**IN THE**
**MISSOURI SUPREME COURT**

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| **STATE OF MISSOURI,** | ) | |
| | ) | |
| **Respondent,** | ) | |
| | ) | |
| **vs.** | ) | **No. SC88959** |
| | ) | |
| **VINCENT McFADDEN,** | ) | |
| | ) | |
| **Appellant.** | ) | |

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**APPEAL TO THE MISSOURI SUPREME COURT**
**FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI**
**21ST JUDICIAL CIRCUIT, DIVISION FIFTEEN**
**THE HONORABLE JOHN ROSS, JUDGE**

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# APPELLANT'S REPLY BRIEF

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## AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**



***STATUTES*:**



**INSTRUCTIONS**

## JURISDICTIONAL STATEMENT

The jurisdictional statement in Vincent's opening brief is incorporated by reference.

## STATEMENT OF FACTS

The Statement of Facts from Vincent's opening brief is incorporated by this reference, with the following corrections to the State's presentation. The State argues that Vincent told Evelyn Carter that he "felt 'good' **about** killing Franklin" and that "Carter **understood** that Appellant killed Franklin." (Resp.Br. at 15)(emphasis added). The State's argument is based upon Carter's speculation and conclusion that Vincent killed Franklin. As Carter acknowledged on cross-examination, Vincent never told her so. (T1405).

## POINTS RELIED ON[1]

### I.Jury Precluded from Hearing Relevant Evidence

**The trial court erred in precluding Vincent from eliciting that Michael Douglas pled guilty to second-degree murder and was sentenced to 20 years imprisonment because this denied Vincent due process, confrontation, 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 the evidence was relevant to credibility and appropriate sentence, and, even if not initially relevant, in both phases, the State opened the door to Michael's testimony**.

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

*Parker v. Dugger*, 498 U.S. 308 (1991);

*State v. Deck*, 303 S.W.3d 527 (Mo.banc 2010);

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

Mo.Const.,Art.I,§§10,18(a),21.

[1] The Points and Arguments from the opening brief are incorporated by this reference. Failure to respond to any is not intended a waiver.

## II.State Gets Second Bite of the Apple

**The trial court erred in overruling Vincent's objections to testimony of Mark Silas, William Goldstein, Eva Addison and Evelyn Carter, Exhibit 408, and opening and closing arguments, that Vincent killed Todd Franklin because Todd testified in a prior prosecution against Corey and Lorenzo, two of Vincent's friends, because these rulings denied Vincent due process, a fair trial, freedom from cruel and unusual punishment and freedom from being re-tried after once having been acquitted of that offense,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19, 21, in that, in the first trial, the jury rejected the statutory aggravator that Todd was a witness in a prior prosecution and was killed because he was a witness. That rejection constitutes an acquittal of that element of the offense and the State is estopped from seeking a different ruling from a second jury and forcing Vincent to re-run the gantlet.**

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

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

*State v. Simmons*, 955 S.W.2d 752 (Mo.banc1997);

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

Mo.Const.,Art.I,§§10,18(a),19,21.

## III.Court Improperly Grants State's Cause Strike

**The trial court abused his discretion in granting the State's challenge for cause of Venireperson Mark Kerr because this denied Vincent due process, a fair, impartial 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 Kerr's responses revealed he could apply the law by considering both punishments and not requiring the State to prove its case by greater than beyond a reasonable doubt. His hesitation in answering questions merely revealed his deliberate nature, not an inability to follow the law.**

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

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

*State v. Christeson*, 50 S.W.3d 251 (Mo.banc2001);

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

Mo.Const.,Art.I,§§5,10,18(a),21.

## VI.Instruction 18 Violates Notes on Use

**The trial court erred in overruling Vincent's objections and submitting Instruction 18, patterned after MAI-CR3d 314.40, because that denied Vincent due process, a properly-instructed 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, contrary to the Notes on Use, the Instruction submitted, as separate numbered paragraphs, Vincent's first degree assault and armed criminal action convictions. Vincent was prejudiced because, when the jury weighed aggravators and mitigators, it was encouraged to believe more aggravators were on the "death" side of the scales and death was the appropriate punishment.**

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

*Daniels v. State*, 285 S.W.3d 305 (Ark.2008);

*State v. Storey*, 986 S.W.2d 462 (Mo.banc1999);

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

Mo.Const.,Art.I,§§10,18(a),21.

## VIII.Instruction 18: Jury Doesn't Find Limiting Construction

**The trial court erred and plainly erred in accepting the jury's death verdict and sentencing Vincent to death because this denied Vincent due process, a fair trial, reliable jury 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 jury was instructed it could find that the "murder of Todd Franklin involved depravity of mind" only if it found "that the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life," and Judge Ross specifically directed the jury to write out the statutory aggravators they found "verbatim," the jury did not find the limiting construction.**

**Alternatively, if this Court believes the jury found the limiting construction, it is void for vagueness because, if the victim is deemed "rendered helpless" by one shot, the limiting construction would apply to any case involving more than one shot or blow. Because the jury's death verdict was based upon its finding that mitigators did not outweigh aggravators, its improper consideration of this aggravator skewed its decision toward death.**

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

*Bollenbach v. United States*, 326 U.S. 607 (1946);

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

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

Mo.Const.,Art.I,§§10,18(a),21.

## XI.Instructions 19 & 21 Violate *Ring, Apprendi* & *Whitfield*

**The trial court erred in submitting Instructions 19 and 21 over objection, rejecting Instructions B-E, which would have cured those errors, and admitting over objection evidence of non-statutory aggravators, because those actions denied Vincent due process, a properly-instructed jury, appellate review, 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 Instructions 19 and 21 place the burden of proof on the defense; don't require the State to prove this eligibility step beyond a reasonable doubt; are contrary to §565.030RSMo by requiring the jury unanimously find mitigators outweigh aggravators to impose life; let the jury consider constitutionally-impermissible evidence in aggravation of punishment; and insulate the jury's decision from appellate review by not requiring written findings on this step and the jury likely considered the evidence adduced and considered under those instructions in deciding penalty phase.**

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

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

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

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

Mo.Const.,Art.I,§§10,18(a),21.

## XII. State's Arguments Violate Due Process

**The trial court erred and abused his discretion in overruling Vincent's objections and denying his mistrial requests and plainly erred in not declaring a mistrial based on the prosecutor's arguments telling jurors in:**

### Voir Dire

1. **He worked for McCulloch, the elected prosecutor, for whom they may have voted;**
2. **Their answers didn't matter;**
3. **For a life without parole result, the jury must be unanimous;**
4. **Referred to other cases in which the State lacked evidence.**

### Guilt Phase Opening

1. **Mark Silas identified Vincent from a photo in the police station;**
2. **Larner's witnesses have "no reason to lie;"**
3. **Reads from letters in Michael's cell.**

### Guilt Phase Closing

1. **Referred to evidence that hadn't been admitted and encouraged jurors to request inadmissible evidence during deliberations;**
2. **Suggested Vincent's rights to a jury trial and confrontation of Michael Douglas were "B.S.;"**
3. **Referred to and encouraged jurors to feel how a .44 gun is fired although no evidence was presented about it and ignored the court's initial ruling;**

4. **Vouched for Hazlett's testimony and misled the jury about his criminal record;**
5. **Encouraged the jury to ignore evidence and vouched for the truth of out-of-court statements;**
6. **Called Vincent and his co-defendant "cold-blooded killers;"**
7. **Suggested defense counsel did not want the people of St. Louis County to convict someone of murder or protect its citizens;**
8. **"You represent St. Louis County.";**
9. **Suggested a lesser-included offense was absurd, contrary to the law;**
10. **Denigrated Vincent, saying he treated Franklin like an animal;**
11. **Aligned himself with jurors and against Vincent, saying "they don't think the way we think.";**
12. **Told jurors he had reasonable doubt about some evidence but it didn't matter;**
13. **Vouched for Lucas' credibility.**

**<u>Penalty Phase Closing</u>**

1. **Told jurors Vincent treated Franklin like an animal and doesn't believe in the sanctity of human life;**
2. **Told jurors he didn't find anything mitigating in the evidence and they should thus ignore it;**
3. **Personalized that he felt the Addison killing warranted the death penalty;**

4. **Argued future dangerousness, that Vincent would kill again;**
5. **Personalized to jurors and equated their function with witnesses, whose lives, he said, were at risk from Vincent;**
6. **Argued outside the evidence that Vincent was the leader and dragged Michael Douglas into this crime;**
7. **Expanded the scope of victim impact past the victims of this offense;**
8. **Made emotionally-charged statements designed to ensure the jurors ignored the law;**
9. **Likened Vincent to an animal and worse, saying he killed for power, control, status and pleasure;**
10. **Stated Vincent's lack of a mental disease or defect is aggravating;**
11. **Stated that Vincent has a supportive family is aggravating;**
12. **Stated Vincent's lack of mental retardation is aggravating;**
13. **Stated Vincent's capacity to know right from wrong is aggravating;**
14. **Stated because Vincent wasn't sexually abused, it was aggravating;**
15. **Stated Vincent believes in the death penalty;**
16. **Stated Vincent showed no remorse;**
17. **Denigrated Vincent's constitutional rights, saying he deserved to be hunted down and killed by Franklin's family;**
18. **Told jurors that they represent the community;**

**19. Personalized to the jury, asking them to think of the terror Leslie and Todd experienced and telling the jury to hold and hug them and not let them down**

**because these arguments denied Vincent due process, a fair trial, reliable sentencing, freedom from cruel and unusual punishment,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that Larner injected his personal beliefs; discounted veniremembers' responses; misstated the facts and law; injected facts not in evidence; injected evidence of other crimes; personalized to the jury; exceeded the scope of proper victim impact; vouched for witnesses' credibility; denigrated defense counsel; utilized epithets; injected heightened emotion; converted mitigators into aggravators, and commented on Vincent's right not to testify.**

*Weaver v. Bowersox*, 438 F.3d 832 (8th Cir.2006);

*Shurn v. Delo*, 177 F.3d 662 (8th Cir.1999);

*Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir.1989);

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

Mo.Const.,Art.I,§§10,18(a),21.

## ARGUMENTS

### I.Jury Precluded from Hearing Relevant Evidence

**The trial court erred in precluding Vincent from eliciting that Michael Douglas pled guilty to second-degree murder and was sentenced to 20 years imprisonment because this denied Vincent due process, confrontation, 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 the evidence was relevant to credibility and appropriate sentence, and, even if not initially relevant, in both phases, the State opened the door to Michael's testimony**.

A sentencer must be permitted to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(emphasis in original). In *Parker v. Dugger*, 498 U.S. 308 (1991), the Supreme Court vacated Parker's death sentence because, after it struck two aggravators, the Florida Supreme Court had not considered mitigation—including the sentences of less-than-death of Parker's co-defendants—in affirming sentence. In *Edwards v. State*, 200 S.W.3d 500 (Mo.banc2006), this Court found undersigned counsel not constitutionally-ineffective for failing to challenge the trial court's exclusion in penalty phase of Edwards' co-defendant's sentence. This Court's conclusion is contrary to *Parker* and *Lockett* and should be reconsidered.

This Court's conclusion in *Edwards* also must be reviewed in light of its subsequent decisions in *State v. Deck*, 303 S.W.3d 527, 552 (Mo.banc2010), and *State v. Dorsey*, 318 S.W.3d 648,659 (Mo.banc2010). There, this Court recognized that Missouri law requires that "all factually similar cases" be reviewed when determining whether death sentences are disproportionate. Such cases include those of co-defendants who receive sentences less than death. Missouri's Legislature thus has given guidance about a circumstance of the offense that should mitigate punishment. Given this change in the law, this Court must reconsider its decision in *Edwards*.

This Court should reverse and remand for a new trial.

## II.State Gets Second Bite of the Apple

**The trial court erred in overruling Vincent's objections to testimony of Mark Silas, William Goldstein, Eva Addison and Evelyn Carter, Exhibit 408, and opening and closing arguments, that Vincent killed Todd Franklin because Todd testified in a prior prosecution against Corey and Lorenzo, two of Vincent's friends, because these rulings denied Vincent due process, a fair trial, freedom from cruel and unusual punishment and freedom from being re-tried after once having been acquitted of that offense,U.S.Const., Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19, 21, in that, in the first trial, the jury rejected the statutory aggravator that Todd was a witness in a prior prosecution and was killed because he was a witness. That rejection constitutes an acquittal of that element of the offense and the State is therefore estopped from seeking a different ruling from a second jury and forcing Vincent to re-run the gantlet.**

In penalty phase, Mr. Larner told this jury that Vincent "wants to kill witnesses. That's his way of getting out of crimes: kill the witnesses. Kill the witnesses."(T2381). He also told this jury, "And he kills Todd because Todd is a witness. Todd was a witness against his friends. That's why he killed Todd. Again, Todd is a witness … Todd should be exterminated."(T2382). Thus, despite having taken the precaution of not re-submitting the statutory aggravator that Vincent killed Todd Franklin because he was a witness against Lorenzo and Corey Smith, after the first jury did not find that fact as a statutory aggravator (LF38-

39,366,374-75,457-58,640-41), Mr. Larner nonetheless encouraged the jury to consider it as a reason to convict Vincent of murder and sentence Vincent to death. (T1360-71,1373-76,1395-1400,1402,1564,1574-76). Despite the State's suggestion to the contrary, (Resp.Br.at 24-27), whether it is delineated as motive in guilt phase, or statutory or non-statutory aggravation in penalty phase, is irrelevant to the question presented here. As Judge Limbaugh pointed out in *State v. Simmons*, 955 S.W.2d 752, 760 (Mo.banc1997), "collateral estoppel bars relitigation of a **specific fact or issue** that was unambiguously determined by a previous jury."(emphasis added). Its application is not limited to elements of an offense. *Id.; see State ex rel. Johns v. Kays*, 181 S.W.3d 565 (Mo.banc2006).

This Court's conclusion, in *State v. Simmons*, 955 S.W.2d 752 (Mo.banc1997), *State v. Simmons*, 955 S.W.2d 729 (Mo.banc1997), and *State v. Storey*, 40 S.W.3d 898 (Mo.banc2001), that collateral estoppel does not bar resubmitting in a second prosecution a statutory aggravator that the jury in the first prosecution rejected, must be reconsidered in light of *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc2003); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). These cases compel a different conclusion.

Statutory aggravators are facts that increase the maximum penalty for first degree murder and thus "must be found by a jury beyond a reasonable doubt." *Id.* at 609. They are the functional equivalent of an element of a greater offense. *Id.*; *Apprendi*, 530 U.S. at 494 n.19; *Whitfield*, 107 S.W.3d at 256. Missouri jurors are instructed that they must write in their verdict forms any statutory aggravator that

they have found unanimously and beyond a reasonable doubt. MAI-CR3d 314.48. (LF369,644). Jurors are duty-bound to follow the Court's instructions, MAI-CR3d 300.02, and appellate courts are to presume that they followed those instructions. *State v. Shurn*, 866 S.W.2d 447, 465 (Mo.banc1993). If a jury does not include a specific statutory aggravator on its death verdict form, it must, therefore, not have found that aggravator unanimously and beyond a reasonable doubt.

By not writing on its death verdict form the aggravator in question, the 2005 jury demonstrated its rejection of the State's theory Vincent killed Todd Franklin because Franklin was a witness in a prior prosecution. The State should have been precluded from relitigating this specific fact or issue in this trial.

This Court must reverse and remand for a new trial.

## III.Court Improperly Grants State's Cause Strike

**The trial court abused his discretion in granting the State's challenge for cause of Venireperson Mark Kerr because this denied Vincent due process, a fair, impartial 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 Kerr's responses revealed he could apply the law by considering both punishments and not requiring the State to prove its case by greater than beyond a reasonable doubt. His hesitation in answering questions merely revealed his deliberate nature, not an inability to follow the law.**

Judge Ross abused his discretion in sustaining the state's cause challenge to Venireperson Kerr. Kerr's ability to follow the instructions was unimpaired by his views. He was qualified to sit. This denied Vincent's state and federal constitutional rights to due process, a fair, impartial jury, and freedom from cruel and unusual punishment.

Venirepersons may be struck for cause **only** if their views prevent or substantially impair their ability to abide by their oath and the instructions. *Wainwright v. Witt*, 469 U.S. 412, 424(1985); *State v. Christeson*, 50 S.W.3d 251, 264 (Mo.banc2001); *State v. Clark-Ramsey*, 88 S.W.3d 484, 486 (Mo.App.,W.D. 2002). Because capital juries have vast discretion to decide if death is the "proper penalty," general objections to the death penalty or conscientious and religious scruples against it do not disqualify venirepersons from serving. *Witherspoon v. Illinois*, 391 U.S. 510, 519(1968);Mo.Const.,Art.I,§5. 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*, 391 U.S. at 519(emphasis added).

Venireperson Kerr told Mr. Larner that he believes in the death penalty (T407); that he could sign a death verdict (T409); that he could announce a death verdict in open court (T409), and that his verdict of death or life without parole would "depend on the case, the circumstances of the case."(T411). The State argues that Mr. Kerr was properly struck for cause because his responses about his ability to follow the "beyond a reasonable doubt" burden of proof were equivocal. (Resp.Br. at 38-41). A review of the "entire examination," *State v. Deck*, 303 S.W.3d 527, 535-36 (Mo.banc2010), reveals that his ability to follow the law was unimpaired. Mr. Kerr's sole statement to Mr. Larner indicating he would require a higher standard of proof was not a bold assertion but rather, was qualified by his understanding, "If that's the only choice you're giving me, then I guess that's true."(T415). When Ms. Kraft explained the law to Mr. Kerr, however, he agreed he could follow the law and not require anything additional from the State.(T438-39).

While a peremptory strike based on Mr. Kerr's responses may have survived a *Batson* challenge and thus been upheld, *see, e.g.*, *State v. Taylor*, 18 S.W.3d 366, 372-73 (Mo.banc2000), his responses were not sufficient to sustain a strike for cause. The totality of his responses reveals someone who thoughtfully considered the questions and, after that consideration, could follow the law. His

ability to abide by his oath was not impaired.*Wainwright v. Witt*, 469 U.S. 412, 424(1985).

Striking Mr. Kerr for cause gave the State an extra peremptory since Kerr was qualified to serve. This Court must reverse and remand for a new trial.

## VI.Instruction 18 Violates Notes on Use

**The trial court erred in overruling Vincent's objections and submitting Instruction 18, patterned after MAI-CR3d 314.40, because that denied Vincent due process, a properly-instructed 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, contrary to the Notes on Use, the Instruction submitted, as separate numbered paragraphs, Vincent's first degree assault and armed criminal action convictions. Vincent was prejudiced because, when the jury weighed aggravators and mitigators, it was encouraged to believe more aggravators were on the "death" side of the scales and death was the appropriate punishment.**

The State asserts that "because the current Note on Use 5 gives no direction as to whether the serious assaultive convictions must be stated in separate paragraphs, the instruction does not violate the Notes on Use in so doing." (Resp.Br. at 66). The State ignores that the current Note on Use 5 **eliminated** the prior Note on Use's directive that "If the defendant has more than one such conviction, a separate numbered paragraph should be used for each conviction." (Appendix at A-1-2). That sea change cannot be ignored since changes in statutes and rules are intended to have some effect.*State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth*, 704 S.W.2d 219, 225(Mo.banc 1986). The State's reliance on *State v. Taylor*, 18 S.W.3d 366 (Mo.banc2000) and *State v. Clemmons*, 753 S.W.2d 901 (Mo.banc1988) is similarly unavailing. When

*Taylor* was decided, the prior Note on Use, which specifically authorized the use of "separate numbered paragraphs" for each serious assaultive conviction, was in effect. Only thereafter, and when this case was tried, was the Note on Use changed. *Taylor* is not controlling. Further, in neither *Taylor* nor in *Clemmons* was the Note on Use at issue. This case presents a different question for this Court's resolution.

Even when juries find statutory aggravators, they have discretion to impose life. *State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003); *State v. Storey*, 986 S.W.2d 462, 464(Mo.banc 1999). Since statutory and non-statutory aggravators are weighed against mitigators, four improperly-submitted aggravators make a difference. *See, Daniels v. State*, 285 S.W.3d 205,214(Ark.2008)(harmless error analysis inappropriate when one of two statutory aggravators declared invalid since jury never had the opportunity to weigh only one aggravator against one mitigator)(overturned on other grounds).

The State cannot demonstrate no prejudice resulted when the jury considered four times as many statutory aggravators as the MAI's permit. This Court should reverse and remand for a new penalty phase or reverse and order Vincent re-sentenced to life without parole.

## VIII.Instruction 18: Jury Doesn't Find Limiting Construction

**The trial court erred and plainly erred in accepting the jury's death verdict and sentencing Vincent to death because this denied Vincent due process, a fair trial, reliable jury 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 jury was instructed it could find the "murder of Todd Franklin involved depravity of mind" only if it found "the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life," and Judge Ross directed the jury to write out the statutory aggravators they found "verbatim," the jury did not find the limiting construction.**

**Alternatively, if the jury found the limiting construction, it is void for vagueness because, if the victim is "rendered helpless" by one shot, the limiting construction applies to any case involving more than one shot. Because the jury's verdict was based upon its finding that mitigators did not outweigh aggravators, its improper consideration of this aggravator skewed its decision toward death.**

The State acknowledges that the portion of Instruction 18 which told the jury that it could find depravity of mind only if it made a particular finding, (LF654-55), is a "limiting factual determination." (Resp.Br.at 75). As such, jury findings are constitutionally required. *Ring v. Arizona*, 536 U.S. 584 (2002);

*Apprendi v. New Jersey*, 530 U.S. 466 (2000); *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc2003). The State's position is that the jury is presumed to have made the requisite factual finding. This effectively relieves the State of its burden of proof beyond a reasonable doubt on an element of the offense. *See Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979). As to an element of the offense, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). Especially here, where the jury asked and then was specifically directed to write its findings "verbatim" (LF679-80), that it did not include the limiting construction in its findings is constitutionally significant. This was not the "inartful" completion of the verdict form referenced in *State v. Zink*, 181 S.W.3d 66, 74 n.24 (Mo.banc2005), but a failure to make a factual finding.

Although other statutory aggravators existed, this Court cannot assume the jury's verdict would be the same if this aggravator were struck from the balance. As Mr. Larner explained to the veniremembers, "You weigh the evidence in aggravation versus the evidence in mitigation … Whatever is 'aggravating' is in this hand and whatever you hear that's 'mitigating' – in his favor – is in this hand." (T403). This Court cannot presume the jury would unanimously beyond a reasonable doubt find aggravators outweighed mitigators and death was the appropriate punishment. *Whitfield*, 107 S.W.3d at 263.

This Court must reverse and remand for a new penalty phase or, in the exercise of its independent proportionality review, resentence Vincent to life without parole.

## XI.Instructions 19 & 21 Violate *Ring, Apprendi & Whitfield*

**The trial court erred in submitting Instructions 19 and 21 over objection, rejecting Instructions B-E, which would have cured those errors, and admitting over objection evidence of non-statutory aggravators, because those actions denied Vincent due process, a properly-instructed jury, appellate review, 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 Instructions 19 and 21 place the burden of proof on the defense; don't require the State to prove this eligibility step beyond a reasonable doubt; are contrary to §565.030RSMo by requiring the jury unanimously find mitigators outweigh aggravators to impose life; let the jury consider constitutionally-impermissible evidence; and insulate the jury's decision from appellate review by not requiring written findings and the jury likely considered the evidence adduced and considered under those instructions in deciding penalty phase.**

In voir dire, Mr. Larner repeatedly told the venire they would weigh mitigators against aggravators. He explained, "And if you unanimously find that the good stuff outweighs the bad, that this is heavier than this, unanimous, if all twelve of you agree that the mitigating outweighs the aggravating, well, then, it's life without parole. But if you don't all twelve agree that the mitigating outweighs the aggravating, if you don't all twelve agree that the mitigating outweighs the aggravating … if one person … says, I think the aggravating weighs more than the

mitigating, then you're at that third door. And that third door … is the death penalty door."(T131-32)(*See also*T67,70,131,132,189,210,404,483,560-61,623). Mr. Larner's mantra, thereafter echoed and reinforced in Instructions 19 and 21, conflict with *State v. Whitfield*, 107 S.W.3d 253(Mo.banc 2003); *Ring v. Arizona*, 536 U.S. 584(2002), *Apprendi v. New Jersey*, 530 U.S. 466(2000), and §565.030.4 RSMo, denying due process. The Instructions violate the fundamental principles set forth in *Kansas v. Marsh*, 548 U.S. 163 (2006), where the Court specifically warned, "although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence." *Id.* at 178-79.

This Court's reliance, in *State v. Johnson*, 284 S.W.3d 561 (Mo.banc 2009) on the Supreme Court's interpretation of the Kansas statute in *Marsh* is misplaced. The weighing step in question in *Marsh* is not an eligibility step, as is the weighing step at issue here. *Whitfield*, 107 S.W.3d at 256, 261. Since it is an eligibility step, a panoply of constitutional principles apply that otherwise might not. This Court's decisions in *State v. Davis*, 318 S.W.3d 618, 643 (Mo.banc2010) and *State v. Anderson*, 306 S.W.3d 529 (Mo.banc2010), which rejected the argument that juries must be instructed that, as to the weighing step, the State bears the burden of proof beyond a reasonable doubt, are contrary to *Whitfield* and thus run afoul of *Ring* and *Apprendi*.

This Court's determination in *Whitfield* that the weighing step is an eligibility step which required jury findings was grounded on the analysis set forth in *Ring*, *Apprendi* and *Jones v. United States*, 526 U.S. 227 (1999). That trio of cases teaches that capital defendants are entitled, under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees, to a jury finding, beyond a reasonable doubt, of all facts upon which increased punishments are contingent. Since this Court has determined that the weighing step is an eligibility step, all of these constitutional guarantees, not merely the jury-trial right, apply.

This Court should reverse and remand for a new penalty phase or reverse and order Vincent resentenced to life without parole.

## XII.State's Arguments Violate Due Process

**The trial court erred and abused his discretion in overruling Vincent's objections and denying his mistrial requests and plainly erred in not declaring a mistrial based on the prosecutor's arguments telling jurors in:**

### Voir Dire

**1. He worked for McCulloch, the elected prosecutor, for whom they may have voted;**

**2. Their answers didn't matter;**

**3. For a life without parole result, the jury must be unanimous;**

**4. Referred to other cases in which the State lacked evidence.**

### Guilt Phase Opening

1. **Mark Silas identified Vincent from a photo in the police station;**
2. **Larner's witnesses have "no reason to lie;"**
3. **Reads from letters in Michael's cell.**

### Guilt Phase Closing

1. **Referred to evidence that hadn't been admitted and encouraged jurors to request inadmissible evidence during deliberations;**
2. **Suggested Vincent's rights to a jury trial and confrontation of Michael Douglas were "B.S.";**
3. **Referred to and encouraged jurors to feel how a .44 gun is fired although no evidence was presented about it and ignored the court's initial ruling;**

4. **Vouched for Hazlett's testimony and misled the jury about his criminal record;**
5. **Encouraged the jury to ignore evidence and vouched for the truth of out-of-court statements;**
6. **Called Vincent and his co-defendant "cold-blooded killers;"**
7. **Suggested defense counsel did not want the people of St. Louis County to convict someone of murder or protect its citizens;**
8. **"You represent St. Louis County;"**
9. **Suggested a lesser-included offense was absurd, contrary to the law;**
10. **Denigrated Vincent, saying he treated Franklin like an animal;**
11. **Aligned himself with jurors and against Vincent, saying "they don't think the way we think.";**
12. **Told jurors he had reasonable doubt about some evidence but it didn't matter;**
13. **Vouched for Lucas' credibility.**

**<u>Penalty Phase Closing</u>**

**1. Told jurors Vincent treated Franklin like an animal and doesn't believe in the sanctity of human life;**

**2. Told jurors he didn't find anything mitigating in the evidence and they should thus ignore it;**

**3. Personalized that he felt the Addison killing warranted the death penalty;**

**4. Argued future dangerousness, that Vincent would kill again;**

**5. Personalized to jurors and equated their function with witnesses, whose lives, he said, were at risk from Vincent;**

**6. Argued outside the evidence that Vincent was the leader and dragged Michael into this crime;**

**7. Expanded the scope of victim impact past the victims of this offense;**

**8. Made emotionally-charged statements designed to ensure the jurors ignored the law;**

**9. Likened Vincent to an animal and worse, saying he killed for power, control, status and pleasure;**

**10. Stated Vincent's lack of a mental disease or defect is aggravating;**

**11. Stated that Vincent has a supportive family is aggravating;**

**12. Stated Vincent's lack of mental retardation is aggravating;**

**13. Stated Vincent's capacity to know right from wrong is aggravating;**

**14. Stated because Vincent wasn't sexually abused, it was aggravating;**

**15. Stated Vincent believes in the death penalty;**

**16. Stated Vincent showed no remorse;**

**17. Denigrated Vincent's constitutional rights, saying he deserved to be hunted down and killed by Franklin's family;**

**18. Told jurors that they represent the community;**

**19. Personalized to the jury, asking them to think of the terror Leslie and Todd experienced and telling the jury to hold and hug them and not let them down**

**because these arguments denied Vincent 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),19,21, in that Larner injected his personal beliefs; discounted veniremembers' responses; misstated the facts and law; injected facts not in evidence; injected evidence of other crimes; personalized to the jury; exceeded the scope of proper victim impact; vouched for witnesses' credibility; denigrated defense counsel; utilized epithets; injected heightened emotion; converted mitigators into aggravators, and commented on Vincent's right not to testify.**

This Court has condemned 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). The Eighth Circuit has repeatedly condemned prosecutorial argument in capital cases arising out of St. Louis County. *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006); *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999); *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). Despite these rulings and numerous teaching moments provided by the Eighth Circuit and the United States Supreme Court, *e.g.*, *Berger v. United States*, 295 U.S. 78 1935); *Darden v. Wainwright*, 477 U.S. 168 (1986); *United States v. Young*, 470 U.S. 1 (1985); *Viereck v. United States*, 318 U.S. 236 (1943); *Antwine*

*v. Delo*, 54 F.3d 1357 (8th Cir. 1995); *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000); *Sublett v. Dormire*, 217 F.3d 598 (8th Cir. 2000); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992), Mr. Larner did not learn. His improper arguments permeated this case, especially in penalty phase, where, as the Supreme Court has cautioned, closing arguments must undergo a "greater degree of scrutiny." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). "[I]t is unreasonable … to conclude the argument did not result in a deprivation of due process." *Copeland*, 232 F.3d at 975.

Especially egregious was Mr. Larner's penalty phase closing. Of the host of errors he created, the following are among the worst and are highlighted here because of the State's attempts on appeal to whitewash them. The State argues that Mr. Larner did not personalize to the jury, as was condemned in *Storey* and *Rhodes*, when he asked them to "Think of the terror" that Leslie, Todd, and their families went through. (Resp.Br. at 108-09). The State asserts that he "did not ask the jurors to put themselves in the victims' place, but only asked them to think of what the victims and families went through." *Id.* The State ignores that Mr. Larner began this exhortation by arguing, "Ladies and gentlemen, everyone who has a sister or brother hopes and prays they never had to endure the pain and suffering that the Addisons and Franklins have had to endure…."(T2413). With that preface, Mr. Larner encouraged the jurors to "think of the[ir] terror." Mr. Larner clearly encouraged the jurors to put themselves in the shoes of the victims and their families. As in *Storey* and *Rhodes*, this kind of argument is grossly

improper because it interferes with jurors' ability to make a reasoned and deliberate decision on punishment. *Rhodes,* 988 S.W.2d at 529.

The State also argues, with a brief reference to Mr. Larner's lengthy diatribe, that "the prosecutor's argument was proper because it argued the evidence; the jury was not required to accept any fact as mitigating." (Resp.Br.at 112). This is in response to Mr. Larner's pounding, repetitive argument that, "He has no mental disease, under the law. That's aggravating." (T2389);

"He's got no excuses. He's not sick in the head. I mean, he doesn't think like we think. There's no question that he's not. There's no mental disease or defect. He's not psychotic, schizophrenic, anything like that. That's aggravating."(T2389);

"He has a supporting family, and he still kills. That's aggravating. Everyone tried to help him in his life: is aggravating." (T2389);

"He has the intelligence to choose to do what is right. He's not retarded. His grades were average in school. That's aggravating."(T2389);

"He has the capacity to know what was right from wrong. That's aggravating. If he didn't have the capacity to know what was right from wrong, that would be in his favor: he didn't know right from wrong. That's not the case here. It's aggravating." (T2390);

"He was never beaten or abused or sexually molested by his family. He had every advantage. That's aggravating. And if he was beaten and sexually

molested, that would be mitigating, wouldn't it? That would be mitigating. Well, that didn't happen. See, that's aggravating."(T2390);

"He was not molested. He was not beaten, abused by any member of his family at any time. He's not psychotic. He doesn't have any mental disease or defect, under the law. The best they could come up with, the best is that he didn't bond properly with his mother and father. And his strengths: He made an "A" in Applied Math."(T2405);

"Now, sometimes we hear people are too young to get the death penalty. That doesn't apply here. Too insane, too crazy, too retarded: that doesn't apply here. Even his own doctors say that he has no mental defect, under the law."(T2407).

These arguments clearly encouraged the jury to convert mitigators into aggravators, a condemned practice. *Zant v. Stephens*, 462 U.S. 862 (1983). The State's citation to *State v. Feltrop*, 803 S.W.2d 1(Mo.banc1991) is unavailing. There, in one isolated instance, the prosecutor asked a teacher about any conversations about "these strange behavior patterns." *Id.* at 18. This Court rejected the contention on appeal that the State had argued that the defendant's personal background and history was an aggravator. *Id.* Here, Mr. Larner explicitly told jurors, not once, but nine times, that aspects of Vincent's background and personal history were not mitigating but aggravating.(T2389-90,2405).

This Court must reverse and remand for a new trial, a new penalty phase, or must order Vincent resentenced to life without parole.

## CONCLUSION

For the reasons set forth in this reply brief and in the opening brief, this Court should reverse and remand for a new trial, a new penalty phase, or re-sentence Vincent to life without parole.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached reply brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,760 words, excluding the cover, signature block, this certification and the Appendix, as determined by Microsoft Word 2007 software; and that, on this 24th day of January, 2012, a copy of this notification was sent through the eFiling system to: Timothy A. Blackwell, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

/s/ Janet M. Thompson