and did not get into fights; he and his cousins would "cut up," kid around, argue, wrestle, and play basketball and football (T1229, 1260, 1272, 1287-88, 1292, 1300, 1315, 1317). When his grandfather asked him to shoot a pellet gun at birds eating vegetables in the garden, Travis refused (T1279-80). His sister Tina did remember him being "a little mouthy" as a teenager (T1260).

Travis "excelled at Palmyra High" (T1289). He had friends and enjoyed school activities but was not outgoing and kept to himself (T1229, 1260-61, 1286). He was "[j]ust an easygoing guy" who "liked to have fun, liked to play saxophone" (T1318). He was the manager of the basketball team, a talented musician who played saxophone "very, very, very well," was in the high school band, and was involved in vocal music (T1244, 1262, 1285, 1304-05; DefEx-37). After graduation, he continued to sing and

play his saxophone whenever he got a chance (T1262-63).

Travis was also interested in art and poetry (T1231-33,1263). He could draw "anything" and after his incarceration drew pictures for his family on the letters he sent from jail (T1231-33, 1263, 1286,1305,1319). When his sister Tina got married, Travis wrote a song in jail and sent it to her for her wedding (T1263; DefEx-32).

Travis was "great" with his sister Tonya's children – he played with them and was never mean or violent toward them (T1233-34). After his arrest, Travis drew a picture and sent it, with a note, to Tonya's oldest daughter for her birthday (T1234-35; DefEx-28). He and Tonya maintained contact after his arrest through letters (T1239).

Amanda Meyer was in the band with Travis and remembered him as a "very, very nice person, very talented" (T1244). If anyone needed help, or wanted to talk, Travis would help them: he "was there" (T1244, 1248).

Travis took Amanda to the prom; they "had a blast" (T1245-48; Def.Ex34). Amanda never saw Travis mad or angry (T1248).

Travis and his grandfather delivered fresh vegetables from their garden to Amanda's family, the Wilsons, and also did plumbing and heating repairs at the Wilson's church (T1250-51). Mrs. Wilson remembered Travis as friendly, nice, and polite; she approved of Amanda going to the prom with him and was impressed with how well he treated

Amanda (T1252). She never saw Travis be mean or violent (T1253).

During his senior year, Travis began attending the United Pentecostal Church in Palmyra (T1324). He went regularly – two, three or four times a week – and became active in the youth group (T1325-26). Travis impressed the pastor, Robert Axton, as quiet and "a follower" (T1325).

Rev. Axton recalled Travis praying, "desiring to seek salvation" and wanting "to make things right with God" (T1328-29). Rev. Axton and church counselors "felt that Travis was making an effort to serve God" and, at Travis' request, they baptized him (T1329).

Travis went to the United Pentecostal Church youth convention in Columbia; he and a few other youth members brought their musical instruments and played for approximately 4,000 people in attendance (T1327). Rev. Axton remembered Travis playing his saxophone: "just caught up in the moment of rejoicing" (T1327-28).

Travis returned from the convention "with a purpose that he wanted to be more involved in ministry" (T1328). The ministry of a group of students from the Gateway College of Evangelism who visited Travis' church further inspired him, and he consulted Rev. Axton about applying to that school (T1330).

Travis asked Rev. Axton to provide the "pastor's recommendation" required for the application (T1331). Because Travis "was new," Rev.

Axton did not know him "well" (T1332). Responding to a question on the recommendation form – could he recommend the applicant – Rev. Axton responded he "had not observed [Travis] enough to know how to recommend, outside of it was just a desire given he wanted to [attend the college]" (T1332).

For a long time, Rev. Axton did not know what happened with Travis' application (T1332). Other students received letters of acceptance; Travis kept saying he had not heard (T1332-33). Travis' participation at church began decreasing and he did not play his saxophone (T1333). He finally told Rev. Axton he had not been accepted at the Bible college (T1333). Gradually Travis ceased attending church (T1333).

Travis was distraught by his rejection from the Bible College (T1277). A "downhill" spiral in his life started in high school and continued after graduation (T1265-66, 1273). High school friends moved away or entered college (T1266). Travis "started running with a group of people that … weren't the best people in the world" (T1273, 1291).

Travis' grandfather, his mother, and his sister Tonya had problems with alcohol (T1237-38,1264-65,1272-73). Travis, too, had problems.

One time Travis came home late, was talking back to his grandfather, and "was either on something or he was intoxicated" (T1269, 1273). The Patres called their daughter Linda who contemplated having Travis

involuntarily committed (T1269,1273-75). Ultimately, she just told Travis to leave the house for the night (T1276).

Another night, Travis got drunk tending bar and ended up at the Hannibal Police Department (T1291). Travis told the police to arrest him because his grandfather wouldn't understand why he wasn't home (T1291). The police allowed Travis to call his Uncle Jeff who picked him up and took him home (T1291).

After graduation Travis tried to start a band with his friend Mike King (T1010). They regularly got together to sing, play instruments, or do karaoke at bars (T1010-11).

An employee of Ole Milts Bar in Hannibal, owned by Liz Campbell, talked Travis "into coming down to sing karaoke and play darts" at Ole Milts (T982). Beginning in late 2000, Travis became a regular customer of Ole Milts (T982).

In March of 2001, Liz hired Travis as a bartender (T982). Around that same time, Liz began employing dancers to work "semi-nude" at Ole Milts (T982, 991). The dancers sometimes wore glitter (T991).

On at least one occasion when Travis was at the bar, as customer or employee, Liz's daughter, 13-year-old Steffini, came in to the bar (T968, 983-84). Liz overheard Travis say that Steffini was "a little hottie" (T983).

Liz was once hospitalized for a back injury and had no way to get

home (T985). Travis offered to help; he drove to Liz's house, got some clothes for her to wear, drove to the hospital and got Liz, then drove her home (T985-86). Another time, Liz forgot to pay her electric bill and sent Travis to her house to get her bill (T986).

Travis was fired from Ole Milts because "he didn't call or show up for two days" (T987). This occurred approximately two weeks before Steffini was killed (T987).

Travis remained a customer at Ole Milts (T987-88). He never confronted Liz or yelled at her about being fired (T992). Liz later told the Hannibal police that had no reason to think Travis would do her any harm and she had no bad feelings toward Travis (T993).

Normally when Liz worked late, her three children stayed with a babysitter (T989). On the evening of the 24th, Steffini asked if she could stay at home that night, and Liz agreed (T990). Liz left the house about 8:30 p.m. (T969).

Liz saw Travis that night at Ole Milts drinking "[c]ans of warm beer" – "one of … very many different things that he drank" (T987-88). Before Travis left, Liz made sure he had retrieved his wallet and keys from behind the bar where he always put them when he was there (T988, 990). According to Liz, Travis patted his pocket, said, "Yeah, I have them" and sneered at her (T988, 990).

About 1:00 a.m. on the 25th, Mike King was awakened by Travis honking his car horn and flashing his headlights (T1004, 1009-10). In the six months that Mike had known Travis, he had seen Travis drunk to the point of intoxication, so drunk that he got sick on himself, and drunk enough that he fell on the ground and got muddy (T1012-13).

This was not Mike's first experience with Travis getting drunk and coming to talk to Mike about his problems and how he hated his life (T1012-14). During these talks, Travis had never mentioned being fired nor said he was angry about it (T1011).

Mike sat in Travis' car, talking, until about 3:00 a.m. (T1008). Mike shook Travis' hand before going back inside, and Travis commented that his hand was sore; in the dark Mike could not tell if Travis' hand was scratched, cut, or dirty (T1007). Travis was dirty or muddy as though he had fallen (T1007). His feet and clothing were muddy (T1008).

Liz arrived home about 3:00 a.m. (T971-73). The front door was unlocked (T972). Steffini was not in the house; things in her room were not in their usual places, and her jeans and underwear were together which was unusual (T974-76).

Liz called several people trying to locate Steffini and eventually called the Hannibal Police (T977-78). Liz's neighbor, Christopher Tharp, told her that when he arrived home that night at about 11:30 p.m., a black

Oldsmobile was parked in front of her house (T1000, 979-80). Liz passed this, and the additional information that Travis Glass drove a black Oldsmobile, to the police (T980, 817-18).

Early on the morning of May 25th, Richard Gillum was at the Salt River Indian Camp Access Area preparing to go fishing when he spotted a body near the boat ramp (T713-17; StEx-1). He went to a nearby house owned by Mr. Lake and called the authorities; Mr. Gillum then returned to the access area to wait for the authorities to arrive (T717-18). He was careful not to park near the body, and Mr. Lake, who also drove to the access area, likewise avoided the area of the body (T722-23).

Brian Fowler, a "first responder" was dispatched to the Indian Camp site (T724-25). He parked away from the body, walked over to the body, and checked for vital signs (T727). There were no vital signs and the skin was cold (T728). An ambulance, then Ralls County Sheriff Berghager, arrived (T729-31). The body was covered, and Sheriff Berghager called for the coroner and the Highway Patrol and began to secure the area (T729-33).

Coroner Woody St. Clair arrived and determined the body was that of a deceased young woman (T737-39). More law enforcement officers

arrived including MSHP[3] Sgt. Mike Platte (T738).

Later that morning, Hannibal Police Sgt. Lawzano, who was investigating Steffini's disappearance, and MSHP Trooper Scott Miller drove together to Travis' residence in Palmyra (T13-14, 819). Previously that morning Sgt. Lawzano had been to the Indian Access area and Liz Campbell's house (T815-16).

Travis' black Oldsmobile was parked in the driveway when Sgt. Lawzano and Trooper Miller arrived; Travis was asleep (T104,819, 844, StEx-32). Sgt. Lawzano spoke to Travis' grandparents and uncle; they woke Travis because Sgt. Lawzano wanted to speak with him (T103-04).

Initially, Sgt. Lawzano told Travis he was investigating Steffini's disappearance (T829). In response to Sgt. Lawzano's questions, Travis denied being at Steffini's house or knowing the address (T829). Travis denied Steffini had ever been in his car (T829).

At Sgt. Lawzano's request, Travis consented to a search of his car (T16,820; StEx-25). Sgt. Lawzano questioned Travis about the clothes he wore the night before; Travis said his grandmother had put them in the washer; acceding to Sgt. Lawzano's request, Travis showed Sgt. Lawzano the clothes in the washer (T823-24).

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[3] Missouri State Highway Patrol

When questioned by Sgt. Lawzano, Travis[4] gave the following verbal account of his whereabouts the night before (T825, 827-28):

Travis left Palmyra for Ole Milts Bar about 6:30 p.m. At Ole Milts he drank 12 and 16 cans of beer, played darts, and talked with people. He left Ole Milts between 11:00 and 11:30 p.m. and went to Mike King's house. Mike got into Travis' car and they talked for two or three hours. Then Travis drove home and went to bed.

Travis agreed to go to the Marion County Sheriff's Office so Sgt. Lawzano could get a written statement (T825-26). There, Sgt. Lawzano prepared a written statement paraphrasing what Travis told him that Travis signed at Sgt. Lawzano's request (T831-32; StEx-32). The written statement contained information not in Travis verbal statement:

> I know Steffini just from my association with her mother Liz. I worked at Ole Milts for about two months but got fired about two weeks ago for not showing up for work. I was asked about e-mailing Steffini. I did this about two or three months ago, once. She never

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[4] The defense objected when the subject of Travis' statements was introduced by Sgt. Lawzano; the trial court overruled the objection and allowed it to be a continuing objection (T827-28). This ruling was included in the motion for new trial (LF432-34).

answered me. The e-mail was just how you doing, answer me back. My internet service, Onemain, got cut off about two or three months ago. I know Liz has three kids, Steffini 13, Phillip seven or eight, and Betty three. I had been to Liz's house a few times with Liz while I worked for her. The last time I was at her house was two or three weeks ago when I gave Taj Epley a ride home. The sergeant asked me if it is possible I was at Liz's house this morning. I told him anything is possible but I don't remember being there. I was feeling really good when I left the bar. End of statement.

(T831-32, StEx-38).

Sgt. Lawzano related the contents of Travis' statements to Sgt. Platte (T1016). Sgt. Platte already knew that the time that Travis said he arrived at Mike King's house was inconsistent with the time given by Mike King and decided to question Travis further (T1017).

Sgt. Platte advised Travis of his constitutional rights; Travis understood his rights, did not have any questions, and signed a form waiving his rights (T1018-22).[5]

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[5] The trial court overruled Travis' objections to evidence of his statements, granted a continuing objection, and allowed the state to elicit evidence of Travis' statements; these rulings were included in the motion

In response to Sgt. Platte's questions, Travis told him what he had already told Sgt. Lawzano adding that he had arrived at Mike King's house at about 12:36 (T1023-25). Sgt. Platte expressed disbelief when Travis, several times, denied being at Liz Campbell's house the previous evening (T1025). Sgt. Platte told Travis that his car and Travis, or someone matching his description, had been seen outside Liz's house next to the car (T1025). Sgt. Platte told Travis it was "funny" that he could not "remember ever going to Liz Campbell's that night at all" since he could "remember such a minute detail [of] arriving at Mike King's at 12:36" a.m. (T1025-26). Travis said "he just couldn't remember" and had drunk a lot of beer (T1026).

At that point, Sgt. Platte told Travis that Steffini was at a hospital, alive, would recover and would tell Sgt. Platte "her side of the story" (T1026-27). Sgt. Platte told Travis to "put forth a factual version of what happened" because "13-year-olds will oftentimes exaggerate" (T1027). Travis said "that if he had gone there, he really didn't remember being there" (T1027).

Then Sgt. Platte proposed a possible scenario of events:

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for new trial (T1022; LF432-34).

Travis had been at Ole Milts that night, had seen Liz, and knew Liz was not at home; Travis went to Liz's house to "meet up with Steffini, to talk to her, become closer to her" and "things had started happening" but Steffini suddenly "changed her mind" (T1028). Sgt. Platte suggested that things "went to … hell in a hand basket" (T1028).

Sgt. Platte ended his scenario by telling Travis, "if that's the case then we just need to talk about it" and "hear your side of the story" (T1028). Travis responded: "yeah, you're right" … "you were right about how it happened" (T1028). Travis then made a verbal statement corresponding to Sgt. Platte's scenario.

Sgt. Platte testified that Travis said he went to Ole Milts and left "between 11, 11:30" (T1029). He did not recall the drive to Liz's house but had thought about going to see Steffini and got to her house (T1029). He walked to the door, knocked, and after a few minutes Steffini answered (T1029). She was wearing "blue boxers and some underpants … and a bra with no top on" (T1029). He went into the house and they started kissing and she performed oral sex on him (T1029). When he tried to "take it further … she started to scream" (T1029).

Travis said that when Steffini started screaming, "he took his hand and placed it across her mouth and held it there very tightly for two to three minutes trying to get her to quiet down" and "at some point in time

she went limp" (T1029). Travis said he looked for life signs: he checked her breathing and tried, unsuccessfully to find a pulse (T1029). At that point, Travis said, he picked Steffini up and put her in his car to go find help for her (T1029). He drove to the river access where Steffini's body was later found (T1030). "Once at the river access... Steffini began to wheeze and make noises, like she was attempting to breathe" (T1030). Travis picked Steffini "up out of his car and dropped her on the ground" (T1030). He picked her up, "laid her on the hood of the car and she slid off" (T1030). He picked her up and sat her on the back of the car, and she slid off (T1030). Steffini continued to make sounds (T1030). Travis panicked; he "became scared, laid her down on the ground and left" (T1030,1041).

Travis denied "stomping" on Steffini (T1045). He said he could have stepped on her because it was slippery.

Travis denied sexual contact (T1030). Sgt. Platte testified, "The only thing he said he had done was to, and again I'm using his language, licked her titties" (T1031). Travis said that when he left, Steffini was naked, except for her bra which was pulled up above her breasts; her clothes were in the living room area (T1031).

During the interview, Travis said he had been "very intoxicated that night" and mentioned problems with heavy drinking (T1041-42). He

asked Sgt. Platte about talking to a counselor and wanted to speak to a psychiatrist (T1041-42).

At Sgt. Platte's request, Travis put his oral statement in writing (T1031-33; StEx-40; A18). After Travis finished writing his statement, Cpl. Hall, in a prearranged attempt to obtain additional information, called Sgt. Platte out of the interview room and within earshot of Travis loudly announced that Steffini had died (T1034).

Travis had believed Sgt. Platte when he said Steffini was alive (T1051-53). After he heard Cpl. Hall announce that Steffini had died, Travis said he didn't deserve to live (T1034).

After the announcement that Steffini was dead, Sgt. Platte questioned Travis for an additional thirty minutes (TT1044). Sgt. Platte repeatedly asked Travis whether he had strangled Steffini with her bra, and Travis repeatedly denied it (T1044).

At one point during the questioning, Travis tried to cut his arm with the spoon in his coffee (T1044). Twice more he repeated that he didn't deserve to live (T1045).

After Sgt. Platte finished with Travis, Sgt. Lawzano took Travis outside to smoke a couple of cigarettes (T1055-56). While outside, Travis stated he wanted to tell Sgt. Lawzano "everything" (T1056).

Back in the interview room, Sgt. Lawzano first served Travis with the

search warrant for his car (T1057). Travis became very upset and began crying (T1057-58). Sgt. Lawzano left Travis alone in the interview room for a time and watched him through a one-way mirror (T1065-66). Travis was on his hands and knees crying and moaning (T1066).

Sgt. Lawzano returned and told Travis there were "blanks in the story that he was telling" and asked him to provide further details (T1059). According to Sgt. Lawzano Travis then said, crying, that Steffini was gasping, turning blue, and suffering when she was on the trunk, so "he wrapped a bra strap around her neck and choked her" (T1059,1068).

Sgt. Lawzano asked Travis to repeat, to Sgt. Platte, what he had said about choking Steffini (T1060). Travis would not repeat it.

Sgt. Lawzano, again, wrote out a statement for Travis "paraphrasing" what Travis said (T1061). Travis read and signed it (T1061). The statement said that after smoking, Travis wanted to talk with Sgt. Lawzano and told him everything he had told Sgt. Platte. It continued:

> [T]ell Liz for whatever it was worth I was sorry. I know she won't ever forgive me. I won't ever forgive myself. Then I told Sergeant Lawzano that at the point I had her on the trunk is when it happened. She was gasping for breath and was blue in the face. She was suffering bad. I prayed to God, God forgive me for what I am about to do. I then wrapped her bra strap around her throat. I choked her. Ended

her suffering. I was scared and afraid. I took her down the bank and laid her on the ground. I left and drove to Mike's... .

(T1062-63; StEx-41).

Officer Van Tress took Travis to the hospital where a doctor collected samples for a sexual assault kit (T856-58). The trial court overruled defense objections and allowed Officer Van Tress to testify that Travis "seemed concerned about himself," was complaining and "whining about the pain" as hairs were pulled for samples, and was "just you know crying, not crying out but making sounds as they were pulling the hair samples as though, you know, it was hurting him" (T858-59).

Dr. Dix, who performed the autopsy died before trial (T743). Using the photographs and Dr. Dix's report from the autopsy, Dr. Adelstein testified at trial about the autopsy (T748-49).

Dr. Adelstein defined "abrasion" as "a scraping of the skin that does not penetrate the skin, "contusion" as "a bruise usually deeper under the skin," and "laceration" as a "break" or a "tearing" of the "skin to the underlining subcutaneous tissue" (T754, 758).

Dr. Adelstein testified that Steffini had bruises, abrasions, and contusions on her face and neck" (T753-54). Dr. Dix's report never mentioned contusions (T769).

Dr. Adelstein testified that linear abrasions on Steffini's neck

correlated with a bra strap tied on her neck (T756). There were abrasions on the front of her body and "long linear superficial abrasions" on her back (T758). Dr. Adelstein testified that the photographs, not Dr. Dix's report, showed "subscalpular injuries ... from being struck on the head" by a blunt object (T763). There was no damage to Steffini's skull and no damage to the brain (T767). The injuries could have been caused by Steffini being hit in the head or by Steffini repeatedly falling and hitting her head (T767-68).

Dr. Adelstein testified that Dr. Dix's reported "conclusion was that the cause of death was asphyxia, that is lack of blood containing oxygen to the brain, secondary to compression of the neck by a ligature" (T763). Dr. Adelstein said it was not possible to "know for sure" how long it would take to cause death and that "in periods as low as 30 to 40 seconds of compression that people can sustain brain damage" (T763). A person would "lose consciousness within 30 to 40 seconds" (T64). If a ligature compressed the arteries with even five pounds of pressure, "irreversible brain damage can occur very quickly" (T764).

Dr. Adelstein testified that Dr. Dix's "external examination" indicated "a laceration of the inferior labia minora ... one of the folds of skin that surrounds the vagina on the right side" (T761). Dr. Dix's report did not indicate the size of the laceration and did not indicate any hemorrhaging

or bruising (T762, 775-76). Dr. Adelstein testified this kind of injury would be caused by "blunt trauma" and "most consistent with an object penetrating the vagina that was too big for that part of the body" (T762). Dr. Dix did not report any damage to Steffini's hymen (T777).

State criminalist Brian Hoey's serology tests of Steffini's sexual assault kit showed no sperm, semen or seminal fluid on any of the swabs, smears or other items from Steffini's sexual assault kit including her vaginal swabs (T913-14). His DNA analysis of the blood samples from the sexual assault kit of Steffini Wilkins, of DNA obtained from blue jeans in the rear seat of Travis' car, from a license plate on Travis' car, and from a hair found on the trunk of Travis' car was consistent with Steffini's DNA (T777, 896-897).

The officers investigating the crime scene made casts of shoe and tire impressions found near Steffini's body (T802-03, 839-40, 850-51). Travis' car was seized and moved to a covered garage at the Marion County Jail where the tires were removed for comparison with the cast tire impressions (T132-34, 843-44, 1046-47). The comparisons did not result in anything "useful" to the state (T803).

On May 25th, while Sgt. Platte and an investigator from the Attorney General's Office were executing a search warrant to seize a computer from Travis' house, they found a variety of materials – driver's licenses,

identification cards, women's underclothing, photographs of young women, purses, keys, credit cards, and other items that appeared to belong to young women (T134-35,163). Authorities started contacting the individuals whose names were on these items to see if the property had been stolen and learn how it ended up at Mr. Glass' residence (T135). On July 2nd, following up on information obtained from these contacts, MSHP Cpl. Hall went to Travis' house to look for other items that might be evidence of a crime (T134-35). Travis' grandfather George Patre consented to a search of his residence (T136).

Cpl. Hall searched the house and seized various items which he listed in a report (T137-38; StEx-14). The report did not identify the locations where each item seized had been found (T138). Areas from which items were seized, in general, were the computer area outside of Travis' bedroom and Travis' bedroom (T138). The types of items seized included a driver's permit, checkbooks, checkbook registers, wallets, voter registration cards, purses, pictures, ATM cards, personal items, photo albums, compact disks, store receipts, and make-up. (T138). Women's names appeared on "many of the items" (T139). None of the items seized had Travis Glass' name or indicated that he was the owner (T139).

Cpl. Hall returned to the Patre house on July 5th (T140). George Patre again consented to a search of the house (T141). After searching

the Patre house on July 5th, Cpl. Hall prepared a report listing the items he seized during that search (T142). Cpl. Hall's recollection was that the items he seized were from the computer room and Travis' bedroom (T142). Cpl. Hall could not identify, the room from which items seized on July 2nd were taken (T150; StEx-14). He could not say whether the items were seized from the computer room or Travis' bedroom (T150).

The items seized on July 2nd were found "in various places" (T153). They were in drawers, in boxes, in dressers, in the computer desk, on the floor, behind the computer desk (T153).

Cpl. Hall testified that some, but not all, of the items seized on July 5th were recovered from Travis' bedroom (T154; StEx-16). Cpl. Hall's report did not list the room from where each particular item was recovered (T155; StEx-16). As with the July 2nd search, some items were seized from the computer room (T155).

Travis was not a minor on July 2nd (T147). Cpl. Hall did not obtain Travis' consent to search his room prior to either the July 2nd or the July 5th search because he thought that George Patre, who owned the residence, could consent to a search the room of an adult living in the house (T147-48, 159).

An "entertainment center" in Travis' room had one or more glass doors (T237, 244, 259). It was about 3 feet tall (T268). Items on top could be

clearly seen (T268).

There was a closet at the end of Travis' bed and a shelf above the head of Travis' bed with some items and photographs stacked on it (T244-45, 256, 272). There was a purse visible on the floor of the closet (T255).

On top of the entertainment center "in plain view" were various kinds of paper documents including "receipts ... financial receipts" (T267). The paper items and identification seized from the house came either from the computer room, or the top of the entertainment center in Travis' bedroom '[o]r from the shelving unit, the book shelf unit that was above his bed" (T272). Some of the items on the shelf were in stacks so only the top item was visible (T275).

The trial court overruled the motion to suppress "with the exception that the [motion was] sustained as to property seized from [the] closet in defendant's bedroom[,]except purse on floor[,] and property seized from shelving and interior of entertainment center subject to objections as to relevance of said property" (T278). The court clarified that what was being suppressed was:

> papers found or objects taken from within the entertainment center. Did not make any reference to anything on the top of the entertainment center. *I excluded only articles that were on the shelves that had to be gone through in order to observe, in other*

> *words that were not in plain view* or the articles that were inside the entertainment center where the Court believes there is an expectation of privacy.

(T279; emphasis added). The court noted its ruling was only for guilt phase, and that "[p]enalty phase is a totally different issue..." (T281).

State criminalist Jenny Smith testified for the state (T934-53). In a previous case, Smith wrote a personal note to one of the state's attorneys now prosecuting Travis saying, "I want to help you all I can," and she "[felt] confident that [the state's attorney's] charming ways will inspire a lucid, coherent and utterly convincing testimony out of me!!!" (T956-58).

Smith first testified that hair comparison is not a means to identify the source of the hair although it can be used to exclude someone if there is a "convincing difference" (T948). Smith then testified that the hair taken from the trunk of Travis' car, StEx-24, was similar to Steffini's hair and that three hairs taken from Steffini's back, StEx-19, appeared to be pubic hairs consistent with Travis' public hair – ""[o]ne hair in particular was a very good match of what we call a root-to-tip match" and that she could not eliminate Travis as the source of the hairs (T948-49). Glitter particles recovered from the jeans found in Steffini's bedroom, StEx-23, from Steffini's bedspread, StEx-20, and from the blue jeans found in the rear seat of Travis' car, StEx-26, were all similar in

that all had one rounded edge and one pointy edge (T950-52).

At the conclusion of guilt phase, Travis moved for judgment of acquittal which the trial court denied; Travis included this ruling in the motion for new trial (T1101; LF395-96,461). Travis objected to instructing the jury on first degree murder because the evidence of deliberation was insufficient; he offered Instruction A on involuntary manslaughter; the trial court overruled Travis' objection and refused to instruct on involuntary manslaughter (T1077-79; LF411;458-59).

Prior to trial, relying on *Apprendi v. New Jersey*, 530 U.S. 466 and *Jones v. United States*, 526 U.S. 227 (1999), the defense moved to quash the information or, alternatively, preclude the state from seeking death; the trial court overruled the motion (LF 7-8, 139-42, T321-23).

At penalty phase, renewing its previous motion to strike an aggravating circumstance, the defense objected to Instruction 17 which submitted two statutory aggravating circumstances; the trial court overruled the objection (LF222-25; T1356-60). The defense included this ruling in the motion for new trial (LF473-75).

The month before trial, the state disclosed police reports of interviews with two young women, Samantha Bramlett and Nicole Withrow, concerning alleged incidents that occurred when they were teenagers, in which, on separate occasions, Travis Glass had "walked in" to Nicole's

house (LF338-53). Neither incident had been reported to the police at the time it allegedly occurred (T1152).

The defense moved to exclude and suppress this evidence (T338-53; T1153-56). At an evidentiary hearing immediately prior to penalty phase, Cpl. Hall testified that while searching the Patre home, he found, somewhere, identification containing one or more of the names Samantha Bramlett, Nicole Withrow, and [Sandra] Harding (T1166-67). Cpl. Hall said most of the "identification" came from the computer area but there were receipts and other items in Travis' bedroom, and some of those items were found on the shelf above his bed (T1167, 1169-70).

The particular item that led Cpl. Hall to Sandra Harding was not "identification;" it was "a receipt from Basswood Pool & Spa [that] contained her name" (T1169). Cpl. Hall did not recall exactly where that receipt was found (T1170). He could not say whether this was found on the shelf above Travis' bed or in the computer room (T1170). Cpl. Hall's first contact with Ms. Harding was on July 3, 2001, when he called her because items belonging to her – the receipt and a business card – had been found in the Patre residence on July 2nd (T1171).

As a result of his conversation with Ms. Harding, Cpl. Hall interviewed Samantha Bramlett and Nicole Withrow (T1172). Neither girl had ever called the police about the unauthorized "walk-in" incidents (T1172-73).

At the conclusion of the hearing on the motion to suppress this evidence, the trial court overruled the motion and said he would allow evidence of Travis' unauthorized "walk-ins" (T1176).

Samantha, 20 at trial, and Nicole, age 19 at trial, were best friends (T1188). Samantha testified that Nicole's house was off Route O approximately two miles from the Indian Camp Access which was also on Route 0 (T1189). Samantha remembered when Steffini was murdered; she did not know Steffini (T1189).

Samantha testified that about a month before Steffini's murder, she was at her friend Nicole's house "off Route O" for a small party (T1189-90). At midnight, Samantha was in the bedroom of Nicole's mother, Sandy, when Travis came into the room (T1191). The bedroom was at the back of the house and had sliding glass doors that opened to the outside (T1192). Travis entered without knocking or announcing that he was coming in to the room (T1193).

Travis "hollered out 'Hello'" and Samantha answered, "hello" (T1193). Travis asked whose house it was, Samantha asked whose house he was looking for, and Travis said, "Mine" (T1193). Samantha said, "Well, this isn't it" and Travis said "Okay" and left (T1193). Samantha estimated Nicole's house was about 20 miles from Palmyra (1193-94).

At the end of her direct examination, in response to the prosecutor's

question, Samantha testified that this incident occurred about a month before Travis murdered Steffini (T1194).

Nicole testified she lived with her mother, Sandy Harding, "off Route O" and had lived there the spring that Steffini was murdered (T1199-1200). Shortly before or after the party at her house, there was a separate incident when Travis Glass came into her house (T1201-02). Nicole knew Travis because her mother had worked with him and he had been at her house before (T1201-02).

One night, Nicole was home with her 11-year-old brother and her 16-year-old sister; Nicole's mother was out (T1202-03). Nicole's siblings were asleep, and she was in her mother's bed (T1203-04).

Nicole heard someone come in the front door without knocking or ringing a doorbell (T1202-03). She repeated, "who is it?" three or four times before someone said "Sandy?" (T1203-05). The person kept saying "Sandy?" but didn't identify himself (T1205).

Nicole put on some shorts and when she went out of her mother's room, she saw Travis (T1205). Travis didn't say anything, and Nicole asked him what he was doing (T1206). Travis said he had a flat tire down the road and asked to use the phone; Nicole allowed him to use the phone (T1206). After using the phone for a minute or two, Travis said "Thank you" to Nicole and left (T1207). On his way out of the house, he

told Nicole that she "look[ed] like shit without make-up" (T1207).

Travis was 23 years old at the time of trial (T1292). Before being arrested, he weighed between 350 and 360 pounds (T1293). His Uncle Jeff drove his grandparents to visit him in jail until his grandfather had a stroke and heart attack (T1294). After that, the family kept in touch with Travis by telephone (T1294). Once, the Callaway County jailers brought Travis to the hospital to visit his grandfather (T1294-95). "It helped [his grandfather] tremendously to get to see him" (T1295).

Uncle Jeff testified he would continue to maintain contact with Travis if he were sentenced to life imprisonment without possibility of parole (T1295). Aunt Connie testified that committing murder was not consistent with the Travis she knew and that if Travis were sentenced to life imprisonment, she would maintain contact with him (T1307).

At the time of trial, George "Grandpa" Patre, 83 or 84 years old, was in a nursing home and in poor health having recently suffered a stroke and heart attack (T1257, 1293). Wanetta "Grandma" Patre, 79 or 80 years old, still lived in the same house where she had raised her grandchildren (T1257-58. 1293). Several years before trial she had quadruple bypass surgery; "her health never got back to normal" and, in addition, she was often confused (T1258).

Travis' Aunt Connie was present when his grandmother wrote a letter

to Travis to let him "know that she was thinking about him" and wished she could be at the trial (T1306). The trial court sustained the state's objection the letter, DefEx-41, and the defense preserved this issue for review by including it in the motion for new trial (T1305-07; LF468).

During Connie's testimony, the defense questioned her about DefEx-46 which she identified as a family tree that Travis made (T1310-11). When the defense moved to admit the exhibit, the prosecutor objected that it was "cumulative" and "hearsay" (T13110. The trial court sustained the objection and excluded the exhibit; the defense included this ruling in the motion for new trial (T1311; LF469-70).

Sandy Glass, Travis' mother, testified that Travis had written a poem for which he had been awarded a certificate (T1348-49;DefEx's-42 and 43). When the defense moved to admit these two exhibits, the state objected to admission of the poem on the grounds that it was hearsay and irrelevant because Travis had written it after he was put in jail (T1349-50). The trial court admitted the certificate but refused to admit the poem; the defense preserved this issue by including it in the motion for new trial (T1350; LF470).

To avoid repetition, additional facts will be presented in the argument.

POINTS RELIED ON

I

The trial court erred in overruling Travis' motion to suppress statements, his objections, and admitting at trial evidence of Travis' statements to Sgt's Lawzano and Platte. This violated his rights to due process of law, protection from unreasonable search and seizure, non-incrimination, reliable sentencing, and freedom from cruel and unusual punishment. U.S. Const., Amend's IV, V, VI, VIII, and XIV; Mo. Const., Art. 1, §§ 10, 15, 19, and 21. Travis' statements to Sgt. Lawzano and Sgt. Platte should have been suppressed in that they were the result – the "forbidden fruit" - of Travis' illegal detention without probable cause and no intervening events were sufficient to attenuate the taint of the illegal arrest. In addition, the statements made to Sgt. Lawzano should have been suppressed because they were obtained by his custodial questioning of Travis without first administering *Miranda* warnings, and the statements made to Sgt. Platte should have been suppressed because he elicited them by using the unwarned statements Travis had made to Sgt. Lawzano.

Dunaway v. New York, 442 U.S. 200 (1979);

Davis v. Mississippi, 394 U.S. 721 (1969);

Kaupp v. Texas, 123 S.Ct. 1843 (2003);

Whren v. United States, 517 U.S. 806 (1996).

II

The trial court erred in overruling Travis' motions to suppress evidence, overruling his objections at trial, and admitting at the penalty phase evidence that on two different occasions Travis walked into residences occupied by teenage girls. This violated Travis' rights to due process of law and fair jury trial, protection from unreasonable search and seizure, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's IV, V, VI, VIII, and XIV; Mo. Const., Art. 1, §§10, 15, 18(a), and 21. This evidence was inadmissible "fruit of the poisonous tree" in that the state learned of this evidence through property improperly seized from Travis' room without his consent or, alternatively, that the state failed to show had been seized from a location other than his room.

Payton v. New York, 445 U.S. 573 (1980);

Katz v. United States, 389 U.S. 347 (1967);

Wong Sun v. United States, 371 U.S. 471(1963);

Nardone v. United States, 308 U.S. 338 (1939).

III

The trial court erred in overruling Travis' motion for judgment of acquittal at the close of all evidence, entering judgment against him for first degree murder and sentencing him to death. This violated his rights to due process of law, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; Mo.Const., Art. I, §§ 10, 14, 18(a) and 21; §565.035.3(3), RSMo. Regardless of the length of time that Travis had to think about what he was doing, the state must still prove that Travis "coolly" reflected on killing Steffini Wilkins and there was no such evidence of "cool" reflection. Further, even if the Court should disagree and find the evidence to be sufficient, evidentiary errors, instructional error at the penalty phase, the lack of evidentiary support for the element of deliberation, and significant and substantial mitigating evidence concerning Travis himself undermine confidence in the reliability of the death verdict and require that it be vacated.

Palmer v. Clarke, 2003 WL 22327180 (D.Neb. 10/92003);

State v. Snow, 293 Mo. 143, 238 S.W. 1069 (Mo. 1922);

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,

532 U.S. 424 (2001);

State v. Chaney, 967 S.W.2d 47 (Mo.banc 1998).

IV

The trial court erred or plainly erred in overruling Travis' motion to strike the state's aggravating circumstance based on 565.032.2(11) or, alternatively, failing to require the state to provide a bill of particulars, in overruling Travis' objections, and in giving Instruction 17. This violated Travis' rights to due process, trial by a properly instructed jury, notice of charges, conviction only of charged offenses, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 17, 18(a), 19, and 21. Travis was prejudiced in that: 1) six months before trial Travis requested as to §565.032.2(11) that the state specify the particular felony he was allegedly committing at the time of the murder, but his first notice that the felony was kidnapping was at the end of penalty phase; and 2) Instruction 17 violated *Ring v. Arizona* and was a fatal

variance from the information submitting an offense not charged since no statutory aggravators were pled in the information.

Herring v. New York, 422 U.S. 853 (1975);

Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1990);

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

State v. Daugherty, 631 S.W.2d 637 (Mo. 1982).

V

The trial court erred in overruling Travis' motion to quash the information for failure to comply with *Jones v. United States* and *Apprendi v. New Jersey* and exceeded its authority and jurisdiction in sentencing him to death. This violated Travis' rights to jury trial, freedom from cruel and unusual punishment, and due process of law. U.S.Const. Amend's VI, VIII, and XIV; Mo.Const., Art I, §§ 10, 18(a) and 21. Because Missouri's statutes authorize a sentence of death only upon a finding of at least one of the enumerated statutory aggravating circumstances, the statutory aggravating circumstances comprise not only facts which the prosecution must prove to increase the punishment for first degree murder from life imprisonment without probation or parole to death, they are also

alternate elements of the offense of "aggravated first degree murder." As the information in the present case failed to plead any aggravating circumstances, the offense actually charged against Travis was unaggravated first degree murder for which the only authorized sentence is life imprisonment without probation or parole. The judgment must be reversed and Travis' sentence of death vacated.

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

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

Jones v. United States, 526 U.S. 227 (1999);

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

VI

The trial court erred and plainly erred in failing to instruct the jury on involuntary manslaughter as requested by the defense. This violated Travis' rights to due process of law, jury trial, to defend against the state's charges, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's V, VI, VIII, XIV; Mo.Const., Amend's 10, 18(a), and 21. Failing to instruct the jury on involuntary manslaughter was a manifest injustice and

prejudiced Travis. Travis' oral and written statements to Sgt. Platte – that he had put his hand over Steffini's mouth to keep her quiet, and his subsequent statements to Sgt. Lawzano – that he choked Steffini with her bra strap to end her suffering, was evidence from which a jury could find or infer an "intentional act" with "a conscious disregard of a risk of death to another" that manifested "a gross deviation from what a reasonable person would do in the circumstances." This evidence provided both a basis to convict Travis of involuntary manslaughter and to acquit him of first and second degree murder.

State v. Avery, No. SC 85300 (Nov. 25, 2003);

State v. Beeler, 12 S.W.3d 294 (Mo.banc 2000);

VII

The trial court erred in overruling Travis' objections and admitting non-statutory aggravating evidence that on two separate occasions prior to the charged offense Travis had entered – uninvited and unannounced – houses occupied by teenage juvenile girls and plainly erred in submitting Instructions 18 and 19.

This violated Travis' rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process of law, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 18(a), and 21.

In State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003), this Court held that the findings required by §§565.030.4(1), (2), and (3) are death-eligibility factual findings that must be made by a jury. The Sixth, Eighth, and Fourteenth Amendments mandate such findings be made "beyond a reasonable doubt." Travis was prejudiced and a miscarriage of justice occurred because Instruction 18, addressing §565.030.4(2), failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted death. Likewise, as to §565.030.4(3), Instruction 19 failed to instruct the jury the state had the burden of proving beyond a reasonable doubt that there were not facts or circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. Under Sullivan v. Louisiana, 508 U.S. 275 (1993), failure to correctly instruct the jury that the state's burden of proof

is "beyond a reasonable doubt" is structural, per se, reversible error. Even reviewing for harmless error or a miscarriage of justice or manifest injustice, the instructional error in this case would require reversal. The "walk-in," uncharged misconduct was inherently unreliable and prejudicial evidence that the flawed instructions allowed the jury to use twice – to find the aggravating evidence warranted death and to find the mitigating circumstances did not outweigh the aggravating circumstances – without ever finding beyond a reasonable doubt that these incidents occurred. Because the jury found only one statutory aggravating circumstance, and because the mitigating evidence was strong, it is not possible to say that the error was harmless beyond a reasonable doubt. Since only a correctly instructed jury can determine whether all the aggravating circumstances warrant death, and only a correctly instructed jury can determine whether the mitigating facts and circumstances outweigh the aggravating facts and circumstances, this Court cannot find that the incorrect instructions were harmless. Travis' sentence of death must be reversed and he must be resentenced to life imprisonment.

State v. Debler, 856 S.W.2d 641 (Mo.banc 1993);

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

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

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

VIII

The trial court erred in sustaining the state's objections and failing to admit as penalty phase mitigating evidence Defense Exhibits 42 – a poem written by Travis after he was confined, and 46 – a family tree that Travis made. This violated Travis' rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process of law, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§ 10, 14, 18(a), and 21. Exclusion of this evidence prejudiced Travis in that the exhibits were artistic and literary work by Travis Glass and relevant to the jury's determination of whether the death penalty was an appropriate punishment for this individual. The family tree demonstrated his love of his family. Because the poem was written after he was confined, it is unique and crucial evidence of Travis' adjustment to confinement, relevant to the jury's determination of whether life

imprisonment or death was the appropriate punishment, and admissible under *Skipper v. South Carolina*, 476 U.S. 1 (1986).

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

Lockett v. Ohio, 438 U.S. 586 (1978);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

Skipper v. South Carolina, 476 U.S. 1 (1986).

IX

The trial court erred in sustaining the state's objections and failing to admit as penalty phase mitigating evidence Defense Exhibit 41 – a letter from Travis' grandmother that she prepared because she was too ill to attend the trial. This violated Travis' rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process of law, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§ 10, 14, 18(a), and 21. Exclusion of this evidence prejudiced Travis in that the exhibits were mitigating evidence of Travis' character reflected in his family's love for him – even when charged with murder and on trial. In particular, his grandmother's letter was evidence of the love of the

person who may have known him better than anyone: his grandmother who raised him from infancy. The letter was primary character evidence relevant to the jury's determination of whether the death or life was the appropriate punishment.

Brown v. Luebbers, 344 F.3d 770 (8th Cir. 2003);

ARGUMENT

I

The trial court erred in overruling Travis' motion to suppress statements, his objections, and admitting at trial evidence of Travis' statements to Sgt's Lawzano and Platte. This violated his rights to due process of law, protection from unreasonable search and seizure, non-incrimination, reliable sentencing, and freedom from cruel and unusual punishment. U.S. Const., Amend's IV, V, VI, VIII, and XIV; Mo. Const., Art. 1, §§ 10, 15, 19, and 21. Travis' statements to Sgt. Lawzano and Sgt. Platte should have been suppressed in that they were the result – the "forbidden fruit" - of Travis' illegal detention without probable cause and no intervening events were sufficient to attenuate the taint of the illegal arrest. In addition, the statements made to Sgt. Lawzano should have been

suppressed because they were obtained by his custodial questioning of Travis without first administering Miranda warnings, and the statements made to Sgt. Platte should have been suppressed because he elicited them by using the unwarned statements Travis had made to Sgt. Lawzano.

The Fourth Amendment protects all citizens "against unreasonable searches and seizures." *State v. Miller*, 894 S.W.2d 649, 651 (Mo.banc 1995). Government officers must have "probable cause" to believe that an offense has been committed before effecting an arrest. *Henry v. United States*, 361 U.S. 98, 100-01 (1959). Evidence obtained as the direct result of an arrest, unsupported by probable cause, is considered the "forbidden fruit" of the illegal arrest and inadmissible at trial. *Davis v. Mississippi*, 394 U.S. 721, 723-24 (1969). "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation – whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." *Id*.

"[R]easonable suspicion" sufficient to justify the brief detention and

limited intrusion of a *Terry*[6] stop, is inadequate to support the custodial detention and restriction of freedom inherent in a full-blown arrest. *Dunaway v. New York*, 442 U.S. 200, 211-12 (1979). Detention of a suspect for investigative purposes, absent probable cause to believe he has committed an offense, violates the Fourth Amendment. *Id*. Information possessed by the police at the time of the arrest determines whether there is probable cause to support a reasonable belief that the suspect is committing or has committed an offense. *United States v. Hensley*, 469 U.S. 221, 229-33 (1964). Probable cause may not be established after the fact by using the information obtained as a result of the illegal arrest. *Taylor v. Alabama*, 457 U.S. 687, 692-93 (1982).

"[A] confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is ' "sufficiently an act of free will to purge the primary taint." ' " *Id*. *quoting Brown v. Illinois*, 422 U.S. 590, 602 (1975) (*quoting Wong Sun v. United States*, 371 U.S. 471, 486 (1963)) (*citing Dunaway v. New York, supra*, 422 U.S. at 218). "[F]actors that should be considered in determining whether a confession has been purged of the taint of the

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[6] *Terry v. Ohio*, 392 U.S. 1 (1968).

illegal arrest" include: '[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, ... and, particularly, the purpose and flagrancy of the official misconduct.' " *Id*. *citing Brown v. Illinois*, *supra*, 422 U.S. at 603-04; *Dunaway v. New York*, *supra*, 442 U.S. at 218.

"The State bears the burden of proving that a confession is admissible." *Id*. "[T]he fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda*[7] warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest." *Id*.

Law enforcement authorities lacked probable cause to detain Travis.

The evidence presented at the suppression hearing, combined with the evidence presented at trial, showed that the authorities had reason to suspect Travis. Their reasonable suspicion was warranted.

But the evidence failed to show that the collective knowledge of the law enforcement officers, prior to detaining and questioning Travis, was sufficient to give a reasonable officer probable cause to believe that Travis had committed an offense. Rather, the sum total of the state's evidence showed that it was only after Travis was taken into custody for

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

further investigation and questioning that the officers obtained the additional information required to justify his seizure and custodial questioning. Under the exclusionary rule, the "poisonous fruit" evidence obtained as a result of that illegal detention and questioning, including Travis' statements, should have been suppressed. Travis' Fourth, Fifth, and Fourteenth Amendment rights were violated. The trial court's error in failing to suppress this evidence was prejudicial and the cause must be reversed.

The record shows that when Sgt. Lawzano arrived at Travis' house with Trooper Miller on the morning of May 25th, law enforcement authorities, including Sgt. Lawzano, knew the following: Thirteen-year-old Steffini Wilkins was missing from Hannibal, and an unknown, deceased, "female juvenile" had been found in Ralls County (T4). A black Oldsmobile had been seen at Steffini's house the previous evening possibly at the time she disappeared (T11-12). Travis Glass had a black Oldsmobile (T12). Travis had once e-mailed Steffini and had once called Steffini "a hottie" (T13). Liz had been Travis' employer and had fired him two weeks earlier (T12-13). Liz had "no reason to believe that Travis would be involved in anything to do with Steffini's disappearance (T13).

"Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible." *Ornelas v. United States*, 517 U.S. 690, 695 (1996). The

Supreme Court has "described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity ... and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found... ." *Id*. at 696; citations omitted.

"Suspicion" also means "the act or an instance of suspecting guilt, a wrong, harmfulness, etc. with little or no supporting evidence." Webster's *New World Dictionary*, 3rd College Ed. at 1349. And "probable" has been defined as "likely to occur or be..." *Id*. at 1072. Probable cause 'has come to mean more than bare suspicion: Probable cause ... exists where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient *in themselves* to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' *Brinegar v. United States*, 338 U.S. 160,175-76 (1949); emphasis in original.

In the present case, the facts known to the police gave them reason to be suspicious. But these *known* facts fell short of establishing probable cause to reasonably believe that Travis had committed a crime.

Black Oldsmobiles are not unique. Travis was not the only person who knew Steffini, and he was surely not the only person who had ever

commented on her appearance or e-mailed her. Liz had other employees and Travis was undoubtedly not the only person whom Liz had fired in the thirteen years she had owned Ole Milts.

Reason to be suspicious: yes. Reasonable belief that Travis had probably committed a crime: no. At the time that Sgt. Lawzano detained Travis and subjected him to custodial questioning, he did not have probable cause to seize Travis.

In fact, Sgt. Lawzano conceded that at the time he took Travis to the Sheriff's Department, he did not have probable cause for arrest and that Travis was not under arrest (T21-22). Sgt. Lawzano never advised Travis of his constitutional rights even though Travis was a suspect before Sgt. Lawzano took him to the police station and had to be "cleared" after he made a statement to Sgt. Lawzano (T835-36).

Travis was detained "within the meaning of the Fourth Amendment.

"A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."'" *Kaupp v. Texas*, 123 S.Ct. 1843, 1846 (2003); citations omitted. "An arrest requires *either* physical force (as described above) *or*, where that is absent,

submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis in original). "Examples of circumstances that might indicate a seizure, *even where the person did not attempt to leave*, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); emphasis in original. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322 (1994); citations and quotation marks omitted. "[D]etermination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id*. at 323.

The following scenario – drawn from the record in this case – shows the circumstances in which a reasonable citizen in Travis' position would have found himself when confronted by investigating officers:

The citizen is asleep when two officers arrive at his house (T13-15,

104). Outside the house, the officers speak to his grandparents and uncle who wake the citizen because an officer says he wants to speak with him (T13-15,103-04,819). The citizen duly reports to the officers who are there seeking "information he may have on Steffini Wilkins being missing from her home" (T15,829).

One officer asks the citizen if he has been at Steffini's house (T5,829). The officer asks the citizen if he knows where Steffini's house is (T829). The officer gives the citizen the address of the house and asks if he knows that address (T829).

The officer asks to search the citizen's car which is in the driveway, and the second officer prepares a "consent to search form" that the citizen signs (T14-15,104,819).

The officers find a hair on the car, photograph it, and seize it (T17112). The officer asks the citizen about mud on his car; the citizen cannot explain how the mud got there (T17).

A third officer is summoned and confers with the officers already at the citizen's house (T112,115,840). The third officer photographs the car and he, too, seizes hairs from the outside of the car (T115-17).

The officers ask the citizen about the clothes he wore the night before (T20). One or more officers inspect these clothes which are now in the washer (T20,824,843).

After listening to the citizen's answers to their various questions, the officers ask him to make a written statement -- at the sheriff's office (T4). A fourth officer is called: to drive the citizen and the first officer to the sheriff's office (T5). The third officer is to remain at the citizen's house to coordinate the towing of the citizen's car to the sheriff's office (T17,843)

On the way to the sheriff's office, the officers grant the citizen's request to stop for cigarettes; watching him the entire time, they allow him to go into a convenience store by himself (T5-6). Once at the sheriff's office, one of the officers obtains some forms and takes the citizen to an interview room (T826).

At no time do any of the officers tell the citizen that he need not speak to them or answer their questions (T236). None of the officers tell the citizen that he may remain silent (T236). The officers never tell the citizen that he is free to leave, or that he is not under arrest (T236).

By this time, a reasonable citizen might well wish to leave. By this time, a reasonable citizen would most certainly not feel free to go.

Sgt. Lawzano's "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996). Notwithstanding Sgt. Lawzano's claim that Travis was not under arrest and was free to leave (T7-8,21), a reasonable person in Travis' position would have felt "he was not at liberty to ignore

the police presence and go... .” Kaupp, 123 S.Ct. at 1846.

Even if this Court should find that Travis consented of his own free will to the “encounter” between the officers and himself at his house, “[e]ven ‘an initially consensual encounter ... can be transformed into a seizure or detention within the meaning of the Fourth Amendment.’" *Kaupp, supra*, 123 S.Ct. at 1847. “It cannot seriously be suggested that when [Sgt. Lawzano] began to question [Travis], a reasonable person in his situation would have thought he was sitting in the interview room as a matter of choice, free to change his mind and go home to bed.” *Id*.

Applying the law as set out in the foregoing cases – *Kaupp*, *Hodari*, and *Mendenhall* – to the foregoing facts demonstrates that Travis was seized at his house. Travis was confronted first by two, then by three, then by four officers. Two officers having Travis waked up so they could talk to him about a missing girl and questioning him about his whereabouts the night before was a show of authority. Three officers, examining and taking pictures of his car and looking at the clothes he wore the night before, was a greater show of authority. A fourth officer, called to process and tow Travis’ car left no doubt that these officials were exercising their authority.

And Travis submitted to their authority. He acceded to the officers’ requests. He consented to the officers’ searching his car (T16,104). He

was "fully cooperative" (T105). He did not refuse to answer the officers' questions. He did not attempt to leave when the officers let him out of the car to get cigarettes (T5).

The situation then, was this: the officers investigating the disappearance of Steffini Wilkins detained Travis, without probable cause to arrest or detain him, for the purpose of further investigation. This violated the Fourth Amendment. *Brown v. Illinois*, *supra*.

No events intervened to break the causal connection between Travis' illegal seizure and Travis statements.

Sgt. Lawzano questioned Travis at his home and upon arrival at the Sheriff's Department after putting him in an interview room. There were simply no intervening events.

None of the factors identified in *Wong Sun* worked to break the causal connection between Travis' illegal seizure and his statements to Sgt. Platte. There were no intervening events. Although there was a brief interval of time from the end of Travis' statement to Sgt. Lawzano and the beginning of Sgt. Platte's questioning, Travis was not "cleared" and did not leave the Sheriff's Office.

The *Miranda* warnings that were eventually administered to Travis by Sgt. Platte – after he had made oral and written statements to Sgt. Lawzano – were insufficient to attenuate the taint of the illegal seizure.

Miranda warnings, given to advise a suspect of his Fifth and Sixth Amendment rights, are alone insufficient to correct a Fourth amendment violation. *Wong Sun, supra*, 371 U.S. at 488; *Dunaway v. New York, supra*; *Brown v. Illinois, supra*.

Here, where Travis' unwarned statements to Sgt. Lawzano were all that intervened between Travis' illegal seizure and his statements to Sgt. Platte, the effect of the belated *Miranda* warnings is greatly diminished.

Finally, even assuming the police had probable cause, Travis' statements should have been suppressed because he was subjected to custodial questioning without first being advised of his constitutional rights as required by the Fifth and Fourteenth Amendments and *Miranda*. *State v. Seibert*, 93 S.W.3d 700 (Mo.banc 2003). Sgt. Lawzano's failure to give Travis *Miranda* warnings was a conscious choice as evidenced by Sgt. Lawzano's claim that Travis did not get *Miranda* warnings because he was not under arrest (T7, 21-22, 835). It was not, as in *Oregon v. Elstad*, 470 U.S. 298 (1985), an oversight. An officer's deliberate decision not to issue *Miranda* warnings prior to the custodial interrogation of a detained suspect, whether a bad-faith ploy as in *Seibert* or for other reasons should not be excused as mere oversight.

At a hearing on a motion to suppress and ultimately at trial, the state has the burden to justify a warrantless search and seizure. *State v. Deck*,

924 S.W.2d 527, 534 (Mo.banc 1999). In reviewing the trial court's ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial. *Id*.

For the reasons previously given, the trial court erred in denying Travis' motion to suppress his statements and admitting evidence of his statements at trial. For reasons that include the following, in addition to those already given, this error prejudiced Travis.

Travis incriminated himself in his statements. The prosecutor used Travis' statements extensively to argue at the first phase of trial that he was guilty of first degree murder (T1106-07, 1109-11, 1131), and the jury would most certainly have used them to reach its verdict of first degree murder. In Travis' oral statement and his own, handwritten statement to Sgt. Platte he admitted going to Steffini's house, engaging in sexual contact, and putting his hand over her mouth until she passed out. The specific sexual contact mentioned – that 13-year-old Steffini performed oral sex on him – was extremely prejudicial evidence portraying Travis as morally reprehensible and the kind of evidence likely to influence the jury's guilt and penalty phase verdicts.

Travis' subsequent statements to Sgt. Lawzano – although, unlike Travis' statements to Sgt. Platte Sgt. Lawzano wrote them – contained Travis' highly damaging admission of strangling Steffini with her bra.

Altogether, the statements allowed the jury to find or infer that Travis deliberated on killing Steffini.

The statements also allowed the jury to find or infer that Travis took Steffini to the Salt River before her murder. This provided evidence of the only statutory aggravating circumstance the jury found: the murder was committed during the felony of kidnapping.

Travis' initial statements denied guilt. These initial statements also prejudiced Travis because they allowed the prosecutor to argue at both stages of trial, and the jury to find or infer, that Travis lied, was not forthcoming, and did not accept responsibility for his actions (T1106-07, 1129, 1388, 1390). This evidence painted an unfavorable picture of Travis as morally weak and likely to commit murder. This evidence, too would have affected both the jury's guilt and penalty phase verdicts.

For the foregoing reasons, the trial court erred in admitting evidence of Travis' statements at trial. The error prejudiced Travis by influencing the jury's verdicts at guilt and penalty phase. The cause must be reversed and remanded for a new trial.

II

The trial court erred in overruling Travis' motions to suppress evidence, overruling his objections at trial, and admitting at the

penalty phase evidence that on two different occasions Travis walked into residences occupied by teenage girls. This violated Travis' rights to due process of law and fair jury trial, protection from unreasonable search and seizure, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's IV, V, VI, VIII, and XIV; Mo. Const., Art. 1, §§10, 15, 18(a), and 21. This evidence was inadmissible "fruit of the poisonous tree" in that the state learned of this evidence through property improperly seized from Travis' room without his consent or, alternatively, that the state failed to show had been seized from a location other than his room.

Someplace in the Patre house, Cpl. Hall found a receipt with Sandra Harding's name on it (T1167-70). The receipt led Cpl. Hall to Sandra Harding and ultimately to Nicole Withrow and Samantha Bramlett (T1172). Interviewed by Cpl. Hall, Samantha, for the first time, claimed that Travis had walked, unannounced and uninvited, into the back bedroom of Nicole's house when she was there for a party (LF347; T1188-93). Interviewed by Cpl. Hall, Nicole for the first time alleged a similar incident: shortly before or after her party, on a night when her mother was not home, Travis had walked into her house (LF351; T1201-07).

Cpl. Hall did not know exactly where he found the receipt with Sandra's name. It may have come from a shelf above Travis' bed in Travis' bedroom or it may have come from a separate "computer area" in the house (T272,1170). Cpl. Hall could definitely say he definitely did not know where he found that receipt (T150,153-55,272,275,1167-70).

The Fourth Amendment prohibits police from making a warrantless entry into a suspect's home to effect a search or seizure. *Payton v. New York*, 445 U.S. 573 (1980). Evidence obtained as a result of a search conducted without a warrant will be excluded at trial unless the circumstances of the search fall within one of the very few, very specific exceptions. *Katz v. United States,* 389 U.S. 347, 357 (1967). Evidence need not be excluded when "voluntary consent has been obtained, either from the individual whose property is searched ... or from a third party who possesses common authority over the premises... ." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); citations omitted. "Common authority" exists when there is a "mutual use of the property by persons generally having joint access or control for most purposes" *Id*.; citations omitted. "The burden of establishing that common authority rests upon the State." *Id*. Even if the person consenting to the search does not have actual authority to consent, the search will be upheld if the officer's belief that the person consenting has authority is "reasonable." *Id*. at 183-89.

The test is whether, based on the facts known to the officer at the time the consent is given. a reasonably cautious man would belief that the consenting party had authority over the premises. *Id*. at 188-89.

Evidence obtained as a result of an illegal search may not be used against the victim of the illegal search. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The exclusionary rule covers "the indirect as well as the direct products of such invasions" – the "fruit of the poisonous tree." *Id*.; *Nardone v. United States*, 308 U.S. 338, 341 (1939). Evidence need not be excluded, however, if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint." *Nardone*, 308 U.S. at 341.

In the present case, the illegally seized receipt led to Nicole, Samantha and the walk-in evidence. There was nothing that attenuated or dissipated the taint of the illegal seizure. The walk-in evidence was therefore subject to the exclusionary rule. For the reasons that follow, it should have been excluded.

"At a hearing on a motion to suppress and ultimately at trial, the state has the burden to justify a warrantless search and seizure." *State v. Deck*, 994 S.W.2d 527, 534 (Mo.banc1999); citation omitted. On appeal, the court considers the record at the suppression hearing and the record at trial. *Id*.; citation omitted.

In the present case, the state failed to sustain its burden. The evidence presented at the evidentiary hearing and at trial failed to show that the "Sandra Harding" receipt came from some place other than Travis' room. The state's evidence showed that receipts were found in Travis' room as well as the computer room.

The state failed to present evidence demonstrating that the receipt had not come from Travis' room. Neither the trial court nor this Court may simply assume that the receipt came from some other place. "The burden of going forward with the evidence and the risk of non persuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled." §542.296.6, RSMo. 2000; *State v. Orso*, 789 S.W.2d 177, 181 (Mo.App.E.D.1990). The state has not met its burden of proving the location of the receipt, and the Court must treat the evidence as having been recovered from Travis' room.

The state did not have a warrant to search Travis' room and therefore had to prove that the search was pursuant to a valid consent. *Illinois v. Rodriguez*, *supra*. The state failed to sustain its burden here, also.

The state needed to do one of the following: 1) show that Travis' grandfather, who consented to the search, had common authority over Travis' room, 2) show that even if Travis' grandfather did not have common authority, it was reasonable to think that Travis' grandfather

did have common authority that would make his consent valid. Again, the state failed to present any evidence proving these circumstances.

In fact, the state presented no evidence at all to demonstrate that Travis' grandfather had common authority with Travis over his room. The only evidence presented was that Travis' grandfather owned the house. It is by now so well-established that property ownership is not sufficient to establish common authority that it would not be reasonable for Cpl. Hall to have relied on the fact that Travis' grandfather owned the property as providing authority for his consent. *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974).

There was no evidence that Travis' bedroom was a "common" area of the house that was jointly used by his grandfather. There was testimony that the layout of the house required people going from one area of the house to another area to go through Travis' room.

In that regard, appellant respectfully asks the Court to take judicial notice of a type of house found in a number of locations, including St. Louis and New Orleans, commonly known as a "shotgun" house. Many houses of this type are configured in an "I" shape with one room directly behind another. A person entering the front door would have to walk through every room in the house to get out the back door.

If this Court were to find that Travis could not have an expectation of

privacy in his room because other people living in his house have to walk through his room to get to other rooms, that would mean that only people living alone in shotgun houses could have an expectation of privacy in any part of their home. This would hardly be reasonable.

What is reasonable is the succinct analysis of this question in *Katz v. United States*, 389 U.S. 347 (1967): "What a person ... seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id*. at 351-52. "[T]he Fourth Amendment protects "privacy ... not solitude." *O'Connor v. Oretega*, 480 U.S. 709, 730 (1987) Scalia, J., concurring.

The state presented no evidence that Cpl. Hall asked Travis' grandfather about his actual "use" of Travis' room – other than as a thoroughfare from one room to another. There was no evidence that anyone but Travis actually "used" the room. And Cpl. Hall could have asked Travis to consent to a search of his room but evidently did not.

For the foregoing reasons, the trial court erred in denying Travis' motion to suppress and admitting the "walk-in" evidence at penalty phase. As discussed, *infra*, in the portion of the argument addressing Point VII, this evidence was highly prejudicial evidence of uncharged, unconvicted offenses resembling in many respects the circumstances of the charged offense. It was evidence that the state relied on heavily at

penalty phase.

For the foregoing reasons and for the additional reasons presented in the argument to Point VII, the trial court erred in overruling Travis' motion to suppress evidence and admitting this walk-in evidence at trial. Travis' sentence of death must be set aside and the cause remanded.

III

The trial court erred in overruling Travis' motion for judgment of acquittal at the close of all evidence, entering judgment against him for first degree murder and sentencing him to death. This violated his rights to due process of law, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; Mo.Const., Art. I, §§ 10, 14, 18(a) and 21; §565.035.3(3), RSMo. Regardless of the length of time that Travis had to think about what he was doing, the state must still prove that Travis "coolly" reflected on killing Steffini Wilkins and there was no such evidence of "cool" reflection. Further, even if the Court should disagree and find the evidence to be sufficient, evidentiary errors, instructional error at the penalty phase, the lack of evidentiary support for the element of deliberation, and

significant and substantial mitigating evidence concerning Travis himself undermine confidence in the reliability of the death verdict and require that it be vacated.

This Court recently commented that the "ultimate purpose of [proportionality review] is to prevent freakish and wanton applications of the death penalty." *State v. Edwards*, 116 S.W.3d 511, 548 (Mo. banc 2003). In this spirit, the comments of the federal district court for the district of Nebraska in *Palmer v. Clarke,* 2003 WL 22327180 (D.Neb. Oct. 9, 2003) – holding that the Nebraska Supreme Court violated due process when reviewing sentences of death by comparing a defendant's death sentence only to other death sentences – bear repeating:

"Finding a sentence of death 'no greater than or disproportionate to' another sentence of death is a fallacy since a death penalty cannot be 'greater than or disproportionate to' another death sentence." 2003 WL 22327180 *23 *citing State v. Bey*, 137 N.J. 334, 645 A.2d 685, 690 (N.J. 1994). "Limiting review to cases in which the death penalty has been imposed is like looking for race discrimination in public transportation by comparing only those riding in the back of the bus." *Id*. "The proportionality review is aimed at narrowing the class of capital defendants, separating those murders that warrant the extreme sanction of death from those that do not [and] [c]omparison to other sentences of

death cannot perform this function." *Id*.; citations omitted.

Viewed in the light most favorable to the verdict, the evidence did not prove beyond a reasonable doubt that Travis coolly reflected on killing Steffini Wilkins. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). Viewed most favorably to the verdict, the evidence did show that Travis had *time* to reflect – *time* to think – before killing Steffini: he went to Steffini's house, took her from her house, drove her to the Indian Creek Access Area, and at some point strangled her with her bra.

Although this is questionable in light of Travis' belief in Sgt. Platte's statement that Steffini was still alive, the evidence may have shown that Travis "intended" to kill Steffini. But unless this Court is willing to say that time to kill or intent to kill is the equivalent of "cool" reflection, there is no evidence of deliberation.

"A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." §565.020.1. Deliberation "sets first degree murder apart from all other forms of homicide." *State v. O'Brien*, 857 S.W.2d 212, 217-18 (Mo.banc 1993). "Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." *Id*. at 218. Deliberation may be inferred, *State v. Malady*, 669 S.W.2d 52, 55 (Mo.App.E.D. 1984), but must still be proved beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 316 (1979).

An intended killing done with knowledge but without "cool reflection" is not first degree murder. *State v. Baker*, 859 S.W.2d 805, 815 (Mo.App.E.D. 1993). Absent evidence of deliberation, an intentional killing is second degree murder. *State v. Snow*, 293 Mo. 143, 238 S.W. 1069 (Mo. 1922); §565.021.1 (one who "knowingly causes the death of another person" commits the offense of murder in the second degree). A person who acts "knowingly" acts with the awareness "that his conduct is practically certain to cause that result." §562.016.3(1).

Merely acting with knowledge that an act (strangling someone) is practically certain to cause a certain result (death) is an intentional act and nothing more. Any intentional act may take time to accomplish. Any intentional act may also involve a period of time when the person thinks about the act. Indeed, how else could an act be intentional – intended – if the person committing the act never thought about it?

But *intending* to act is not the same as acting with knowledge *plus* coolly reflecting (deliberating) before the act. Knowing that death is practically certain to follow or will be caused by strangling is second degree murder. But for first degree murder, knowing that death is practically certain to follow from strangling someone is not enough; first degree murder requires the additional element of acting only after *coolly*

reflecting on the matter.

Here, the state's evidence fell short of establishing that Travis coolly reflected on, deliberated on, killing Steffini. The evidence showed that at Steffini's house, Travis' intention in putting his hand over her mouth was to keep her from screaming and waking neighbors; he had no intention of killing her.

Sgt. Lawzano's written statement provides evidence that allows the inference that Travis' intent at the river was to kill Steffini to end her suffering. This is hardly cool reflection. Travis' statement that Steffini "was suffering bad," that he " prayed to God, God forgive me for what I am about to do, and that he "then wrapped her bra strap around her throat ... choked her ... [and] [e]nded her suffering" evinces knowing, intentional actions (T1062-63; StEx-41). It does not prove beyond a reasonable doubt that Travis coolly reflected on "what he was about to do" or that he deliberated.

Even if the Court should disagree, reject the foregoing argument, and conclude that the state made a sufficient case to support a verdict of guilt, there are substantial reasons for reducing Travis' sentence to life imprisonment without probation or parole. First, as shown above, the evidence of deliberation is not sufficiently strong to serve as a reliable and valid basis for a sentence of death. In terms of the reliability of the

evidence, that obtained through Sgt. Lawzano is particularly problematic because Sgt. Lawzano, unlike Sgt. Platte, never gave Travis his *Miranda* warnings. When he spoke to Sgt. Platte, Travis wrote out his own statements; when he spoke to Sgt. Lawzano, Sgt. Lawzano wrote out the statements. Obviously Travis was capable of writing. This, too, calls the reliability and strength of the evidence into question.

In addition, the risk that serious and prejudicial errors occurring at both the guilt and penalty phases of trial improperly influenced the sentencing verdicts is too great to be confident in the outcome of the trial and the reliability of the verdicts of death. Finally, the evidence shows that Travis is not a person who should be put to death. For these reasons, the sentence of death must be vacated and Travis re-sentenced to life imprisonment without probation or parole.

Numerous errors pervaded the trial. Even if the Court should find that the errors themselves do not warrant reversal of the conviction or sentence, the Court must consider their effect on the reliability of the verdict of death. Some, but not all of these errors are listed below.

One error, although not included in this brief, was the trial court's refusal to allow the defense to challenge the state's DNA test results by questioning the state's witness, Brian Hoey, about errors in his raw data (T899-923). Because Mr. Hoey's DNA tests were physical evidence

linking Travis to Steffini's death, it was highly prejudicial. Another error, briefed, is that the trial court erroneously withheld from the jury an involuntary manslaughter instruction warranted by the evidence. Also not briefed is the trial court's error in allowing the state to ridicule Travis by presenting evidence that he complained and whined when his hair was pulled for the sexual assault kit (T858-59). The trial court's failure to suppress Travis' statements, particularly in light of the odd discrepancy between the Sgt. Lawzano statements and the Sgt. Platte statements, is another error that should be considered by this Court in evaluating the reliability of the death sentence imposed on Travis. Penalty phase errors that must be taken into account in determining the proportionality of this death sentence include allowing the jury to hear the unreliable testimony of Nicole and her friend Samantha, but not letting the jury hear a letter that Travis' grandmother wrote to him.

Even if this Court should decide that these errors do not rise to the level of reversible error, they are factors that the Court may and should consider in evaluating the reliability and proportionality of the verdict of death. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-43 (2001). Further, state statute, the Due Process Clause and the Eighth Amendment mandate that the Court also determine whether the verdict of death is proportionate to the sentence imposed in similar

cases. *Cooper Industries*, supra, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., conc'g and diss'g); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Harris v. Blodgett*, 853 F. Supp. 1239 (W.D.Wa. 1994); and *Wilkins v. Bowersox*, 933 F. Supp. 1496 (W.D.Mo. 1996); §565.035.3(3) ("With regard to the sentence, the supreme court shall determine ... 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"); *State v. Chaney*, 967 S.W.2d 47, 60 (Mo.banc 1998).

"Similar" cases should include cases with similar facts regardless of sentence. *BMW*, 517 U.S. at 583-85. Appellant suggests that among the non-death sentenced similar cases the Court should consider in deciding whether Travis' sentence is proportionate are the following: *State v. Masden*, 990 S.W.2d 190, 192 (Mo.App.W.D.1999) (Defendant was convicted of first degree murder after jury trial and sentenced to life imprisonment; the victim was killed by defendant hitting him the head with a cinder block then slitting his throat; defendant and his accomplice let the body "drain" for an hour before wrapping his head with a pillowcase and plastic bag which were tied around his neck with a telephone cord); *State v. Crenshaw*, 59 S.W.3d 45, 47 (Mo.App.E.D.2001)

(Defendant was convicted of first degree murder and sentenced to life imprisonment after jury trial for strangling victim, a 14-year old girl and moving her body to an abandoned house so it would deteriorate before being discovered); *State v. Hayes*, 15 S.W.3d 777 (Mo.App.S.D.2000) (Defendant, who strangled his girlfriend and threw her body in a cave behind a rock, was convicted of second degree murder after jury trial); *State v. Brown*, 966 S.W.2d 332 (Mo.App.W.D.1998) (Defendant was convicted after jury trial of killing a woman and then killing her four year old daughter – so he would not leave any witnesses – and sentenced to life imprisonment on both counts; the woman had been stabbed 42 times, and the four-year old had been strangled and possibly suffocated); *State v. Futo*, 990 S.W.2d 7 (Mo.App.1999) (Defendant was convicted of four counts of first degree murder for killing his parents and two younger brothers and sentenced to life imprisonment on each count; his mother was found with an electrical cord tied around her neck).

This Court must also consider the defendant. §565.035.3(3). A very brief review of the evidence adduced at trial shows that Travis had never been in serious trouble before. Travis' family and friends came into court to testify on his behalf and provided evidence about him showing that he was a person for whom a sentence of life would be appropriate. This evidence included Travis' past contributions to his community and society in general through his music. The evidence shows he has continued to be a

supportive, contributing member of society and his community back home even while incarcerated. He has maintained contact with his family sending them letters and pictures; in his sister's case, he even sent a song he had composed for her wedding. While in jail he has continued to write poetry and even won an award. He has demonstrated that he can be a productive, contributing member of a prison community.

Travis was remorseful. When he learned that Steffini was dead, he said he did not want to live. He asked Sgt. Platte to get his gun. He accepted responsibility. He asked that Sgt. Lawzano tell Steffini's mother, Liz, that he was sorry and acknowledged that Liz would never forgive him (T1062). He said he would never forgive himself (T1062).

The sentence of death imposed on Travis is excessive and he should not be put to death. The legislature has decreed that a sentence of life imprisonment without probation or parole is, in the appropriate case, an adequate and sufficient sentence for first degree murder. For the foregoing reasons, the Court should find that Travis' sentence of death is disproportionate and re-sentence him to life imprisonment without the chance of probation or parole.

IV

The trial court erred or plainly erred in overruling Travis' motion to strike the state's aggravating circumstance based on 565.032.2(11) or, alternatively, failing to require the state to provide a bill of particulars, in overruling Travis' objections, and in giving

Instruction 17. This violated Travis' rights to due process, trial by a properly instructed jury, notice of charges, conviction only of charged offenses, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 17, 18(a), 19, and 21. Travis was prejudiced in that: 1) six months before trial Travis requested as to §565.032.2(11) that the state specify the particular felony he was allegedly committing at the time of the murder, but his first notice that the felony was kidnapping was at the end of penalty phase; and 2) Instruction 17 violated *Ring v. Arizona* and was a fatal variance from the information submitting an offense not charged since no statutory aggravators were pled in the information.

On January 4, 2002, the state filed notice of its intent to seek the death penalty based, in part, on section §565.032.2(11) – the statutory aggravating circumstance that the murder was committed while defendant was perpetrating or attempting to perpetrate one of several enumerated felonies (LF48-49). The defense moved to require the state to disclose the evidence it would rely on to prove the statutory aggravating circumstances (LF116-19). The defense also moved to strike the §565.032.2(11) aggravating circumstance or, alternatively, for a bill of

particulars or an identification of the type and degree of felony that the state was alleging Travis had been perpetrating or attempting; if the felony was of a type, such as burglary, that involved an underlying crime, the defense asked that the state be ordered to disclose the exact underlying crime (LF222-25). The trial court overruled this motion (LF9).

At the penalty phase instruction conference, the defense objected to Instruction 17 (T1357-58; LF222-25). Citing and renewing Travis' previously filed motion to strike the aggravating circumstance based on §565.032.2(11) or in the alternative for a bill of particulars or more definite statement, counsel pointed out that the court had overruled that motion "so we were essentially kind of left hanging not knowing what aggravating circumstance they were trying to prove and what evidence they were trying to prove, what crime, and so they elected to go with kidnapping, but that's news to us... ." (LF9; T1358). The Court overruled the objection and defense counsel included it in the motion for new trial (T1358; LF473-75). Travis did not object on the ground that the "terrorize" kidnapping element could apply to any murder and therefore was too vague to narrow the class of offenders, nor did Travis object to Instruction 17 on the fatal variance ground raised in this Brief. Travis therefore respectfully requests that the court review these claims for plain error. Rule 30.20.

Although §565.032.2 lists all the statutory aggravating circumstances (see Appendix, A6-A7), in most cases, subsection (11), as listed, does not provide an accurate description of what that statutory aggravating circumstance will be at trial. This is because subsection (11) requires the state to elect the felony or felonies, from among those listed, that it will rely on and prove at trial. Unless the state planned to rely on and prove all of the felonies at trial, simply giving "notice" that the state will rely on §565.032.2(11), as was done in this case, is inadequate. The state must also elect which of the listed felonies it will rely on and attempt to prove. Only if the state provides this additional information is there true notice.

The Sixth Amendment guarantees to the accused in all criminal prosecutions the rights to a 'speedy and public trial,' to an 'impartial jury,' to notice of the 'nature and cause of the accusation,' to be 'confronted' with opposing witnesses, to 'compulsory process' for defense witnesses, and to the 'Assistance of Counsel.' *Herring v. New York*, 422 U.S. 853, 856-57 (1975). "These fundamental rights are extended to a defendant in a state criminal prosecution through the Fourteenth Amendment." *Id*. Notice of the "nature and cause of the accusation" permits the accused the opportunity for "adequate preparation of a defense." *Sheppard v. Rees*, 909 F.2d 1234, 1236 (9th Cir. 1990).

Without notice of the nature and cause of the accusation, the other rights would be hollow because the accused would have no way of meaningfully preparing to confront, to defend and to avail himself of the assistance of counsel.

This Court has taken the position that "notice" of the statutory aggravating circumstances stands in lieu of charging them in the information or indictment. *See, e.g., State v. Edwards*, 116 S.W.3d 511, 543-44 (Mo.banc 2003) ("Where, as here, the state gave the defendant pretrial notice, pursuant to section 565.005, of the aggravating circumstances it intended to prove at the penalty phase of trial, it was not required to list them in the indictment").

Statutory aggravating circumstances are of primary importance in a capital case. Proof of statutory aggravating circumstances is the first step of the death-eligibility process. §565.030.4(1); *State v. Whitfield*, *supra*. Meaningful notice, the kind that would allow the accused and his attorneys to prepare a meaningful penalty phase defense, requires that the state fully disclose the statutory aggravating circumstances.

The court has required "notice" of non statutory aggravating evidence. *State v. Thompson*, 985 S.W.2d 779, 792 (Mo.banc 1999). Given the critical role statutory aggravators play in a capital case, this Court may require no less for statutory aggravating circumstances.

In failing to grant Travis' motion and require the state to provide a bill of particulars or identify the felony that it would rely on to complete §565.032.2(11), and in giving Instruction 17, which contained this aggravating circumstance, to the jury, the trial court committed prejudicial error. Travis' sentence must be vacated and the cause remanded for a new penalty phase proceeding.

There is a second reason that it was error to submit Instruction 17: it was a fatal variance from the offenses of first degree murder charged in the Information (LF29-30).

In Missouri, a sentence of death is not authorized unless the state proves beyond a reasonable doubt that at least one aggravating circumstance exists. *State v. Taylor*, 18 S.W.3d 366, 378 n. 18 (Mo.banc 2000); §§565.030.4(1), 565.032.1(1), RSMo. "Instructions which are at variance with the charge or which are broader in scope than the evidence are improper unless it is shown that an accused is not prejudiced thereby." *State v. Daugherty*, 631 S.W.2d 637, 639-40 (Mo. 1982). A variance is not fatal, and will not require reversal, unless it submits "a new and distinct offense from that with which defendant was charged." *State v. Clark*, 782 S.W.2d 105, 108 (Mo.App.E.D. 1989). A variance must be material, and defendant must be prejudiced, to warrant reversal. *Id*. "Variances are material when they affect whether the

accused received adequate notice; variances are prejudicial when they affect the defendant's ability to defend against the charges." *State v. Whitfield*, 939 S.W.2d 361, 366 (Mo.banc 1997).

Appellant recognizes that ordinarily issues involving variances arise during the jury's determination of the defendant's guilt or innocence and involve differences between the charging document and the verdict directing instruction(s). See, e.g., *Id.*; *State v. Madison*, 997 S.W.2d 16, 19-20 (Mo.banc 1999). But in a death penalty case, with regard to the aggravating circumstances – the facts necessary for a verdict of death – there is no occasion to determine whether the information or indictment conforms to the pleadings because the jury does not receive instructions concerning the aggravators unless and until the jury returns a verdict finding the defendant guilty of first degree murder.

It is through penalty phase instructions submitting aggravators that the jury is asked to determine if a defendant is guilty of aggravated murder. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) ('Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense..."').

In the present case, the state failed to plead any aggravating circumstances in the information filed (LF29-30). The addition of aggravating circumstances to first degree murder increases the range of

punishment from life imprisonment to death. *Id*.; §565.030.4(1), RSMo. (2000); *see also*, *e.g*., *State v. Taylor*, *supra*, 18 S.W.3d at 378 n. 18; *State v. Shaw*, 636 S.W.2d 667, 675 (Mo.banc 1982); *State v. Bolder*, 635 S.W.2d 673, 683 (Mo.banc 1982). Failing to plead any aggravating circumstances in the charging document means the state has not charged the greater offense of aggravated first degree murder.

Applying the rules concerning variances to the present case, compels the conclusion that the instructions submitting the aggravating circumstances varied fatally and materially from the information charging Travis Glass with first degree murder. The penalty phase instructions, Instruction 17 in particular, submitted a new and greater offense than that charged in the information, and the information gave Travis no notice whatsoever that he was being charged with the greater offense of aggravated first degree murder.

Since "the penalty of death is qualitatively different from a sentence of imprisonment, however long," there exists a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976). Thus, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*

v. Florida, 430 U.S. 349, 358 (1977).

For the foregoing reasons, the trial court erred in submitting Instruction 17; it contained an aggravating circumstance as to which the defendant did not receive timely notice, and it was a fatal variance from the charging document. The Court must reverse and remand for a new penalty phase trial; alternatively, the Court must vacate Travis' death sentence and order that he be resentenced to life imprisonment without probation or parole.

V

The trial court erred in overruling Travis' motion to quash the information for failure to comply with *Jones v. United States* and *Apprendi v. New Jersey* and exceeded its authority and jurisdiction in sentencing him to death. This violated Travis' rights to jury trial, freedom from cruel and unusual punishment, and due process of law. U.S.Const. Amend's VI, VIII, and XIV; Mo.Const., Art I, §§ 10, 18(a) and 21. Because Missouri's statutes authorize a sentence of death only upon a finding of at least one of the enumerated statutory aggravating circumstances, the statutory aggravating circumstances comprise not only facts which the prosecution must

prove to increase the punishment for first degree murder from life imprisonment without probation or parole to death, they are also alternate elements of the offense of "aggravated first degree murder." As the information in the present case failed to plead any aggravating circumstances, the offense actually charged against Travis was unaggravated first degree murder for which the only authorized sentence is life imprisonment without probation or parole. The judgment must be reversed and Travis' sentence of death vacated.

In *Jones v. United States*, 526 U.S. 227 (1999), the Supreme Court announced a broad constitutional principle governing criminal cases that had only been implicit in its prior decisions: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6. Subsequently, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applied this rule of jury fact-finding to the states through the Fourteenth Amendment. *Apprendi*, 530 U.S. at 476. In *Ring v. Arizona* 536 U.S. 584 (2002), the Supreme Court held that the jury

fact-finding rule applies to eligibility factors in state capital prosecutions. *Ring*, 536 U.S. at 600, 609.

The Supreme Court has repeatedly acknowledged the relationship between facts that must be found by a jury beyond a reasonable doubt, facts that must be pled in the charging document, and the lack of constitutionally-required "notice" when such facts are not included in an indictment or information. The Court's opinions suggest aggravating facts that must be found by a jury beyond a reasonable doubt are elements of a greater offense. *See e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) ("[T]he underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death..."); *Harris v. United States*, 536 U.S. 545, 564 (2002) *quoting Apprendi,* 530 U.S. at 483 n.10 ("Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"); *Ring v. Arizona,* 536 U.S. at 609 *citing Apprendi,* 530 U.S. at 494, n.19 (Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense...," the Sixth Amendment requires that they be found by a jury).

Recently, in ruling that *Ring* announced a rule of substantive criminal law, the Ninth Circuit Court of Appeals expressly held that under *Ring*, an aggravated murder is a "distinct" offense:

> Under substantive Arizona law, there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense.... That is, when *Ring* displaced *Walton*,[8] the effect was to declare Arizona's understanding and treatment of the separate crime of capital murder as Arizona defined it, unconstitutional. And when *Ring* overruled *Walton*, repositioning Arizona's aggravating factors as elements of the separate offense of capital murder and reshaping the structure of Arizona murder law, it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally. *Cf. Jones v. United States*, 526 U.S. 227, 229 (1999)....

Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) *petition for cert. granted*, Dec. 1, 2003 (No. 03-526).

The logical corollary of the foregoing cases is: aggravating circumstances, as elements of the greater offense of capital or *aggravated*

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[8] *Walton v. Arizona*, 497 U.S. 639 (1990).

murder, must be pled in the document charging capital or aggravated murder. This is in line with established federal law. "An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). "[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *E.g., Jackson v. Virginia*, 443 U.S. 307, 314 (1979) *citing Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978); *Cokeley v. Lockhart*, 951 F.2d 916 (8th Cir. 1991).

The rule follows the law in this state. In Missouri, "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information... ." Mo. Const., Art. I, §17. An indictment or information must "contain all of the elements of the offense and clearly apprise the defendant of the facts constituting the offense." *State v. Barnes*, 942 S.W.2d 362, 367 (Mo.banc 1997). "[A] person cannot be convicted of a crime with which the person was not charged unless it is a *lesser* included offense of a charged offense." *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo.banc 1992); emphasis added.

Although §565.020 ostensibly establishes a single offense of first degree murder for which the punishment is either life without probation or parole, or death, under *Ring, Apprendi, Jones*, and *Whitfield*, the combined effect of §§565.020 and 565.030.4, which establishes the three

death-eligibility steps, is to create, *de facto*, two kinds of first degree murder in Missouri: 1) *unaggravated* first degree murder, for which the elements are set out in §565.020.1 and which does not require proof of any statutory aggravating circumstances, and 2) the greater offense of *aggravated* first degree murder.

The difference between charging *aggravated* and *unaggravated* first degree murder is constitutionally significant. In Missouri, to prosecute a defendant for *aggravated* first degree murder, the charging document must plead not only the elements of the lesser offense of *unaggravated* first degree murder; the charging document must also plead the statutory aggravating circumstance or circumstances on which the state will rely to establish the defendant's eligibility for death.[9] Under *Ring, Whitfield*, and prior decisions of this Court, these additional facts are, in function and effect, elements of the greater offense of aggravated first degree murder and must be pled in the charging document. *See, e.g., State v. Whitfield, supra; State v. Taylor*, 18 S.W.3d 366, 378 n.18

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[9] In light of *State v. Whitfield, supra*, the charging document should plead not only the statutory aggravating circumstances: it should also plead all facts that under §565.030.4(1), (2), and (3) must be proved beyond a reasonable doubt before a defendant is eligible for a sentence of death.

(Mo.banc2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); *State v. Shaw*, 636 S.W.2d 667, 675 (Mo.banc1982) *quoting State v. Bolder*, 635 S.W.2d 673, 683 (Mo.banc1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence").

The state did not plead any statutory aggravating circumstances – or any of the facts required by §565.030.4(1), (2), and (3) in the information charging Travis with first degree murder. The state charged Travis with the lesser offense of *unaggravated* first degree murder and that is the "greatest" offense of which he could be convicted. *Jackson v. Virginia, Presnell v. Georgia, Cole v. Arkansas, Cokely v. Lockhart, State v. Parkhurst, supra*.

This Court's opinion in *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), illustrates these principles. In *Nolan*, the defendant was charged with first degree robbery. Although the robbery statute authorized an enhanced or additional punishment of ten years imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the amended information failed to charge this aggravating fact. *Id.* at 52. The jury, however, found the

defendant guilty of "[r]obbery first degree, by means of a dangerous and deadly weapon" and based on the aggravating fact of the "dangerous and deadly weapon," enhanced defendant's punishment to fifty years. *Id*.

On appeal, the issue was the necessity of "pleading" in the charging document, "aggravating circumstances which would authorize the imposition of additional punishment." *Id*. at 53. The state claimed that because the defendant had adequate notice "of the cause and the nature of the offense for which he was convicted" it was not necessary to charge the aggravating circumstance in the information. *Id*. at 53-54. The state's two-fold argument was a) it was obvious from "the words used in the information" that the offense involved the use of a weapon, and b) the defendant's motion to vacate his sentence indicated he was aware during voir dire that the state intended to try the case as an aggravated robbery and the defendant never objected. *Id*. at 53-54.

This Court rejected the state's arguments holding, 'The charge "with force and arms" does not include the allegation that the robbery was committed by means of a dangerous and deadly weapon.' *Id*. at 54. "The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and "[t]he trial court was without power or jurisdiction to impose that sentence." *Id*.

The Due Process Clause of the Fourteenth Amendment affords no less

protection to defendants charged with murder than to those accused of robbery. If aggravating circumstances must be alleged in a robbery indictment to charge the aggravated form of robbery and to subject the defendant to an enhanced punishment, *State v. Nolan, supra*, then the Due Process Clause requires that aggravating circumstances must be alleged in the document charging first degree murder to subject a defendant to the enhanced punishment of death.

Although *Hurtado v. California*, 110 U.S. 516 (1884), holds that the Indictment Clause of the Fifth Amendment does not apply to the states, *Hurtado* does not go so far as to say a state need not be consistent in whatever processes and procedures it chooses to adopt. The Due Process Clause of the Fourteenth Amendment requires at a minimum that a state consistently follow the procedure elected for prosecuting criminal charges. Nor is *Hurtado* inconsistent with states being required, under the Due Process Clause of the Fourteenth Amendment, to adopt procedures for criminal prosecutions that provide the same kind and degree of notice of charges provided by a grand jury indictment.

Even assuming that the states, Missouri included, are not bound by the Indictment Clause and are free to choose the procedures by which criminal cases are prosecuted, the Due Process Clause mandates that a state be consistent in the application of its rules: "when a State opts to

act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Missouri has chosen to require that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information..." Mo.Const., Art. 1, §17; *State v. Barnes, supra*, *State v. Parkhurst, supra*. Having made this choice, Missouri may not, consistent with Due Process, provide less protection for prosecutions of aggravated forms of first degree murder than for aggravated robbery or other crimes. *Evitts v. Lucey*, *supra*.

Although cognizant that this Court has previously rejected claims similar to that presented here, *e.g.*, *State v. Tisius*, 92 S.W.3d 751, 766-67 (Mo.banc 2002), Travis raises the claim here because the Supreme Court has yet to directly address the specific question presented here: whether facts that must be found by a jury beyond a reasonable doubt before a sentence of death may be imposed are required to be included in the charging document to charge the greater offense of "aggravated" or capital murder punishable by death.

For the foregoing reasons, the Court should find that although the trial court had jurisdiction over Travis on the charge of *unaggravated* first degree murder, the trial court exceeded its jurisdiction and authority

in sentencing Travis to death. *Ring v. Arizona, Apprendi v. New Jersey, Jones v. United States, State v. Whitfield* and *State v. Nolan, supra*. The sentence of death imposed by the trial court violated Travis' rights to jury trial, due process of law, freedom from cruel and unusual punishment, and reliable sentencing; it must be vacated and Travis resentenced to life imprisonment without probation or parole. U.S. Const., Amends. V, VI, VIII, and XIV; Mo.Const., Art I, §§ 10, 17, 18(a) and 21.

VI

The trial court erred and plainly erred in failing to instruct the jury on involuntary manslaughter as requested by the defense. This violated Travis' rights to due process of law, jury trial, to defend against the state's charges, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's V, VI, VIII, XIV; Mo.Const., Amend's 10, 18(a), and 21. Failing to instruct the jury on involuntary manslaughter was a manifest injustice and prejudiced Travis. Travis' oral and written statements to Sgt. Platte – that he had put his hand over Steffini's mouth to keep her quiet, and his subsequent statements to Sgt. Lawzano – that he choked Steffini with her bra strap to end her suffering, was evidence from

which a jury could find or infer an "intentional act" with "a conscious disregard of a risk of death to another" that manifested "a gross deviation from what a reasonable person would do in the circumstances." This evidence provided both a basis to convict Travis of involuntary manslaughter and to acquit him of first and second degree murder.

At the guilt phase instruction conference, Travis proffered Instruction A, involuntary manslaughter, MAI-CR3d 313.10, modified.[10] This instruction submitted that Travis had "recklessly" caused Steffini's death by strangling her (TLF411; A8). In refusing to give this instruction to the jury, the trial court explained:

> [I]t submits that the act of involuntary manslaughter was done recklessly to cause the death of Steffini Wilkins. The Court finds from the evidence that has been adduced in this case that there is

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[10] The complete instruction may be found in the Appendix at A8. Because the instruction submitted only death by strangulation and did not submit death by suffocation – from Travis putting his hand over Steffini's mouth – Travis respectfully requests the Court to review for plain error the portion of this point that addresses the failure to submit involuntary manslaughter by suffocation. Rule 30.20.

> no showing that the defendant acted recklessly. In the event the Court were to find that the deceased had died of suffocation, then the recklessly might well come into play under the theory that the defendant as he stated in one of the statements to the arresting offices, placed his hand over the girl's mouth and she died as a result of suffocation. However, in this case, there is no dispute that the deceased died as a result of strangulation by the bra strap and the strangling of her and the physical symptoms that were present which required a period of time of at lest 30 to 40 seconds and upwards of three to four minutes at the upper limit to cause her death. And hence, and with the defendant's statement that he did actually strangle her with the bra strap to put her out of her misery, there is no basis for the court to submit an instruction on involuntary manslaughter, the defendant having acted recklessly.

(T1077-78).

The trial court erred in failing to instruct the jury on involuntary manslaughter. The trial court's quoted comments demonstrate that in refusing to give the involuntary manslaughter instruction, the trial court based its decision on its own finding of the facts. Specifically, the trial court found that the evidence conclusively showed that Steffini had died by strangulation and that only Travis' final statement – that he wrapped

Steffini's bra strap around her neck – was credible fact.

In making his own findings of fact, the court abdicated his function as judge and took the place of the jury. The result was that Travis' state and federal constitutional rights to due process of law, to present a defense, to a fair trial by a properly instructed jury were violated. And, because had he not been convicted of first degree murder he would not have faced and been sentenced to death, the trial court's ruling also violated Travis' right to freedom from cruel and unusual punishment and reliable sentencing. Had the trial court based its decision, as should have been done – on an objective evaluation of whether there was evidence that would have supported an involuntary manslaughter instruction, he would have had to conclude that there was.

In determining whether a refusal to submit an instruction was error, "the evidence is viewed in the light most favorable to the defendant." *State v. Avery*, No. SC 85300 (Nov. 25, 2003) 2003 WL 22784342 *3 (citation omitted). "If the evidence tends to establish the defendant's theory, *or supports differing conclusions*, the defendant is entitled to an instruction on it." *Id*. (citation omitted); emphasis added.

"Instruction on a lesser-included offense is required if the evidence produced at trial, by fact or inference, provides a basis both for the acquittal of the greater offense and the conviction of the lesser offense."

Id. at *8. "When in doubt, courts should instruct on the lesser-included offense, leaving it for the jury to decide of which offense, if any, the defendant is guilty." *Id*. This is because "*the jury as fact finder [is] entitled to consider all of the evidence and make its own credibility determination*." *Id*. at *9; emphasis added.

In the present case, Travis' first oral and written statements to Sgt. Platte – introduced and used by the state – provided an evidentiary "basis both for the acquittal of the greater offense [of first degree murder] and for the conviction of the lesser offense [of involuntary manslaughter]." *Id*.

Travis' oral statement to Sgt. Platte and the statement that Travis wrote out in his own hand were both introduced by the state at trial (T1028-31; StEx-40; A18). They contained the following information:

After Steffini opened her door and Travis went into her house, "they started kissing" and she "performed oral sex on him" (T1029). When Travis "tried to then take it further … she started to scream" (T1029). Sgt. Platte testified that Travis said Steffini was screaming that she was "going to call her mom" or "Mike" or "someone" (T1029).

When Steffini began screaming, Travis "covered her mouth to keep the neighbors from waking" (StEx-40). Travis told Sgt. Platte that when Steffini was screaming, "he took his hand and placed it across her mouth and held it there very tightly for two to three minutes trying to get her to

quiet down" (T1029). At some point, Steffini "went limp" and "must [have] passed out" (T1029; StEx-40). Travis checked her breathing and pulse trying to find "any type of life sign" (T1029). He found no signs of life, could not hear her breathing, *and thought she was dead* (T1029; StEx-40; A18); emphasis added.

Travis put Steffini in his car and drove to the Salt River (T1029; StEx-40; A18). At the Salt River, he found Steffini was still alive (StEx-40; A18). She began wheezing "like she was attempting to breathe (T1030). Travis put Steffini on his car trunk and hood but she kept slipping off (T1029; StEx-40; A18). Travis wrote: "When I found out she was still alive I should of took her to a hospital but I was very intoxicated and just left her by the river... ." (StEx-40; A18). He told Sgt. Platte that when Steffini was making sounds he "he became scared" and "panicked," and that "he laid her down on the ground and left" (T1030,1041).

Based on the foregoing evidence, the jury could have inferred and found as facts that after Travis left, Steffini died from the effects of suffocation as a result of Travis putting his hand over her face. Travis' statements to Sgt. Platte provide an evidentiary basis for both acquittal of first degree murder and second degree murder in that Travis intended only to keep Steffini quiet, not to kill her.

This evidence also provides a basis for convicting Travis of involuntary

manslaughter in that the jury could have found or inferred that in keeping his hand over Steffini's face until she went limp, Travis "consciously disregard[ed] the "substantial and unjustifiable risk" that he would cause Steffini's death and that his "disregard" of this risk of death was "a gross deviation from what a reasonable person would" have done "in the circumstances" (LF411; A8).

The jury did not have to believe the conclusions in Dr. Dix's report that Steffini died as a result of strangulation, and the trial court's peremptory finding and use of that fact as conclusive was an error of law. Especially because Dr. Dix – who performed the autopsy and who wrote the report – had died and could not be cross-examined at trial, the trial court's decision to accept strangulation as the cause of death to the exclusion of other evidence was a manifest injustice.

Likewise, Travis' statement to Sgt. Lawzano, in which Sgt. Lawzano claimed Travis said he strangled Steffini, may not be treated as irrebuttable fact. It was evidence, and it was for the jury to determine what weight, if any, to give it. That Travis believed Sgt. Platte when he said Steffini was still alive was additional evidence from which the jury could infer that Travis did not intend to kill Steffini and constituted a basis for acquitting of first and second degree murder.

The failure to give the involuntary manslaughter instruction

prejudiced Travis because it covered the specific facts of the case and provided a defense to the state's charges of first degree murder that addressed these specific facts.

Traditionally, this Court has held that when a jury is "presented with instructions on murder in the first degree and murder in the second degree, [and] had the opportunity to find that [the defendant's] actions were not deliberate" but convicts of first degree murder, "no reasonable basis exists to suggest that the jury would have reduced the conviction had they been presented with" a different lesser included offense instruction. *See e.g., State v. Jones*, 979 S.W.2d 171, 185 (Mo. banc 1998). This analysis, however, recently has been called into question by *State v. Beeler*, 12 S.W.3d 294 (Mo.banc 2000).

Beeler was charged with second degree murder. *Id*. at 297. The trial court instructed the jury "on second degree murder, which included a self-defense instruction, and [gave] a separate instruction on involuntary manslaughter, which contained no reference to self-defense." *Id*. The jury convicted Beeler of involuntary manslaughter. *Id*.

On appeal, Beeler argued that the trial court erred in instructing the jury on involuntary manslaughter because there was no evidence of "reckless" – meaning "unintentional or accidental" – conduct to support the instruction. *Id*. This, according to Beeler, resulted in inconsistent

verdicts: one could not be acquitted of second degree murder, where the only basis for such acquittal is an intentional act of self defense, and also be convicted of involuntary manslaughter, which required the jury to find a reckless – unintentional or accidental – intent. *Id*. Analyzing the issue "somewhat different[ly]" than Beeler, the Court reversed. *Id*. It is this Court's analysis that is significant for present purposes.

In *Beeler*, the Court recognized that the term "reckless" encompassed "knowing conduct in one respect in that it involves awareness, but it is an awareness of risk, that is, of a probability less than a substantial certainty." *Id*. at 299. Instructing the jury on self defense – "the intentional act of defending one's self" – was not inconsistent with instructing on involuntary manslaughter since both self-defense and involuntary manslaughter involved similar, albeit not identical, "intentional," conduct. *Id*. at 299.

The Court held that instructing on self-defense did not preclude instructing on involuntary manslaughter because the reckless state of mind required for an involuntary manslaughter instruction was not inconsistent with the "knowing" state of mind required for self-defense. "[W]here the evidence permits an inference of reckless conduct and the state or accused requests the instruction, the trial court is obligated to give a proper involuntary manslaughter instruction." *Id*. at 300.

The Court's analysis in *Beeler* has called into question the oft-repeated rationale that in a first degree murder case, when a jury is given an instruction on a lesser offense but finds the defendant guilty of first degree murder, there is no error in failing to give a different lesser offense instruction because the jury has already been given an opportunity to reject the element of deliberation and did not do so. *E.g.*, *State v. Wise*, 879 S.W.2d 494, 517 (Mo.banc 1994) (no prejudice in failing to give a felony second degree murder instruction because "second degree conventional murder instruction sufficiently tested the jury's belief of the elements of first degree murder"); *State v. Stepter*, 794 S.W.2d 649, 652 (Mo.banc 1990) (second degree murder instruction tests a jury's belief of the crucial facts for a conviction of first degree murder); *State v. Frost*, 49 S.W.3d 212, 218-19 (Mo.App.W.D. 2001) (*citing cases).*

Beeler and *Avery* ("if the evidence tends to establish the defendant's theory, *or supports differing conclusions*, the defendant is entitled to an instruction on it") are at odds with a rule of appellate review that precludes allowing a jury to determine whether it believes evidence supporting the state's theory that a defendant deliberated or "differing" evidence that supports the defense theory that a defendant, in a "gross deviation from what a reasonable person would do in the circumstances," chose to disregard "a substantial and unjustifiable risk that he [would]

cause death."

The old theory hangs on the rationale that if a jury was given an opportunity to convict the defendant of a lesser offense but convicted the defendant of first degree murder, there can be no prejudice in failing to offer the jury a different lesser offense instruction.

The defect in that analysis is that it presumes that the hierarchy of offenses starts at the top with first degree murder and that at each successive step down, the lesser offense is exactly the same as the greater offense minus one element. But in reality, lesser offenses, especially statutory lesser offenses, don't work that way. A felony murder is, by statute, a lesser offense of first degree murder, but it contains an additional element not found in first degree murder, i.e., that the murder was committed in the course of a felony. A juror may find in a lesser offense that is two steps down from murder first degree the elements that fit the evidence s/he believes.

Due process must surely require that the detailed evidentiary analysis mandated by *Beeler* to determine whether to instruct on both intentional self-defense and reckless involuntary manslaughter is also mandated when the facts support either a deliberated murder or reckless, unreasonable, murder. For the foregoing reasons, the Court must reverse Travis' conviction and remand for a new trial.

VII

The trial court erred in overruling Travis' objections and admitting non-statutory aggravating evidence that on two separate occasions prior to the charged offense Travis had entered – uninvited and unannounced – houses occupied by teenage juvenile girls and plainly erred in submitting Instructions 18 and 19.

This violated Travis' rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process of law, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§10, 18(a), and 21.

In *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), this Court held that the findings required by §§565.030.4(1), (2), and (3) are death-eligibility factual findings that must be made by a jury. The Sixth, Eighth, and Fourteenth Amendments mandate such findings be made "beyond a reasonable doubt." Travis was prejudiced and a miscarriage of justice occurred because Instruction 18, addressing §565.030.4(2), failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the aggravating

facts and circumstances warranted death. Likewise, as to §565.030.4(3), Instruction 19 failed to instruct the jury the state had the burden of proving beyond a reasonable doubt that there were not facts or circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. Under *Sullivan v. Louisiana*, 508 U.S. 275 (1993), failure to correctly instruct the jury that the state's burden of proof is "beyond a reasonable doubt" is structural, per se, reversible error. Even reviewing for harmless error or a miscarriage of justice or manifest injustice, the instructional error in this case would require reversal. The "walk-in," uncharged misconduct was inherently unreliable and prejudicial evidence that the flawed instructions allowed the jury to use twice – to find the aggravating evidence warranted death and to find the mitigating circumstances did not outweigh the aggravating circumstances – without ever finding beyond a reasonable doubt that these incidents occurred. Because the jury found only one statutory aggravating circumstance, and because the mitigating evidence was strong, it is not possible to say that the error was harmless beyond a reasonable doubt. Since only a correctly instructed jury can determine

whether all the aggravating circumstances warrant death, and only a correctly instructed jury can determine whether the mitigating facts and circumstances outweigh the aggravating facts and circumstances, this Court cannot find that the incorrect instructions were harmless. Travis' sentence of death must be reversed and he must be resentenced to life imprisonment.

The state's attorney directed the jury's attention to this evidence at the beginning of the penalty phase:

> [Y]ou will also hear evidence in this case from two young women, a Samantha Bramlett and Nicole Withrow. These two young ladies are friends of each other's. I think they both knew the victim in this case, Ms. Wilkins. But they will tell you that on two occasions that Samantha, one where Samantha Bramlett was at the home of Nicole Withrow and one when Nicole Withrow was there by herself that the defendant unannounced uninvited entered their home without permission, that is entered the home of Nicole Withrow's mother. they will describe the circumstances of that. These two girls will tell you, I believe, that they're young teenagers.

(T1180). The state returned to this uncharged, unconvicted misconduct in closing argument:

> [H]e said he took her to the Indian Camp access to get her help. I

think he may have been looking for some help, but I think he was looking for some help for his own sexual gratification and nothing more. Because the help he was seeking for her was pretty darn obvious from [the] way he left her, isn't it?

We do have a hint, however, of what might have been going on. Because in the month or two prior to this murder we know that he walked uninvited and unannounced into somebody else's home, didn't he? You heard that from Samantha Bramlett and you heard that from Nicole Withrow. Why that didn't turn into something ugly, I can't say. I don't know. But when someone comes up in a sliding glass door in the back of your house and into a bedroom, those are not the actions of a person who has come by with a lawful purpose. What's more, coming there at midnight or after uninvited and unannounced is not the actions of a lawful person who has lawful conduct on their mind. And he knew – "Is this my house?" Please... . It is the home of a person he knows who has what? Two teenage girls living there... .

(T1388-89).

Between his opening statement and closing argument, the prosecutor called Samantha Bramlett and Nicole Withrow who alleged separate instances when Travis had walked into Nicole's house, unannounced, at

a time when Nicole's mother was not at home (T1189-1207).[11] According to Samantha, Travis "walked in" on her a month before Steffini's murder (T1189-90). Nicole claimed Travis walked in on her shortly before or after he walked in on Steffini (T1201-02). Neither girl had ever reported

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[11] Penalty phase began immediately after the hearing on the motion to suppress evidence pertaining to the unauthorized walk-in's, and Samantha and Nicole were the state's first two witnesses (T1187-1212). Defense counsel did not object at the time these witnesses testified, but the following morning moved the trial court to strike their testimony; the trial court denied this motion (T1241). Defense counsel included this in the motion for new trial (LF465-67). Because the evidence followed so soon after the trial court's denial of the motion to suppress, it is unlikely that the court would have changed its mind had defense counsel timely objected. For this reason, appellant seeks plenary review even though there was no objection at trial. In the alternative, appellant requests the Court review this part of the claim for plain error. Rule 30.20.

As defense counsel did not object to Instructions 18 and 19 (T1356-60). Appellant therefore requests that the Court review this part of the point for plain error. Rule 30.20.

these alleged walk-in episodes to the authorities (T1172-73).

Ten years ago in *State v. Debler*, 856 S.W.2d 641 (Mo.banc 1993), the Court was confronted with a similar question involving the introduction of uncharged, unconvicted misconduct at penalty phase. The question in *Debler* was whether admission of extensive drug dealing misconduct for which the defendant had never been convicted was "a manifest injustice. 856 S.W.2d at 657. The *Debler* Court's resolution of that question foreshadowed a recent trio of Supreme Court cases – *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), and this Court's recent opinion in *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003). In light of these recent cases, *Debler* bears careful examination today.

The *Debler* Court noted that evidence of criminal activity for which a defendant has never been charged or convicted is "significantly less reliable than evidence related to prior convictions" because no jury or judge has ever found the facts in question beyond a reasonable doubt. *Id*. It was clear, the Court said, that because a jury would not distinguish between evidence of acts for which a defendant had been convicted and evidence of acts never tested in court, evidence of unconvicted criminal activity is "highly prejudicial." *Id*.

Was admission of this evidence a manifest injustice? The Court found

nothing to "cure" the prejudice or the risk of allowing the jury to consider unreliable, unproved, "unconvicted" criminal misconduct evidence:

> If instructed on the drug dealing, the jury, before considering this circumstance, must unanimously find beyond a reasonable doubt that Debler was involved in a conspiracy to distribute drugs ... thereby curing some of the unreliability of this evidence. MAI-CR3d 313.41. *Without such an instruction, it is possible that some jurors took this evidence into account while applying a lesser standard of proof. Such consideration would clearly violate the statutory standards governing the death penalty*. §565.030.4 RSMo 1986.

Id.; emphasis added.

In *Debler*, the evidence in question, which the Court found to be highly prejudicial, involved Debler's uncharged, unconvicted drug dealing. The walk-in evidence in the present case is even more prejudicial because it closely resembles the charged offense in which Travis went to Steffini's home when her mother was not there (T1029). *See State v. Barriner*, 34 S.W.3d 139, 150-51 (Mo.banc 2000); *State v. Randolph*, 698 S.W.2d 535, 539-40 (Mo.App.E.D. 1988). The risk that some jurors would apply a standard of proof "lesser" than the constitutionally required "beyond a reasonable doubt" standard to unreliable, prejudicial, unconvicted, aggravating evidence not only

violates "statutory standards" as *Debler* found: it also violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Section 565.030.4 provides in pertinent part:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier....

Unfortunately, in the present case, because penalty phase

Instructions 18 and 19 – addressing §565.030.4(2) and (3) – failed to direct the jury that they must apply the reasonable doubt standard, the risk that some jurors would apply a "lesser standard of proof" infected the jury's determination of i) whether all the aggravating evidence, statutory and non-statutory, warranted death, and ii) whether the mitigating evidence was sufficient to outweigh all the aggravating evidence. The risk that the jurors would not apply the reasonable doubt standard to these two steps was rendered a near certainty by Instruction 14, MAI-CR3d 313.30A which told them that "to consider the death penalty, you must first find one or more statutory aggravating circumstances beyond a reasonable doubt" and that "[t]he burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the state" (LF412; A9).

In *Jones v. United States*, *supra*, the Supreme Court articulated a fundamental constitutional principle only implicit in its prior decisions: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n.6. *Apprendi* applied this rule to the states through the Fourteenth Amendment holding that "[o]ther than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Ring*, the Supreme Court held that the rule requiring a jury to find beyond a reasonable doubt any fact that increases the penalty applies to eligibility factors in state capital prosecutions. 536 U.S. at 589, 602, 609.

In *Whitfield*, this Court held that §§565.030.4(1), (2), and (3) establish eligibility factors that must be found by a jury. 107 S.W.3d at 256-62. *Whitfield* recognized that under *Ring* and the Sixth Amendment the death-eligibility findings required by §565.030.4(1), (2), and (3) means more than a jury simply making findings of fact: it means the jury must make these findings beyond a reasonable doubt. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it must be found by a jury beyond a reasonable doubt." *Whitfield*, 107 S.W.3d at 257 *citing Ring*, 536 U.S. at 602. *See also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). Moreover, the *state* bears the burden of proving, beyond a reasonable doubt, the existence of the facts required to prove a defendant eligible for death. *Schlup v. Delo*, 513 U.S. 298, 328 (1995); *Bullington v. Missouri*, 451 U.S. 430 (1981). In

Missouri, these facts are set forth in §565.030.4(1), (2), and (3). *State v. Whitfield*, 107 S.W.3d at 257-61.

Penalty phase Instructions 18 and 19 given at Travis' trial suffer from the constitutional infirmities that troubled the Supreme Court in *Ring* and the Missouri Supreme Court in *Whitfield* (A12-13). Unlike Instruction 17 (A10-11) – concerning whether the statutory aggravating circumstances exist – that unambiguously, specifically, and appropriately directed the jury to require the state to meet its burden of proof beyond a reasonable doubt, Instructions 18 and 19 did not inform the jury that the state had the burden of proof. Moreover, Instructions 18 and 19 also failed to tell the jury that the state's burden was to prove beyond a reasonable doubt that the aggravating facts and circumstances warranted death and that the mitigating circumstances did not outweigh the aggravating circumstances. When compared to Instruction 17, also addressing an eligibility requirement, the absence of any language in Instructions 18 and 19 regarding the state's "beyond a reasonable doubt" burden of proof is striking and egregious.

Instruction No. 17, MAI-CR3d 313.40, expressly advised the jury that its finding as to §565.030.4(1) – whether or not statutory aggravating circumstances existed – must be made unanimously and beyond a reasonable doubt:

> [T]he burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.
>
> Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life....

(LF415-16; A10-11).

In stark contrast, the directions in Instruction 18, MAI-CR3d 313.41A, regarding the "warrant" step, §565.030.4(2), failed to instruct the jury that its findings must be unanimous and beyond a reasonable doubt:

> If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life... .

(LF417; A12).

Likewise, as to the third eligibility step, §565.030.4(3), Instruction 19, MAI-CR3d 313.44A, modified, wholly failed to instruct the jury that the state had the burden of proof beyond a reasonable doubt:

> If you unanimously find that the facts and circumstances in

aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life....

(LF418; A13)

The failure of Instructions 18 and 19 to advise the jury of the existence and nature of the state's burden of proof means that they are constitutionally deficient. There is a "reasonable likelihood" that the plain language of Instruction 18 would have been read by a reasonable juror as not requiring him or her to find beyond a reasonable doubt that

the aggravating facts or circumstances warranted death. Instruction 19's failure to tell the jury that the state must prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances improperly would have led a reasonable juror to believe a) the state's burden of burden of proving that the mitigating facts and circumstances did not outweigh the aggravating facts and circumstances was some " lesser standard of proof," *Debler*, 856 S.W.2d at 657, than beyond a reasonable doubt, or b) Travis had the burden of proof to show that the mitigating facts and circumstances outweighed the aggravating facts and circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 696-99 (1975). Either way, Instruction 19 improperly would have led the jury to require something less from the state than proof beyond a reasonable doubt. *Jones v. United States*, 527 U.S. 373, 390 (1999); *Boyde v. California*, 494 U.S. 370,380 (1990); *State v. Erwin*, 848 S.W.2d 476, 483 (Mo.banc 1993) ("A defendant need not establish that the jury was more likely than not to have misapplied the instruction. It is sufficient that there is a 'reasonable likelihood that the jury has misapplied the challenged instruction' in a way which violates the defendant's constitutional rights").

Further compounding the problem is that it was the very aggravating circumstances that the state was not required to prove beyond a

reasonable doubt, per Instruction 18, warranted death that the jury was allowed to consider in determining whether the mitigating circumstances outweighed the aggravating circumstances, per Instruction 19.

Not all constitutional errors require reversal; "'certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the factfinding process at trial.'" *Sullivan v. Louisiana*, *supra*, 508 U.S. at 279. Here, however, "where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings," the error is "structural" and harmless error analysis does not apply. *Sullivan*, 508 U.S. at 281.

Even if harmless error review were required, the error here is not harmless. The explicit language of Instruction 17 – repeatedly directing the jury that the state had the burden of proving the aggravating circumstances beyond a reasonable doubt – contrasts starkly with the total absence of any such language in Instructions 18 and 19.

Further compounding the prejudice, the defective instructions allowed the jury to twice consider and use the unconvicted, uncharged, and unreliable misconduct evidence to find Travis eligible for death. Under Instruction 18, the jury was first allowed to consider and use this highly prejudicial and unreliable evidence to find that death was warranted. Then, under Instruction 19, the jury was allowed to consider and use

this same unreliable, prejudicial evidence – that the state was not required to prove beyond a reasonable doubt, per Instruction 18, warranted death – to find that the aggravating circumstances were not outweighed by the mitigating circumstances.

Although in any case, the failure of the instructions to require the jury to apply the reasonable doubt standard to the eligibility determination would be error, it is error exceedingly prejudicial in this case because of the nature of the non-statutory aggravating evidence. Samantha's and Nicole's untested testimony is eerily reminiscent of Arthur Miller's *The Crucible* which, perhaps better than legal citations, confirms the prejudicial effect of the admission of this testimony.

Our state and federal constitutions afford the accused in a capital trial little protection if "the government's reasonable doubt burden" does not apply to "unreliable and otherwise untested evidence." *United States v. Fell*, 217 F.Supp.2d 469, 490 (D.Vt. 2002).

The trial court in this case created prejudicial error in admitting the walk-in evidence, and through the constitutionally deficient instructions, this error became a manifest injustice. For the foregoing reasons, the Court must find that the trial court erred in admitting the walk-in evidence and plainly erred in giving Instructions 18 and 19. The cause must be reversed and remanded for a new penalty phase trial.

VIII

The trial court erred in sustaining the state's objections and failing to admit as penalty phase mitigating evidence Defense Exhibits 42 – a poem written by Travis after he was confined, and 46 – a family tree that Travis made. This violated Travis' rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process of law, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§ 10, 14, 18(a), and 21. Exclusion of this evidence prejudiced Travis in that the exhibits were artistic and literary work by Travis Glass and relevant to the jury's determination of whether the death penalty was an appropriate punishment for this individual. The family tree demonstrated his love of his family. Because the poem was written after he was confined, it is unique and crucial evidence of Travis' adjustment to confinement, relevant to the jury's determination of whether life imprisonment or death was the appropriate punishment, and admissible under *Skipper v. South Carolina*, 476 U.S. 1 (1986).

When the state objected to admission of the poem on the grounds that

it was "hearsay," defense counsel tried to explain that the poem was not hearsay because he was not offering it for the truth of what it said but "just for what it is" and to show that Travis wrote poetry (T1349-50). Upon learning that Travis had written the poem after being incarcerated, the state added "relevance" to his objection: "What possible relevance is that?" (T1350). Defense counsel responded that it showed that Travis had talent and "that he's doing something while he's incarcerated other than getting in trouble" (T1350). The trial court noted that he had already let in a poem and sustained the state's objection (T1350).

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). For this reason, the sentencer in a capital case may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978). "The sentencer ... may determine the weight to be given relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982). "But [the sentencer]

may not give it no weight by excluding such evidence from … consideration." *Id.* In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Supreme Court construed "mitigating" to encompass evidence that might serve as a basis for a sentence less than death. *Id*. at 4.

These rules, taken together, mean that a defendant has a right to present evidence to provide a basis for the jury to sentence him to life instead of death. Equally important, these rules mean that a judge may not prevent the jury from giving such relevant evidence by "excluding such evidence … from consideration" by refusing to admit it.

The evidence excluded in *Skipper*, for which the case was reversed, was the proffered testimony of the defendant's jail guards and a regular visitor to the jail that the defendant had behaved well while he was in jail. In the present case, Travis' poem functions in much the same way as the excluded testimony in *Skipper*. Travis' poem would have allowed the jury to see, for themselves, that Travis had made a good adjustment to being incarcerated: classic *Skipper* evidence. The jury could have used that evidence to infer and find that Travis would continue to be interested in poetry and to write poetry and that this would help him to continue to remain well-adjusted to prison life.

In addition, the poetry was also evidence that Travis' life had value: fundamental mitigating evidence because it provided a basis for the jury

to allow his life to continue. Through his poetry, Travis could continue to contribute to society.

The family tree that Travis made demonstrated not only his creative talents but his love of his family. This evidence would have provided tangible evidence of his good character and provided a basis for sentencing Travis to life imprisonment.

In *State v. Whitfield*, *supra*, this Court determined that only a jury could make the findings required by §565.030.4(3) – whether the mitigating circumstances outweighed the aggravating circumstances. Only a jury can determine how much weight to give the penalty phase evidence. For this reason, the exclusion of penalty phase mitigating evidence should never be considered to be harmless.

But even if the Court disagrees and reviews for harmless error: the exclusion of Travis' poetry and artwork (the family tree) was not harmless. It was unique evidence offering an insight into Travis' character. Moreover, the state's penalty phase case was far from overwhelming. The jury rejected one aggravating circumstance (A10, A17) and deliberated for approximately 6 hours before returning a verdict of death. It simply cannot be said that the exclusion of Travis' poem and his family tree would not have made a difference. For these reasons, the cause must be reversed and remanded for a new penalty phase trial.

IX

The trial court erred in sustaining the state's objections and failing to admit as penalty phase mitigating evidence Defense Exhibit 41 – a letter from Travis' grandmother that she prepared because she was too ill to attend the trial. This violated Travis' rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process of law, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. 1, §§ 10, 14, 18(a), and 21. Exclusion of this evidence prejudiced Travis in that the exhibits were mitigating evidence of Travis' character reflected in his family's love for him – even when charged with murder and on trial. In particular, his grandmother's letter was evidence of the love of the person who may have known him better than anyone: his grandmother who raised him from infancy. The letter was primary character evidence relevant to the jury's determination of whether the death or life was the appropriate punishment.

The prosecutor's objection to admission of this exhibit was: "[T]his is

a written document purportedly written by someone else who is not present. It's obviously hearsay. Irrelevant." (T1307).

Recently, in *Brown v. Luebbers*, 344 F.3d 770 (8th Cir. 2003), the Eighth Circuit ruled that the exclusion at Brown's trial of a letter from his brother who was not able to attend the trial required a new penalty phase trial. *Id*. at 786. In his letter, Brown's brother said that "[Brown had been very protective of his little brother and his friends" and that Brown "continued to mean a great deal to his brother ... more to his brother than did other family members." *Id*. at 785.

The Eighth Circuit found the letter from Brown's brother – which the trial court had excluded on hearsay grounds – "had the potential to sway the jury because it cast petitioner in such a positive light and showed the continuing positive impact that his life could have if preserved." *Id*.

The Court noted:

> The Supreme Court has also held that the Due Process Clause requires that a state's rules of evidence not be applied mechanically when doing so would preclude the defendant from introducing highly relevant evidence at the penalty phase. Thus, the exclusion of hearsay testimony at the penalty phase of a death-penalty case violates the Due Process Clause of the Fourteenth Amendment where "[t]he excluded testimony was highly relevant to a critical

issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability." *Green v. Georgia*, 442 U.S. 95, 97 (1979) (citations omitted) (per curiam).

In the present case, as in *Brown*, there is no reason to doubt the reliability of the letter. In fact, the state never challenged the authenticity of the letter.

Here too, as in *Brown*, there was no valid reason to exclude the letter but, in contrast, reason to find that its exclusion was significant constitutional error. As previously noted, in *Lockett v. Ohio*, 438 U.S. 586 (1978), the United States Supreme Court held that the sentencer in a capital case may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 602.

In *Brown*, the Eighth Circuit reiterated that it and the Supreme Court had both "held that a *Lockett* claim is reversible error unless the error can be said to be 'harmless.'" 344 F.3d at 786. The exclusion of the brother's letter in *Brown* was not harmless, and the exclusion of Travis' grandmother's letter in this case is not harmless either.

In both instances, the defendant's character was a critical issue at the penalty phase. In attempting to persuade Brown's jury that his life was worth saving, his

brother's letter would have been "highly relevant." *Id*. Likewise, in the present case, Travis' grandmother's letter would have been "highly relevant" to the jury's determination of whether Travis should live or die.

Under *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), only a jury may make the findings required by §565.030.4(3) – whether the mitigating circumstances outweighed the aggravating circumstances. Only a jury can determine how much weight to give the penalty phase evidence. For this reason, the exclusion of penalty phase mitigating evidence should never be considered to be harmless.

But even if the Court disagrees and reviews for harmless error, it simply cannot be said that the exclusion from the jury's consideration of a letter from the person who had, since he was an infant, raised him as her own child, was harmless. That this woman loved him and cared enough about him, even though her own health was poor, to write to him and tell him she loved him was something the jury should certainly have been able to consider in determining whether Travis should be sentenced to life imprisonment or death.

The state's penalty phase case was far from overwhelming. The jury rejected one aggravating circumstance (A10, A17) and deliberated for approximately 6 hours before returning a verdict of death. It cannot be said that the exclusion of the letter from Travis' grandmother would not

have made a difference. For these reasons, the cause must be reversed and remanded for a new penalty phase trial.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that the Court reverse the judgment and sentences and remand for a new trial, or, in the alternative, for a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises _____ words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, this ___ day of _____, 20___, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Attorney for Appellant

INDEX TO APPENDIX