IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC87753**
	)	
VINCENT McFADDEN,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION SIX
THE HONORABLE GARY M. GAERTNER, JR., JUDGE

APPELLANT'S REPLY BRIEF

Janet M. Thompson, Mo.Bar No. 32260
Office of the State Public Defender
3402 Buttonwood
Columbia, MO 65201
(573) 882-9855 (telephone)
(573) 884-4921 (fax)
Janet.Thompson@mspd.mo.gov (e-mail)

INDEX

AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

RULES:

INSTRUCTIONS

JURISDICTIONAL STATEMENT

The jurisdictional statement from Appellant's opening brief is incorporated herein by this reference.

STATEMENT OF FACTS[1]

The Statement of Facts contained in Appellant's opening brief is incorporated by this reference. The following correction is made to the Respondent State's Statement of Facts.

Rule 84.04(c) provides that "the statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Its purpose is to give the appellate court an accurate, complete and unbiased understanding of the facts. *State v. Wahl*, 89 S.W.3d 513, 515 (Mo.App.,E.D. 2002); *Hoer v. Small*, 1 S.W.3d 569, 572 (Mo.App.,E.D. 1999).

The State instead has chosen to argue its case, making assumptions rather than stating the facts. The State argues that Vincent told Eva "that she was **banned from** Pine Lawn and that she needed to leave before he took his problems out on her." (Resp.Br. at 10)(emphasis added). Eva testified, however, that Vincent had told her that she and her sisters were "all **abandoned from** Pine Lawn," because "somebody want to kill them." (T1020)(emphasis added).

[1] Record references are as follows: Legal File—(LF_); Transcript—(T_); Exhibits—(Exh._).

POINTS RELIED ON

I. *Batson* Violations

The trial court clearly erred in overruling Vincent's *Batson* objections to the State's peremptory strikes of Veniremembers Sherlonda Harris and Donna Cole, because those actions violated Vincent's, Harris' and Cole's rights to equal protection, and Vincent's rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§2,10,18(a),21, in that Vincent challenged the State's strikes, identified Harris and Cole as African-Americans, and established the State's explanations—including that Cole's brother had been shot and she visited a jail and that Harris's lack of a driver's license demonstrated a lack of community ties, her demeanor was hostile, and her red "Ronald McDonald" hair demonstrated she was trying to make a statement—were pretextual. The State failed to strike similarly-situated white veniremembers; question veniremembers about or mention those concerns, and adopted logically-irrelevant justifications.

Miller-El v. Dretke, 545 U.S. 231 (2005);

State v. McFadden, 191 S.W.3d 648 (Mo.banc 2006)

McCormick v. State, 803 N.E.2d 1108 (Ind. 2004);

State v. Edwards, 116 S.W.3d 511 (Mo.banc 2003).

II. REVERSAL OF PRIOR CONVICTION RENDERS CONVICTION AND DEATH SENTENCE INVALID

The trial court erred in denying Vincent's new trial motion and sentencing him to death and this Court, exercising its independent proportionality review, §565.035RSMo, should reduce Vincent's sentence to life without probation or parole because Vincent's conviction and death sentence violate due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that, through photographs, the State established Todd Franklin's death and presented, to establish two statutory aggravators, the fact of Vincent's first degree murder conviction and death sentence, which this Court reversed on May 16, 2006, before sentencing. The jury's sentencing decision was based on these invalid factors, thus, Vincent's conviction and sentence cannot stand.

Johnson v. Mississippi, 486 U.S. 578(1988);

State v. McFadden, 191 S.W.3d 648(Mo.banc2006);

Brown v. Sanders, 546 U.S. 212 (2006);

Morgan v. Illinois, 504 U.S. 719 (1992).

III. IMPROPER CAUSE STRIKES

The trial court abused its discretion in overruling Vincent's objections and granting the State's cause strikes of Veniremembers Swanson and Vinson because that denied Vincent due process, a fundamentally-fair trial before a properly-constituted jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, while Swanson did not believe she could sign a death verdict or announce the verdict as the foreperson and acknowledged it would be difficult, she believes in and could impose death and, while Vinson wasn't certain she could sign a death verdict and acknowledged imposing death would be "tough" and she preferred a life option, she could consider imposing either penalty. Their views would not prevent or substantially impair their ability to abide by their oath and the instructions.

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

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

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

IV. "SERIOUS ASSAULTIVE"—THE JURY'S DECISION

The trial court erred in overruling Vincent's pre-trial "Objection to MAI-CR3d 314.40's Method of Submitting 'Serious Assaultive' Aggravating Circumstances;" trial objections to the court making the "serious assaultive" fact-findings, and accepting the jury's penalty phase verdict because that denied due process, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, whether prior convictions were "serious assaultive" is an eligibility factor to be found by the jury beyond a reasonable doubt.

State v. Whitfield, 107 S.W.3d 253(Mo.banc2003);

State v. Rathmann, 148 S.W.3d 842 (Mo.App.,E.D. 2004);

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

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

Note On Use 5, MAI-Cr3d 314.40.

ARGUMENTS

I. *Batson* Violations

The trial court clearly erred in overruling Vincent's *Batson* objections to the State's peremptory strikes of Veniremembers Sherlonda Harris and Donna Cole, because those actions violated Vincent, Harris and Cole's rights to equal protection, and Vincent's rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§2,10,18(a),21, in that Vincent challenged the State's strikes, identified Harris and Cole as African-Americans, and then established the State's explanations—including that Cole's brother had been shot and she visited a jail and that Harris's lack of a driver's license demonstrated a lack of community ties, her demeanor was hostile, and her red "Ronald McDonald" hair demonstrated she was trying to make a statement—were pretextual. The State failed to strike similarly-situated white veniremembers; question veniremembers about or mention those concerns, and adopted logically-irrelevant justifications.

Significant by its absence in the State's discussion of this Point is any reference to *State v. McFadden*, 191 S.W.3d 648 (Mo.banc 2006), in which this Court found that the same Assistant Prosecutor whose actions are challenged here, Mark Bishop, had exercised his peremptory challenges in a racially-discriminatory fashion. The State would have this Court rely on the trial court's statement that he believed Bishop had "no racial animus." (Resp.Br. at 18; T969-70). Yet, this

Court explicitly has found the opposite to be true. The State also ignores the record. At sentencing, Counsel Kraft reminded the court, who didn't dispute her statements of fact, that, after the court had researched the *Batson* issue, he had told Bishop, off the record, of his inclination to disallow Bishop's strikes. (T1592). Kraft further reminded the court that Bishop then had responded, in raised tones, that such an action would label him a racist and a liar. (T1592). Bishop's actions spoke louder than words.

The State's attempts to shore up Bishop's strikes of the two Black women in question fall woefully short as they misapprehend both the law and the facts. First, the State asserts that only the third step of the *Batson* analysis is at issue in this appeal. (Resp.Br. at 17). As the following discussion of the State's rationale for striking Sherlonda Harris will reveal, that is not necessarily so since its focus on her "Ronald McDonald" hair may well be code for Black. Thus, Bishop's reason for striking Ms. Harris may well be race-based. Second, the State's assertions that none of the veniremembers were similarly-situated to Donna Cole because none of them had the same combination of characteristics (Resp.Br. at 25-26) ignores the law. As this Court affirmed in *McFadden I*, "'A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.'" 191 S.W.3d at 652, citing *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2329 n.6 (2005).

Donna Cole

Bishop stated two reasons for peremptorily striking Donna Cole, a Black woman: First, because she visited the workhouse "at least" once a year to benefit inmates and second, because a neighbor shot her brother and she didn't know if he cooperated with police or someone was prosecuted. (T945-46). On appeal, the State argues that Caucasian Veniremembers Matye and Woolsey, who also made jailhouse visits, were not similarly-situated because "it is reasonable to presume" those visits took place years earlier. (Resp.Br. at 26). This blatant speculation has no basis in the record and thus must be disregarded. After all, post-hoc speculation undermines the purpose of *Batson* when the information itself can be elicited at the time of voir dire. *United States v. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005); *People v. Johnson*, 557 N.E.2d 565, 569 (Ill.App. 1990). The State further argues, as did Bishop at trial, that the purpose of the visits was different, with Ms. Cole's being expressly for the inmates' benefit, while the Caucasian veniremembers' visits had no such purpose. (Resp.Br. at 26-27). Once again, this is speculation, unsupported by the record, which must be disregarded. Further, the record made by defense counsel expressly contradicts the spin the State would put on Ms. Cole's visit. Ms. Cole is a member of a church choir and one of the choir activities is a yearly Christmas workhouse visit. (T835,915-16). Ms. Cole has no contact with prisoners and it is the church, not she, that organizes the activity. (T915-16). Finally, the State's argument disregards a critical factor—if a jailhouse visit is a sufficient reason to strike Ms. Cole, why then is it not a sufficient reason to strike Caucasian veniremembers?

The State on appeal misstates Ms. Cole's testimony, just as Bishop did at trial, as to Bishop's second reason for striking Ms. Cole. (Resp.Br. at 29). Bishop asserted he struck her because "her brother was shot and she didn't know if he cooperated with the State or someone was prosecuted, even though a neighbor shot him." (T945-46). On appeal, the State argues Bishop's claim was that Ms. Cole's brother "had been shot by a neighbor, but the neighbor had not been prosecuted." (Resp.Br. at 29). The transcript reveals that Ms. Cole knew nobody had been prosecuted but did not know why. (T952).[2] She also stated the incident would not affect her. (T792). By contrast, one of the two Caucasians identified as also having experienced family violence, Michael Walker, said the process would be "difficult," but, he ultimately concluded, he would not be unfair. (T816). Further, Ms. Cole's brother was shot, but recovered, while the Caucasians' family members died. (T800,816,952). Thus, the State's claim that Ms. Cole's experience was more personal because of the degree of relationship, (Resp.Br. at 29; T956), rings hollow since surely homicides are more violent, and thus more of concern, than a mere assault. Again, if the State's real reason for striking Ms. Cole was that violence had touched her life, surely that same reason would have

[2] The State states on appeal that the trial court found "the lack of prosecution raised a legitimate concern. (Tr.956)." (Resp.Br. at 29). While that may have raised a concern were Ms. Cole's brother the venireperson, to impute that concern to her requires a quantum leap in logic with no supporting facts.

held true for Caucasian veniremembers whose experiences involved someone dying?

Sherlonda Harris

On appeal, the State appears to acknowledge that Bishop's statement that he was striking Ms. Harris because of her lack of a driver's license was not be a sufficient basis upon which to sustain Bishop's strike. (Resp.Br. at 45). As Judge Gaertner explicitly stated, her lack of a driver's license "is not really logically relevant," (T973), and Bishop's assertion that it showed she lacked identification (T964) and was not vested in the community (T964) simply does not hold water. After all, Ms. Harris had sufficient identification to be called as a juror in this case and she held a job in the community.

The State also relies on Bishop's statement that Ms. Harris's demeanor was sufficient reason to support his strike since he didn't believe her when she said she could impose death. (T964-65;Resp.Br. at 42-43). Yet, Judge Gaertner, upon whose observations the State would have this Court depend, stated that he only saw that she was "offended" by Bishop's repeated questioning of her about her driver's license, and specifically saw no hostile attitude during death qualification. (T968-69).

So, with what is the State left?[3] Bishop's "major"(T964) grounds was Ms. Harris's "crazy red hair,"(T950,964); her red hair that "was not Lucille Ball red hair. This is more like Ronald McDonald's hair. It looked like clown red hair. It tended more towards the orange side."(T1594). Preliminarily, this rationale is invalid since it is unrelated to the case. *State v. Edwards*, 116 S.W.3d 511, 527 (Mo.banc 2003). Second, as Counsel Kraft noted at trial, Ms. Harris's hair color was consistent with fashion within the African-American community. (T962).

The State has, varyingly, alleged that Vincent has failed to show her hair style and color are "normal" in the African-American community (Resp.Br. at 44) and that the color and style were "flamboyant."(Resp.Br. at 45). In the Appendix to Vincent's opening brief, he supplied this Court with excerpts from a national fashion magazine, "Hype Hair," that clearly demonstrates the truth of Kraft's assertions at trial. (App. at A-38-44);(*see also* Suggestions in Opposition to Respondent's Motion to Strike). That two Caucasian men—Judge Gaertner and

[3] While the State would have this Court sustain Judge Gaertner's decision "where the prosecutor articulates other, race-neutral reasons," (Resp.Br. at 43), the burden would then fall on the State to demonstrate it would have exercised the strike even absent the discriminatory reasons. *Weaver v. Bowersox*, 241 F.3d 1042, 1032 (8th Cir. 2001); *McCormick v. State*, 803 N.E.2d 1108, 1112 (Ind. 2004); *McFadden*, 191 S.W.3d at 657 n.25. Just because the State can articulate non-racially-discriminatory reasons does not excuse the *Batson* violation. *Id.*

Mr. Bishop—found Ms. Harris's hair color "different" doesn't mean that it was not normal in the African-American community. As Kraft noted, the color is "popular. There are very, very popular entertainers, such as Mary J. Blige, B-L-I-G-E, who have that same color hair."(T962). The Appendix materials demonstrate the wide range of red and orange hair colors popular in the African-American community and help to show that such colors are not "crazy," as Bishop asserted. Moreover, the State's assertion that it has moved to strike the "Hype Hair" excerpts because "there is no proof that Harris' hair color or style resemble any of the models who are depicted," (Resp.Br. at 44, n.9), rings hollow since the State has fought, at every turn, Vincent's attempts to contact Ms. Harris and thus establish the exact color of her hair at the time of trial.

Finally, it must be asked whether Bishop's and Bert's "Ronald McDonald" comments about Ms. Harris were even race-neutral such that the burden of proof would move back to Vincent. Mr. Bert called Ms. Harris's hair "clown red hair" (T1594), and Judge Gaertner called it a "distinctive red hairstyle." (T972-73). These comments indicate that not just the color, but the style of her hair was at issue. Ronald McDonald's hairstyle is clearly an Afro. Bishop's rationale may be facially race-based, thus requiring that his peremptory strike be denied.

Judge Gaertner "carefully examined" (Resp.Br. at 45) Bishop's excuses for striking Ms. Cole and Ms. Harris. His first response was to disallow the strikes and only granted them after Bishop argued that, if he did so, Judge Gaertner would be labeling him a racist and a liar.(T1592). This Court cannot condone Bishop's

repeated violations of the Equal Protection rights of Mr. McFadden and veniremember-citizens of St. Louis County. It must reverse and remand for a new trial.

II. *Johnson v. Mississippi* Violation

The trial court erred in denying Vincent's new trial motion and sentencing him to death and this Court, exercising its independent proportionality review, §565.035RSMo, should reduce Vincent's sentence to life without probation or parole because Vincent's conviction and death sentence violate due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that, through photographs, the State established Todd Franklin's death and presented, to establish two statutory aggravators, the fact of Vincent's first degree murder conviction and death sentence, which this Court reversed on May 16, 2006, before sentencing. The jury's sentencing decision was based on these invalid factors, thus, Vincent's conviction and sentence cannot stand.

At an in-chambers conference just before trial, Mr. Bishop informed the court and Counsel Kraft that he intended to

> move to admit [Vincent's] certified prior for Murder in the First Degree, which shows a conviction and sentence of death, to prove the statutory aggravating circumstance was a serious assaultive conviction for Murder in the First Degree, and also Armed Criminal Action, which was also in the same cause. And the State of Missouri believes that we would need to put that evidence in to prove the statutory aggravating circumstance of the

> serious assaultive conviction. In order to do that we would have to prove that he was sentenced. And also, to prove its evidence of the seriousness of that, the sentence as evidence of the seriousness of the offense. And it's evidence in the way of character, because it shows the type of character of this man, Vincent McFadden, who would commit an offense that would warrant the death sentence.

(T38-39). Kraft responded that she had moved to prevent the State from adducing evidence of Vincent's death sentence and reiterated her objections to any evidence of that sentence.(T40-41). Judge Gaertner stated his belief that "it would be a better precedential effect" for the State not to tell the jury about the prior death sentence. (T43). Bishop responded that, "unless it involves the State being able to tell the jury specifically what sentence Mr. McFadden received, we are not willing to negotiate that in that sense. We have every right under Missouri Supreme Court decisions and the U.S. Supreme Court decisions to put that information before the jury so they can be fully informed about the serious nature of Mr. McFadden's prior record." (T43-44).

In penalty phase, Bishop introduced the certified copy of Vincent's conviction and the fact that another jury had sentenced him to death.(T1289-91;Exh.200). In closing, he told the jury to consider Vincent's criminal history, including his prior death sentence, in deciding punishment. (T1543-46).

Despite warnings from the trial court and motions by defense counsel, Bishop chose to make the fact of Vincent's prior death sentence an integral part of

his penalty phase case. Bishop chose badly. This Court must vacate Vincent's death sentence and re-sentence him to life without parole or reverse and remand for a new penalty phase.

The State now relies on *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884, 892 (2006) in an attempt to save its sentence. There, the Court stated:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to **the same facts and circumstances**.

(italics—in original; bold—added emphasis). The State asserts that, since Bishop adduced facts about the Todd Franklin homicide, the *Brown* rule was met and the "fact that the evidence was tied to a statutory circumstance would not have skewed the weighing process towards imposition of the death penalty." (Resp.Br. at 49-50). The State would have this Court believe that the jury's knowledge that the defendant is under another death sentence is of minor concern, that it could not have much, if any, impact upon the jury's sentencing determination. The State's argument ignores the facts and Bishop's adamant position at trial.

Bishop's goal was not just to present the facts of the Franklin homicide. What he wanted and what he got—over warnings from the trial court—was to tell the jury the fact that another jury had sentenced Vincent to death. This is not mere

surplusage nor is it something incidental to that which the jury would consider in reaching its sentencing decision.

Bishop was not satisfied with just presenting evidence of the prior homicide. He wanted the jury to know the fact of the prior death sentence. This was something vastly different from just the facts of the homicide or even the prior conviction. Bishop's intent was to ensure a death sentence in this case by telling the jury that Vincent is a person "who would commit an offense that would warrant the death sentence." (T39).

The State's claim on appeal that the defense injected the issue of the other death sentence, (Resp.Br. at 50), rings hollow in light of the facts. Kraft specifically stated that Bishop's insistence upon presenting the other death sentence obligated her to voir dire about the effect of that sentence upon venirepersons. (T41-43). She noted, and the trial court agreed, that the fact of the prior conviction and death sentence were critical facts warranting voir dire. *State v. Clark*, 981 S.W.2d 143, 147 (Mo.banc 1998). After all, without such voir dire, in which unqualified jurors who harbor bias or prejudice can be identified, Vincent's right to an impartial jury would be denied. *Id.*; *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Kraft had no choice, given Bishop's adamant insistence upon informing the jury about the prior death sentence.

The jury's sentencing decision in this case was based in part upon an invalid factor, his conviction in *State v.McFadden*, 191 S.W.3d 648 (Mo.banc

2006).[4] Allowing this sentence to stand would thus violate Vincent's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

The trial court erred in failing to grant Vincent's new trial motion. This Court can correct the error by either reducing Vincent's sentence to life without probation or parole or reversing and remanding for a new trial.[5]

---

[4] The State asserts that this Court is not bound by *Johnson v. Mississippi*, 486 U.S. 578 (1988) or *State v. Herret*, 965 S.W.2d 363 (Mo.App.,E.D. 1998) since both cases dealt with subsequently vacated convictions. By contrast, the State argues, the opinion in *McFadden I*, "raises no serious question about Appellant's guilt, but is addressed entirely to whether he received the procedural protections which he is due." (Resp.Br. at 51). First, in *McFadden I*, this Court found the *Batson* violation dispositive and thus addressed no other claims. *McFadden*, 191 S.W.3d at 658. Thus, it does not support the State's position. Second, the State's argument again seeks to elevate form over substance. It ignores that what Bishop sought to introduce here was not simply the **fact** of Vincent's prior conviction but rather the **fact** of his death sentence. And, that death sentence was set aside by this Court in *McFadden I*.

[5] Since the jury was apprised of the death sentence in voir dire, that knowledge affected its guilt phase verdict as well, necessitating a whole new trial.

III. Improper Cause Strikes

The trial court abused its discretion in overruling Vincent's objections and granting the State's cause strikes of Veniremembers Vinson and Swanson because that denied Vincent due process, a fundamentally-fair trial before a properly-constituted jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, while Swanson did not believe she could sign a death verdict or announce the verdict as the foreperson and acknowledged it would be difficult, she believes in and could impose death and, while Vinson wasn't certain she could sign a death verdict and acknowledged imposing death would be "tough" and she preferred a life option, she could consider imposing either penalty. Their views would not prevent or substantially impair their ability to abide by their oath and the instructions.

The trial court found that Veniremember Carol Vinson "kept equivocating on the death penalty…She equivocated in her answers…."(T761-62). The State ignores *Gray v. Mississippi*, 481 U.S. 648 (1987) and *Adams v. Texas*, 472 U.S. 320 (1985) in its attempt to salvage this improperly-granted cause strike. The trial court abused its discretion in sustaining the strike, over objection.

In death penalty cases, venirepersons may be struck for cause only if their views prevent or substantially impair their ability to abide by their oath and the court's instructions. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *State v. Richardson*, 923 S.W.2d 301, 309 (Mo.banc 1996). While Veniremember

Vinson's views may have been a sufficient basis for the State to move to strike her peremptorily, they were inadequate for a cause strike.

Vinson stated that she "would really prefer life in prison;" she would not automatically exclude the death penalty but whether she would impose it depended on the strength of the "facts and circumstances;" she might be able to announce a death verdict; she didn't know if she could sign the death verdict but might be able to, especially if she were instructed to; she could consider both death and life without parole but thought neither was a "good deal;" it would be really tough and wouldn't be easy but she could impose death.(T736-39,755-58).

Gray v. Mississippi, 481 U.S. 648 (1987) is instructive. There, Juror Bounds "[could not] make up her mind," she "[was] totally indecisive … say[ing] one thing one time and one thing another." *Id.* at 655, n.7. She "ultimately stated that she could consider the death penalty in an appropriate case…." *Id.* at 653. Her "somewhat confused" answers "hint[ed] at an uncertainty," and she probably would not have been the most helpful juror for the State. But, that did not make her subject to a cause challenge. "[She] was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria" *Id.* at 659, since she was not irrevocably committed to vote against the death penalty, regardless of the facts and circumstances. *Id.* at 657-58.

A juror who "opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

By removing Vinson, Bishop created a process in which the scales were deliberately tipped toward death. *Id.* at 521-22, n.20. Defendants cannot "constitutionally be put to death at the hands of a tribunal so selected." *Id.* at 522-23.

Hesitancy, equivocation and indecisiveness are not sufficient bases for cause strikes. Granting such strikes violates Vincent's state and federal constitutional rights to due process, a fair trial, an impartial jury and freedom from cruel and unusual punishment and creates structural error not subject to harmless error analysis. *Gray*, 481 U.S. at 668.

Improperly granting Bishop's cause challenges of Vinson and Swanson "in effect afforded the prosecution [two] additional peremptory challenge[s]."*People v. Lefebre*, 5 P.3d 295, 298(Colo.2000). This Court should reverse and remand for a new trial.

IV. "Serious Assaultive"—A Jury Issue

The trial court erred in overruling Vincent's pre-trial "Objection to MAI-CR3d 314.40's Method of Submitting 'Serious Assaultive' Aggravating Circumstances;" trial objections to the court making the "serious assaultive" fact-findings, and accepting the jury's penalty phase verdict because that denied due process, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, whether prior convictions were "serious assaultive" is an eligibility factor to be found by the jury beyond a reasonable doubt.

Although the State gives lip service to the rule that the failure to give an MAI-Cr instruction is presumptive prejudicial error, *State v. Rathmann*, 148 S.W.3d 842, 844 (Mo.App.,E.D. 2004), it ignores that standard; relies on cases decided before the current MAI-Cr went into effect, and seems to place the burden of showing prejudice on Vincent. (Resp.Br. at 69-76).

Counsel Kraft objected to the instruction based on MAI-Cr3d 314.40, Instruction No. 18 (LF369-70), that the court submitted to the jury. (T1530). Kraft had earlier objected to Bishop's motion that the trial court make the "serious assaultive" findings on the statutory aggravators. The court overruled Kraft's objections and found the prior convictions were serious assaultive. (T1265-67). Note on Use 5 to MAI-Cr3d 314.40 required, however, that the "serious assaultive" finding be made by the jury, not the judge. That the court did not

know the law is no excuse. *See State v. Feltrop*, 803 S.W.2d 1, 15 (Mo.banc 1991).

The State argues that the trial judge's finding that Vincent's priors were serious assaultive "was the functional equivalent of a finding that sufficient evidence existed to submit the prior convictions to the jury." (Resp.Br. at 73). The State urges that the information presented to the jury was sufficient to establish that fact and thus, that the jury "could therefore also find that Appellant had previous serious assaultive convictions." (Resp.Br. at 75).

The State's argument ignores the record, the verdicts and the law. As noted, the judge, not the jury, made the finding of "serious assaultive" and the judge specifically denied counsel's motion that the jury make that finding.(T1265-67). The jury, by its verdicts did not find that Vincent has "serious assaultive" convictions, but merely that Vincent was convicted of several prior offenses. (LF391-92).

The rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) is not one that the State can elect to follow or disregard, at its leisure. Note on Use 5 demonstrates that because the "serious assaultive" finding must be made by the jury, *Apprendi*, *Ring*, and *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003) analysis controls. That a judge could make a factual finding does not resolve the issue. In *Whitfield*, the trial judge had undertaken the four-step process §565.030.4 RSMo requires for determining punishment after the jury was unable to agree on punishment, and the trial judge

had assessed Whitfield's punishment at death. *Id.* at 256. This Court found that, because the judge, not the jury, made the factual determinations upon which Whitfield's eligibility for his sentence was predicated, the sentence could not stand. *Id.* Similarly here, that the judge made the factual finding of "serious assaultive," does not mean that the jury would have. Further, a judicial finding of fact is not the functional equivalent of a jury finding of fact beyond a reasonable doubt. The State's suggestion that what happened here is "close enough for government work," (see Resp.Br. at 76), simply does not satisfy either the constitutional right to a jury trial or to due process.

To obtain a death sentence, Bishop relied on Vincent's prior convictions but he refused to let the jury find beyond a reasonable doubt that they were "serious assaultive." Instead, over objection, he specifically moved that the judge make that factual finding. Because Vincent's state and federal constitutional rights to due process, a fair trial, jury sentencing, and freedom from cruel and unusual punishment were violated, this Court must reverse and remand for a new penalty phase or vacate and order Vincent re-sentenced to life without probation or parole.

CONCLUSION

For all of the reasons stated in this reply brief and in his opening brief, Vincent requests this Court reverse and remand for a new trial, a new penalty phase, or re-sentence him to life without parole.

Respectfully submitted,

_____

Janet M. Thompson
Attorney for Appellant
3402 Buttonwood
Columbia, MO 65201-3724
(573)882-9855 (telephone)
(573)884-4921 (fax)
Janet.Thompson@mspd.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of January, 2007, two true and correct copies of the foregoing brief and floppy disk(s) containing a copy of this brief were mailed, postage pre-paid, to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

_____

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

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

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 5,073 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

_____

Janet M. Thompson