

**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 STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

An all-white jury tried and convicted Vincent in St. Louis County Circuit Court, of first-degree murder, §565.020RSMo¹; armed criminal action, §571.015RSMo, and witness tampering, §575.270RSMo. The trial court imposed consecutive sentences of death, 75 and seven years. This Court has exclusive appellate jurisdiction. Mo.Const., Art. V, §3.

¹ Statutory references are to Missouri Revised Statutes 2004.

STATEMENT OF FACTS²

The State charged Vincent McFadden with first degree murder, armed criminal action and witness tampering, alleging that, on May 15, 2003, at 11:42 p.m., Vincent shot Leslie Addison in Pine Lawn, Missouri and thereafter threatened Eva Addison so she would not testify against Vincent.(LF281-84). The charging document pled no aggravating circumstances.(LF17-19,40-45,280-84). Assistant Prosecutor Bishop represented the State.(T1). On May 16, 2006, eight days before sentencing here, this Court reversed and remanded for a new trial in *State v. McFadden*, 191 S.W.3d 648 (Mo.banc 2006) because Assistant Prosecutor Bishop exercised peremptory challenges in a racially-discriminatory fashion.

JURY SELECTION

Bishop peremptorily challenged four Black women and one Asian man.(T943). Counsel asserted Bishop's challenges violated *Batson v. Kentucky*.³(T944). Only one Black woman remained on Vincent's jury and, when she could not arrange childcare, she was removed, over objection, immediately before opening statements.(T990-98). The court replaced her with a white alternate, leaving Vincent with an all-white jury.(T999). Counsel unsuccessfully moved to quash the panel.(T998-99).

² Record references: Legal File—(LF_); Transcript—(T_); Exhibits—(Exh._).

³ 476 U.S. 79 (1986).

Bishop provided the following reasons for striking Donna Cole and Sherlonda Harris.⁴ He moved to strike Ms. Cole because she voluntarily visits the workhouse once yearly, to benefit inmates awaiting trial, and because a neighbor shot her brother and she didn't know if he cooperated with the State or someone was prosecuted.(T945-46).

He moved to strike Ms. Harris because she was the only person on the panel without a physical reason for having no driver's license; she had "crazy-looking red hair;" and her demeanor seemed hostile.(T950-51). Later, Assistant Prosecutor Bert stated, "This was not Lucille Ball red hair. This is more like Ronald McDonald's red hair. It looked like clown red hair. It tended more towards the orange side. She had indicated that she wanted to stand apart from the crowd by her physical appearance, it was so striking."(T1594). From her demeanor and responses, Bishop believed she was lying to him.(T950-51).

Defense counsel Kraft countered that Bishop's explanations were pretextual, noting the church choir organized Ms. Cole's yearly Christmas workhouse visits and Bishop did not strike two similarly-situated white veniremembers, Walter Matye and Judith Woolsey, who visited jails and prisons in school and while on City Council.(T919-20,952). Kraft also noted Bishop's

⁴ Vincent has omitted the facts surrounding the strikes of Venirepersons Lui, Harris (Barbara) and Poke since counsel waived the *Batson* challenge on Poke and Harris.(T960-61).

factual statement was inaccurate since Ms. Cole knew nobody was prosecuted in her brother's assault but didn't know why.(T952). Further, Bishop didn't strike two similarly-situated white venirepersons, Kathleen Effinger and Michael Walker.(T952). Effinger's husband's cousin was killed but she didn't recall ever knowing what happened.(T800,952). Walker's girlfriend's mother was killed and he knew the "process would be difficult."(T816,952).

Kraft noted Harris's lack of a driver's license was irrelevant to her ability to sit and the issues.(T962). When Bishop responded it meant Harris wasn't "vested" in the community, Kraft noted a host of reasons may dictate why someone lacks a license and Harris was never asked.(T966-68). Judge Gaertner found Harris's lack of a driver's license was irrelevant to her ability to serve and perceived Harris was offended by Bishop's questions about her driver's license, not his death penalty voir dire.(T969,973-74). Kraft stated Harris's hair color was fashionable within the Black community and she was neatly, fashionably dressed.(T962,967). Judge Gaertner denied Vincent's *Batson* challenges.(T956,974).

At the new trial motion hearing, Kraft recalled that, before Judge Gaertner ruled, he researched the issue and told Bishop he was inclined to disallow his peremptory strikes.(T1592). Bishop had responded, in raised tones, that doing so would label Bishop a racist and liar.(T1592). Neither Bishop nor Judge Gaertner disputed Kraft's recollection.

Over objection, Judge Gaertner also granted Bishop's cause strikes of Kaye Swanson and Carol Vinson.(T276-77,762). Swanson unequivocally believes in

the death penalty, equivocated about her ability to impose it yet ultimately stated, while it would be a difficult decision, it was possible.(T245-47,266-69). Vinson believed the decision to impose death would be difficult and preferred not to have to impose death or sign a death verdict but ultimately stated she could do both.(T736-39,755-58).

Counsel requested permission to voir dire on whether veniremembers' beliefs about the relative costs of life without parole and death sentences would impact their ability to consider a life without parole sentence. (T535-37). The State successfully objected.(T537).

Pre-trial, counsel moved to preclude the State from introducing evidence of Vincent's death sentence in the Todd Franklin case.(LF190-93). Counsel suggested the State could present the prior conviction to establish the statutory aggravator.(LF190-93). Bishop stated his intent to present evidence of the death sentence and moved to restrict defense voir dire on the subject.(T38). Counsel objected, since informing the jurors about the prior death sentence would lessen their sense of responsibility.(T40-46). Counsel also suggested the court empanel separate guilt and penalty phase juries to minimize the prejudice from the evidence.(T8-9,60;LF112-17). Juror Isaac Sandifer, when informed of Vincent's other death sentence, believed this verdict wouldn't really matter because of that sentence.(T264). Sandifer stated he could seriously consider both punishments and the court denied Vincent's cause challenge.(T273-279-80,285-86). Sandifer sat on Vincent's jury.(LF328).

During jury selection, the court noted only 35% of veniremembers survived death qualification.(T706). Since over 50% were removed because they couldn't consider death, counsel moved for a mistrial or to preclude the State from seeking death.(T765-66). Counsel unsuccessfully argued this lack of public support for the death penalty demonstrated that evolving standards of decency precluded the State from seeking death.(T766).

THE EVIDENCE

Eva Addison, Leslie's sister, met Vincent in 1998 and in 2002, they had a son. (T1011-13). Over objection, in guilt phase, Bishop introduced photographs of Leslie and her sisters.(T1051-56;Exh.300,303,306). On the evening of May 15, 2003, Eva was at Maggie Jones' house on Blakemore in Pine Lawn.(T1015). Leslie was at another house, braiding hair.(T1017-18). As Eva sat on the front porch, Vincent and "BT," who was driving a Nissan Altima, arrived; Vincent got out, hit Eva in the face, and told Eva she and her sisters were "all abandoned from Pine Lawn," because someone wanted to kill them.(T1020-21). The men left and Leslie arrived.(T1021-22). The men returned, followed by another car; Vincent again got out, hit Eva, and told Leslie she would see her deceased brother that night. (T1023-25). Vincent pulled a gun from his waistband, pointed it and "clicked" the trigger.(T1024). The men left.(T1026).

Leslie, crying and scared, ran in the house and came out, stating she was walking to the Skate King to use the pay phone.(T1025-26). Eva tried to discourage her, since it was pitch-dark, unsafe and the Jones house had a phone.

(T1026,1059). Leslie walked down Blakemore, onto Naylor and then onto Kienlen, while Eva ran through the alley behind Blakemore and hid amidst the bushes some distance away.(T1028-31). Eva saw a car pull from Dardanella onto Kienlen; a figure she identified as Vincent get out, go to Leslie, pull a gun and shoot her three or four times.(T1032-34). Eva heard Leslie beg him not to shoot.(T1034). Eva “could hardly hear them. But he did say something to her.”(T1035).

Stacy Stevenson, who lived on Kienlen, heard two women arguing at the corner of Blakemore and Naylor around 11:45 p.m.(T1090-92). They split up and one walked down Naylor onto Kienlen.(T1092-93). Over objection, Stevenson testified he heard an unidentified man say “come here, bitch, where you fixin’ to go? I told you and your sister to get the f—from down here in Pine Lawn.” (T1094-95). Because “it was really dark,” with no street lights, Stevenson couldn’t see but heard shots.(T1095-96,1101). The responding paramedic couldn’t see in the dark and crime scene investigators illuminated the area with car headlights.(T1104,1165). The body was almost 76 feet from the Naylor/Kienlen intersection.(T1166-67). Over objection, Bishop showed the jury multiple photographs and x-rays of Leslie.(T1157-63,1175-79,1198-1206).

Over objection, Bishop played a taped phone conversation between Eva and non-testifying Slim Dickens, in which, Eva stated, Vincent spoke in the background. (T1039-42;Exh.148,148A,148D,148E). The speakers referred to “Al,” who purportedly dropped pending charges against Vincent.(T1039-41).

They also referred to Vincent's "dope" case, and speculated, if a ten-year sentence were imposed, he would serve three.(Exh.148E—19).

Immediately pre-trial, the court addressed Vincent's *pro se* conflict of interest motion and motion for access to Eva's school and medical records.(T1-5;LF62-63,260-64). Since Eva was the only witness, and the scene entirely lacked illumination, Vincent asserted her ability to perceive and recount was at issue.(T2). Vincent stated Eva was in Learning Disabled classes in high school and received Social Security disability checks.(T3-4). Without reviewing the records, the Court stated he believed they contained nothing helpful.(T14-16). Counsel stated she was "unaware" if they contained useful information.(T17). The court denied Vincent's motions.(T6).

In guilt phase closing, Bishop argued, over objection, that the evidence was uncontroverted.(T1215-16). In final closing, he argued, over objection, "Don't forget about her. When you go back there, you don't forget that this was a young woman with a future. You don't forget that she's eighteen years old, in the prime of her life. She had family that loved her." "She was eighteen years old. Eighteen years old. A defenseless girl."(T1248).

In penalty phase, Bishop presented, over objection, Vincent's record of convictions (T1276-91;Exh.101,102,103A,104,200); uncharged misconduct (T1321-32;Exh.105); victim impact (T1313-16,1324-38;Exh.300-11) and multiple photographs of Todd Franklin's body.(T1294-1302;Exh.9-14,18,27-28,31-33,35). He also presented two photographs of Franklin—one as a youngster and the other

at prom.(T1313-14;Exh.157,160). In closing, he argued he had no burden of proof on the non-statutory aggravators(T1543-44); Vincent was “terrorizing” the entire neighborhood and, after killing Franklin, fled the State(T1545); and speculated about crimes Vincent hadn’t yet committed.(T1546-47). He argued this crime was “the worst of the worst”(T1563-64), and Vincent enjoys hurting people.(T1564). He speculated about what Leslie might have done were she still alive.(T1565). He called Kraft “cruel” to ask Vincent’s father if he believed he was a good father.(T1566). He stated, “And if you want to talk about mothers, let’s talk about a mother’s worst nightmare. A mother’s worst nightmare is a picture of your child with a State’s Exhibit sticker on it. And we’ve got two of them. Two of them (indicating). Picture your own child with a State’s Exhibit sticker on it. That’s a mother’s worst nightmare.”(T1551).

PENALTY PHASE INSTRUCTIONS

Pre-trial, counsel moved that the jury find whether the statutory aggravators were “serious assaultive.”(LF126-36). The State successfully objected.(LF219-20;T10). Pre-penalty phase, Bishop requested the court make the “serious assaultive” findings, which it did, over objection.(T1263-66). Counsel moved for a new trial because the Notes On Use require the jury make these findings.(T1596). Bishop was unaware of that requirement.(T1596-98). The court denied the claim.(T1599).

Counsel objected to Instruction 18, which listed as six separate statutory aggravators Vincent’s prior convictions.(T1530-31). The jury’s death verdict

listed them all.(LF391-92). Counsel also objected to Instructions 19-21 because they do not impose a “beyond a reasonable doubt” burden of proof on the State and place a burden of proof on the defense.(T1531-34;LF118-20).

At the new trial motion hearing, on May 24, 2006, counsel informed the court that this Court reversed and remanded in *McFadden I.*(T1574-76). Counsel requested a new trial since the jury’s verdict was based on an inaccurate factor.(T1574). The court denied the request and sentenced Vincent to death.(T1575-76,1604-05;LF452-55).

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.

Batson v. Kentucky, 476 U.S. 79(1986);

Miller-El v. Cockrell, 537 U.S. 322(2003);

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

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

Mo.Const.,Art.I,§§2,10,18(a),21.

**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);

State v. Herret, 965 S.W.2d 363(Mo.App.,E.D.1998);

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

Mo.Const.,Art.I,§§10,18(a),21.

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.

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

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

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

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

Mo.Const.,Art.I,§§10,18(a),21.

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);

Shepard v. United States, 544 U.S.13(2005);

Note On Use 5, MAI-Cr3d 314.40;

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

Mo.Const.,Art.I,§§10,18(a),21.

V. INADMISSIBLE HEARSAY BOLSTERS FLAWED IDENTIFICATION

The trial court abused its discretion in overruling Vincent's pre-trial motion and trial objections to Stacy Stevenson's testimony that he heard an unidentified man say, "Come here, bitch, where you fixin' to go. I told you and your sister to get the f--- from down here in Pine Lawn;" denying Vincent's motion for Eva Addison's school and medical records, and letting the State bootstrap an identification of Vincent as the speaker/shooter, because this denied due process, confrontation, cross-examination, 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, although no light source illuminated the scene and she was far away, Eva claimed she could recognize Vincent as the person who exited the car, said something un-discernable and shot Leslie. The State used Stevenson's description of what he overheard to bolster Eva's identification despite his inability to identify the speaker. This testimony was highly prejudicial since, unless the statement could be independently identified as Vincent's, it fell within no hearsay rule exception and it made Eva's identification more credible. Further, while the distance and lack of illumination between Eva and the events rendered Eva's identification questionable, counsel was precluded from challenging it with objective evidence about her credibility and ability accurately to observe.

State v. Edwards, 31 S.W.3d 73(Mo.App.,W.D.2000);

State v. Revelle, 957 S.W.2d 428(Mo.App.,S.D.1997);

United States v. Owens, 484 U.S. 554(1988);

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

Mo.Const.,Art.I,§§10,18(a),21.

VI. VOIR DIRE LIMITED

The trial court abused his discretion in sustaining the State’s objection and prohibiting the defense’s proposed voir dire about veniremembers’ beliefs about the costs of death versus life without parole sentences because that denied Vincent due process, a fair trial, a fair, impartial jury, effective assistance of counsel, 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, although Vincent’s jurors may have believed incorrectly that life incarceration is more expensive than execution, which belief may have informed their sentencing decision, defense counsel was prohibited from discovering those beliefs to exercise challenges and Vincent may have been sentenced to death based on mistaken, false beliefs.

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

State v. Clark, 981 S.W.2d 143(Mo.banc1998);

United States v. Love, 219 F.3d 721(8thCir.2000);

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

Mo.Const.,Art.I,§§10,18(a),21.

VII. Caldwell Violation

The trial court abused its discretion in denying Vincent's cause strike of Juror Isaac Sandifer, denying Vincent's Motion in limine, letting the jury hear that Vincent was already on death row in the Todd Franklin case, or, alternatively, refusing Vincent's request for separate guilt and penalty-phase juries because that denied Vincent due process, a fair trial, a fair, impartial jury, 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 Vincent moved pre-trial to preclude admitting evidence that Vincent was on death row from the Todd Franklin case because it would lessen the jury's sense of responsibility, and counsel was compelled to voir dire on the impact that evidence would have on jurors. Once apprised of Vincent's prior death sentence, Sandifer asked "what's the point?" of this prosecution, demonstrating his lessened sense of responsibility. Had the Court granted Vincent's motion for separate juries, the prejudice would have been limited to penalty phase.

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

Mitchell v. State, 136 P.3d 671(Okla.Crim.App.,2006);

Witherspoon v. Illinois, 391 U.S. 510(1968);

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

Mo.Const.,Art.I,§§10,18(a),21.

VIII. EVOLVING STANDARDS OF DECENCY IN ST. LOUIS COUNTY

The trial court erred and abused its discretion in denying Vincent’s mistrial motion, not quashing the jury panel and precluding the State from seeking death and this Court, exercising its independent proportionality review, §565.035.2(3) RSMo, should find Vincent’s death sentence unconstitutionally excessive, because it violates due process, a fair trial, a properly-selected jury, reliable sentencing, freedom from cruel and unusual punishment and the jurors’ right to serve, irrespective of their religious beliefs, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§5,10,18(a),21, in that over 50% of the entire panel was struck for cause because they couldn’t consider the death penalty. Evolving standards of decency in St. Louis County, manifested in the views of the majority of those called, mandate setting aside Vincent’s death sentence.

Trop v. Dulles, 356 U.S. 86(1958);

Roper v. Simmons, 543 U.S. 551(2005);

Atkins v. Virginia, 536 U.S. 304(2002);

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

Mo.Const.,Art.I,§§10,18(a),21.

IX. IMPROPER ARGUMENT

The trial court erred and plainly erred in overruling Vincent's objections and requests for a mistrial, and not granting a mistrial *sua sponte* based on the State's improper arguments in:

Voir Dire

1. "We have an interest in this case, too, as does the victim's family."(T773);
2. "And if I had to prove everything beyond a reasonable doubt, the trial would never end."(T775-77);

Guilt Phase

3. "In this case, all the evidence points to the defendant's guilt. There's a term we use called uncontroverted. There's no evidence to the contrary. All of the evidence you heard was that he did it. You heard no evidence of"(T1215-16);
4. "Don't forget about Leslie. This isn't just about him, about Vincent McFadden (indicating). Don't forget about her. Don't forget about her. When you go back there, you don't forget that this was a young woman with a future. You don't forget that she's eighteen years old, in the prime of her life. She had family that loved her." "She was eighteen years old. Eighteen years old. A defenseless girl."(T1248);

Penalty Phase

5. “There are other convictions that you should consider in determining what to do with him. His whole criminal history are non-statutory aggravating circumstances. I didn’t have to prove them to get you past this stage. But you’ve got a more complete picture of his entire criminal history.”(T1543-44);

6. “This man was terrorizing the whole neighborhood.”(T1545);

7. “And don’t forget about how he fled, how after he killed Todd he fled the State. After he killed Leslie he fled the County.”(T1545);

8. “First one, you see he’s climbing the ladder of crime. The 6100 block of Greer. He didn’t kill them. He killed Todd Franklin. Then he knows—with Leslie Addison, he kills her at that particular time to avoid the witnesses. Do you remember he knew he was on the run in California. He knew he was wanted for the murder. He knows you don’t leave witnesses... He didn’t realize Eva was there.”(T1546-47);

9. “And if you want to talk about mothers, let’s talk about a mother’s worst nightmare. A mother’s worst nightmare is a picture of your child with a State’s Exhibit sticker on it. And we’ve got two of them. Two of them (indicating). Picture your own child with a State’s Exhibit sticker on it. That’s a mother’s worst nightmare.”(T1551);

10. “The death penalty is only appropriate for the worst of the worst. The worst of the worst. He is the worst of the worst.”(T1563-64);

11. **“He does bad things. He does evil things. He hurts people. And he enjoys it. He enjoys it.”(T1564);**

12. **“He took from her parents any grandchildren that she might have. There’s going to be no wedding for Leslie, no marriage, no children, no grandchildren, no life.”(T1565);**

13. **“You know, and what a cruel question to ask his father. Do you think you’re a good father, do you think you did a good job as a father... To ask him that. What father wouldn’t think, boy, think how bad a job he did. What a cruel question to ask him.”(T1566)**

because they denied 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 Bishop defined reasonable doubt; misstated the facts and law; commented on Vincent’s failure to testify; injected emotion into guilt phase; personalized to himself and the jury; attacked defense counsel; speculated, and injected facts outside the record, rendering the verdicts unreliable.

Berger v. United States, 295 U.S. 78(1935);

State v. Storey, 901 S.W.2d 886(Mo.banc1995);

State v. Rhodes, 988 S.W.2d 521(Mo.banc1999);

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

Mo.Const.,Art.I,§§10,18(a),21.

X. PHONE CONVERSATION CONTAINS HEARSAY AND EVIDENCE
OF UNCHARGED BAD ACTS

The trial court erred and abused its discretion in overruling Vincent's objections to Exhibits 148D-E, a taped phone conversation between Eva Addison and "Slim" Dickens, because this denied confrontation and cross-examination, trial only for charged offenses, 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),19,21, in that Slim never testified, wasn't available for cross-examination, and referred to Vincent's "dope case" and "Al" dropping charges in another case, implying Vincent obtained that result through threats and coercion. Both references were evidence of other crimes and since Vincent was on trial for witness tampering, the reference to Al was highly prejudicial, letting the jury decide, "he did it before, he probably did it again."

United States v. Mejia-Uribe, 75 F.3d 395(8thCir.1996);

State v. Bernard, 849 S.W.2d 10(Mo.banc1993);

State v. Case, 140 S.W.3d 80(Mo.App.,W.D.2004);

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

Mo.Const.,Art.I,§§10,18(a),21.

XI. IRRELEVANT & INFLAMMATORY PHOTOS

The trial court abused its discretion in admitting, over objection, in guilt phase, Exhibits 300, 303, 306, photographs of Leslie and her family in life, and Exhibits 129-37,140-45,147,149-50,152-53, autopsy photographs and x-rays of Leslie, and admitting in penalty phase Exhibits 9-14,18,27-28,31-33,35, photographs of Todd Franklin, because that denied due process, a fair trial, a fair, impartial jury, 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 in guilt phase, Leslie’s autopsy photos were cumulative and duplicative, allowing the guilt phase verdict to be based on emotion, not the facts and law, and the photos of Leslie in life were irrelevant, establishing no fact and solely inflaming the jury’s passions and prejudices. In penalty phase, the photographs of Todd’s body were cumulative, unnecessarily gruesome, and irrelevant, and the “life” photos were inadmissible victim impact, proving no fact at issue.

State v. Robinson, 328 S.W.2d 667(Mo.1959);

Spears v. Mullin, 343 F.3d 1215(10thCir.2003);

State v. Sladek, 835 S.W.2d 308(Mo.banc1992);

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

Mo.Const.,Art.I,§§10,18(a),21.

XII. ONE STATUTORY AGGRAVATOR BECOMES MANY

The trial court erred in overruling Vincent’s objections to Instruction 18, submitting it to the jury, and accepting the jury’s verdict that found six statutory aggravators—Vincent’s prior convictions, 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;§565.032 RSMo, in that the Legislature has designated, as one enumerated statutory aggravator, that the jury can consider whether “the offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.” This demonstrates the clear legislative intent that, whether a defendant has one, or multiple, such convictions, they be considered one statutory aggravator. Vincent was prejudiced by the State’s submitting his priors separately because those separate submissions placed a thumb on the scales for death when the jury weighed aggravators against mitigators.

Sochor v. Florida, 504 U.S. 527(1992);

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

State v. Clemmons, 753 S.W.2d 901(Mo.banc1988);

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

Mo.Const.,Art.I,§§10,18(a),21.

XIII. NO GUIDANCE ON NON-STATUTORY AGGRAVATORS

The trial court erred, plainly erred and abused its discretion in overruling Vincent’s pre-trial motions objecting to the MAI-Cr3d 314 Series; admitting extensive evidence about Vincent’s prior bad acts and unadjudicated misconduct; admitting “victim impact” evidence; overruling objections to and giving Instructions No.19, 20,21, modeled after MAI-Cr3d 314.44, 314.46 and 314.48, and accepting the jury’s death verdict because this denied due process, a fair trial, a properly-instructed jury, 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, although the State presented extensive evidence of Vincent’s prior bad acts and his impact on others and instructed the jury to consider that evidence in sentencing, the jury received no guidance on how to consider that evidence and was told the defense bore the burden of proof. The jury was instructed to weigh that evidence in making its sentencing decision, but, lacking guidance on how, the reliability of its verdict is undermined.

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

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

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

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

Mo.Const.,Art.I,§§10,18(a),21.

XIV. Apprendi Violations

The trial court erred in overruling Vincent's pre-trial *Apprendi* motions; not quashing the information; proceeding to penalty phase; accepting the jury's death verdict and sentencing Vincent to death because this denied due process, a jury 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 statutory and non-statutory aggravators are facts that increase the range of punishment for first degree murder from life without parole to death, must be pled in the charging document and found by the jury unanimously and beyond a reasonable doubt.

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

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

Hurtado v. California, 110 U.S. 516(1884);

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

Mo.Const.,Art.I,§§10,18(a),21.

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.

The State of Missouri, acting through the same Assistant Prosecutor whose peremptory challenges were held racially-discriminatory in *State v. McFadden*, 191 S.W.3d 648(Mo.banc2006)(*McFadden I*), again ensured Vincent would be

tried by an all-white jury. Mr. Bishop peremptorily challenged four black women and one Asian man, leaving only one black woman on the petit jury.⁵

Bishop's purported rationale for his strikes reveals he failed to strike similarly-situated white jurors, question about his purported areas of concern, raise the issues contemporaneously with the conduct noted, and adopted justifications logically irrelevant to the case or lacking record support. Bishop's use of racially-motivated peremptory strikes to remove Veniremembers Donna Cole and Sherlonda Harris denied Vincent, Cole and Harris equal protection and Vincent due process, a fair trial, a fair, 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.

By sustaining Bishop's peremptories, the court gave the State a license to discriminate. Bishop's prejudices denied Ms. Cole and Harris the right to serve and Vincent trial by an impartial jury. As this Court recognized in *McFadden I*:

Racial discrimination in jury selection compromises the defendant's right to a trial by an impartial jury, ... and essentially creates "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." ... This

⁵ Veniremember Gill-Havens, the only black woman left on the petit jury after Bishop's peremptory challenges, was removed before opening statements, over objection, because she couldn't arrange her daughter's daycare. (T990-98). Because her removal left Vincent with an all-white jury, counsel moved to quash the panel. (T997-98). The Court instead seated an alternate, white juror. (T999).

discriminatory practice “invites cynicism respecting the jury’s neutrality,”
... undermines public confidence, ... and jeopardizes the integrity of the
judicial system.

191 S.W.3d at 650 n.2(internal citations omitted).

Batson Procedure

A defendant establishes a prima facie case of discrimination in jury selection by “the totality of the relevant facts” of the prosecutor’s behavior.*Batson v. Kentucky*, 476 U.S. 79(1986). In *State v. Parker*, 836 S.W.2d 930(Mo.banc1992), this Court set forth the applicable procedure when a defendant timely raises *Batson*. First, he must challenge one or more specific veniremembers the State is striking and identify their cognizable racial group.*Id.* at 934,939. Second, the State must provide a race-neutral reason—more than an unsubstantiated denial of discriminatory purpose.*Id.* Third, the defendant must show the State’s explanation is pretextual and the strike’s true basis is racial.*Id.*

At the third step, the trial court must consider whether “(1) the explanation is race-neutral, (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate.”*State v. Edwards*, 116 S.W.3d 511, 527(Mo.banc2003). In the third step, the trial court’s “chief consideration should be the plausibility of the prosecutor’s explanations in light of the totality of the facts and circumstances surrounding the case.”*Id.*; *Miller-El v. Cockrell*, 537 U.S. 322, 339(2003); *Parker*, 836 S.W.2d at 939.

“Evidence of purposeful discrimination is established when the stated reason for striking an African-American venireperson applies to an otherwise-similar member of another race who is permitted to serve.” *McFadden I*, 191 S.W.3d at 651. “Crucial to the [*Batson*] analysis is whether similarly situated white venirepersons escaped the state’s challenge.” *State v. Weaver*, 912 S.W.2d 499, 509(Mo.banc1995); *State v. Marlowe*, 89 S.W.3d 464, 469-70(Mo.banc 2002); *State v. Smith*, 5 S.W.3d 595, 597-98(Mo.App.,E.D.1999); *State v. Davis*, 894 S.W.2d 703, 708-11(Mo.App.,W.D.1995). The court should consider the logical relevance between the stated reason and the evidence and punishment; the prosecutor’s statements, demeanor and questioning methods; the court’s history with the prosecutor and “objective factors bearing on the state’s motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses.” *Parker*, 836 S.W.2d at 939-40; *Edwards*, 116 S.W.3d at 527; *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2326 n.2(2005).

[P]eremptories are often the subjects of instinct, ... and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade

because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Id., 125 S.Ct. at 2332 (internal citations omitted).

The trial court's findings on a *Batson* challenge must be set aside if clearly erroneous. *McFadden I*, 191 S.W.3d at 651; *State v. Antwine*, 743 S.W.2d 51, 66 (Mo.banc1987). Findings are clearly erroneous when, although evidence supports the findings, the reviewing court is has the definite and firm conviction that a mistake has been made. *Id.*

Defense counsel challenged Bishop's peremptory strikes, alleging five of nine peremptories to remove black veniremembers, a process ultimately leaving Vincent with an all-white jury, violated *Batson*. (T944). After Bishop asserted his justifications, (T945-51), counsel explained why they were pretextual. (T952-74). Counsel included the issue in Vincent's new trial motion. (LF423-25). Counsel noted at the new trial motion hearing that, after Judge Gaertner researched the *Batson* issue, he told Bishop, off the record, his inclination to disallow the strikes. (T1592). Bishop responded, in raised tones, that, if they were disallowed, he would be labeling Bishop a racist and a liar. (T1592). Neither the trial judge nor Bishop disputed counsel's recitation.

Donna Cole

Donna Cole, a black woman, stated she could impose life-without-parole or death sentences. (T249). After death qualification, neither side moved to strike her for cause. (T279).

During general voir dire, Cole stated, for the past ten years or so, her church choir has sung at the workhouse on Hall Street every Christmas.(T835). She has no contact with the prisoners and this activity is one the church, not she, organizes.(T915-16). Since she is a choir member and this is a choir activity, she participates.(T916). She also stated, about ten years ago, a neighbor shot her brother, who recovered.(T796). Nobody was prosecuted.(T796-98). She did not know why not but stated the incident would not affect her.(T798).

Bishop moved to strike Cole peremptorily.(T943). Kraft challenged the strike, noting Cole is a black woman.(T944). Bishop retorted, “the State is insulted by the insinuation that these strikes are racially motivated and frivolous.”(T945). He stated he moved to strike her peremptorily because she visits the workhouse voluntarily at least once a year, “just a few short months ago,” and to benefit inmates awaiting trial, and 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). The court found these reasons race-neutral.(T946).

Kraft countered Bishop’s excuses, noting Cole’s workhouse visits were once yearly, on Christmas, with her church choir, and organized by the church, not her.(T952). Kraft noted two similarly-situated white jurors, Walter Matye and Judith Woolsey, who also visited jails and who Bishop did not challenge peremptorily.(T952). Matye visited the jail in high school and college.(T918).

Woolsey visited a prison having an electric chair in high school and a jail while on St. John's City Council.(T919-20).

Bishop said prison ministry differs from school visits.(T954). Judge Gaertner found Bishop's excuse race-neutral.(T955).

Kraft also countered Bishop's excuse about Cole's brother. Bishop's explanation was inaccurate since Cole said she **knew** nobody was prosecuted but didn't know why.(T952). Cole also stated the incident would not affect her.(T798). Bishop hadn't struck two similarly-situated whites—Kathleen Effinger and Michael Walker.(T952). Although Effinger's husband's cousin was killed she didn't remember knowing what happened.(T800,952). Walker's girlfriend's mother was killed during a burglary. (T816,952). Walker stated the process "would be difficult. But no ... [he wouldn't be unfair]. You just need to set it aside."(T816).

Bishop responded Effinger's and Walker's relatives were "farther removed;" the court agreed, stating a brother was "closer than a cousin."(T954-55). Bishop said he asked if Cole's brother cooperated with the State, "which is a different problem that I have with her."(T954). Kraft noted Cole's brother's actions were irrelevant to **her** reactions.(T955). Judge Gaertner found logically-relevant and justifying the strike that a neighbor shot Cole's brother and he didn't prosecute.(T955-56).

Bishop's excuses were pretextual. He didn't strike similarly-situated white people and his excuses didn't match the evidence. Kraft noted similarly-situated white people not struck.

Cole's choir visits to the workhouse were the functional equivalent of Matye and Woolsey's student and City Council jail visits. All were members of a larger group with a planned activity. None personally organized the visits and none had personal contact with inmates. The mere fact of their visits neither suggests nor establishes support for either side.

Cole's brother was shot and recovered and, for unknown reasons, the shooter wasn't prosecuted. Although Effinger's husband's cousin was killed, she didn't know what happened. Walker's girlfriend's mother was killed during a burglary, making this trial "difficult." Distinct from Cole, Bishop never asked Walker if he knew whether someone was prosecuted. *Cockrell*, 537 U.S. at 332.

Notwithstanding that violent deaths touched Effinger and Walker's lives; Effinger's lack of knowledge of court proceedings, and Walker's acknowledgement that those events would make this difficult, Bishop moved to strike neither. Rather, he misstated the record, asserting Cole stated she didn't know if her brother cooperated with police or anyone was prosecuted, although she actually stated she **knew** her brother recovered and nobody was prosecuted. Lack of record support for a strike indicates pretext. *Flowers v. State*, __So.2d __, 2006 WL 1767334(Miss.2006) at 10; *Ford v. State*, 1 S.W.3d 691, 693-94 (Tex.Crim.App.1999); *K.S. v. Carr*, 618 So.2d 707, 711(Ala.1993).

Bishop also attempted to attenuate the violence's impact on Effinger and Walker, distinguishing them from Cole, asserting a brother is closer, and more immediately felt, than a cousin or a close friend. This argument ignores, although Cole's brother was **assaulted**, Effinger and Walker's friend and relative were **killed**. Judge Gaertner's false construct, that Cole's brother's failure to prosecute logically supported challenging Cole, may have been a logical basis for striking Cole's brother, but it can't be extrapolated to Cole. The record demonstrates Effinger and Walker, white, were similarly-situated to Cole yet Bishop attempted to strike neither.

Cole's responses gave Bishop no reason to strike her. She stated unequivocally she could consider either punishment. Her brother having been shot wouldn't impact her decision. By contrast, a white veniremember stated a friend's violent death would make the process more difficult. The sole difference between them is the color of Cole's skin.

Sherlonda Harris

Harris unequivocally stated she could impose either punishment. (T614,625). Neither party moved to strike her for cause.(T646). Thereafter, she told Bishop she had no driver's license.(T851-52). Bishop asked why not and she responded, "I just don't have a driver's license."(T852).

Bishop moved to strike Harris peremptorily,(T943), because (a) she was the only person "who doesn't have a physical reason for not having a driver's license," (T950); (b) she has "crazy-looking red hair,"(T950), and (c) her

demeanor seemed hostile—her arms were folded, her eyes seemed to be closed, and he believed “from her demeanor, and her answers, that she was lying to me.” (T950-51). Judge Gaertner reviewed voir dire and her “just very plain simply yes or no answers.”(T968).

Kraft said Harris’ lack of a driver’s license was irrelevant to her ability to sit and the issues.(T962). Kraft also noted many people, her mother and aunt included, have no license.(T962). Bishop retorted, “She is obviously not invested in the community if she doesn’t even have a driver’s license. What kind of identification does she have? That’s my thought.”(T964). And,

I don’t think that an unlicensed driver is that big of a deal. But you combine all of it, she’s obviously sitting – I, in fact, asked her about her license. I thought, well, maybe if she’s got some physical problem, I can’t tell by looking at her, that’s a reason why you wouldn’t have a driver’s license in St. Louis. She’s not elderly. She probably looks to me like she’s in her twenties. And it seems to me odd that somebody who especially has retail employment at her job as a Foot Locker employee, which would have, I would assume, varying hours, which would make it very difficult to get to work if you don’t have a license, an ability to drive a car. That’s what we experienced with the juror who didn’t show up today, because she said she didn’t have a ride, and didn’t have a license.
(T966-67).

Kraft challenged Bishop's assertion that lacking a driver's license equates with not being vested in the community. "There are a lot of people without driver's licenses who do a lot for their communities. It may be a money issue. She was never asked. All she was asked is whether it was a physical thing or it was suspended. She was never asked why she didn't have a driver's license. Make [sic] she can't afford car insurance."(T967-68).

Judge Gaertner perceived Harris was offended by Bishop's questions about driver's licenses.(T968-69). He stated, "I didn't see any offense towards Mr. Bishop or towards the defense in the death penalty voir dire. But in the general voir dire, I did notice that."(T969). Judge Gaertner stated, "having a non-driver's license, I think in and of itself, is not a very – is not logically relevant between –is not really logically relevant...But Ms. Harris, I think, was taken aback by the questioning concerning the license. I'm not sure if she was offended. She appeared offended. But I'm not sure if that would play any role."(T973-74).

Kraft also stated, "I think you may be able to find numerous women in the community, particularly in the African-American community, that would have their hair dyed that color as a fashion statement. I think it's popular. There are very, very popular entertainers, such as Mary J. Blige, B-L-I-G-E, who have that same color hair. I don't think that the fact that her hair is that color red makes her crazy or weird, as Mr. Bishop has stated, I believe, off the record."(T962). Kraft noted Harris was "very neatly" "very fashionably dressed. She did not appear to be crazy at all."(T962). "While her red hair might set her apart from Mr. Bishop's

crowd, it certainly does not, I guarantee you, set her aside from her community of African-American women. So it makes it even actually more of a racial issue.”(T967). Judge Gaertner stated, “the red hair of Ms. Harris is not a hairstyle that is –the Court has seen on a lot of –ever, really, before. And it is a very distinctive red hairstyle that Ms. Harris has...I think the red hair, also, as Mr. Bishop indicates, does distinguish her and makes her separate from the crowd, and very individualistic.”(T972-73). At sentencing, Assistant Prosecutor Bert stated, “This 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. She had indicated that she wanted to stand apart from the crowd by her physical appearance, it was so striking.”(T1594).

Judge Gaertner considered Bishop’s history in deciding the challenges. (T969). He had tried several cases with Bishop, who “has avoided on many occasions attempting to even get into a *Batson* type challenge area.”(T970). After consideration, Judge Gaertner denied the *Batson* challenge.(T974). This Court found, in *McFadden I*, Bishop made race-based strikes.

As Judge Gaertner recognized, Harris’ lack of a driver’s license is irrelevant to the issues. Valid excuses must be related to the case being tried.*State v. Edwards*, 116 S.W.3d 511,527(Mo.banc2003);*Marlowe*, 89 S.W.3d at 469. Bishop’s concern was her lack of a driver’s license could cause her to miss work

(T966-67), something unrelated to this trial.⁶ He also claimed it “odd” she had no license (T966-67), but never asked why. Not voir diring on a characteristic or factor purportedly supporting the strike demonstrates pretext.*Dretke*, 125 S.Ct. at 2328, quoting *Ex parte Travis*, 776 So.2d 874, 881(Ala.2000);*McFadden I*, 191 S.W.3d at 653-54.

Bishop’s reference to Ms. Harris’ red hair is not mere pretext. It is no more racially-neutral than a reference to an “Afro” or “dredlocks.” He and Judge Gaertner found her hair color separated her from the crowd.(T973). Were the “crowd” Anglo-Saxon, it might. But, as Ms. Kraft noted, Harris’ hair style and color is acceptable and normal in the African-American community.(T962);*See* Appendix, “Hype Hair” excerpts.

As Judge Higginbotham noted,

Recent commentators have noted that *Batson* has left prosecutors free to strike jurors based on what amounts to patent stereotypes. *See, e.g.* Serr & Maney, *Racism, Peremptory Challenges and the Democratic Jury*, 79 J.Crim.Law & Criminology 1, 43-47(1988); Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U.Pa.L.Rev. 1365, 1420(1987) (prosecutor may seek to justify strike on arbitrary grounds such as speech, hair style, demeanor). Indeed, the *Batson* standard, as it has been

⁶ Were Bishop concerned Harris’ lack of a license would cause her to be late for court, that would have been a false issue since this was a sequestered jury.

interpreted, appears now to allow prosecutors to strike non-white jurors for reasons that are clearly, but subtly, racial in nature.

U.S. v. Clemmons, 892 F.2d 1153, 1162(3rd Cir.1989)(Higginbotham, J., concurring). At first blush, reference to Harris' hair color seems, although unrelated, and therefore suspect, facially-race-neutral. But, when viewed in the context of the differences in hair styles and colors in race and ethnic groups, its racial basis becomes clear.

This Court also must evaluate carefully Bishop's claim that Harris appeared hostile and he believed she was lying. Judge Gaertner recalled she demonstrated no hostility during death penalty voir dire and only appeared upset when Bishop repeatedly confronted her about having no license.(T969). Bishop's assertion is factually inaccurate and, since his other excuses were not race-neutral, this assertion must be considered in their refracted light.*State v. Hopkins*, 140 S.W.3d 143, 157(Mo.App.,E.D.2004);*McCormick v. State*, 803 N.E.2d 1108, 1113 (Ind.2004);*State v. Lucas*, 18 P.3d 160, 163(Ariz.App.2001);*Rector v. State*, 444 S.E.2d 862, 865(Ga.App.1994);*State v. Shuler*, 545 S.E.2d 805, 811(S.C.2001);*Moore v. State*, 811 S.W.2d 197, 200(Tex.Crim.App.1991);*State v. King*, 572 N.W.2d 530, 535(Wis.App.1997).

When the spectre of racial discrimination in jury selection enters the courthouse, our constitutional system is threatened. Litigants are threatened and harmed by the risk that the prejudice motivating the discriminatory jury selection process will infect the entire proceedings.*Edmonson v. Leesville Concrete Co.*,500

U.S. 614, 628(1991);*Rose v. Mitchell*, 443 U.S. 545, 556(1979). Veniremembers are harmed by denying their right to participate.*Powers v. Ohio*, 499 U.S. 400 (1991). The community is harmed by the state's perpetuation of "invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140(1994). "However guilty a defendant may be, the law requires that a conviction only be obtained through a fair trial. The right to sit before a jury of one's peers, chosen not because of race, but because of their standing as citizens doing their civic duty, is essential to a fair trial."*Edwards*, 116 S.W.3d at 551(Teitelman, J., concurring).

Vincent was denied a fair trial because Bishop removed black veniremembers for racially-discriminatory reasons. This Court must scrutinize the plausibility of his excuses. That scrutiny will reveal a new trial is warranted.

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.

Before trial, counsel moved that Vincent's jury not be informed of his death sentence in the Franklin case.(LF190-93). Bishop stated he intended to introduce the certified copy of Vincent's conviction and fact of his death sentence.(T38). In penalty phase, he did so(T1289-91; Exh.200), and presented photographs, a diagram and video of Franklin's body.(T1294-1311). Then, in penalty phase closing, he argued that the jurors consider Vincent's criminal history, including that death sentence, in deciding punishment.(T1543-46). The jury sentenced Vincent to death, finding as statutory aggravators Vincent's first-degree murder and armed criminal action convictions. (LF391-92).

On May 16, 2006, in *McFadden I*, this Court reversed and remanded for a new trial. On May 24, Kraft requested the trial court grant the new trial motion based on that reversal.(T1574). Bishop argued this Court’s decision was not final and Judge Gaertner denied Kraft’s request.(T1575-76).

Since the jury’s decision was based on at least one⁷ invalid factor, letting Vincent’s death sentence stand violates his state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. This Court, under §565.035.2(1)RSMo, should vacate Vincent’s death sentence or reverse and remand for a new trial since the jury’s verdicts in both phases were affected by Bishop’s reliance on this evidence.

In *Johnson v. Mississippi*, 486 U.S. 578(1988), the Court addressed whether reversing a prior conviction that the jury considered in imposing death in the Mississippi case affected that death sentence’s validity. Concluding it did, the Court reversed and remanded.

At Johnson’s sentencing hearing, the State introduced documentary evidence of the prior conviction, but introduced nothing about the assault itself. “Since that conviction has been reversed, unless and until petitioner should be

⁷ Vincent has challenged the validity of the remaining four statutory aggravators in a post-conviction relief motion, filed October 12, 2006 in St. Louis County. He has alleged, *inter alia*, that Bishop violated *Batson* and counsel was constitutionally ineffective for not investigating actual innocence.

retried, he must be presumed innocent of that charge. Indeed, even without such a presumption, the reversal of the conviction deprives the prosecutor's sole piece of documentary evidence of any relevance to Mississippi's sentencing decision." *Id.* at 585.

The reversal "provided no legitimate support for the death sentence imposed on petitioner" and was prejudicial. *Id.* at 586. The prosecutor told the jury to use that conviction in weighing and, "even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" *Id.*; *Gardner v. Florida*, 430 U.S. 349, 359 (1977). Since the jury considered evidence "revealed to be materially inaccurate," *Johnson*, 486 U.S. at 590, the Court reversed.

The Eighth Amendment's prohibition against cruel and unusual punishment creates a special "need for reliability in the determination that death is the appropriate punishment." *Id.* at 584; *Gardner*, 430 U.S. at 363-64; *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Decisions to impose death cannot be based on mere caprice or factors "constitutionally impermissible or totally irrelevant to the sentencing process." *Johnson*, 486 U.S. at 585; *Zant v. Stephens*, 462 U.S. 862, 884-85 n.24 (1983).

In *Romano v. Oklahoma*, 512 U.S. 1 (1994), the State introduced a copy of the judgment and sentence from one death penalty trial in the penalty phase of the other. The Court denied Romano's *Johnson* claim because the reviewing court

had struck the invalid aggravator, reweighed three untainted aggravators against the mitigators and still concluded that the death sentence was warranted.*Id.* at 11.⁸

Since *Johnson*, this Court has addressed the effect of admitting a prior conviction that has been reversed. In *State v. Storey*, 901 S.W.2d 886, 896 (Mo.banc1995), the prior conviction had not yet been reversed, so no error resulted from using it as a non-statutory penalty phase aggravator. In *State v. Storey*, 986 S.W.2d 462(Mo.banc1999), once the prior conviction was reversed, this Court addressed whether using that prior to impeach the defendant's credibility in guilt phase created reversible error. It found the constitutional error was harmless because, while the trial court took no curative action, the references were brief, the evidence of guilt overwhelming and there was virtually no exculpatory evidence.*Id.* at 466;*Chapman v. California*, 386 U.S. 18, 24(1967).

In *State v. Herret*, 965 S.W.2d 363, 364-65(Mo.App.,E.D.,1998), the Court applied *Johnson* and found the defendant's due process rights were violated by using a vacated robbery conviction to sentence him as a prior offender. "A sentence passed on the basis of a materially false foundation lacks due process of law and entitled the defendant to a reconsideration of the question of punishment in light of the true facts, regardless of the eventual outcome."*Id.*; *Wraggs v. State*, 549 S.W.2d 881, 884(Mo.banc1977).

⁸ Whether this procedure would still be permissible post-*Ring* and *Apprendi* is doubtful.

Unlike *Storey*, here, Bishop’s references to Vincent’s conviction and death sentence in the Franklin case permeated the case. Bishop insisted the judge, not the jury, find those priors to be “serious assaultive”(T1265-67). Bishop never asked the jury to find the facts of the Franklin case—he showed them Franklin’s body, through Exhibits 9-14,18,27,28,31-33,35, and told them Vincent’s conviction and sentence were fact. And, in closing, he argued that Vincent was “climbing the ladder of crime...He killed Todd Franklin.”(T1546-47). But, Vincent’s conviction and sentence in that case were reversed—before this sentencing. Vincent’s death sentence rested on an invalid factor, rendering his death sentence arbitrary and capricious. Further, since that invalid factor was a focal point of voir dire, its effect in guilt phase cannot be deemed harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

This Court must vacate Vincent’s death sentence and order him re-sentenced to life without probation or parole or reverse and remand for a 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 abused its discretion in sustaining, over objection, Bishop’s cause challenges of Veniremembers Carol Vinson and Kaye Swanson. Their views did not substantially impair their ability to abide by their oath and follow the instructions. They were qualified to serve. The court’s actions denied Vincent’s state and federal constitutional rights to due process, a fair trial, a properly-constituted jury and freedom from cruel and unusual punishment.

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

Such rulings are affirmed on appeal unless clearly against the evidence and a clear abuse of discretion.*State v. Kreutzer*, 928 S.W.2d 854, 866(Mo.banc1996).

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.banc1996). Because capital juries have vast discretion to decide if death is the "proper penalty," general objections to or conscientious and religious scruples against it are not disqualifications.*Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968);*see also* Art.I,§5,Mo.Const. One "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*, at 519.

The Court has scrupulously followed *Witherspoon*.*Davis v. Georgia*, 429 U.S. 122(1976);*Maxwell v. Bishop*, 398 U.S. 262(1970);*Boulden v. Holman*, 394 U.S. 478(1969). *Witherspoon* and its progeny create a narrow class of venirepersons whose views disqualify them from serving. Only those who can never consider death or are partial about their guilt decision when death is a possibility cannot serve.*Witherspoon*, 391 U.S. at 520-22. If one is excluded "on any broader basis than this, the death sentence cannot be carried out...."*Id.* at 522-23,n.21. If the trial court permits removing those who merely have generalized objections to or scruples against the death penalty, it condones the State's "cross[ing] the line of neutrality."*Id.* at 520. Even if venirepersons' statements

demonstrate their “hints of uncertainty” about death, not “all who oppose the death penalty are subject to removal for cause....”*Lockhart v. McCree*, 476 U.S. 162, 176(1986).

“The State’s power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would ‘frustrate the State’s legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.’”*Gray v. Mississippi*, 481 U.S. 648, 658 (1987);*Witt*, 469 U.S. at 423. Veniremembers who will view their task “with greater seriousness and gravity,”*Adams v. Texas*, 448 U.S. 38, 49(1980), may not be removed for cause. The decision to impose death involves awesome responsibility, *Caldwell v. Mississippi*, 472 U.S. 320, 329-30(1985);*McGautha v. California*, 402 U.S. 183(1971), and should never be easy.

Carol Vinson

Bishop asked Vinson if, “in the appropriate case at the appropriate time, can you render a verdict of death?”(T736). She answered:

Vinson: I could consider it. But I would really prefer life in prison.

Bishop: Okay. So if we get to that stage in the trial, and the judge would give you the option, you can pick life in prison without probation or parole, which means just that, he spends every day of his life in prison, or the death penalty, are you automatically going to go with the life in prison?

Vinson: I think I would.

Bishop: So you're automatically going to exclude the death sentence if you're given that choice?

Vinson: Well, it depends on the circumstances and the evidence.

Court: If you would speak up just a little bit? I apologize.

Vinson: It depends on the evidence and how strong it would be.

Bishop: If you were selected as a juror, could you announce the verdict of death in open court? Assuming that that was your verdict.

Vinson: That would be tough to do. I might be able to. I don't know. I've never pronounced a verdict of death on anybody.

Bishop: Right. If you were selected as the foreperson by your fellow jurors, could you sign the verdict, if you believed the verdict of death was appropriate? Could you sign that verdict of death as the foreperson?

Vinson: I don't know if I could do that.

Bishop: So you can't assure the Court that—if you were instructed that that may be one of your duties, you can't assure the Court that you would be able to fulfill that duty?

Vinson: Not totally. But I might be able to.

Court: Would you say that last part—

Vinson: I'm not sure if I could or not. I might be able to.

Bishop: Okay. And I want to make sure you understand. I don't really care what your answers are. I'm not going to argue with you. I'm asking followup questions. So don't feel like you have to answer one way

or the other. That's true of defense counsel when they ask questions. We just want to know what your views are.

So what—did you have a problem with the sentence of life in prison without the possibility of probation or parole?

Vinson: That's not a good deal either. But at least I'm not killing somebody.

Bishop: Okay. So you could seriously consider that option as a penalty? Life in prison?

Vinson: Yes, sir.

Bishop: Could you assure us that you could seriously consider the death penalty as a possible option?

Vinson: I could consider it. I don't know if I could impose it or not.

Bishop: Okay. So even if you thought it was the appropriate punishment, you don't think you could actually do it?

Vinson: I don't know.

(T736-39). Thereafter, defense counsel questioned Vinson:

Kraft: You sort of talked along those same lines, you just weren't sure. And at one point in time you did talk about, well, it would depend on the circumstances. Do you remember saying that?

Vinson: Yes, ma'am.

Kraft: Okay. So is it possible that if you sat on a jury, there would be some circumstances that you would determine would be bad enough that you could say that the death penalty was appropriate?

Vinson: That is possible.

Kraft: Okay. And if you felt that strongly, that the death penalty was appropriate could you, in fact, say, in this case I need to do it?

Vinson: I don't know. It's possible. But it's really tough.

Kraft: Okay. And it shouldn't be easy for anybody to do this. I mean, if it's easy for anybody to do this, you know, that's interesting.

But you're telling me that it's possible—even though it would be hard, it's possible that that could happen?

Vinson: I would just as soon not issue that proclamation. The life without parole is not good either.

Kraft: Right.

Vinson: But it's not taking a life.

Kraft: Okay. But even though you would just as soon not do it, is it at least possible that you could? If you felt strongly enough about it?

Vinson: It's possible. But I don't know.

Kraft: Okay. You're not automatically excluding the death penalty?

Vinson: Right.

Kraft: Okay. And you said that you might be able to sign the verdict form, if it came down to it?

Vinson: I don't think I could do that.

Kraft: Okay. Because I thought that earlier that you had said you might be able to.

Vinson: Oh, no. I don't think I did.

Kraft: Okay. So are you telling us that even if you believed the death penalty was the appropriate punishment, you know right now you would refuse to sign the verdict form, even if you were told you had to?

Vinson: I would—I don't think I could. I would be told I would have to?

Kraft: If you were the foreperson of the jury. And there's no requirement that anybody be the foreperson of the jury. But if you were the foreperson of the jury, the law that says that the foreperson has to sign the verdict. If you knew that that was the instruction of the Court, could you do—follow that instruction?

Vinson: It's a possibility. But I would really prefer not to.

Kraft: Okay. You wouldn't want to. But if the instructions told you you had to, you could?

Vinson: I suppose so. I don't know.

(T755-58).

Bishop moved to strike Vinson for cause.(T761). The court granted the strike, ruling that Vinson had “equivocated in her answers” and had “negative body language” indicating she would be unable to follow the instructions.(T762).

Vinson never indicated an unwillingness or inability to follow the law or abide by her oath. *Adams*, 448 U.S. at 49. Her views would not prevent or substantially impair her from following the law. *Witt*, 469 U.S. at 423. Like Juror Bounds in *Gray*, Vinson was “clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria” since she was not irrevocably committed to vote against death, regardless of the facts and circumstances. *Gray*, 481 U.S. at 657-59.

Vinson’s statements merely demonstrated she was torn. She unequivocally stated she wouldn’t automatically exclude death yet would “just as soon” not have to impose either punishment. Vinson’s answers revealed she would take the process seriously and not enter the jury room with her mind made up about punishment. While she may not have been the perfect State’s juror, her answers didn’t constitute a cause strike.

Kaye Swanson

Bishop first asked Swanson if she could consider imposing death. She stated, “I’m not for sure if I could. I just want to be up front and honest. I don’t feel like they do, but when it came right down to it, I don’t think I could.”(T244). When Bishop asked if she would automatically exclude death as an option, the following occurred:

Swanson: I just don’t know if I could go to bed at night and personally do that to somebody.

Bishop: And you’re talking about, to choose the death sentence?

Swanson: Yes.

Bishop: Not the life without parole?

Swanson: No, not that.

Bishop: And so I'm inferring from your answer that, yes, you would exclude the death sentence, you would go with life without? Or you tell me.

Swanson: I'm not for sure.

...

Bishop: I'm talking about seriously considering as a real option. Is the death sentence a real option for you in the appropriate case at the appropriate time, if we get to that point?

Swanson: Not really.

Bishop: And let me ask you, if you're a juror and you're selected by the other jurors as the foreperson, can you sign a verdict of death if you think it's the appropriate verdict?

Swanson: No.

Bishop: Assuming that you think it's the appropriate verdict, is there any way you could sign that verdict?

Swanson: No.

Bishop: And if you are a juror, and you're not the foreperson, you would have to announce your verdict in open court. Could you do that?

Swanson: No.

(T245-47). Bishop stated he would return to Swanson as he believed she was going to exclude death as an option.(T247). Thereafter, defense counsel questioned her about her views:

Swanson: I believe in the death penalty. And like anybody who had anything to do with like 9/11, those people should get the death penalty. Do I want to be the person signing that, or saying yes? No. But do I want somebody else saying that somebody else should have the responsibility for that, saying yes? Does that make—

Turlington: Okay. You don't want to participate in the process, but you do believe in the death penalty, is that a correct statement?

Swanson: Yes.

Turlington: All right. Is your belief such that—I know you don't want to participate in the process. Most people don't. Do you think that you could not participate in the process, is my question.

Swanson: I think part of the reason why I say I couldn't is because, I don't know—just like, you know, if God, and everything, it's like, you know, I don't know if I'm worthy enough. I don't know, you know, if I'm worthy enough to say, yes, that person should die. I guess I don't want the burden.

...

Turlington: If you personally felt that you have gone through the legal steps, and you personally believed that the death penalty was the

appropriate punishment, and you felt comfortable with it, could you do it in those circumstances?

Swanson: Honestly, I don't know. I mean, for me to sit here—I mean, this is something I have to like sleep on, and deliberate. So for me to give you a yes or no quick answer is probably not fair.

Turlington: Okay. And I know that this isn't the greatest place to have to ask you this stuff, because you didn't know you were going to be asked this before you came in.

Do you think—realistically, in your mind, do you think it's possible that you could do it?

I think at the end of the day, --

Swanson: Yes.

Turlington: --it would be very difficult for you, it's fair to say?

Swanson: Um-hum.

Turlington: Is that a yes?

Swanson: Yes.

(T266-69). Over defense objections, the court granted Bishop's cause challenge, finding Swanson's physical mannerisms and equivocal answers led him to believe she could not follow the law.(T276-77).

Swanson's views did not disqualify her. *Gray* again 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."481 U.S. 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 State’s most helpful juror. But, that did not make her challengeable for cause. “[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 death, regardless of the facts and circumstances.*Id.* at 657-58.

Swanson, who unequivocally supported the death penalty,(T266), ultimately stated she could impose death, although it would be difficult.(T269). That her answers were “somewhat confused” did not render her unqualified. She could consider both punishments. Bishop’s attempt to commit her to excluding death as an option failed.(T245).

Swanson’s statements that she couldn’t, as foreperson, sign a death verdict or announce it openly(T247), also do not disqualify her. This Court, in *Smith*, 32 S.W.3d at 545, stated that view “hints at an uncertainty” about one’s ability to consider both punishments and thus disqualifies one from serving. “Uncertainty” is not, however, the standard by which qualification is measured.*Witherspoon*, 391 U.S. at 520-22. Removing jurors on any basis broader than that approved in *Witherspoon* and *Witt* must result in reversal.*Id.* at 522-23, n.21. Moreover, since venirepersons are never required to be foreperson, the inability to fulfill that aspect of a foreperson’s duties also doesn’t disqualify one from service.*See Alderman v. Austin*, 663 F.2d 558, 563(5th Cir.1981).

Hesitancy, equivocation and indecisiveness are not sufficient for cause strikes. Strikes on those bases violate the defendant's state and federal constitutional rights to due process, a fair trial, an impartial jury and freedom from cruel and unusual punishment and create structural error not subject to harmless error analysis.*Gray*, 481 U.S. at 668.

Improperly granting Bishop's cause challenges "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.

A jury must find any fact that increases the maximum penalty for a crime. *Ring v. Arizona*, 536 U.S. 584(2002); *State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003). Every fact, including statutory aggravators, “the legislature requires be found before death may be imposed must be found by the jury.”*Id.* at 257. Precluding the jury from making those findings beyond a reasonable doubt requires that a death sentence be vacated, as it violates state and federal constitutional rights to due process, a fair trial, a properly-instructed jury, and freedom from cruel and unusual punishment.

Counsel objected to “MAI-Cr3d 314.40’s Method of Submitting ‘Serious Assaultive’ Aggravating Circumstances, Section 565.032.2(1), RSMo and Motion to Modify MAI-Cr3d 314.40.”(LF126-36). The State responded (LF219-20) and the court denied the defense motion.(T10).

Before penalty phase, Bishop asked that the court find Vincent's convictions for first-degree murder, armed criminal action and first-degree assault "are...serious assaultive criminal convictions for the purposes of seeking the death penalty, and them being aggravating circumstances."(T1265-66). Kraft objected, since *Whitfield* entitled Vincent to have the jury make those factual findings. The court overruled counsel's objection and found Vincent's priors serious assaultive convictions.(T1266-67). He also overruled counsel's objections to additional evidence about the Franklin case.(T1263-64).

At the hearing on Vincent's new trial motion, counsel noted she included this claim of error in the new trial motion (LF433-34), and the Notes On Use specifically required the jury make the factual findings.(T1595).

It's my understanding that the State was not aware that that had gone into effect. And I will state for the record that the defense was not aware that that had gone into effect.

We did object to the Court making a finding that the conviction was serious and assaultive. We had made that objection at trial, and argued that it should be up to the jury to make that determination. Which it sounds like that's what the Supreme Court of Missouri is now saying when it changed the notes on use regarding this instruction.

(T1596). Kraft requested the court grant a new trial or penalty phase.(T1596).

Bishop responded he did not know the Notes on Use had changed and the instructions and verdict forms “were all in the proper form, according to MAI.” (T1596).

[T]he Court did make a finding they are serious and assaultive. But that was out of the presence of the jury. They did not know that. And so it was basically a superfluous, I guess, proceeding or finding by the Court based on the change in the notes on use.

But the jury did, in fact, find that these are serious assaultive convictions. They were presented with evidence in the sense that they were—they knew what the charges were, and I read into the record, and to the jury, and admitted into evidence the prior convictions, which included the murder by shooting of Todd Franklin; the Armed Criminal Action, which also referenced the shooting, the murder of Todd Franklin; the Assault First Degree, which was the shooting and wounding of Daryl Bryant; and Armed Criminal Action, which incorporated that assaultive conduct within it; and then the shooting at Jermaine Burns, although he didn’t hit him. That would still be pretty serious and assaultive. And the Armed Criminal Action, which, of course, incorporated those essential elements of the serious assaultive crime.

And the jury did actually make a finding of a serious assaultive conviction in all six of those separate counts.

I will note that the defense objected to the State presenting any additional evidence of those convictions, except for the convictions themselves. And it was over their objection we presented additional evidence, including the photographs of the assaultive nature of Todd Franklin's murder. We did not present additional evidence in the Assault First Degree and the associated Armed Criminal Action counts. But the defense, of course, objected to us doing that.

And now they claim that that was an error, that somehow we should have, I guess, disregarded their objections and presented the evidence. And nor did they want us to present evidence that they objected to in the first place.

(T1596-98). The court denied counsel's claim.(T1599).

Bishop presented no evidence except the judgment and sentence about the first-degree assaults and armed criminal action cases—four of the six statutory aggravators. He presented photographs of Franklin's body on the remaining statutory aggravators.

The jury's penalty phase verdict listed as statutory aggravators that Vincent had been:

1. Convicted of Murder in the First Degree on April 22, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on July 3, 2002 for killing Todd Franklin.
2. Convicted of Armed Criminal Action on April 22, 2005 in Division 15

of the St. Louis County Circuit Court for events that occurred on July 3, 2002 for killing Todd Franklin.

3. Convicted of Assault in the First Degree on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting Daryl Bryant.

4. Convicted of Armed Criminal Action on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting Daryl Bryant.

5. Convicted of Assault in the First Degree on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting at Jermaine Burns.

6. Convicted of Armed Criminal Action on February 4, 2005 in Division 15 of the St. Louis County Circuit Court for events that occurred on April 4, 2002 for shooting at Jermaine Burns.

(LF391-92). Significantly, the jury never stated that these priors were “serious assaultive.”

Missouri’s Legislature has limited statutory aggravators for first-degree murder to cases where the State proves, beyond a reasonable doubt, “the offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.”§565.032.2(1)RSMo. This Court has held, to comply with Due Process and the Sixth Amendment, the jury must find beyond a

reasonable doubt all facts, like statutory aggravators, elevating the defendant's punishment. *Whitfield*, 107 S.W.3d at 257; *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584(2002). If a judge finds the death-eligibility facts, the death sentence cannot stand. The *Whitfield* Court expanded *Ring* and *Apprendi* to make all but the last step of the process death-eligibility steps. *Whitfield*, 107 S.W.3d at 257. The "weighing step" also requires a jury finding beyond a reasonable doubt.

Post-*Whitfield*, the Court decided *Shepard v. United States*, 544 U.S. 13 (2005). The Court addressed whether, under the Armed Career Criminal Act, a court could consider police reports to determine whether an earlier guilty plea meant a factual basis for finding the prior offense a "generic" burglary—a violent felony. The Court found the district court was limited to the statutory definition, charging documents, written plea agreement, plea transcript, and the trial judge's factual findings. It rejected the Government's position urging a broader evidentiary net to establish the nature of the offense. "If the trial record showed no evidence of felonious entrance to anything but a building or structure, the odds that the offense actually committed was generic burglary would be a turf accountant's dream." *Id.* at 22. To adopt the Government's position would implicate the Sixth Amendment right to a jury finding of the facts aggravating the prior conviction. *Id.* at 24; *Apprendi*, 530 U.S. at 490.

Note on Use 5, MAI-Cr3d 314.40 states, "Because of the United States Supreme Court decision in *Shepard v. United States*, ..., the facts of the 'serious

assaultive conviction’ should be submitted to the jury.” The jury must find the fact of the conviction **and** its serious assaultive nature. Bishop never presented evidence—beyond the fact of the offenses—about at least four of his six statutory aggravators. The jury’s verdict demonstrates it made no “serious assaultive” finding.

The State relied on Vincent’s prior convictions but refused to let the jury make factual findings. The jury utilized those convictions in its deliberations. This unconstitutionally skewed the balance toward death.

This Court must reverse and remand for a new penalty phase or vacate and order Vincent re-sentenced to life without probation or parole.

V. Hearsay Bolsters Weak Identification

The trial court abused its discretion in overruling Vincent's pre-trial motion and trial objections to Stacy Stevenson's testimony that he heard an unidentified man say, "Come here, bitch, where you fixin' to go. I told you and your sister to get the fuck from down here in Pine Lawn;" denying Vincent's motion for Eva Addison's school and medical records, and letting the State bootstrap an identification of Vincent as the speaker/shooter, because this denied due process, confrontation, cross-examination, 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, although no light source illuminated the scene and she was far away, Eva claimed she could recognize Vincent as the person who exited the car, said something un-discernable and shot Leslie. The State used Stevenson's description of what he overheard to bolster Eva's identification despite his inability to identify the speaker. This testimony was highly prejudicial since, unless the statement could be independently identified as Vincent's, it fell within no hearsay rule exception and it made Eva's identification more credible. Further, while the distance and lack of illumination between Eva and the events rendered Eva's identification questionable, counsel was precluded from challenging it with objective evidence about her credibility and ability accurately to observe.

Without Stacy Stevenson's testimony that he heard an unidentified man say he told a woman and her sister to leave Pine Lawn, Eva Addison's testimony that, on an unlit street, she saw Vincent kill her sister, would have been less credible, potentially resulting in an acquittal. Because of the pitch-blackness and distance between Eva and the shooting, Eva's testimony alone was insufficient to establish that Vincent killed Leslie. Only by bootstrapping the two could Bishop bolster Eva's credibility and convert Stevenson's "unknown speaker" into Vincent.

This bootstrapping did not relieve Bishop of his burden to prove the admissibility of Stevenson's testimony. Because the court also denied Vincent the opportunity to challenge Eva's ability to see, hear and recount, her testimony about what occurred in the near-blackness was virtually unchallenged. These rulings violated Vincent's state and federal constitutional rights to due process, confrontation, cross-examination, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

Stevenson, who lived on Kienlen in Pine Lawn, looked out his window on May 15, 2003, but, since "it was really dark," with no street-lights, he only could see two women arguing and then a man and woman walking onto Kienlen and thereafter north.(T1093,1098-1101). The paramedic who responded couldn't see because it was so dark.(T1104). The crime scene investigator recalled officers had to illuminate the scene with their car headlights since no streetlights were around the body, almost 76 feet from the Naylor-Kienlen corner.(T1164-66;Exh.62A,120-22).

That evening, Eva was at Maggie Jones' house on Blakemore awaiting Leslie's return from braiding hair.(T1017-18). Vincent and "BT" arrived in BT's car, a Nissan Altima.(T1019, 1021). Vincent hit Eva and stated she and her sisters were "abandoned" from Pine Lawn, indicating they should leave the area.(T1020). The men drove away.(T1021).

Leslie, their sister Jessica, and their friend Mika arrived and Jessica, Mika and Eva's nephew left after Eva recounted Vincent's conversation.(T1022-23). Vincent and BT again drove up, Vincent got out and again hit Eva.(T1023-24). Leslie said something to Vincent, who asked if she loved her dead brother and told her she would see him that night.(T1024). Vincent pulled a gun from his pants waistband, pointed and "clicked" it.(T1024). He then left.(T1026).

Leslie, crying, ran in the house, which had a working phone, and then said she was going to the Skate King to use the pay phone.(T1026,1059). Eva tried to discourage Leslie from walking but Leslie insisted.(T1027). Leslie walked down Blakemore toward Naylor and onto Kienlen.(T1027-28). Eva ran down the back alley, and saw Leslie, already on Kienlen.(T1028). Eva told Leslie that Vincent was turning from Dardanella onto Kienlen; Leslie waved Eva away, and Eva ran and hid in some bushes.(T1028-29,1032,1077). Eva was in the alley, half-way down Naylor, on a hilltop.(T1031,1077).

Peering from behind the bushes, Eva saw who she identified as Vincent and BT pull up to the stop sign at the Kienlen-Naylor corner.(T1032). Vincent jumped

out, ran to Leslie on the sidewalk, and pulled a gun.(T1033). Leslie pushed the gun away but he shot her.(T1033-34).

Eva could “hardly hear them,” but knew her sister screamed and Vincent said something.(T1034-35). Eva could hear his voice and, when asked if she recognized it, said “I recognized him.”(T1035).

Stevenson lives in a first-floor apartment on Kienlen and, about 11:45 p.m., heard two women arguing around the Naylor-Blakemore corner.(T1093). They split up, one up the hill and the other down Naylor.(T1093-94). “About halfway before she got to Kienlen,” a man said “Come here, bitch, where you fixin’ to go. I told you and your sister to get the fuck from down here in Pine Lawn.”(T1094-95). Stevenson neither saw nor identified the speaker.(T1095). The woman walked quickly, turned north on Kienlen with the man closely following her and then Stevenson lost sight of them.(T1095). He heard shots and screams.(T1095).

Counsel moved to preclude all questioning about the hearsay statements Stevenson overheard.(LF180-83;T28-32). Judge Gaertner ruled he would allow the evidence if Bishop could link it up through Eva.(T32). Counsel unsuccessfully objected to the statement.(T1094). Bishop responded, “It’s a statement of the defendant. It’s part of the murder itself.” (T1094). Counsel preserved the objection in Vincent’s new trial motion.(LF418-20).

Stevenson heard an unidentified man’s statement. Bishop inaccurately asserted the statement was Vincent’s yet he could link it to Vincent only through Eva. But, she really couldn’t hear what was said; it was very dark, and she was far

away.(T1034-35,1104,1164-66). The shooting occurred 76 feet north of the Naylor-Kienlen intersection and Eva was at least twice that distance away.(Exh.62A). Eva “recognized” Vincent, yet, given the pitch-darkness,(Exh.120-22), and distance, was her “recognition” accurate? Letting Bishop present the unidentified statement, purportedly Vincent’s, through Stevenson, impermissibly bolstered Eva’s identification.

Bishop bootstrapped Eva’s “identification” to Stevenson’s overheard-statement and inaccurately led the jury to believe there was a positive, conclusive identification. Stevenson recounted inadmissible hearsay that should have been excluded. Further, the court precluded the defense from discovering if Eva had any medical, physical or emotional disabilities impacting her ability to make an accurate identification, especially under these circumstances.(LF260-61;T14-17). These actions rendered Vincent’s guilt phase unreliable.

Trial courts have broad discretion to admit or exclude evidence.*State v. Forrest*, 183 S.W.3d 218, 223(Mo.banc2006);*State v. Madorie*, 156 S.W.3d 351, 355(Mo.banc2005). Those rulings will be reversed if the court abuses its discretion. *Forrest*, 183 S.W.3d at 223.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Revelle*, 957 S.W.2d 428, 431(Mo.App.,S.D.1997);*State v. Shurn*, 866 S.W.2d 447, 457(Mo.banc1993). Hearsay is generally inadmissible, *Id.* at 457-58, to protect the defendant’s confrontation rights.*Bear Stops v. United States*, 339 F.3d 777, 781(8thCir.2003). The defendant’s confrontation and due

process rights are satisfied if the evidence falls within a generally-accepted exception to the hearsay rule; is supported by facts otherwise supporting its trustworthiness, or the declarant testifies at trial and is subject to cross-examination.*Id.* at 782;*United States v. Owens*, 484 U.S. 554, 557(1988).⁹ This statement was hearsay. Bishop used it to establish Vincent threatened and shot Leslie.

If a declarant's identity is unknown, the statement can only be admitted if, **first**, it fits within an exception to the hearsay rule.*State v. Edwards*, 31 S.W.3d 73, 79-80(Mo.App.,W.D.2000); *State v. Moss*, 627 S.W.2d 667, 669 (Mo.App.,W.D.1982). Bishop asserted the statement wasn't hearsay because it was Vincent's.(T1094). That circular argument must be rejected.

An unknown declarant's identity can be shown by circumstantial evidence, *Edwards*, 31 S.W.3d at 80. Yet, it cannot be established by corroborating another identification that rests on an equally-shaky foundation. The State undoubtedly will argue this statement is Vincent's because it is similar to one he made earlier. While the two statements bear surface similarity, they are insufficiently similar to support that leap.

Eva testified Vincent earlier said she and her sisters were "abandoned from" Pine Lawn.(T1020). Stevenson never heard that turn of phrase, but heard

⁹ The statement is not testimonial. *Crawford v. Washington*, 541 U.S. 36(2004) is inapplicable.

the speaker say he told her and her sister to get out of Pine Lawn.(T1094-95). While Stevenson heard allusions to a prior conversation, they weren't allusions to Vincent and Leslie's earlier conversation. They could as easily have referenced conversations involving practically anyone.¹⁰ Asserting this was Vincent end-runs numerous evidentiary hurdles.

As in *Scherrfius v. Orr*, 442 S.W.2d 120, 127(Mo.App.,Spfd.D.1969), admitting this hearsay “constituted an attempt to corroborate ... and, being hearsay, its admission may not conceivably be justified on any theory of discretion... [it] constituted an attempt to bolster, corroborate, ... and, since it was based upon the credibility of (an unknown) witness not present and concerned a most vital matter, it was prejudicial.” Since the shooter's identity was the critical issue facing the jury, Bishop should not have been allowed to bolster Eva's identification of Vincent by ascribing to Vincent the statements of someone Stevenson neither identified nor described. Just saying Vincent was the speaker doesn't make it so.

Although Judge Gaertner let Bishop bolster Eva's identification with Stevenson's testimony, he denied Vincent a correlative opportunity to discount it. Vincent requested disclosure of Eva's school and medical records, to discover whether Eva had any mental, physical or emotional disability impacting her ability

¹⁰ Eva's description of Leslie's statement similarly fails to establish any link to Vincent, since Leslie never referred to him by name or nickname.

to observe and recount.(LF260-61). With no factual basis, Judge Gaertner said he didn't believe they contained any impeachment evidence.(T14-16). While not allowing counsel access to the records or reviewing them *in camera* to determine their relevance, he asked counsel if she believed the records contained *Brady* or exculpatory evidence.(T17). Counsel responded, "We're unaware of anything specific."(T17).

The court abused its discretion, *State v. Davis*, 186 S.W.3d 367, 371 (Mo.App.,W.D.2005), in denying the records request and in not reviewing them *in camera*.¹¹ Although a patient's medical and psychiatric records are privileged, *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 62(Mo.banc1999), that privilege is not absolute. Privileges protect confidentiality but are not expansively construed because they stymie the search for truth.*United States v. Nixon*, 418 U.S. 683, 709-10(1974). A criminal defendant's rights to production of evidence, confrontation, compulsory process and due process, mandate that "the courts [] vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced...."*Id.* at 711-12. Thus, when privilege is asserted based only on a generalized interest in confidentiality, "it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."*Id.* at 713. To protect against public disclosure of privileged

¹¹ Counsel did not request *in camera* review. If this Court deems this issue incompletely preserved, Vincent requests plain error review.*Rule 30.20.*

information, the trial court must review the material *in camera* to determine its relevance and materiality.*Id.* at 714;*State v. Newton*, 925 S.W.2d 468, 471 (Mo.App.,E.D.1996).

Judge Gaertner failed to protect Vincent's rights. He assumed the records contained nothing relevant, accepting Bishop's assertion that the request was a "fishing expedition."(T15). Vincent raised more than a possibility that Eva had a disability affecting her ability to observe and accurately recount events, since she received social security checks and in high school was in learning-disabled classes.(T2-4). The court should have reviewed the records *in camera*.

Because of the admission of the hearsay statements through Stacy Stevenson and Judge Gaertner's failure to either disclose Eva's records or review them *in camera*, this Court should reverse and remand for a new trial.

VI. Voir Dire Limited

The trial court abused his discretion in sustaining the State's objection and prohibiting the defense's proposed voir dire about veniremembers' beliefs about the costs of death versus life without parole sentences because that denied Vincent due process, a fair trial, a fair, impartial jury, effective assistance of counsel, 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, although Vincent's jurors may have believed incorrectly that life incarceration is more expensive than execution, which belief may have informed their sentencing decision, defense counsel was prohibited from discovering those beliefs to exercise challenges and Vincent may have been sentenced to death based on mistaken, false beliefs.

The trial court abused its discretion in sustaining the State's objection to the defense's proposed voir dire about the relative costs of the death penalty and life without parole. This precluded the defense from discovering whether venirepersons held views substantially impairing their ability to abide by their oath and follow the court's instructions. *Wainwright v. Witt*, 469 U.S. 412, 424(1985). Vincent therefore could not intelligently exercise his cause and peremptory strikes. Because voir dire was inadequate, Vincent's death sentence likely violated the Eighth and Fourteenth Amendments.

Criminal defendants are entitled to a fair and impartial jury.
U.S.Const.,Amends.VI,XIV;Mo.Const.,Art.I,§18(a);State v. Clark, 981 S.W.2d

143, 146(Mo.banc1998);*Morgan v. Illinois*, 504 U.S. 719, 726-27(1992). While voir dire is generally within the trial court's discretion, *Id.*; *Clark*, 981 S.W.2d at 146, "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan*, 504 U.S. at 719.

To fulfill the constitutional demand for fairness, "a liberal attitude is allowed in the examination of jurors." *Clark*, 981 S.W.2d at 146; *State v. Granberry*, 484 S.W.2d 295, 299(Mo.banc1972). Thus, parties can develop facts for cause and peremptory challenges. *Id.* at 299. A process that prevents developing those facts is unconstitutional since the right to challenge veniremembers is "one of the most important rights secured to the accused," and "[a]ny system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned." *Pointer v. United States*, 151 U.S. 396, 408(1894).

During voir dire, counsel approached the bench and indicated that she wanted to question jurors about their beliefs concerning the relative costs of the death penalty and life without parole sentences.(T535). Bishop objected and Judge Gaertner adhered to his pre-trial ruling prohibiting such voir dire.(T535-37). Judge Gaertner ruled that this Court's ruling in *State v. Ferguson*, 20 S.W.3d 485, 506(Mo.banc2000) prohibited that inquiry.(T537). Judge Gaertner allowed counsel's objection to be continuing.(T537). Counsel included this claim in the new trial motion.(LF439-40).

Trial courts do not abuse their discretion in disallowing voir dire about the relative costs of death and life without parole. *Ferguson*, 20 S.W.3d at 506; *State v. Armentrout*, 8 S.W.3d 99, 109-10 (Mo. banc 1999); *State v. Clay*, 975 S.W.2d 121, 142 (Mo. banc 1998). It is “irrelevant to any issue submitted to the jury,” because it “does not reflect the properly considered circumstances of the crime or character of the individual.” *Armentrout*, 8 S.W.3d at 109-10.

Vincent respectfully disagrees and requests reconsideration. Vincent notes that, although the parties’ race may not be designated “circumstances of the crime or character of the individual,” not uncovering jurors’ racial prejudices, which might cause them to issue a death sentence, would violate due process and the Sixth and Eighth Amendments. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *United States v. Love*, 219 F.3d 721, 723-26 (8th Cir. 2000). Similarly, a juror’s belief that life imprisonment is more expensive than death, and his death verdict based on that belief, must be discovered. If a defendant is sentenced to death because the jurors believe that life imprisonment costs too much, his sentence is arbitrarily imposed.

Judge Gaertner recognized the diverse views about costs of penalties. (T536). Death penalty supporters often ask:

“Why should my tax dollars be spent taking care of inmates for the rest of their lives when it would be much cheaper to execute them?” This question presumes the falsehood that, in the long run, fewer tax dollars are spent

when prosecutors pursue the death penalty than when they pursue life imprisonment.

Justin Brooks & Jeanne Erickson, “The Dire Wolf Collects His Due While The Boys Sit By the Fire: Why Michigan Cannot Afford to Buy into the Death Penalty,” 13 T.M.Cooley L.Rev. 877, 878(1996).¹²

A defendant’s right to an impartial jury is “meaningless without the opportunity to prove bias.” *Clark*, 981 S.W.2d at 147; *Dennis v. United States*, 339 U.S. 162, 171-72(1950). The trial court’s “sweeping ruling,” preventing counsel from probing the issue, eviscerated Vincent’s right to a fair and impartial jury. This Court must reverse and remand for a new trial.

¹² North Carolina demonstrates the higher costs of seeking death. “When the total picture is taken into consideration, ... the extra cost of a capital case over a non-capital case that resulted in a twenty-year life sentence was more than \$216 thousand per death penalty imposed. Furthermore, the study found that if ten percent of those sentenced to death were actually executed, the total cost per execution would exceed \$2.16 million. If the execution rate went up to twenty percent, the cost per execution would be \$1.08 million, and even if an unprecedented thirty percent of all prisoners sentenced to death were executed, the cost would still exceed \$800,000 per execution.” *Id.* at 884-85.

VII. Caldwell Violation

The trial court abused its discretion in denying Vincent’s cause strike of Juror Isaac Sandifer, denying Vincent’s Motion in limine, letting the jury hear that Vincent was already on death row in the Todd Franklin case, or, alternatively, refusing Vincent’s request for separate guilt and penalty-phase juries because that denied Vincent due process, a fair trial, a fair, impartial jury, 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 Vincent moved pre-trial to preclude admitting evidence that Vincent was on death row from the Todd Franklin case because it would lessen the jury’s sense of responsibility, and counsel was compelled to voir dire on the impact that evidence would have on jurors. Once apprised of Vincent’s prior death sentence, Sandifer asked “what’s the point?” of this prosecution, demonstrating his lessened sense of responsibility. Had the Court granted Vincent’s motion for separate juries, the prejudice from this evidence would have been limited to penalty phase.

The Eighth Amendment’s “heightened need for reliability in the determination that death is the appropriate punishment in a specific case,” *Woodson v. North Carolina*, 428 U.S. 280, 305(1976)(plurality), requires that capital sentencing juries not be led to believe the responsibility for determining the appropriateness of the sentence rests elsewhere. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29(1985). Letting Bishop introduce evidence of Vincent’s death

sentence in the Franklin case; forcing counsel to voir dire about that death sentence; overruling Vincent's cause challenge of Juror Isaac Sandifer, and disallowing separate guilt and penalty phase juries violated Vincent's state and federal constitutional rights to due process, a fair trial, a fair, impartial jury, reliable sentencing and freedom from cruel and unusual punishment.

Pre-trial, the defense filed a *Motion in limine to Prevent Disclosure to the Jury that Defendant is Already Under a Sentence of Death*.(LF190-93). Counsel suggested the State could present evidence of the prior conviction, establishing a statutory aggravator, without informing the jury of the prior death sentence.*Id.* Counsel argued that, if the jurors heard about McFadden's death sentence, it would minimize the importance of their decision in this case.(LF191-92).

Pre-trial, Bishop stated that he intended to move to admit evidence of Vincent's conviction and death sentence in the Franklin case in penalty phase.(T38). Bishop moved to restrict defense voir dire on the subject, stating it was improper to voir dire on a specific aggravator.(T38). Kraft responded the case was on appeal, the fact of the sentence was problematic, the sentence was irrelevant and its admission violated *Caldwell*.(T40-41). If Bishop were allowed to present evidence of Vincent's sentence, she would have to voir dire about it.(T41). The court proposed the jury be told the conviction and sentence in the Franklin case were being appealed; Kraft again objected, noting that would also violate *Caldwell*.(T45-46). Kraft objected to all mention of the other sentence.(T46).

She also moved for *Separate Juries for Guilt and Penalty Phase*.(LF112-17). She acknowledged usually bifurcated trials with the same jury don't present error of constitutional proportions but here, two juries were required. The defense was being placed

in the untenable position of choosing to voir dire on a prior homicide before guilt phase evidence, thus seriously prejudicing the prospective jurors, or not questioning potential jurors about a prior homicide when that may cause some jurors who would otherwise give fair consideration to both punishments to become unable to consider a sentence other than death. (LF114). Counsel unsuccessfully renewed the motion pre-trial.(T8-9,60).

As voir dire began, Kraft renewed her objection to evidence of Vincent's other death sentence.(T83)¹³. The court proposed telling the jury the case was on appeal and Kraft again objected to the *Caldwell* violation.(T84).¹⁴ The court denied Kraft's continuing objection and Kraft noted the court's ruling forced her voir dire.(T85-86). "Judge, we feel we have no choice."(T87).

Turlington told the second panel, "So in plain English, he is currently on death row for an unrelated murder."(T262). Turlington asked whether, given that

¹³ This Court subsequently vacated that death sentence.*McFadden I*. Kraft suggested the problem could be resolved if Bishop presented only evidence of the conviction, not the sentence. Bishop implicitly rejected that solution.(T38-46).

¹⁴ The court's solution would have re-created the error from *Caldwell*.

sentence, they could “still give realistic consideration to a sentence of life without probation or parole in this case?”(T262). Turlington asked, “Mr. Sandifer, my question to you is, would you feel like your verdict in this case didn’t really matter because he’s already on death row for another homicide?”(T264). Sandifer responded, “I would have to be honest with you and say yes.”(T264). Bishop thereafter questioned Sandifer, who claimed he could seriously consider both punishments and, “just because some other jury may have said one sentence doesn’t mean you are to go with it.”(T273).

Turlington moved to strike Sandifer for cause because of his diminished sense of responsibility.(T279). Bishop objected and the court denied the strike, but allowed further questioning.(T280). Sandifer stated Vincent’s prior death sentence wouldn’t cause him automatically to sentence Vincent one way or another.(T281). Kraft asked “after all of our discussion, do you still feel like your verdict wouldn’t matter in this case?” Sandifer replied that

Sandifer: I don’t understand what the verdict of this trial would even accomplish. I’m just being honest. That’s why I—

Court: That’s the problem you have?

Sandifer: Yes, sir.

(T282-83). The court found that Sandifer would have no problems following the instructions and denied the cause strike.(T285-86). Sandifer served on Vincent’s jury.(LF328).

It is “constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Caldwell*, 472 U.S. at 330. Since death is qualitatively more severe than any other punishment, thus requiring more scrutiny, the limits on the process “are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.” *Id.* at 329; *Eddings v. Oklahoma*, 455 U.S. 104(1982). The Eighth Amendment requires “jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision....” *Caldwell*, 472 U.S. at 329; *McGautha v. California*, 402 U.S. 183, 208(1971).

The *Caldwell* Court addressed whether a sentencing jury’s sense of responsibility is lessened by the knowledge that, if they imposed death, the appellate court would review it for correctness. The Court found that occurred, noting several factors. First, since appellate courts review “with a presumption of correctness” and do not consider mercy, the right to a fair determination of sentence would disappear if left to a court. *Caldwell*, 472 U.S. at 330-31. Second, if a jury believes its sentence can be rectified on appeal, it may impose death to “send a message,” despite having never found death was the appropriate sentence. *Id.* at 331-32. Third, since the jury may believe a life sentence cannot be increased on appeal, it may impose death—trying to delegate the responsibility of imposing the “correct” sentence to the appellate court. *Id.* at 332. Finally, since the

jury is asked to make a “very difficult and uncomfortable choice,” telling them appellate judges will review their decision “presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.”*Id.* at 333. “[T]he chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great.”*Id.*

Similar risks exist when jurors are told the defendant is already on death row. This knowledge may lead them to believe their decision makes no difference and they need not exercise the constitutionally-mandated level of care and scrutiny. Since they know he already has a death sentence, they may believe “what’s one more?” and a bias “toward returning a death sentence” is created. *Id.*; *Mitchell v. State*, 136 P.3d 671, 707-08(Okla.Crim.App.,2006).

That risk became more than just speculation. Sandifer, despite saying he could follow the instructions, vocalized the prejudice arising from his knowledge. Even as he stated he could follow the instructions, he reiterated he didn’t understand “what the verdict of this trial would even accomplish.”(T283). His “honesty” throughout voir dire about his belief this jury’s verdict didn’t matter, demonstrates the risk of a death sentence not based upon the jury’s reasoned decision is too great. Their knowledge of the prior death sentence likely affected their sentencing decision.*Caldwell*, 472 U.S. at 341. This death sentence is “fundamentally incompatible with the Eighth Amendment’s heightened ‘need for reliability in the determination that death is the appropriate punishment in a specific case.’”*Id.* at 340;*Woodson*, 428 U.S. at 305.

While Judge Gaertner granted the State's cause challenges of Venirepersons Swanson and Vinson (T276-77,762) despite their responses not indicating an inability to follow the instructions, Point II, he denied Vincent's cause challenge of Sandifer, who questioned the "point" of the entire proceeding. (T282-83). Cause challenges may be sustained if it appears the venireperson cannot consider the entire range of punishment, apply the proper burden of proof or follow the court's instructions.*State v. Smith*, 32 S.W.3d 532, 541 (Mo.banc2000);*State v. Rousan*, 961 S.W.2d 831, 839(Mo.banc1998). These rulings are not disturbed on appeal unless clearly against the evidence and an abuse of discretion.*State v. Kreutzer*, 928 S.W.2d 854, 866(Mo.banc1996).

The State cannot have it both ways. "Fair play and common sense dictate[] that what is sauce for the goose is sauce for the gander."*Sharp v. State*, 221 So.2d 217, 219(Fla.App.1969);*State v. Rodgers*, 3 S.W.3d 818, 820-21 (Mo.App.,W.D.1999). Veniremembers either should be readily excused, in an abundance of caution, when their ability to apply the law or set aside other information is questioned by either party, or cause strikes should not be granted except under the most extreme of circumstances. Instead, the State received the benefit both ways.

The State's decision to present evidence about Vincent's other death sentence affected the jury's penalty and guilt phase decisions and resulted in the removal of veniremembers Moffat(T198-202,218-21), Hannah(T340,349), Trout (T344,348), Lastarria(T320,349), Rachel(T322,349), O'Keefe(T473,484), Kostedt

(T525,538), Diederich(T639,646), Baese(T690,707-08) and Miller(T701,708), who otherwise could have sat on guilt had they not known of Vincent's prior sentence. Had the court granted Vincent's motion for separate guilt and penalty phase juries, this could have been avoided. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.18(1968).

This Court must reverse and remand for a new trial. In the alternative, if this Court finds no error in the refusal to proceed with two juries, it should, at least, grant a new penalty phase.

VIII. Evolving Standards of Decency

The trial court erred and abused its discretion in denying Vincent’s mistrial motion, not quashing the entire jury panel and precluding the State from seeking death and this Court, exercising its independent proportionality review, §565.035.2(3) RSMo, should find Vincent’s death sentence unconstitutionally excessive, because it violates due process, a fair trial, a properly-selected jury, reliable sentencing, freedom from cruel and unusual punishment and the jurors’ right to serve, irrespective of their religious beliefs, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§5,10,18(a),21, in that over 50% of the entire panel was struck for cause because they couldn’t consider the death penalty. Evolving standards of decency in St. Louis County, manifested in the views of the majority of those called, mandate setting aside Vincent’s death sentence.

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, *Furman v. Georgia*, 408 U.S. 238, 239(1972), provides “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” This “flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”” *Roper v. Simmons*, 543 U.S. 551, 560(2005); *Atkins v. Virginia*, 536 U.S. 304, 311(2002); *Weems v. United States*, 217 U.S. 349, 367(1910).

How a society judges the appropriateness of a sentence is not static but changes, developing through time. That over 50% of those called for jury duty

here couldn't assure the court they could consider death reveals that, in St. Louis County, it constitutes cruel and unusual punishment. The trial court should have taken steps to ensure Vincent would not be subjected to death. This Court must reduce his sentence, through proportionality review, pursuant to its independent duty, under §565.035RSMo, to life without parole. Failures to so act violate Vincent's state and federal constitutional rights to due process, a fair trial, a properly-selected jury, reliable sentencing and freedom from cruel and unusual punishment and the jurors' rights to serve, regardless of religious beliefs.

Of the first group of 12 venirepersons, after death-qualification, nine were struck for cause, eight on the State's motion.(T210-23). Of the second group of 12, nine were struck for cause, six on the State's motion.(T274-86). Of the third group of 12, five were struck for cause.(T347-50). Of the fourth group of 12, ten were struck for cause, seven on the State's motion.(T419-24). Of the fifth group, seven were struck for cause, five on the State's motion.(T482-84). Of the sixth group of 12, three were struck for cause, two on the State's motion.(T538-43). Of the seventh group of 12, eight were struck for cause, seven on the State's motion.(T584-87). Of the eighth group, eight were struck for cause, five on the State's motion.(T645-49). Of the ninth group of 12, eleven were struck for cause, six on the State's motion.(T705-08). The trial court noted only 35% survived death-qualification.(T706). Of the tenth group of 12, ten were struck for cause, six on the State's motion.(T759-62).

After the court ruled the motions to strike members of the tenth group, defense counsel moved for a mistrial.(T765). Counsel argued, since over 50% of panelists were removed because they couldn't consider death, evolving standards of decency required either a mistrial be declared or the court preclude the State from seeking death.(T765-66). The court denied counsel's motions.(T766).

The ban on cruel and unusual punishments is not static but changes over time. *Roper v. Simmons*, 543 U.S. 551,560-61(2005). It is proper and necessary to refer to “‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.” *Id.*; *Trop v. Dulles*, 356 U.S. 86,100-01(1958)(plurality).

Addressing whether executing juvenile offenders violated the Eighth Amendment, the Court looked to the world community's practices, *Simmons*, 543 U.S. at 561, and other “objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions....”*Id.* at 562. The inquiry did not end there, as “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”*Id.* at 563. The beginning was the “objective indicia of consensus,” while the end was the court's exercise of independent judgment.*Id.* at 564.

The national consensus against the juvenile death penalty was reflected by the decisions of various state legislatures to abolish it; the rate of abolition, and the consistency of the change's direction.*Id.* at 564-67. The *Simmons* Court also

noted the “stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”*Id.* at 575; *see also*, Art.5,Universal Declaration of Human Rights;Art.6,§1,International Covenant on Civil and Political Rights; Dorean Koenig, “A Death Penalty Primer: “Reviewing International Human Rights,”4 ILSA J.Int’l & Comp.L 513, 523, n.58(1998), *citing* “Council of Europe Demands Worldwide Ban on Death Penalty,”Agence-France Presse, (10/11/97). The experience of the United Kingdom, which has abolished the death penalty, “bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”*Simmons*, 543 U.S. at 577.

Judge Gaertner recognized as few as 35% of veniremembers survived death qualification.(T706). Even adjusting that number to include only those Bishop struck because of their views about the death penalty, 50% could not sit. The views of these St. Louis County residents otherwise qualified to serve demonstrates evolving standards of decency within St. Louis County reject applying the death penalty.

Over 50% of veniremembers called for service in this case could not impose the death penalty. A death sentence imposed, given that the people of St. Louis County have, in such numbers rejected its imposition, would be arbitrary and capricious. This Court therefore should, under §565.035, reduce Vincent’s death sentence to life without probation or parole.

IX. Improper Arguments

The trial court erred and plainly erred in overruling Vincent's objections and requests for a mistrial, and not granting a mistrial *sua sponte* based on the State's arguments in:

Voir Dire

1. "We have an interest in this case, too, as does the victim's family."(T773);
2. "And if I had to prove everything beyond a reasonable doubt, the trial would never end."(T775-77);

Guilt Phase

3. "In this case, all the evidence points to the defendant's guilt. There's a term we use called uncontroverted. There's no evidence to the contrary. All of the evidence you heard was that he did it. You heard no evidence of"(T1215-16);
4. "Don't forget about Leslie. This isn't just about him, about Vincent McFadden (indicating). Don't forget about her. Don't forget about her. When you go back there, you don't forget that this was a young woman with a future. You don't forget that she's eighteen years old, in the prime of her life. She had family that loved her." "She was eighteen years old. Eighteen years old. A defenseless girl."(T1248);

Penalty Phase

5. “There are other convictions that you should consider in determining what to do with him. His whole criminal history are non-statutory aggravating circumstances. I didn’t have to prove them to get you past this stage. But you’ve got a more complete picture of his entire criminal history.”(T1543-44);

6. “This man was terrorizing the whole neighborhood.”(T1545);

7. “And don’t forget about how he fled, how after he killed Todd he fled the State. After he killed Leslie he fled the County.”(T1545);

8. “First one, you see he’s climbing the ladder of crime. The 6100 block of Greer. He didn’t kill them. He killed Todd Franklin. Then he knows—with Leslie Addison, he kills her at that particular time to avoid the witnesses. Do you remember he knew he was on the run in California. He knew he was wanted for the murder. He knows you don’t leave witnesses... He didn’t realize Eva was there.”(T1546-47);

9. “And if you want to talk about mothers, let’s talk about a mother’s worst nightmare. A mother’s worst nightmare is a picture of your child with a State’s Exhibit sticker on it. And we’ve got two of them. Two of them (indicating). Picture your own child with a State’s Exhibit sticker on it. That’s a mother’s worst nightmare.”(T1551);

10. “The death penalty is only appropriate for the worst of the worst. The worst of the worst. He is the worst of the worst.”(T1563-64);

11. **“He does bad things. He does evil things. He hurts people. And he enjoys it. He enjoys it.”(T1564);**

12. **“He took from her parents any grandchildren that she might have. There’s going to be no wedding for Leslie, no marriage, no children, no grandchildren, no life.”(T1565);**

13. **“You know, and what a cruel question to ask his father. Do you think you’re a good father, do you think you did a good job as a father... To ask him that. What father wouldn’t think, boy, think how bad a job he did. What a cruel question to ask him.”(T1566)**

because they denied 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 Bishop defined reasonable doubt; misstated the facts and law; commented on Vincent’s failure to testify; injected emotion into guilt phase; personalized to himself and the jury; attacked defense counsel; speculated, and injected facts outside the record, rendering the verdicts unreliable.

This Court condemns prosecutorial argument that renders juries’ verdicts unreliable.*State v. Storey*, 901 S.W.2d 886 (Mo.banc1995); *State v. Rhodes*, 988 S.W.2d 521(Mo.banc1999). An accused is entitled to a fair trial and prosecutors must do nothing to deny it or obtain a wrongful conviction.*State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27(banc1947); *Berger v. United States*, 295 U.S. 78, 88(1935);*Rule 4.3.8*. Bishop ignored this Court’s repeated admonitions.

Prosecutorial misconduct in argument is unconstitutional when it “so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637(1974). Argument may be so outrageous it violates due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337(8th Cir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364(8th Cir.1995). Bishop’s repeated, intentional misconduct violated Vincent’s state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. Judge Gaertner erred and plainly erred, *Rule 30.20*, in overruling counsel’s objections and mistrial requests, and not *sua sponte* declaring a mistrial. Although counsel did not object to all of the improper arguments, a manifest injustice or a miscarriage of justice will occur if Bishop’s misconduct is left uncorrected. *Rhodes*, 988 S.W.2d at 526-27.

Voir Dire

Voir dire is intended to expose juror bias so parties can intelligently exercise cause and peremptory challenges and thus select a fair, impartial jury. *State v. Clark*, 981 S.W.2d 143, 146(Mo.banc1998); *Morgan v. Illinois*, 504 U.S. 719, 729(1992). Questions calculated to create prejudice are impermissible. *State v. Lacy*, 851 S.W.2d 623, 629(Mo.App.,E.D.1993).

Bishop injected the desires and wishes of the State and Leslie’s family. “And the State of Missouri ... have an interest in this case, too, as does the victim’s family.”(T773). This comment converted Bishop into an unsworn witness, encouraging the jury to weigh his position more heavily because he is a

State official.*Storey*, 901 S.W.2d at 901;*Berger*, 295 U.S. at 88. By referencing the family’s “interest,” Bishop encouraged a decision based on emotion, not the facts and law.*Storey*, 901 S.W.2d at 901;*Gardner v. Florida*, 430 U.S. 349, 358(1977).

Bishop defined and re-defined reasonable doubt, confusing and misleading the jury.*State v. Williams*, 659 S.W.2d 778, 781(Mo.banc1983);*State v. Massey*, 817 S.W.2d 624, 626(Mo.App.,E.D.1991). He encouraged they disregard the inconsistent evidence. He said, over objection, “Does anybody think that before you can consider finding someone guilty of Murder in the First Degree, you want everything that comes up in the case proved beyond a reasonable doubt? ... And if I had to prove everything beyond a reasonable doubt, the trial would never end.” (T775-76). Even after the court said “I think you’ve made your point. Just wrap it up real quick,”(T776), Bishop continued, “is there anyone that thinks that I should have to prove beyond any possible doubt that the defendant is guilty before you can consider finding him guilty of Murder in the First Degree?”(T776). Bishop’s repeated definitions and analogies confused the jury, so they would misapply the law and ignore the instructions.

Guilt Phase

Over objection and Vincent’s request for a mistrial, Bishop argued, “In this case, all the evidence points to the defendant’s guilt. There’s a term we use called uncontroverted. There’s no evidence to the contrary. All of the evidence you heard was that he did it. You heard no evidence of ...”(T1215-16). This

indirectly commented on Vincent's failure to testify.*State v. Redman*, 916 S.W.2d 787, 792(Mo.banc1996);*State v. Parkus*, 753 S.W.2d 881, 885(Mo.banc1988); see *Griffin v. California*, 380 U.S. 609, 615(1965). It drew the jury's attention to Vincent's failure to testify, highlighting that only Vincent could have contested Bishop's version of events.*Redman*, 916 S.W.2d at 792; *State v. Lawhorn*, 762 S.W.2d 820, 826(Mo.banc1988). It also shifted the burden of proof to Vincent, improperly suggesting that the State didn't have that burden.*In re Winship*, 397 U.S. 358(1970). Especially since Bishop's evidence of guilt was so weak, this argument likely had a decisive effect on the jury.

In final closing, Bishop argued, over objection, "Don't forget about Leslie. This isn't just about him, about Vincent McFadden (indicating). Don't forget about her. Don't forget about her. When you go back there, you don't forget that this was a young woman with a future. You don't forget that she's eighteen years old, in the prime of her life. She had family that loved her." "She was eighteen years old. Eighteen years old. A defenseless girl."(T1248). Bishop encouraged the jury to decide guilt based on emotion, not the evidence. He injected irrelevant considerations and undermined Vincent's fair trial.*State v. Debler*, 856 S.W.2d 641, 656 (Mo.banc1993);*Clark v. Comm.*, 833 S.W.2d 793, 796-97(Ky.1991); *Price v. State*, 725 So.2d 1003(Ala.Crim.App.1997);*State v. Hartman*, 754 N.E.2d 1150, 1172 (Ohio2001);see *Payne v. Tennessee*, 501 U.S. 808(1991).

Penalty Phase

Capital closing arguments undergo a “greater degree of scrutiny.” *Caldwell v. Mississippi*, 472 U.S. 320, 329(1985); *California v. Ramos*, 463 U.S. 992, 998-99(1983). Bishop nonetheless encouraged an unreliable verdict.

If the State misstates the law, it risks misleading the jury. *State v. Jones*, 615 S.W.2d 416(Mo.1981); *Tucker v. Kemp*, 762 F.2d 1496, 1507(11th Cir.1985); *State v. Storey*, 901 S.W.2d at 902. Bishop misstated the law, arguing that, along with the statutory aggravators, “There are other convictions that you should consider in determining what to do with him. His whole criminal history are non-statutory aggravating circumstances. I didn’t have to prove them to get you past this stage. But you’ve got a more complete picture of his entire criminal history.”(T1543-44). He encouraged the jury to believe he had no burden of proving the non-statutory aggravators Instruction 19 (LF371) instructed them to weigh against mitigators. This is contrary to established law, §565.030.4(3); *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc2003), since, unless the jury finds the State has met its burden in this weighing step, a defendant is death-ineligible.

Bishop also misstated the facts and argued outside the record. *Tucker v. Kemp*, 762 F.2d at 1507; *Drake v. Kemp*, 762 F.2d 1449, 1458-59(11th Cir. 1985)(en banc); *Storey*, 901 S.W.2d at 900-01. He argued, “this man was terrorizing the whole neighborhood,”(T1545), and “don’t forget about how he fled, how after he killed Todd, he fled the State. After he killed Leslie he fled the County.”(T1545). By stating Vincent was “terrorizing” the community, Bishop implied Vincent’s actions far-exceeded those for which he was on trial. He

encouraged the jury to sentence Vincent for other actions as well. Further, although Vincent was arrested in St. Charles and he accompanied his stepsister to California in 2002, (T1122,1126-27,1482-83), there was no evidence of “flight” nor a trip to California after Franklin’s death. To “flee” implies Vincent visited California to escape the jurisdiction. The evidence simply does not support that stretch.

Bishop also speculated about other crimes Vincent **could have committed or could still commit** and encouraged the jury to sentence him to death for what he might have done.*State v. Burnfin*, 771 S.W.2d 908, 911-12(Mo.App.,W.D. 1989);*State v. Cuckovich*, 485 S.W.2d 16(Mo.banc1972);*Storey*, 901 S.W.2d at 900-01. “First one, you see he’s climbing the ladder of crime. The 6100 block of Greer. He didn’t kill them. He killed Todd Franklin. Then he knows—with Leslie Addison, he kills her at that particular time to avoid the witnesses. Do you remember he knew he was on the run in California. He knew he was wanted for the murder. He knows you don’t leave witnesses...He didn’t realize Eva was there.”(T1546-47). With no evidence in support, he argued Vincent **would have** killed Eva and they therefore should sentence him to death. Since Bishop never established when Vincent traveled to California, to argue he ran to evade justice rests neither upon fact nor legitimately-drawn inference.

Most egregiously, Bishop ignored this Court’s repeated mandate and argued, “And if you want to talk about mothers, let’s talk about a mother’s worst nightmare. A mother’s worst nightmare is a picture of your child with a State’s

Exhibit sticker on it. And we've got two of them. Two of them (indicating).

Picture your own child with a State's Exhibit sticker on it. That's a mother's worst nightmare."(T1551)(emphasized). This Court warned in *Storey*, 901 S.W.2d at 901 and *Rhodes*, 988 S.W.2d at 528, that argument personalizing to the jury is "grossly improper." Its prejudice "is undeniable. Inflammatory arguments that inflame and arouse fear in the jury are especially prejudicial when the death penalty is at issue.*State v. Tiedt*, 206 S.W.2d 524, 529(Mo.banc1947). 'It 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, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977)." *Storey*, 901 S.W.2d at 901.

Bishop's outrageous argument, "The death penalty is only appropriate for the worst of the worst. The worst of the worst. He is the worst of the worst,"(T1563-64), is like that condemned in *Storey*, in which the prosecutor, by comparing that case to others, argued facts outside the record. "Assertions of facts not proven amount to unsworn testimony by the prosecutor...A prosecutor arguing facts outside the record is highly prejudicial. A prosecutor's assertions of personal knowledge...are 'apt to carry much weight against the accused when they should carry none' because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Storey*, 901 S.W.2d at 900-01; *see also, Newlon*, 885 F.2d at 1337.

Bishop also speculated, with no supporting evidence, “He does bad things. He does evil things. He hurts people. **And he enjoys it. He enjoys it.**” (T1564)(emphasized).*Burnfin*, 771 S.W.2d at 912;*State v. Cuckovich, supra*. He speculated about harm Vincent’s actions *might have caused*. He argued, “He took from her parents any grandchildren that she might have. There’s going to be no wedding for Leslie, no marriage, no children, no grandchildren, no life.”(T1565). While the jury may consider how a defendant’s actions affect a victim’s family, *Payne v. Tennessee*, 501 U.S. 808(1991), it may not consider and base a death sentence upon harm that *might* occur. Especially since victim impact evidence is among that which the jury may consider in the weighing step, it must reach a level of proof beyond a reasonable doubt before it can be weighed. *Whitfield, supra*.

Bishop denigrated defense counsel. “You know, and what a cruel question to ask his father. Do you think you’re a good father, do you think you did a good job as a father...To ask him that. What father wouldn’t think, boy, think how bad a job he did. What a cruel question to ask him.”(T1566). Bishop argued defense counsel acted improperly elicited mitigation evidence from Vincent’s father.*State v. Hornbeck*, 702 S.W.2d 90, 93(Mo.App.,E.D.1985). It may have encouraged the jury to disregard Vincent’s mitigation evidence.

Bishop’s repeated misconduct rendered the jury’s verdicts unreliable. This Court must reverse and remand for a new trial.

X. Taped Phone Conversation—Hearsay and Other Bad Acts

The trial court erred and abused its discretion in overruling Vincent’s objections to Exhibits 148 and 148A, [Exhibits 148D-E], a taped phone conversation between Eva Addison and “Slim” Dickens, because this denied confrontation and cross-examination, trial only for charged offenses, 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),19,21, in that Slim never testified, wasn’t available for cross-examination and referred to Vincent’s “dope case” and “Al” dropping charges in another case, implying Vincent obtained that result through threats and coercion. Both references were evidence of other crimes and since Vincent was on trial for witness tampering, the reference to Al was highly prejudicial, letting the jury decide, “he did it before, he probably did it again.”

The State charged Vincent with witness tampering, alleging, in a three-way phone conversation through “Slim” Dickens, Vincent threatened Eva Addison so she would not testify that Vincent shot Eva’s sister Leslie.(LF280-81). Bishop did not call Slim but, over objection, played the tape, alleging Vincent got Slim to make the call. Slim referred to “Al,” who “just [went] to court and sa[id] it wasn’t him.”(Exh.148E-10). The speakers also referred to Vincent’s “dope case,” and speculated about his potential sentence.(Exh.148E-19). This evidence violated Vincent’s state and federal constitutional rights to due process, confrontation,

cross-examination, trial only for the charged offenses, reliable sentencing, a fair trial and freedom from cruel and unusual punishment.

Trial courts have broad discretion to admit or exclude evidence. *State v. Forrest*, 183 S.W.3d 218, 223(Mo.banc2006);*State v. Madorie*, 156 S.W.3d 351, 355(Mo.banc2005). Those rulings will be reversed for an abuse of discretion. *Forrest*, 183 S.W.3d at 223.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Revelle*, 957 S.W.2d 428, 431(Mo.App.,S.D.1997);*State v. Shurn*, 866 S.W.2d 447, 457(Mo.banc1993). Hearsay is generally inadmissible, *Id.* at 457-58, to protect the defendant's right to confront and cross-examine witnesses.*Bear Stops v. United States*, 339 F.3d 777, 781(8thCir.2003). A defendant's constitutional rights to confrontation and due process are satisfied if the declarant testifies at trial and is subject to cross-examination.*Id.* at 782;*United States v. Owens*, 484 U.S. 554, 557(1988).

Criminal defendants "have a right to be tried only for the offense for which they are charged."*State v. Hornbuckle*, 769 S.W.2d 89, 96(Mo.banc1989);Art. I, §17,Mo.Const. Due process is violated when the State adduces evidence or argues the defendant has committed, been accused or convicted of, or definitely associated with another crime or crimes.*Id.*,*State v. Clark*, 112 S.W.3d 95, 100 (Mo.App.,W.D.2003).

Proof the defendant committed other crimes is inadmissible unless it legitimately tends to establish his guilt of this offense.*State v. Williams*, 804

S.W.2d 408, 410(Mo.App.,S.D.1991). Evidence of other crimes may be admitted only if its probative value outweighs its prejudicial effect.*State v. Mallett*, 732 S.W.2d 527, 534(Mo.banc1987). It is “highly prejudicial and should be received only when there is strict necessity.”*Williams*, 804 S.W.2d at 410;*State v. Collins*, 669 S.W.2d 933, 936(Mo.banc 1984). If adduced solely to show propensity to commit the charged offense, it is inadmissible.*United States v. Mejia-Uribe*, 75 F.3d 395, 398-99(8thCir.1996);*State v. Gilyard*, 979 S.W.2d 138, 140(Mo.banc 1998);*State v. Bernard*, 849 S.W.2d 10, 13(Mo.banc1993). “[S]howing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence, because such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.' ”*State v. Burns*, 978 S.W.2d 759, 761(Mo.banc1998);*Bernard*, 849 S.W.2d at 16.

Evidence of uncharged crimes is admissible for **other** purposes if relevant. It must meet be logically relevant—having “some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial,” and legally relevant—its “probative value [must] outweigh[] its prejudicial effect.”*Id.* To be admissible, it cannot merely prove the defendant did it before and therefore is likely to do it again.

“Slim” Dickens did not testify(T1039), yet, through him, Bishop presented references to another shooting incident allegedly involving Vincent and “Al,” who dropped pending charges against Vincent.(T1039-41;Exh.148D,E). “...just go to

court and say it wasn't him. ... Like Al did.”(Exh.148E-10). Bishop asserted this reference wasn't hearsay but, since Vincent was allegedly in the background of the conversation, was a tacit admission.(T1040-41). The court overruled counsel's objections.(T36,1041-42). The court did not believe the tape contained evidence of other crimes.(T36).

A defendant makes a tacit admission of guilt when he doesn't respond or “significantly acquiesces in the import of an inculpatory statement (e.g., by making an equivocal, ambivalent, or evasive response, *People v. Riel*, 22 Cal.4th 1153, 96 Cal.Rptr.2d 1, 998 P.2d 969, 995(2000)) when the inculpatory statement: (1) was made in the presence and hearing of the accused, (2) was sufficiently direct, as would naturally call for a reply, and (3) was not made at a judicial proceeding, or while the accused was in custody or under arrest.”*State v. Case*, 140 S.W.3d 80, 85(Mo.App.,W.D.2004).

The tacit admissions doctrine must be rejected here. Since the phone call originated in county jail, the doctrine cannot be applied.*Id.* Further, although Eva identified Vincent's voice in the background,(T1046), Vincent was not a direct participant in the conversation and could have said or done something, not recorded, which Eva neither saw nor heard, denying participation in the alleged misconduct.

Slim's statements are multi-leveled hearsay, admitted for their truth—to prove: (a) Vincent threatened Eva so she would not testify against him at this trial and (b) Vincent similarly had threatened Al. Yet, neither Slim nor Al testified.

Since the Confrontation Clause commands “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination,” *Crawford v. Washington*, 541 U.S. 36, 61(2004), this evidence should not have been admitted.

The prejudice derives not solely from Vincent’s inability to confront and cross-examine the two out-of-court declarants, Slim and Al, but because the State implied Vincent threatened violence on someone else unless he went “to court and [said] it wasn’t him.” Since this was why Vincent was on trial, the jury was led to believe “he did it before, he probably did it again.” The probative value of this evidence did not outweigh its prejudicial effect. *Mallett*, 732 S.W.2d at 534.

The conversation also referred to Vincent’s “dope case,” and the speakers speculated about him serving a potential three-year sentence. (Exh.148E-19). The tape impermissibly disclosed Vincent faced drug charges. The reference was logically irrelevant, helping to prove no fact at issue, *Bernard*, 849 S.W.2d at 16, and was legally irrelevant. It lacked probative value yet was incredibly prejudicial, presenting Vincent as a drug dealer and encouraging the jury to convict him here because of his complicity there. *Id.* Vincent was entitled to have the jury consider and decide his guilt only on the evidence surrounding these offenses, not evidence concerning offenses for which he was not on trial and counsel had not prepared a defense.

This Court should reverse and remand for a new trial.

XI. Improper Photographs

The trial court abused its discretion in admitting, over objection, in guilt phase, Exhibits 300, 303, 306, photographs of Leslie and her family in life, and Exhibits 129-37,140-45,147,149-50,152-53, photographs and x-rays of Leslie at the autopsy, and admitting in penalty phase Exhibits 9-14,18,27-28,31-33,35, photographs of Todd Franklin, because that denied due process, a fair trial, a fair, impartial jury, 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 in guilt phase, Leslie’s autopsy photos were cumulative and duplicative, allowing the guilt phase verdict to be based on emotion, not the facts and law, and the photos of Leslie in life were irrelevant, establishing no fact and solely inflaming the jury’s passions and prejudices. In penalty phase, the photographs of Todd’s body were cumulative, unnecessarily gruesome, and irrelevant, and the “life” photos were inadmissible victim impact, proving no fact at issue.

Through words and pictures, the State inflamed the jury’s emotions so they would convict Vincent of first-degree murder and sentence him to death. In guilt phase, Bishop repeatedly displayed photographs of Leslie—in life and at the autopsy. In penalty phase, he swamped the jury with multiple photographs of Todd Franklin at the scene and him as a youngster and at his prom. Those actions violated Vincent’s state and federal constitutional rights to due process, a fair trial,

a fair, impartial jury, reliable sentencing and freedom from cruel and unusual punishment.

Trial courts have broad, but not unfettered, discretion in admitting evidence.*State v. Bernard*, 849 S.W.2d 10,13(Mo.banc1993). Evidence must be logically and legally relevant to be admissible. Evidence is logically relevant if it tends to make the existence of a material fact more or less probable.*State v. Smith*, 32 S.W.3d 532, 546(Mo.banc2000);*State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc2002). Evidence is legally relevant if its probative value outweighs its prejudicial effect.*Id.* Prejudicial effect encompasses unfair prejudice, issue confusion, misleading the jury, undue delay, wasted time, or cumulativeness.*Id.*; *State v. Sladek*, 835 S.W.2d 308, 314(Mo.banc1992)(Thomas, J., concurring).

A trial court that abuses its discretion by admitting photographs may be reversed.*State v. Kincade*, 677 S.W.2d 361, 366(Mo.App.,E.D.1984);*State v. McMillin*, 783 S.W.2d 82,100(Mo.banc1990). Photographs of a victim's body used solely to arouse the jury's emotions and prejudice the defendant, *State v. Wood*, 596 S.W.2d 394(Mo.banc1980), or when their needlessly inflammatory nature outweighs their probative value, should be excluded.*State v. Robinson*, 328 S.W.2d 667(Mo.1959);*State v. Floyd*, 360 S.W.2d 630(Mo.1962). "The fundamental rationale barring the introduction of gruesome photographs is that their impact on the jury is such that it will become so incensed and inflamed at the horrible conditions depicted that it will not be able to objectively decide the issue of the defendant's guilt."*State v. Clawson*, 270 S.E.2d 659, 674(W.Va.1980).

Prosecutors “have a greater responsibility than to assure the conviction of a defendant. It is their responsibility to assist the trial court in assuring that both the state and the defendants get a fair trial.”*State v. Stevenson*, 852 S.W.2d 858,865 (Mo.App.,S.D.1993)(Parrish, J.,concurring).

Because death is qualitatively different from terms of imprisonment, a “corresponding difference [exists] 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, 305(1976). Death cannot be imposed under procedures creating a substantial risk of arbitrary or capricious sentencing.*Furman v. Georgia*, 408 U.S. 238(1972). Judge Blackmar stated, “It is suggested that a little more gore would make no difference. I cannot accept this argument when a man is on trial for his life.” *State v. Leisure*, 749 S.W.2d 366, 384(Mo.banc1988). Using photographs of a victim “in life” solely to engage the jury’s emotions,*Gardner v. Florida*, 430 U.S. 349, 358(1977), must be condemned.

GUILT PHASE

Through Leslie’s sister, Eva, Bishop introduced, over continuing objection, Exhibits 300, 303 and 306.(T1051-56). Exhibit 300 depicted Leslie with one of her nephews; Exhibit 303 depicted the three sisters as young girls, around age 7, and Exhibit 306 depicted Leslie alone.(T1051-56).

The photos demonstrate that Bishop’s purpose was to engender an emotionally-charged verdict, not based on the facts and law. Eva acknowledged she was unaware when they were taken, but knew Exhibit 303 depicted them as

young girls.(T1052,1056). The child with Leslie in Exhibit 300 wasn't hers; Leslie had none.(T1055). Were Bishop's intent solely to identify Leslie in life, he could have used her photograph, taken around her death. Instead, he showed her family relationships with sisters and nephew, and showed her and her sisters years earlier, as little girls.

Since Leslie's identity was not at issue, any photograph of her in life had only marginal logical relevance. It proved no material fact at issue. These photographs had even less legal relevance, having little or no probative value yet enormous prejudicial effect. They pushed home Bishop's theme in his guilt phase closing—Leslie's youth.(T1248). They underscored the impact of Leslie's death on her family, something wholly inadmissible in guilt phase. Bishop's sole purpose in adducing this evidence was to prejudice the jury. This became clear in his guilt phase closing as he argued, over objection, "Don't forget about her. Don't forget about her. When you go back there, you don't forget that this was a young woman with a future. You don't forget that she's eighteen years old, in the prime of her life. **She had family that loved her.**"(T1248)(emphasis added).

Similar were the autopsy photos—Exhibits 129,130-37,140-45,147. The Court excluded Exhibit 128,(T1173), but nonetheless let Bishop display numerous cumulative images.(T1157-63,1175-79,1198-1206). Their prejudicial effect was enormous, while their probative value was minimal. They bombarded the jury with duplicative images, adding nothing new but re-enforcing the blood and gore. Had Bishop contented himself with depicting a wound once, his ostensible

purpose of demonstrating the injuries could be accepted. Since he instead chose to present the same image multiple times, his real purpose—prejudice—becomes clear. Exhibits 129-31 all show the bullet wound to the chin. Yet, instead of merely showing it in Exhibit 131, without the accompanying blood and gore in Exhibits 129-130, Bishop showed all three.(T1173-76). Exhibits 129-30 added no information—they just created prejudice—as Bishop intended. Bishop “gilded the lily,” showing the same injury through x-rays.(T1202-05;Exh.149-50,152-53).

Exhibits 132-34 all show the bullet wound to the left side of the head. Exhibit 134 shows the wound, but Bishop introduced Exhibits 132-33, which focus on the intubation device, blood streaks across the face and blood behind the body.(T1176-77). These additional photographs, and accompanying x-ray, added nothing relevant. Det. Anderson acknowledged Exhibit 134 was “the same that was of the previous same injury”(T1177)—merely increasing emotion and prejudice.

Exhibits 141-45,147 all show the same wound, to the top right shoulder. Anderson acknowledged Exhibits 142 and 144 show “the same injury that was in the previous photograph.”(T1178). Showing that injury multiple times only added prejudice.

Exhibits 135-37,140 all showed “an apparent injury to her left arm.” (T1177). Exhibit 135 shows the bloody arm on the autopsy table, while Exhibits 137 and 140, identical photographs, show it elevated and cleaned, and Exhibit 136

shows it elevated but bloody. One exhibit would have sufficed. The Court admitted all.(T1160-63,1172-75).

PENALTY PHASE

In penalty phase, over objection, the Court found Vincent's prior first-degree murder conviction "serious assaultive."(T1266-67). The sole jury issue about the Franklin homicide was the fact of Vincent's conviction. The State proved that, over objection, with Exhibit 200.(T1289-91).

The State presented, over objection, Exhibits 9-14, 18, 27-28, 31-33, 35, showing Franklin in death, from varying distances and angles.(T1294-1302). While they may have accurately depicted the scene, they provided no necessary information. They were logically and legally irrelevant, creating prejudice and resolving no factual issue. As in *Spears v. Mullin*, 343 F.3d 1215, 1228(10th Cir. 2003), even if minimally relevant, by parading this host of gory photos in penalty phase, the State used them "solely for their shock value." Their prejudicial impact substantially outweighed their minimal probative value. They rendered the jury's decision unreliable, "made on an emotional basis and not on the basis of the other relevant evidence introduced at trial."*Reese v. State*, 33 S.W.3d 238, 242 (Tex.Crim.App.2000). Exhibits 157 and 160, photographs of Franklin,(T1313-14), were logically and legally irrelevant, victim impact evidence from an offense for which Vincent was not on trial. They violate *Payne v. Tennessee*, 501 U.S. 808(1991) since such evidence is to give the jury a "quick glimpse" of the life the defendant **is charged** with taking.*Id.* at 830-31; *See also*, §565.030.4, which limits

victim impact evidence to the murder victim and the impact of that crime upon the family and others. While that evidence would have been admissible in the Franklin case, it was not here. Its sole purpose was to inflame the jury's passions and prejudices.

This Court should reverse and remand for a new trial or, at least, for a new penalty phase.

XII. One Statutory Aggravator Made Many

The trial court erred in overruling Vincent's objections to Instruction 18, submitting it to the jury, and accepting the jury's verdict that found six statutory aggravators—Vincent's prior convictions 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;§565.032RSMo, in that the Legislature has designated, as one enumerated statutory aggravator, that the jury can consider whether “the offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.” This demonstrates the clear legislative intent that, whether a defendant has one, or multiple, such convictions, they be considered one statutory aggravator. Vincent was prejudiced by the State's submitting his priors separately because those separate submissions placed a thumb on the scales for death when the jury weighed aggravators against mitigators.

Missouri jurors are told to be guided by the instructions.(LF 334-35). In capital cases, instructions direct that, in determining whether to sentence a defendant to death, they **weigh** aggravators and mitigators and determine whether mitigators outweigh aggravators and thus the sentence to impose.(LF371; MAI-Cr3d 314.44).

Vincent's jurors were told to **weigh** against the mitigation six statutory aggravators that purportedly were "serious assaultive criminal convictions." §565.032.2(1). By dividing one aggravator into six, the State gained an undue advantage. Vincent's death sentence is the prejudice.

The trial court erred in overruling Vincent's objections to Instruction 18, MAI-Cr3d 314.40, submitting it, and accepting the penalty phase verdict finding, as statutory aggravators, Vincent's six "serious assaultive criminal convictions." This violated Vincent's state and federal constitutional rights to due process, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment. Since error and resulting prejudice occurred from submitting an instruction not conforming to the law, reversal is warranted. *State v. Westfall*, 75 S.W.3d 278, 280(Mo.banc2002); *State v. Haberman*, 93 S.W.3d 835, 837 (Mo.App.,E.D.2002).

The court gave Instruction 18, over objection.(T1530-31). Modeled after MAI-Cr3d 314.40, it listed, as six statutory aggravators, "whether the defendant has a serious assaultive conviction" based on prior convictions for first-degree murder; first-degree assault(2); and armed criminal action(3).(LF369-70)¹⁵

¹⁵ Since Vincent is not challenging the instruction's form but dividing one statutory aggravator into six, he has not set forth the instruction. He does not thereby waive his challenge.

Instruction 19, modeled after MAI-Cr3d 314.44, instructed the jury to “determine whether there are facts and circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction 18, and evidence presented in support of mitigating circumstances submitted in this instruction.”(LF371). In voting for death, the jury listed, as six statutory aggravators, the six priors from Instruction 18.(LF391-92).

Instruction 18, listing Vincent’s prior convictions separately and letting the jury weigh them more heavily for death, is contrary to §565.032.2(1)RSMo. It states, “Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following: (1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions....” Note on Use 5 advises, “the court should determine before submitting paragraph 1B that there is sufficient evidence to warrant its submission. For discussion of offenses that might constitute a ‘serious assaultive conviction,’ see State v. Brooks, 960 S.W.2d 479, 496(Mo.banc1997); State v. Kinder, 942 S.W.2d 313, 332(Mo.banc1996); and State v. Brown, 902 S.W.2d 278, 293-94(Mo.banc1995).” The statutory language and Note on Use support Vincent’s position.

By prefacing the list of what constitutes statutory aggravators with the proviso that they “shall be limited to the following,” the Legislature has indicated the list is restrictive, not expansive. Further demonstrating that intent is the subsection’s language—that it is aggravating if the defendant has been convicted of first-degree murder or “has one **or more** serious assaultive criminal convictions.”(emphasized). Had the Legislature intended each separate conviction be listed separately, it would have indicated. Instead, by combining them in one subsection, and allowing for the possibility that the defendant would have one **or more** prior assaultive convictions, the Legislature manifested its intent that they be listed as one. Statutory construction rules support this reading.

The primary rule of statutory construction is to ascertain legislative intent from the language used, give effect to that intent, if possible and give the statutory language its plain and ordinary meaning.*State v. Graham*, 149 S.W.3d 465, 467 (Mo.App.,E.D.2004);*Irvin v. Missouri Board of Probation and Parole*, 34 S.W.3d 202, 205(Mo.App.,W.D.2000); *State v. Kraus*, 530 S.W.2d 684, 685(Mo.banc 1975). Ambiguities in criminal statutes are construed against the State.*Irvin*, 34 S.W.3d at 205;*State v. Knapp*, 843 S.W.2d 345, 347(Mo.banc1992). If statutory language is unambiguous, the statutory language must be given effect, as written. *State v. Daniel*, 103 S.W.3d 822, 826(Mo.App.,W.D.2003). “Every word, clause, sentence and section of a statute should be given meaning, and under the rules of statutory construction statutes should not be interpreted in a way that would render

some of their phrases to be mere surplusage.”*Graham*, 149 S.W.3d at 467;
Hadlock v. Director of Revenue, 860 S.W.2d 335, 337(Mo.banc1993).

Whether this statutory language is deemed ambiguous, the legislative intent is clear. If a defendant has a prior conviction for first-degree murder or has one or more prior assaultive criminal convictions, the State can submit that circumstance as **one** statutory aggravator. If it were allowed to submit each prior conviction separately, it would render the statutory language purporting to limit the aggravator’s scope mere surplusage.

This Court, in *State v. Clemmons*, 753 S.W.2d 901(Mo.banc1988), faced a similar issue. The defense argued the instruction patterned after MAI-Cr3d 313.40 did not comply with §565.032.2RSMo since it submitted, as separate statutory aggravators, the defendant’s prior capital murder and first-degree assault convictions.*Id.* at 911. This Court rejected that argument: “Contrary to defendant’s assertion the procedure under MAI-Cr3d 313.40 in no way adds any aggravating circumstance to those enumerated in §565.032.2. Even though MAI-Cr3d 313.40 mandates separate submission of prior convictions, it only permits submission of those types of convictions that are authorized as aggravating circumstances under §565.032.2(1).”*Id.*

The *Clemmons* Court missed the point. The MAI-Cr text doesn’t support the Court’s statement since it never mandates that each conviction be submitted separately. Even if it did, it would be inconsistent with the substantive law, e.g., the statute, and wouldn’t control. Finally, the question is not what types of prior

convictions may be used to support the aggravator but whether the priors may be submitted separately to increase the number of statutory aggravators. This approach the statutory language rejects.

The *Clemmons* Court also rejected the defendant's argument saying a jury finding of one statutory aggravator makes a defendant death-eligible.*Id.* at 912. "Because a finding of any such conviction permits jury consideration of the death penalty, each one must be listed as a separate aggravating circumstance in the instructions in order to avoid confusing the jury. If the convictions were submitted together as one aggravating circumstance the jury would be confused about whether it could consider the death penalty if it believed one of the convictions existed but not the others."*Id.*

This analysis is based on pre-*State v. Whitfield*, 107 S.W.3d 253(Mo.banc 2003) doctrine. There, this Court held that jury findings on all but the final penalty phase step are eligibility findings.*Id.* at 256-57, 261. Even if a jury finds one statutory aggravator, the defendant is not death-eligible. To impose death, the jury must also find, in the weighing step, that aggravators outweigh mitigators. The *Clemmons* Court's analysis suggests instead, by referring to the "threshold requirement," a defendant is death-eligible with the statutory aggravator finding. Post-*Whitfield*, that analysis is of doubtful validity.

The *Clemmons* Court says each prior conviction must be listed separately "to avoid confusing the jury."*Clemmons*, 753 S.W.2d at 912. Jury "confusion" could be avoided by the State not submitting convictions of doubtful validity,

rather than submitting them separately. The argument raises a false issue instead of addressing the real problem.

That problem, which the *Clemmons* Court failed to address, is not merely what happens in the first step of the penalty phase process—the finding of a statutory aggravator—but, what happens in the weighing step. The jury is instructed to decide whether aggravators “outweigh” mitigators. While lawyers might consider the word “outweigh” one of art, jurors are not given a definition suggesting anything other than its plain and ordinary meaning. Thus, when jurors weigh aggravators and mitigators, it undoubtedly is a numbers game, with the balance tipping toward life or death. If the State can convert one statutory aggravator into six, the weight on that side of the scale tips toward death.

This is similar to *Stringer v. Black*, 503 U.S. 222(1992), where the effect of the jury’s consideration of an invalid aggravating factor was considered. “[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death’s side of the scales.”*Id.* at 232. An invalid factor, just like making one factor many, “create[s] the risk of treating the defendant as more deserving of the death penalty.”*Sochor v. Florida*, 504 U.S. 527, 532(1992).

By letting the State convert one aggravator into six, the court created the risk the jury would find Vincent more deserving of death than the legislative scheme authorizes. This put a thumb on death’s side of the scales, resulting in

Vincent's death sentence. This Court should reverse and remand for a new penalty phase with a properly-instructed jury.

XIII. No Guidance—Non-Statutory Aggravators

The trial court erred, plainly erred and abused its discretion in overruling Vincent’s pre-trial motions objecting to the MAI-Cr3d 314 Series; admitting extensive evidence about Vincent’s prior bad acts and unadjudicated misconduct; admitting “victim impact” evidence; overruling objections to and giving Instructions No.19, 20,21, modeled after MAI-Cr3d 314.44, 314.46 and 314.48, and accepting the jury’s death verdict because this denied due process, a fair trial, a properly-instructed jury, 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, although the State presented extensive evidence of Vincent’s prior bad acts and his impact on others and instructed the jury to consider that evidence in sentencing, the jury received no guidance on how to consider that evidence and was told the defense bore the burden of proof. The jury was instructed to weigh that evidence in making its sentencing decision, but, lacking guidance on how, the reliability of its verdict is undermined.

The State’s penalty phase focused on two things—Vincent’s prior bad acts and misconduct and the impact of those actions on others, including Todd Franklin’s and Leslie Addison’s families. Bishop argued Vincent was “climbing the ladder of crime,”(T1546), culminating with their deaths. He argued Vincent was “a bad person,”(T1549), who “does bad things. He does evil things. He hurts people. And he enjoys it. He enjoys it.”(T1564). Although the jurors were told to

consider that evidence, weighing it against the mitigators, in determining punishment, they were never instructed **how** to consider it and were affirmatively told the defense had the burden to prove mitigators outweighed aggravators. These instructions, misdirecting, misleading and confusing the jury, prejudicing Vincent, *Martens v. White*, 195 S.W.3d 548, 557(Mo.App.,S.D.2006); *Hosto v. Union Electric Co.*, 51 S.W.3d 133, 142(Mo.App.,E.D.2001), violated Vincent's state and federal constitutional rights to due process, a fair trial, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment.¹⁶

Pre-trial, Vincent moved to exclude evidence of his crack cocaine possession(LF226-29); the Franklin case(LF247-49); un-adjudicated bad acts in penalty phase(LF250-53); victim impact evidence because of the flawed instructions(LF254-59), and to submit penalty phase instructions comports with *State v. Whitfield*.(LF118-20,121-25,126-36). The court denied those motions pre-trial (T17-27) and pre-penalty phase.(T1261-65).

In his penalty phase opening, Bishop outlined Vincent's prior convictions and misconduct. He said, to help the jurors decide "what is the appropriate penalty for the murder of Leslie Addison," they would hear about Vincent's

¹⁶ This Court has rejected this argument, *State v. Forrest*, 183 S.W.3d 218, 229 (Mo.banc2006);*State v. Gill*, 167 S.W.3d 184, 193-94(Mo.banc2005). Vincent presents it for reconsideration.

murder, assault and armed criminal action convictions.(T1267-68). He said they would hear from Franklin's aunt and Leslie's family.(T1269,1271). He said they would hear about his guilty pleas in two misdemeanor cases,(T1268), and, when arrested in a St. Charles hotel room "rented under a different name," he "had 18.4 grams of cocaine base in little baggies. He had some drugs on him."(T1270).

In penalty phase, Bishop began detailing, over objection, Vincent's criminal history.(T1277-91). He read verbatim from Exhibits 104, 103A,102,101 and 200.(T1277-90). Then, after documenting the evidence seized after Franklin's death, through multiple pictures of his body,(Exhibits 9-14,18,27,28,31-33,35), Bishop called Jeannette Legard, his aunt, who "had to identify" the body.(T1313,1315). Over objection, Bishop had her identify photos of Franklin as a youngster and at his prom.(Exh.157,160).

Detective Akers arrested Vincent on May 17, 2003.(T1318). Vincent told Akers he had crack cocaine in his pocket.(T1318). Detective Krey testified the substance was 18.4 grams of cocaine base.(T1321-23;Exh.156).

Bishop called Jessica and Shonte Addison, Leslie's sisters. Jessica testified, over objection, about various family photographs, identifying multiple family members, including Leslie, and their relationships.(T1326-33;Exh.300-11). Shonte testified about nuclear and extended-family relationships and how Leslie's death affected each person.(T1334-38). Shonte described Leslie as "loving, caring, helpful, ambitious," loving children and helping her sisters.(T1334,1337). The sisters were best friends and Leslie's death left the others nervous and on

edge.(T1335). Shonte’s father, healthy most of his life, now has failing health, neither eats nor sleeps, and carries a gun.(T1336). Their mother, whose hypertension has worsened, eats poorly and doesn’t sleep.(T1336).

Over objection,(LF118-20;T1531-34), the court gave Instruction No. 19¹⁷, modeled after MAI-Cr3d 314.44:

If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstance(s) submitted in Instruction No. 18 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh 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, including evidence presented in support of the statutory aggravating circumstance(s) submitted in Instruction No. 18, and evidence presented in support of mitigating circumstances.

You shall consider any 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

¹⁷ The same claim of error is made about all three instructions. Vincent presents it once, through Instruction 19, but maintains his claims to Instructions 20 and 21.

there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(LF371). This instruction, particularly in light of the State's evidence and argument, is constitutionally-problematic because of how it directed the jury to treat non-statutory aggravators. The first paragraph places the burden of proof on the defense and doesn't set a standard of proof for the State's evidence. The final paragraph reiterates this allocation of burdens and again fails to place a standard of proof on the State.

Instructions 20 and 21 similarly don't guide the jury about the standard of proof and, referring back to the weighing step, allocate whatever burden the jury cares to impose on the defense. Instruction 20 states, "You are not compelled to fix death as the punishment even if **you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment.**"(LF372)(emphasized).

Instruction 21 states, in paragraph three, "**If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment,** then the defendant must be punished for the murder of Leslie Addison by imprisonment for life by the Department of Corrections...."(LF373)(emphasized). Instruction 21 compounds

the other instructions' error, improperly requiring unanimity on the mitigation finding.

Instruction 19 addresses the "weighing step," which a jury must find beyond a reasonable doubt.

Capital defendants are entitled, under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial rights, to have a jury find, beyond a reasonable doubt, all facts upon which an increased punishment is contingent. *Whitfield*, 107 S.W.2d at 257; *Jones v. United States*, 526 U.S. 227, 243 n.6(1999); *Ring v. Arizona*, 536 U.S. 584, 600(2002). A fact increases the maximum punishment when its absence renders the higher sentence unavailable. *Id.* at 600-01. The *Whitfield* Court held, under then-in-effect §565.030RSMo, the first three steps required jury fact-findings. *Whitfield*, 107 S.W.3d at 261. The *Whitfield* analysis applies to all factual determinations, including §565.030.4(3)'s weighing step.

A defendant's due process and jury trial constitutional guarantees are not satisfied just by that factual finding. Rather, as *Ring* held and *Whitfield* affirmed, it must be "beyond a reasonable doubt." *Id.* at 257; *Ring*, 536 U.S. at 602; *Apprendi v. New Jersey*, 530 U.S. 466, 494(2000). For death-eligibility steps, the functional equivalent of elements of the offense, the burden of proof beyond a reasonable doubt is on the State. *In re Winship*, 397 U.S. 358(1970); *Jackson v. Virginia*, 443 U.S. 307(1979).

Despite *Ring* and *Whitfield*, the first and final paragraphs of Instruction 19 require the defense to produce some quantum of mitigation “sufficient to outweigh facts and circumstances in aggravation of punishment.” The Instruction sets no standard by which aggravation is to be weighed and even fails to tell the jury the State bears **any** burden of proof. Especially since Instruction 18,(LF369-70) specifically directs that statutory aggravators be found “beyond a reasonable doubt,” the lack of that directive in Instruction 19 is critical. It signals jurors’ findings on **this** eligibility step need not meet that standard. That signal violates due process.

Vincent’s jury heard about his prior convictions for non-“serious assaultive” offenses; misdemeanors with suspended sentences; prior misconduct not resulting in convictions, and the Franklin and Addison families’ experiences. Yet, Instruction 19 never instructed how to consider that evidence or who had to prove what. Since the weighing step is an eligibility step, the jury should have received guidance. Only thus could it decide whether Vincent was death-eligible. Without that guidance, Vincent’s jury sentenced him to death, perhaps never having found the State proved this eligibility step unanimously beyond a reasonable doubt.

This Court’s prescient decision in *State v. Debler*, 856 S.W.2d 641, 657 (Mo.banc1993) is instructive. This Court found evidence of Debler’s prior drug dealings not resulting in convictions highly prejudicial. Only an instruction

placing the burden of proof—unanimously beyond a reasonable doubt—on the State would satisfy due process.*Id.*

These instructions created constitutional error. The State, benefiting from the error, must prove beyond a reasonable doubt it did not contribute to the death verdict. *Whitfield*, 107 S.W.3d at 262, citing *Chapman v. California*, 386 U.S. 18, 24(1967). Especially since, when “instructional error consists of a misdescription of the burden of proof, which vitiates the jury’s findings,” the error is structural and harmless error analysis is inapplicable. *Sullivan v. Louisiana*, 508 U.S. 275, 281(1993).

This Court must reverse and remand for a new penalty phase before a properly-instructed jury or vacate Vincent’s death sentence and order him re-sentenced to life without probation or parole.

XIV. Apprendi Violation—Charging Document

The trial court erred in overruling Vincent’s pre-trial *Apprendi* motions; not quashing the information; proceeding to penalty phase; accepting the jury’s death verdict and sentencing Vincent to death because this denied due process, a jury 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 statutory and non-statutory aggravators are facts that increase the range of punishment for first degree murder from life without parole to death, must be pled in the charging document and found by the jury unanimously and beyond a reasonable doubt.

A jury must find any fact that increases a crime’s maximum penalty.*State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003);*Ring v. Arizona*, 536 U.S. 584(2002). All but the final step of §565.030.4 make the jury’s factual findings prerequisites for the defendant’s death-eligibility.*Id.* at 261. “[E]very fact that the legislature requires be found before death may be imposed must be found by the jury.”*Id.* at 257. Due Process and the Sixth Amendment’s notice and jury trial guarantees require eligibility factors be charged to seek death..*Jones v. United States*, 526 U.S. 227, 243 n.6(1999). Since Vincent’s charging document didn’t allege those eligibility factors, the State only charged Vincent with the non-death-eligible offense of un-aggravated first-degree murder. Proceeding against him with a capital prosecution violated his state and federal constitutional rights to due

process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.¹⁸

Pre-trial, Vincent challenged Missouri's statutory, instructional and evidentiary schemes, moving to preclude the State from seeking death, require jury findings, quash the information, and submit instructions complying with *Ring* and *Apprendi*.(LF73-105,112-117,118-120,121-125,126-136,140-147,163-77,T1261-67). Judge Gaertner rejected his challenges.(T1262-67). Vincent preserved his challenges in his new trial motion.

The State charged Vincent by indictment with first-degree murder but didn't charge statutory or non-statutory aggravators.(LF40-45). It later filed Notice of Evidence in Aggravation, alleging as statutory aggravators convictions for first-degree assault, armed criminal action and first-degree murder, and as non-statutory aggravators, guilty pleas to third-degree assault, possession of a controlled substance, unlawful use of a weapon, and second-degree tampering.(LF58-61).

During trial, the State filed an Information in lieu of Indictment, charging Vincent with first-degree murder, and charging Vincent "is a prior offender under

¹⁸ This Court has rejected this argument, *State v. Forrest*, 183 S.W.3d 218, 229 (Mo.banc2006);*State v. Gill*, 167 S.W.3d 184, 193-94(Mo.banc2005);*State v. Cole*, 71 S.W.3d 163, 171(Mo.banc2002). Vincent presents it for reconsideration and preservation.

Section 558.016, RSMo, in that he has pleaded guilty to a felony as follows: On or about December 17, 1997, the defendant pleaded guilty to the felony of Unlawful Use of a Weapon, in the Circuit Court of the City of St. Louis, State of Missouri in Cause Number 971-2199, for events occurring on June 30, 1997.” (LF280-84).

The Due Process Clause and the Sixth Amendment’s notice and jury trial guarantees require “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 v. United States*, 526 U.S. 227, 243 n.6(1999). The Court re-affirmed:

[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 490(2000). The critical inquiry is “one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Id.* at 494. In *Ring v. Arizona*, 536 U.S. 584(2002), the Court re-emphasized the statutory aggravator’s effect was determinative. *Id.* at 602(citations omitted). Because aggravators are “the functional equivalent of an element of a greater offense,’... the Sixth Amendment requires that they be found by a jury.” *Id.* at 609; *Apprendi*, 530 U.S. at 494,n.19.

The *Whitfield* Court, applying *Ring* to Missouri's statute, held a jury must make "the factual determinations on which his eligibility for the death sentence [is] predicated." *Whitfield*, 107 S.W.3d at 256. This Court expressly noted the *Ring* "Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury." *Id.* at 257.¹⁹ Instructional error, compounding the evidentiary and argument errors, requires Vincent's death sentence be vacated. *See* Points IV, XII, XIII. The flawed indictment and substitute information exacerbate this error.

The Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require "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(emphasized). Only the jury can find the aggravators making the charge death-eligible since they "operate as 'the functional equivalent of an element of a greater offense.'" *Ring*, 536 U.S. at 602,609(citation omitted).

This Court applied *Ring* to Missouri's death penalty statute, holding: "every fact that the legislature requires be found before death may be imposed," must be found by the jury beyond a reasonable doubt. *Whitfield*, 107 S.W.3d at

¹⁹ In Point XIII, Vincent challenges the failure to require jury findings unanimously and beyond a reasonable doubt on all eligibility steps. This Point and Argument address the charging document-requirement.

261. *Whitfield*'s theoretical underpinning is that these factual findings are elements of a greater offense.

The combined teachings of these cases compel the conclusion, although §565.020 ostensibly creates one first-degree murder offense, for which punishment is life without parole or death, the combination of §§565.020 and 565.030.4 establishes two distinct offenses—un-enhanced first-degree murder, a knowing and deliberate killing, for which punishment is life without parole, and aggravated, enhanced, first-degree murder, which requires proof beyond a reasonable doubt of at least one statutory aggravator, and for which punishments are life without parole or death.

Since a jury's finding beyond a reasonable doubt of at least one statutory aggravator is the threshold requirement to its ability to recommend death, *State v. Shaw*, 636 S.W.2d 667, 675(Mo.banc1982), statutory aggravators are elements of the enhanced offense. "Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense...."*Harris v. United States*, 536 U.S. 545, 563(2002), citing *Apprendi*, 530 U.S. at 483, n.10.

Jones, *Ring*, *Apprendi* and *Whitfield* teach, unless the charging document pleads these additional elements that put death-eligibility in play, the State only charges un-enhanced first-degree murder, for which the maximum punishment is life without parole.

“[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.” *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). The charging document must charge a crime was committed. The test for its sufficiency is “whether it contains all the essential elements of the offense as set out in the statute creating the offense.” *State v. Stringer*, 36 S.W.3d 821, 822(Mo.App.,S.D.2001); *State v. Haynes*, 17 S.W.3d 617, 619(Mo.App.,W.D. 2000); *State v. Pride*, 1 S.W.3d 494, 502(Mo.App.,W.D.1999).

In *State v. Nolan*, 418 S.W.2d 51(Mo.1967), this Court held the trial court lacked jurisdiction to impose an enhanced sentence for first-degree robbery “by means of a dangerous and deadly weapon.” “The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal” and the “trial court was without power or jurisdiction to impose that sentence.” *Id.* at 54.

Since the State failed to plead any facts making Vincent death-eligible, the only authorized punishment was life without parole. Judge Gaertner erred holding otherwise.(T1261-62). This argument often is rejected because of the inaccurate view this pleading requirement only applies to cases under the federal Indictment Clause.

Missouri’s 1875 Constitution originally required, like the Fifth Amendment’s Indictment Clause, all prosecutions for capital crimes or felony offenses be prosecuted by indictment. Missouri’s 1900 Constitution subsequently

allowed prosecution by indictment or information.*State v. Kyle*, 65 S.W.

763(Mo.1901);*State v. Cooper*, 344 S.W.2d 72(Mo.1961).

When charges were preferred by information, “the Legislature ... intended ... to accord the accused the security of a preliminary examination before he should be charged by information for a capital offense.”*State v. Gieseke*, 108 S.W. 525(Mo.1908). A primary “purpose of a preliminary examination is ‘to safeguard them (the accused) from groundless and vindictive prosecutions.’”*State ex rel. McCutchan v. Cooley*, 12 S.W.2d 466, 468(Mo.1928);*State v. Sassaman*, 114 S.W. 590(Mo.1908).

The Fifth Amendment’s Indictment Clause provides, “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” This ensures a defendant’s jeopardy is limited “to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.”*Stirone v. United States*, 361 U.S. 212, 218(1960). It “serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power.”*United States v. Cotton*, 535 U.S. 625, 631, 634(2002); *United States v. Miller*, 471 U.S. 130, 142-43, n.7(1985). “The grand and petit juries thus form a ‘strong and two-fold barrier ... between the liberties of the people and the prerogative of the [government].”*United States v. Harris*, 536 U.S. 545, 564(2002)(Kennedy, J., concurring);*Duncan v. Louisiana*, 391 U.S. 145, 151(1968).

In *Smith v. United States*, 360 U.S. 1,9(1959), the Court recognized the indictment's important role. "The Fifth Amendment made the [grand jury indictment] rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings ... [T]o permit the use of informations where ... the charge states a capital offense, would ... make vulnerable to summary treatment those accused of ... our most serious crimes." See also *United States v. Green*, 372 F.Supp.2d 168(D.Mass.2005).

The Indictment Clause protects the accused by having independent citizenry act as a check on prosecutorial authority and providing notice of the charges so he can prepare his defense. *United States v. Duncan*, 598 F.2d 839, 848(4th Cir.1979). The Fifth Amendment's Indictment Clause and the Sixth Amendment's Notice Clause's demands are thus met. *United States v. Wheeler*, 2003WL1562100 (D.Md.2003) at 1; *United States v. Higgs*, 353 F.3d 281, 296(4th Cir.2003).

In state prosecutions, whether commenced by indictment or information, what is required? "The federal constitution provides the floor, not the ceiling, for protecting individual rights." Hon. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L. Rev. 535(1986). If the federal constitution provides the floor, the state constitution can go no lower. It must protect the individual's rights co-

extensively with the federal constitution. *Oregon v. Haas*, 420 U.S. 714, 719(1975).

That the Fourteenth Amendment's Due Process Clause did not incorporate the Fifth Amendment's right to be charged by indictment, *Hurtado v. California*, 110 U.S. 516, 534-35(1884), does not resolve the question. Missouri may not deny its citizens those protections the federal constitution guarantees. Missouri can choose how to charge a criminal defendant, but cannot deny the "safeguard against oppressive and arbitrary proceedings" afforded by some check on prosecutorial authority. Only thus and with the notice the Sixth Amendment mandates, can he be afforded the full panoply of rights the federal constitution guarantees. *Green, supra*.

In trying to avoid the State's constitutional obligations, it is often argued the Fifth Amendment's Indictment Clause is inapplicable to the States. *See, Apprendi*, 530 U.S. at 477, n.3. Similarly, it is often argued the only federal constitutional limitation on state charging documents derives from the Sixth Amendment's notice requirement. *Blair v. Armontrout*, 916 F.2d 1310, 1329(8th Cir.1990). That argument is based on a flawed and materially incomplete reading of *Hurtado*.

Hurtado did not require, under the Fourteenth Amendment's Due Process Clause, that state court prosecutions proceed by indictment, but did not discount the States' constitutional obligations. "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by

information—**after examination and commitment by a magistrate, certifying to the probable guilt of the defendant**, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.”*Id.* at 538, n.6(emphasis added).

Whether prosecuted by indictment or information, key to ensuring the defendant’s rights is that an independent third party—magistrate or grand jury—review the charges.*See, McCutchan*, 12 S.W.3d at 468. In capital cases, in which aggravators are death-eligibility elements, they, too, must be reviewed.

The amended information upon which Vincent was tried did not include the aggravators making him death-eligible. This Court must reverse and order Vincent re-sentenced to life without parole.

CONCLUSION

For the reasons stated, 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,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2006, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered 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 29,892 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson