IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
VS.	)	NO. SC86689
	)	
JOHNNY A. JOHNSON,	)	
	)	
APPELLANT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,
DIVISION 3, THE HON. MARK D. SEIGEL, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

A jury found Johnny Johnson, guilty as charged, of Count I–first degree murder, Count II–armed criminal action, Count III– kidnapping, and Count IV–attempted forcible rape and assessed a death sentence. The trial court sentenced him to consecutive sentences of death on Count I and life imprisonment on Counts II, III, and IV. This Court has jurisdiction. Art. V, §3, Mo.Const. (as amended 1982).

STATEMENT OF FACTS

Johnny Johnson – Background Facts

Johnny Johnson fails kindergarten(T1726,2080;DefEx-BB2). When Johnny is four years old, his mother's boyfriend tries to drown him and a neighbor sexually abuses him (T2036,2080-81,2213;DefEx-BB2). Three times, injuries to Johnny's head require stitches (T1784-85).

Johnny fails first grade (T2082;DefEx-BB3). He wets himself at school shaming himself; his enuresis persists today (T1550,2082;DefEx-BB3).

At age 9 or 10, Johnny is again sexually abused (T2083;DefEx-BB3). He tries drinking alcohol for the first time (T2084;DefEx-BB3).

Johnny's learning disabilities persist in middle school (T2146,1786, 2085-86;DefEx-BB4). Kids make fun of his looks and his learning disability(T2034,2148). He repeats more grades (T1786).

There is a history of mental illness and mental problems in Johnny's family. Johnny's brother Eric is diagnosed with schizophrenia (T2084-85;DefEx-BB2). His maternal grandfather spent time in a mental hospital (T2186).

In seventh grade, Johnny talks about wanting to die and is hospitalized (T2159). He does not kill himself because he thinks he'll go to hell (T2160-61).

Shortly after his 13th birthday, Johnny sees his grandfather die from a heart attack, becomes distraught and is admitted to a mental hospital (T2086,2184-85,2193). He starts using drugs and alcohol with his brother and sister and has hallucinations (T2035,2086;DefEx-BB4). He is sexually abused, again, by a neighbor (T2086-87;DefEx-BB4).

At 14, Johnny slashes his wrists to kill himself and is put in a psychiatric

hospital; upon release, he overdoses on drugs and is readmitted (T1787-89,2087-88;DefEx-BB5). He is hospitalized for major depression (T2088; DefEx-BB5).

School problems continue (T1786,2088;DefEx-BB5;DefEx-BB6). Sixteen-year-old Johnny brings a knife to school in ninth grade; The juvenile court places Johnny on probation and sends him to live with his father to provide a "male role model"(T2090-91;DefEx-BB6). His father's "serious diabetic health problems" lead to gangrene and amputation of a foot (T1586,2090-96). Johnny develops post-traumatic stress disorder (T2094-96;DefEx's-BB8 & -BB9).

Johnny becomes truant, leaves school, and moves back to live with his mother (T2090-91;DefEx-BB6). Drug and alcohol problems persist(T1791). He talks about suicide and mutilates himself (T1791).

At 17, Johnny works erratically(T2092-93;DefEx-BB7). His drug use escalates; he uses LSD and hears voices (T2093;DefEx-BB7).

By his 18th year, Johnny has lived in 9 different places always without an "adult who [was] consistently emotionally stable and in his life for him" (T1096-97). Johnny is depressed; he drinks and tries, more than once, to kill himself (T2094;DefEx-BB8). He is "in and out of hospitals" and drug treatment programs (T2094;DefEx-BB8).

Between 18 and 22, Johnny lives "on the streets" when not in custody on various criminal charges or violating his probation (T2098-99; DefEx'sBB9 & BB10). He and a friend, Lisa Mabe, use drugs together and have a child

(T2100;DefEx-BB11).

Dr. John Rabun's Evaluation of Johnny in 2001

In 2001, the St. Louis County Court sends Johnny to the St. Louis State Hospital (also called the St. Louis Psychiatric Rehab Center) after he violates his probation in a stealing case and assigns psychiatrist John Rabun to evaluate him (T1449-50,1452). Before evaluating Johnny, Dr. Rabun reviews Johnny's in-patient hospital records at the Rehab Center (DefEx-L), probation violation reports, and records from Johnny's previous treatment at Southeast Missouri Mental Health Center and Metropolitan St. Louis Psychiatric Center (T1451). The records document Johnny's "history of treatment since a young age for psychiatric problems in particular starting around the age of thirteen," several attempts to kill himself, a history of self-mutilation, and his series of hospitalizations and treatment "for problems with alcohol, drugs and his mental illness" (T1454;DefEx-L). Johnny's family's history is replete with substance abuse and mental illness (T1459). Mental disorders are genetic meaning they run within families (T1461).

Early in Johnny's illness, when he was younger, he was diagnosed with depression and had psychotic symptoms: hallucinations, delusions (T1455). In 1996, Johnny is diagnosed with major depression and "psychotic disorder not otherwise specified" meaning he has psychotic symptoms of unknown cause (T1469-70). Later the diagnosis is "schizo-affective disorder" a disease similar to schizophrenia. He also had problems with drug abuse (T1455). Dr. Rabun

testifies that drug abuse alone does not cause schizo-affective disorder (T1461).

Dr. Rabun also interviews Johnny for two hours (T1452). Dr. Rabun finds Johnny suffers from schizophrenia (T1463,1473). As ordered by the Court, Dr. Rabun included a "risk assessment" of Johnny's risk for violence in his 2001 report to the court (T1476). Dr. Rabun identified several factors "that would suggest in certain situations ... [Johnny] would pose an unacceptable risk of violence to himself or others" (T1476). Johnny has heard "voices telling him to harm himself ... in the past" (T1477). Voices could possibly tell Johnny to harm someone else (T1477). To minimize the risk of violence, Johnny must stay on medication, live in a stable situation, and avoid drugs and alcohol (T1476-77).

Johnny remains in the Psychiatric Rehab Center from until mid-January, 2002. Upon release, Johnny returns to his grandmother's house in Kirkwood where he lives with his grandmother, Lillie Owens, his girlfriend Lisa Mabe, and his son Devon (T1548-49,2187). Community support worker[1] Dahley Dugbatey meets with him (T1518-22). She helps him find a psychiatrist, get a medicaid card, and get medicine (T1522-23,1525-26). For about six months, things go well(T1526,1550).

Late in June, Johnny stops taking his medication (T1550). He tells

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[1] Dugbatey worked for "Adapt of Missouri" – an agency that the Department of Mental Health contracts with "to provide community support services to adults coming out of the State Mental Hospital" (T1519).

Dugbatey that his probation officer saw him in a bar when he was there with his girlfriend (T1527-28). Dugbatey knows Johnny should not be in a bar and gets his permission to talk to the probation officer (T1527-28).

Johnny's conversations with Dugbatey become different – his reality seems "off a little" (T1528). Johnny tells Dugbatey he has an "alien registration card" and talks about the tattoos on his hands that he did himself (T1528). Dugbatey knows this isn't normal (T1529).

Johnny begins staying away from home (T1551,2188). He tells Lisa he is "doing drugs" in Valley Park (T1554). Lisa goes to find him in Valley Park, and he acts paranoid (T1552).

Johnny misses his next appointment with Dugbatey (T1529). She speaks to him once, then is unable to make contact with him (T1529). Dugbatey's supervisor writes to Johnny saying he needs to contact the agency by July 31st to continue getting services and sends a copy to Johnny's probation officer; Dugbatey hopes the probation officer will see the letter and "say it's time, [Johnny] needs to go back to the State mental hospital" (T1530).

On July 25, 2002, Lisa goes to Valley Park to bring Johnny home to Kirkwood (T1553). After 20 minutes, in house, Johnny "space[s] out" (T1553). He screams at Lisa and runs off (T1553).

Dugbatey never hears from Johnny again (T1531). She does not hear from the probation officer until July 26th when Casey's disappearance and Johnny's picture are broadcast on TV (T1531).

Ernie and Angie Williamson have known Johnny since he was a little kid (T824-25,859). In 2002, Ernie and Angie separate(T856). Angie and their children, Chelsea--age 12, Casey—age 6, Elizabeth—4, and Ernie—2, stay with her father, Jim Wideman, at 805 Benton in Valley Park; Ernie stays across the street at Michelle Rehm's house, 810 Benton, where Michelle lives with her boyfriend Eddy Barrick (T827,855-57,899).

On Wednesday, July 24th, Angie and Ernie are on the front porch at 805 Benton and see Johnny walking down the street (T860-61). Angie says hello and Johnny stops to talk (T861-63).

That evening, Angie goes to Michelle's with the children to spend the night with Ernie; Michelle, Eddy, and Johnny Johnson are there(T864-67). Eddy knows Johnny from school (T902). Angie, Ernie, and the children go upstairs and stay there all night (T867-68).

The next morning, Thursday, Angie goes downstairs; Casey and Johnny are sitting at opposite ends of the couch watching cartoons (T868-69). Angie asks Johnny if Casey had wakened him, and he says "she was fine, she wasn't bothering [him]" (T869).

Thursday evening, Angie, Ernie, and the children are at Michelle's house, cooking dinner on the grill, and see Johnny walking down Benton again(T871). They ask Johnny to eat with them. He accepts and says someone is coming to pick him up (T871-72).

At 8:30 p.m. Michelle, Eddy and Johnny are in the living room watching

television (T872,874,875). Angie, Ernie, and the children go upstairs (T876). At 10 o'clock, Ernie briefly goes downstairs to get Casey something to eat (T877). Then everyone goes to sleep (T877).

The alarm goes off at 6 or 6:30 Friday morning, and Ernie gets up to go to work; Angie stays in bed (T826,877). Casey is hungry, and Ernie tells her he will take her across the street to get something and to wait; he goes downstairs (T827,878). Johnny is asleep on the couch, and Ernie goes into the bathroom (T827). Fifteen minutes later he comes out and goes upstairs for Casey (T828). Casey is not upstairs, and Ernie looks for her (T828-29).

At about 7:00 a.m. that morning, in bright sunlight, Johnny walks through Valley Park with Casey on his back (T944,950). They cross St. Louis Avenue, a main business and residential street busy at that time of day with people driving to, and arriving at, work (T935-37,944,950-51).

Ernie wakes Angie at about 7:15 a.m. because he cannot find Casey (T829-30,878). Ernie then notices Johnny is not there (T830,879). Thinking maybe Johnny had taken her to the store to get milk or something for breakfast, Ernie goes to the store (T831). Casey is not there.

Ernie and Angie search 805 and 810 Benton without finding Casey (T879-80). They begin to get worried and, still checking the houses, contact relatives, neighbors, friends and call 911 (T833,880-83). The police come and Ernie tells them that Johnny spent the night on the couch and is no longer there (T834).

The police and numerous other people search for Casey (T835,883-84).

Lewis Barnhart tells the police that earlier that morning he saw a man at St. Louis Avenue and Sixth Street carrying a little girl on his back (T933-39).

Chelsea and her friend, Angel Friese, look for Casey on their bikes; they split up to search (T989). Angel sees Johnny Johnson walking toward Benton (T990). Angel asks Johnny where Casey is (T990-91). Johnny says he doesn't know, and Angel reports this to the police (T991-92).

Officer Louis spots Johnny as he approaches Benton and goes to meet him (T1012-14). Johnny says, "I hear you're looking for me" and identifies himself (T1014). Johnny talks with Officer Louis and agrees to go to the police station to talk some more (T1015-20). Lewis Barnhart identifies Johnny as the man he had seen with the little girl (T939-40).

Detective Neske's Testimony

St. Louis County Detectives Neske and Kneib begin questioning Johnny at 9:30 a.m. (T1232-46). Johnny first says he was sleeping on a couch at Michelle's house where he had been staying recently (T1248). No one in the house was awake when he got up and went out to meet his boss at Sal's Market (T1248). His boss didn't arrive, and Johnny went swimming (T1248). He was walking back to Michelle's when the police stopped him (T1248).

Detective Neske confronts Johnny with information obtained from Ernie Williamson and Lewis Barnhart suggesting that Johnny and Casey had left Michelle's house together (T826-30,935-40,1249-50). Detective Neske questions Johnny throughout the morning; Johnny denies knowledge of

Casey's whereabouts(T1250-60). In the afternoon, Johnny agrees to allow collection of evidence for a rape kit, and Detective Neske says it could eliminate him as a suspect (T1260-61). Just before the evidence is collected, Detective Neske tells Johnny, "[y]ou need to do the right thing, you need to be a man and tell me where she's at, we can help you, tell us where she's at" (T1265-66).

Johnny begins crying and says Casey was in the old glass factory and he killed her by accident (T1265-67). He says that as he started to leave Michelle's house that morning, Casey was there and asked where he was going (T1268). He told her "the old glass factory" and she wanted to go with him; they went to the glass factory together (T1268). They came to a "silo" and "dropped" into it (T1269). Johnny tried to climb one of the walls by holding onto a large rock; it "came out and hit Casey in the head killing her and he freaked out, he didn't think anybody would believe him so he covered up the body with rocks and leaves and sticks and he went down to the river to kill himself" (T1269). At the river, he "couldn't kill himself" (T1269). He was returning to Michelle's house, and the police stopped him (T1269-70).

Johnny draws two diagrams for Detective Neske: one showing the location of the glass factory and another locating the silo (T1272-73;StEx's-88A&B). Johnny's information is given to people searching for Casey (T1276-77).

In a chamber in the glass factory, searchers find Casey's night-gown clad

body[2] virtually covered with pieces of the concrete ruins, rocks, and dried leaves (T1046-57,1114-15,1139-66;StEx's-22,23,26-37,43-47). A large concrete segment covers her head; she does not respond when her name is called (T1056). Blood is on leaves, debris, rocks, a brick under her body, and the chamber walls (T1136-37,1156-58,1161-62; StEx's-33B-33L,38,40-41). Casey's underwear are in an adjacent archway (T1140,1158,1161-62;StEx's-9,10,37-39).

Detective Neske arranges for other officers to take Johnny to police headquarters in Clayton and goes to look at the scene in the silo to see if it verifies Johnny's statement (T1282-84). He does not see anything like a rock that had fallen from a wall and struck Casey in the head (T1285). Detective Peeler, also in the silo, says there appear to be "blood spatters on the walls" and throughout the silo chamber; this is inconsistent with Johnny's statement about a rock falling and hitting Casey in the head (T1287).

Detective Neske returns and tells Johnny it doesn't look like an accident (T1288). Johnny says everything he had told Detective Neske was correct up to entering the silo (T1289-90). Johnny says after he and Casey entered the silo,

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[2] Comparison of StEx-47, a photograph of Casey after all rocks were removed, with StEx-49, a photograph of Casey after being placed on a body bag, shows that her nightgown was raised from the position in which it was when she was found (T1165-66,1178-79;StEx's-47&49).

he asked "if she wanted to see his penis" (T1290). She said no; he lowered his shorts and asked Casey to "show him her vagina" (T1291).

Casey began "freak[ing] out" (T1291). "[B]ecause she started to freak out, he started to freak out and he picked up the brick and as she was freaking out ... from what he described as a distance of five feet ... struck her in the head with the brick"(T1291). She fell, dazed, and was crawling away when Johnny "picked up the brick and struck her in the head a second time" (T1291). She crawled to the other side of the silo; Johnny tossed a boulder onto her killing her (T1291).

Johnny, still freaking out, covered her body with rocks, leaves, and tree branches to hide her (T1291). Then he left the silo and went to the river to wash off the blood (T1292).

Detective Neske asks Johnny why he exposed himself and asked to see Casey's vagina; Johnny says "he wanted to sit on the side and masturbate" (T1292). Johnny says he pulled Casey's panties off when she was freaking out and later used them to wipe blood from her face (T1292). He discarded the underwear in a hole in the silo (T1292).

Johnny agrees to record his second statement (T1293). At 8:30 p.m., Detective Neske audio-tapes Johnny's second statement (T1294-95;StEx-87).

A swab of Johnny's penis, obtained for a rape kit, is negative for blood (T1089-95,1220). Swabs of Casey's vagina and rectum are negative for sperm, semen, and blood (T1221-22). Swabs of her mouth are negative for semen and sperm (T1222). Casey's underpants, positive for blood, are negative for semen

and sperm (T1222). Her DNA is not in Johnny's nail clipping or in scrapings from under his nails (T1223-24). Leaf debris in the chamber in which Casey was found is checked for seminal fluid; none is found (T1225-26). No seminal fluid is found on debris at the scene around Casey's body(T1225-26).

A stain on Johnny's shorts tests positive for his semen (T1213-15). Testing cannot determine the length of time the stain had been on his shorts (T1223).

Detective Newsham's testimony

Detective Newsham arrives at police headquarters on July 26th at about 7:30 p.m. (T1358). At 11:30 or 11:45 p.m., he and Detective Longworth are told to take Johnny to the jail (T1361).

In the jail's booking area, the detectives and Johnny wait; "every prisoner has to be evaluated by the nurse on duty there before they can be booked" (T1363). Four or five people have to be evaluated before Johnny (T1364).

Detective Newsham chats with Johnny about his Edgar Allen Poe tattoo and Poe's works (T1365-66). Detective Newsham asks Johnny if he likes reading anything else; Johnny mentions the Bible (T1367). Johnny says he is "concerned about eternal salvation"(T1367). He says it is "fine" he feels he is "going to receive the death penalty" and wants "to be executed"(T1367).

Detective Newsham testifies, "Well, he asked me – we talked about eternal salvation for a few moments and I asked him, I said, – he asked me do you think I'll ever achieve eternal salvation"(T1368). Detective Newsham says, "well, yes, I believe to be forgiven for this crime you have to be completely

honest about every single detail, he couldn't leave anything out" (T1368).

Up to that point, Detective Newsham had not tried to interrogate Johnny, but when the subject of eternal salvation came up, his "process change[s]" (T1368). This is an opportunity to get more information(T1368-69).

Johnny says "he hadn't been completely honest, that there were details he had left out"(T1369). The detectives and Johnny return to the police station without having seen the nurse(T1385,1393). Detective Newsham says it was about midnight when he decided to take Johnny back to the jail(T171).

Detective Newsham administers a warning and waiver form to Johnny (T1369-71;StEx-89). Johnny signs the waiver form (T1371-72).[3] The date and time on the waiver form are July 27, 2002 at 12:30 a.m. (T1373-74).

The nurse's notes for the jail on the night Johnny was booked, (StEx-95), as read into the record by Dr. Dean, indicate the following:

"23:38" [11:38 p.m.] – Johnny was "escorted into the medical office by county detective" (T1653;StEx-95). He was "calm" and asked for "protective custody" saying, "I'm scared" (T1653;StEx-95).

:05 [12:05 a.m., 7/27] – a call was placed giving instructions for patient to go to the high risk area on the "psych side" (T1653; StEx-95).

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[3] When the prosecutor offers the warning and waiver form, defense counsel timely objects "pursuant to our previously filed motion" and asks that the objection continue (T1372). The trial court overrules the motion (T1372).

:07 [12:07 a.m., 7/27] – the infirmary calls "to inform arrival of inmate" (T1654; StEx-95).

:20 [12:20 a.m., 7/27] – "Patient taken back with officers, county detectives, to 7900 Forsyth with patient. Told officer he would like to give more information on tape" (T1654; StEx-95).

01:20 [1:20 a.m., 7/27] – "patient returned with county detectives, stated [steady] gate, with no apparent injuries. Patient states: "Quote, I feel fine, same as before, close quote" (T1654;StEx-95).

Detective Newsham says it is not until 11:30 or 11:45 p.m. that he and Detective Longworth are even told to take Johnny to the jail (T1361). This is the same time that the nurse's notes say Johnny was "escorted into the medical office by county detective" (T1653;StEx-95).

According to Detective Newsham, Johnny is not then in the medical office with the nurse – he and Johnny are waiting in the booking area until the nurse finishes evaluating the four or five people who are ahead of Johnny (T1363-64). The nurse's notes indicate she evaluates Johnny and sends him to the "high risk" area on the "psych side" of the jail between 11:38 p.m. and 12:20 a.m. (StEx-95). Detective Newsham says Johnny never sees a nurse until after he makes his statement to Detective Newsham (T1393-94).

Detective Newsham says he and Johnny return to the jail about midnight(T171). Johnny has been in police custody for sixteen hours when he makes a statement for Detective Newsham (T1396). Detective Newsham does

not make a video or an audio recording of what Johnny initially says (T1396).

Detective Newsham says Johnny initially says he spent several nights "at the house where Casey disappeared from" (T1375). He thought Casey was cute; he began to think about sexual relations with her (T1375).

The morning Casey disappeared, Johnny woke up on the couch and she was standing nearby (T1376). He thought "that was his best opportunity to have sexual relations with her because everybody else was asleep" (T1376). He asked Casey to go to the glass factory with him to play games and have fun (T1376). They left the house and, because her feet hurt, he carried her piggyback all the way to the glass factory (T1376). Casey went into a silo at the glass factory and he went in behind her (T1377). They were about a foot apart; he pulled down his shorts exposing his penis and asked her to pull down her panties so he could [see] her vagina (T1378). Casey refused and turned away (T1378). He got mad, grabbed a brick, and hit her in the head several times (T1378). He tore her panties from her body causing her to fall; "then he laid on top of her ... pinning her body to the ground" (T1379). He tried to achieve an erection by rubbing his penis on her thigh (T1379). Casey screamed and pushed him away; he grabbed a brick and hit her in the head several times (T1379). She fell, and he slammed a large boulder onto her head (T1379). He wiped blood from her face with her panties then threw them into a hole; he covered her body with rocks and debris (T1380). He then went to the river and washed away her blood and any other evidence (T1380). He returned to Valley Park and was arrested (T1380).

Johnny records this statement for Detective Newsham (T1381; StEx-90). In the taped statement, the following occurs:

Newsham: Okay. And you told me over there that when you had made up your mind for this you were afraid that you could be caught, that she was going to tell someone correct?

Johnny: Yes.

Newsham: Okay. And what was your plan once you had finished having vaginal sex with her?

Johnny: To kill her.

Newsham: Okay. And you knew that you were going to do that correct? (StEx-90).

At about 1:10 a.m., Detective Newsham returns Johnny to the jail; Johnny is seen by the nurse then "booked" (T1384-85).

Post-Offense Treating Physicians

In 2003, while Johnny was in jail awaiting trial,[4] psychiatrist Dr. Rehmani, treats Johnny with psychotropic medications for schizophrenia (T1754). Dr. Rehmani prescribes these medications because Johnny is hallucinating, and has "a lot of anxiety symptoms and depressive symptoms" (T1757).

During the trial, Dr. Rehmani orders that Johnny be given "medications for

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[4] Before trial, Johnny was transferred a number of times between various prisons and the St. Louis County Jail (*e.g.*,T5-59,1754-55,1777).

anxiety and depression as well as psychosis" (T1756). Johnny is given "amitriptyline" for anxiety and depression; "Seroquel," also known as "Critopene" for psychosis, "Valium" for anxiety, and "Propanerol" for "anxiety and some of the symptoms of anxiety disorder" (T1756).

Dr. Rehmani knows of Johnny's "history of self-injurious behavior" (T1759). Dr. Rehmani knows of Johnny's self-injurious behavior in the St. Louis County Jail: Johnny banging his head on the door of the cell (T1759-60).

St. Louis County Jail psychologist, Dr. Karen Cotton-Willigor, evaluates Johnny on July 29, 2002, after his arrest, and determines he needs "to stay in the psychiatric infirmary" (T1767-68). This is based on her previous evaluation of Johnny in August, 2001 – diagnosing Johnny with schizophrenia, post-traumatic stress disorder and borderline personality disorder – and concern that those illnesses would cause "emotional instability and some slippage ... the possibility of him becoming suicidal and perhaps decompensating and perhaps becoming psychotic" (T1775).

Dr. Cotton-Willigor finds it unusual that when she saw Johnny in 2001 he "endorsed a good number of psychotic symptoms," but when she sees him on July 29, 2002, Johnny "denie[s] psychotic symptoms" (T1771). Johnny's interaction on July 29, 2002, seems "unusual" to Dr. Cotton-Willigor: "being overly solicitous of how I was, smiling, which seemed a bit inappropriate in light of the current circumstances" and "indicating that he wanted to be put to death by the State" (T1771). He denied suicidal thoughts but said "he wanted

the State to give him the death penalty" (1773).

Johnny tells Dr. Cotton-Williigor "what he had done was very, very wrong" (T1773). He tells her his mental illness did not have anything to do with the offense (T1773). He does not know why he had killed Casey (T1773).

The defense hires forensic psychologist Dr. Delaney Dean to evaluate Johnny's mental condition at the time of the offense (T1575-79). Dr. Dean meets with Johnny four times; each time he is in prison or jail and each time he is getting psychotropic, anti-psychotic, medication for relief of his psychiatric symptoms (T1581-82). She reviews approximately 2100 pages of Johnny's school, hospital, prison, and jail records as well as comparable records of Johnny's family documenting a family history of mental illness (T1583-87). Prior to making a diagnosis she gives Johnny psychological tests which indicate he has a "very, very severe depressive disorder" with psychosis (T1587- 97).

Dr. Dean also reviews the diagnoses of other mental health professionals who have evaluated Johnny (T1604). Among their diagnoses, consistent with Johnny's depression and psychosis, are schizophrenia with major depression and psychotic features and schizo-affective disorder (T1605).

The records show that with one exception in 1996, every doctor who evaluated Johnny found he suffered from mental illness (T1617-18). Their diagnoses – schizophreneia, major depressive disorder with psychotic features, and schizo-affective disorder – overlap considerably (T1607,1617-18).

Dr. Dean's opinion is that Johnny's behavior prior to killing Casey indicates

lack of cool reflection:

> Lack of cool reflection I see in taking a child in her nightgown, barefoot and putting her up on your shoulders and walking in public quite a long distance in daylight were everybody can see you...

(T1630). In Dr. Dean's opinion, Johnny's return to Michelle's house after killing Casey also reveals a lack of cool reflection:

> This is the subsequent behavior that shows to me a lack of genuine understanding of what he had done even though he had become tearful, he tried to clean himself up, he still was so out of it mentally that he walked soaking wet in public from the crime scene, as it were directly to the crime victim's house where her parents were looking for her, where the police were looking for her, to get his cigarettes, of all things. This shows that he was not thinking clearly and rationally. This shows that he was still in a very clouded mental state.

(T1631).

Dr. Dean's primary diagnosis is that Johnny has schizo-affective disorder (T1634). Secondarily, he also has personality disorders – some features of antisocial personality and some features of borderline personality (T1634).

Dr. Dean concludes that at the time he killed Casey, Johnny was under the influence of extreme mental or emotional disturbance (T1635). His capacity to appreciate the criminality of his conduct, or conform to the requirements of the law, was substantially impaired (T1636). His mental state "was one of extreme

emotional disturbance" caused by the voices he was hearing and ongoing clouding of consciousness caused by delusional beliefs (T1636).

In Dr. Dean's opinion, Johnny did not have the capacity or ability to coolly reflect on killing Casey (T1636).

On May 31, 2003, while confined in the Missouri Department of Corrections, Johnny reported being raped by another inmate (T2105;DefEx-BB14). A week later, Johnny was put on "full suicide watch" (T2105;DefEx-BB14). He became self-desructive: he swallowed a tube of toothpaste, cut himself, and tried to pull the skin off his arm(T2105; DefEx-BB14).

Johnny reported hearing voices and, consistent with schizophrenic behavior, plugged his ears with paper to stop them – so "deeply that medical personnel had to extract it" (T1606,DefEx's-BB14&15). Feces was found on the walls of his cell; urine was found on the floor (T1606,DefEx's-BB14&15).

Dr. Draper, a human development expert specializing in "developmental epistemology," testified that Johnny had told her that he had, at some point, been involved in a satanic cult (T2043,2121). Johnny believed in communicating with the dead which was the major gist of that cult" (T2121). Another cult belief that Johnny shared was "necromancing" – that until people are embalmed, they can rise from the dead" (T2121-22).

At the conclusion of evidence at the first phase, the jury returns guilty verdicts on all counts, as charged, and the case proceeds to penalty phase (LF219-23;Tr.1127-28).

Penalty Phase

The state presents evidence of Johnny's prior convictions for burglary and stealing and his guilty pleas to violations of city ordinances, (T1986-91). The state also calls members of Casey's family who describe how intensely her death has impacted everyone in her life. Her grandfather, Jim Wideman, said, "Everybody wanted to be around her" (T1991-92). He "wish[ed] it could have been [him] instead" (T1997). He and Kathy Moran, Casey's maternal grandmother, remembered her as loving adventure (T1992, 1999). Angie's sister, Carrie, said Casey's death had an impact on all the children in the family: Casey's siblings and her cousin (T2008-09). Chelsea, Casey's sister, said Casey was her best friend; Casey's death depressed Chelsea (T2016). Angie said Casey was "daddy's girl" and since her death, Ernie has given up on life (T2019). Angie also said Chelsea now suffers from post-traumatic stress (T2026). Angie herself feels as though part of her is gone and it is a struggle to live (T2030).

Family members, former school teachers, and a professor of human development offer mitigating evidence for Johnny. Their testimony is discussed throughout appellant's brief and will not be repeated here.

Other Issues

Batson: The state strikes two jurors giving as his primary reason that they do not have children (T760-61). The trial court overrules the *Batson* motion without allowing counsel to establish pretext (T761-62). The defense identifies two similarly situated jurors the state did not strike and says the state failed to

voir dire about children (T762-64).

Voir Dire: During voir dire, the defense attempted to ask if the jurors could consider a sentence of life for a person convicted of coolly-reflected upon, deliberated murder (*e.g.*,T277-78). The trial court sustained the prosecutor's objections that this was "attempting to define the crime" and inappropriate voir dire saying, "I think it's improper to attempt to instruct the jury at this time on what the law is" (T278).

Uncharged "Bad Acts"

Before opening statements, the parties discuss potential testimony "that Johnny Johnson was stalking Chelsea or one of her friends maybe the day before this happened" (T783). The prosecutor indicates he will ask Angel, Chelsea's friend, about that (T783). Counsel moves in limine to exclude evidence that Johnny was stalking or following Chelsea and Angel in that it would be "uncharged misconduct of the defendant and inadmissible" (T784).

The prosecutor argues this evidence is admissible as "evidence of certainly state of mind of the defendant at the time" and claims that Casey and Elizabeth were also in the house when Johnny was outside (T784-85). He adds, "I think that's all direct evidence, certainly inferential evidence of his intent, his purpose and goes with his statements later that he had been thinking for some time of abducting this kid and having sex with her" (T785). The trial court overrules the motion in limine(T786).

Before the prosecutor begins questioning Angel about Johnny, defense

counsel objects that it is "evidence of uncharged crimes... irrelevant, highly prejudicial" (T975).

The prosecutor says, "It certainly is prejudicial. I think it goes to motive, intent, everything else that this guy is in the neighborhood following little girls around and the next day he walks off with one. I don't know – how could it not be more relevant, including the fact that Casey, the ultimate victim, is in the house at the time he's following these two girls." (T975)

Counsel responds: "[I]f the State is offering this for motive or intent, there is no evidence of his following or talking to Casey Williamson. If that were the evidence then they might have an argument why it is [ad]missible. These are unrelated people in this case." (T975).

The trial court thinks "it indicates a pattern of conduct that certainly might be relevant" and overrules the objection (T976).

Counsel timely renews the objection during Angel's testimony, and the trial court again overrules it (T981-82). Johnny preserves this issue in the motion for new trial (LF822).

Instructional Error

At guilt phase, over defense objections, the trial court submits Instruction 6—MAI-CR3d 310.50—voluntary intoxication (T1890;LF764;A38). At penalty phase, over defense objections, the trial court submits: Instruction 23—MAI-CR3d 314.40—statutory aggravating circumstances, Instruction 24—MAI-CR3d 314.44—mitigating circumstances and weighing, and MAI-CR3D 324.48—

penalty phase verdict director (T2129-35;LF789-90,791,793-95; A43-47).

Closing Argument and Verdicts

In his guilt phase closing argument, the prosecutor urges the jury, to hold Johnny completely responsible "for once in his entire life...." (T1957).

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

POINTS RELIED ON

POINT ONE

The trial court clearly erred in overruling Johnny's *Batson* challenge to the state's peremptory strikes of African-American, male juror Murphy and Asian, female juror Gilbert. This violated Johnny's and the excluded jurors' rights to equal protection, due process, and fair jury trial, U.S.Const., Amend's V,VI,&XIV; Mo.Const., Art.1 §§2,10,&18(a), and his right to justice in Missouri's courts, Mo.Const., Art.1, §14. Excluding Mr. Murphy–because he was single, childless, and a DYS youth specialist who has "contact with kids" and "works with troubled kids," and Ms. Gilbert–because "although married" she had no minor children, might be a "professional student" and might lack important life experiences "with kids and ... being something other than a student," is pretext concealing discriminatory purpose in that: 1) similarly situated childless jurors were not struck, 2) informed of similarly situated jurors, he added a "makeweight," "afterthought" explanation – "mannerism" and "other matters ... were important" in striking Mr. Murphy and Ms. Gilbert, and 3) failing to voir dire on subjects later given as reasons undermined the plausibility of his explanations. The trial court's ruling on the *Batson* challenges immediately after the prosecutor gave reasons without giving

the defense an opportunity to prove pretext compounded the error. This is structural, *per se* reversible, error.

Miller-El v. Dretke, 125 S.Ct. 2317 (2005);

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

State v. Marlowe, 89 S.W.3d 464 (Mo.banc 2002);

State v. Hopkins, 140 S.W.3d 143 (Mo.App.E.D. 2004);

U.S.Const., Amend. XIV;

Mo.Const., Art. 1, §14.

POINT TWO

The trial court erred in sustaining the state's objection and precluding the defense from asking prospective jurors whether, knowing that first degree murder is a coolly-reflected-upon, deliberated killing, they could consider a sentence of life imprisonment without probation or parole. This violated Johnny's rights to jury trial, due process, counsel, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV, Mo.Const.,Art.I, §§10, 18(a) & 21. Disallowing the question prevented counsel from ensuring that when jurors said they could consider a sentence of life imprisonment without probation or parole, they understood that first degree murder was a cool, reflected, deliberate act and not another kind of homicide or a killing in self-defense or accident.

It prejudiced Johnny by ascertaining which jurors truly could consider a sentence of life imprisonment for a person convicted of first degree murder, follow the law, and were qualified to serve in a death penalty case as §§494.470.1 & .2 require. It also prevented Johnny and counsel from intelligently making strikes for cause and peremptory challenges thereby denying effective assistance of counsel.

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

State v. Gill, 167 S.W.3d 184 (Mo.banc 2005);

State v. Ramsey, 864 S.W.2d 320 (Mo.banc 1992);

State v. Clark, 981 S.W.2d 143 (Mo.banc 1998).

POINT THREE

The trial court erred in overruling defense objections and allowing the state to elicit evidence that Johnny committed uncharged crimes of "stalking" children in the days preceding his crime. This violated his rights to due process, trial of only the offense charged, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art. 1,§§10,18(a), & 21. Angel Friese's testimony that two days before killing Casey, Johnny followed Chelsea and Angel when they were riding bikes and pursued them to Chelsea's grandfather's, Jim Wideman's, house is evidence of the uncharged crime of stalking; it did not fit any exception to

the rule against admission of uncharged crimes and was neither logically nor legally relevant. Angel's testimony that the day before the crime, she and Chelsea were in the Wideman house with Casey and two other children when Johnny started knocking on the door is a second incident of uncharged stalking also logically and legally irrelevant. It was pure propensity evidence used to prejudice the jury against Johnny's defense of diminished capacity and convict him of first degree murder. Evidence of the uncharged stalkings allowed the jury to find Johnny had a scary propensity to commit crimes against children and use that as proof that he planned and deliberated on killing Casey.

State v. Bernard, 849 S.W.2d 10 (Mo.1993);

State v. Burns, 978 S.W.2d 759 (Mo.banc 1998);

State v. Vowell, 863 S.W.2d 954 (Mo.App.S.D. 1993);

State v. Lancaster, 954 S.W.2d 27 (Mo.App.E.D. 1997);

Mo.Const., Art.1,§17.

POINT FOUR

The trial court erred in overruling Johnny's objections and submitting Instruction No. 6: MAI-CR3d 310.50—"voluntary intoxication." This violated his rights to due process, jury trial, and reliable sentencing,

U.S.Const., Amend's V,VI,VIII &XIV; Mo.Const., Art. 1, §§10,18(a), &21. Despite the lack of substantive evidence that Johnny was in "an intoxicated or drugged condition ... from drugs or alcohol," the instruction posited this as presumptive fact violating Johnny's 6th and 14th Amendment rights to jury, not judge, fact-finding. It injected a false issue misleading the jury: that Johnny's defense was that his intoxicated or drugged condition at the time of the crime excused it. It prejudiced Johnny at guilt phase by drawing the jury's attention away from the true issue and his true defense: whether, as a result of his mental illness, Johnny was unable to deliberate at the time of the crime and could not and did not coolly reflect on killing Casey. The instruction's prejudicial effect extended into penalty phase with the prosecutor's argument criticizing the mitigating circumstance that Johnny was "under the influence of extreme mental or emotional disturbance" because "ample evidence" showed that if Johnny was under the influence of anything, it was drugs.

Goodman v. Simonds, 61 U.S. 343,359 (1857);

State ex rel. Missouri Highway and Transportation Commission v. Delmar Gardens of Chesterfield, 872 S.W.2d 178 (Mo.App.E.D. 1994);

State v. Barnes, 740 S.W.2d 340 (Mo.App.E.D. 1987);

State v. Erwin, 848 S.W.2d 476 (Mo.banc 1993);

§552.020.14, RSMo, 2000;

§552.030.5, RSMo, 2000.

POINT FIVE

The trial court erred in overruling Johnny's motion to suppress statements, and admitting the statements he made for Detective Newsham. This violated Johnny's rights to due process, to be free from self-incrimination, and reliable sentencing. U.S.Const., Amend's V,VIII, & XIV; Mo.Const., Art. 1, §§10, 19 & 21. The total circumstances show the statements were unreliable and involuntary: jail records show Johnny was being evaluated by the nurse and sent to the jail's psychiatric unit exactly at the time that Detective Newsham claimed he and Johnny were waiting to see the nurse and discussing Poe and "eternal salvation." If the jail records are correct, Detective Newsham was lying about the circumstances under which Johnny made his statement. If Detective Newsham was truthful, he coerced Johnny by telling him he would not achieve eternal salvation or be forgiven for the crime unless he was provided every detail and did not leave anything out. Johnny failed to complete ninth grade, he had been in police custody for approximately 16 hours when he made the statement for Detective Newsham, and he is a schizophrenic who was in need of his medication when he made the

statement to Detective Newsham. Detective Newsham did not make a recording of what Johnny initially told him. The total circumstances show the risk that Johnny's statement was coerced and is unreliable is too great for it to have been admitted as evidence against him. Johnny was prejudiced by the admission this evidence because it was critical direct evidence of deliberation.

Jackson v. Denno, 378 U.S. 368 (1964);

Bram v. United States, 168 U.S. 532, (1987);

Carley v. State, 739 So.2d 1046 (Miss.App. 1999);

State v. Smith, 944 S.W.2d 901 (Mo.banc 1997).

POINT SIX

The trial court erred in overruling defendant's objections, submitting Instruction No. 23 to the jury, and sentencing Johnny to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's XIV, VI and VIII. Instruction 23 submitted a statutory aggravator based on §565.032.2(7) – that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind" – which was unconstitutionally vague. Johnny was prejudiced because if this statutory aggravator had not been given, it cannot be said that the outcome of the weighing of aggravators

and mitigators would have been the same.

Maynard v. Cartwright, 486 U.S. 356 (1988);

Godfrey v. Georgia, 446 U.S. 420 (1980);

State v. Feltrop, 803 S.W.2d 1 (Mo.banc 1991);

Loving v. United States, 517 U.S. 748 (1996).

POINT SEVEN

The trial court erred in overruling Johnny's new trial motion and sentencing him to death. This violated his rights to due process, reliable and proportionate sentencing, and freedom from cruel, unusual, and excessive punishment. U.S.Const., Amend's VIII&XIV; Mo.Const., Art.1, §§ 10&21;Mo.Rev.Stat,§565.035.3(3). Johnny's death sentence is excessive, unreliable, and disproprtionate. His severe, childhood-onset, mental illness and mental disabilities, documented by extensive evidence at trial and post-trial, distinguishes him from other, similarly situated, capital defendants. Further, there are defendants in similar cases – charged with first degree murder of a child or children – who were not sentenced to death. The evidence is adequate to support Johnny's conviction but only adequate on the critical question of whether he had the capacity to deliberate and did deliberate; this is not enough to support a sentence of death. Johnny's severe, long-term mental illness plus other

trial errors, undermine the reliability of the death sentence in this case. His sentence must be reduced to non parolable life imprisonment.

Atkins v. Virginia, 526 U.S. 304 (2002);

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

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

Crook v. State, 908 So.2d 350 (Fla. 2005);

U.S.Const., Amend. VIII;

U.S.Const., Amend. XIV.

POINT EIGHT

The trial court erred in overruling Johnny's objections and giving Instructions 24, MAI-CR3d-314.44, and 26, MAI-CR3d-314.48 which failed to instruct that unless the state proved beyond a reasonable doubt that the mitigators were insufficient to outweigh aggravators "found" by the jury, 565.030.4(3), the verdict must be life imprisonment and failed to tell the jury what to do if not unanimous or if equally divided on whether mitigators outweighed "found" aggravators. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const.,Art.1,§§ 10,18(a),&21; it violates §565.030.4(3). Because the weighing step is a death-eligibility requirement, the state must prove beyond a reasonable doubt that the mitigators are insufficient

to outweigh the found aggravators. Instructions 24 and 26 were silent, therefore ambiguous, regarding the burden of proving the weighing step. Johnny was prejudiced: the jury would interpret these instructions as eliminating or lessening the state's burden of proof thus diminishing its burden of establishing Johnny's death-eligibility.

There was also plain error: §565.030.4(3) limits weighing to those aggravators "found" by the jury and does not require jury unanimity in determining mitigators outweigh aggravators, but the instructions did not restrict the aggravators to be weighed to only aggravators found by the jury and they imposed a requirement that the jury be unanimous in finding mitigators outweigh aggravators.

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

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

Bullington v. Missouri, 451 U.S. 430 (1981);

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

Section 565.030.4(3), RSMo. (Supp. 2004).

POINT NINE

The trial court erred in overruling Johnny's motion to quash the information or, alternatively, preclude the death penalty, and sentencing

him to death. This violated his rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const. Amend's V,VI,&XIV; Mo.Const., Art. 1, §§10,17,18(a)&21. In Missouri, at least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Statutory aggravators function as alternate elements of the greater offense of first-degree murder and must be pled in the charging document for the charged murder to be punishable by death. Because the amended information failed to plead any statutory aggravators, Johnny's death sentence was unauthorized; it must be reduced to life imprisonment.

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

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

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

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

U.S.Const., Amend. V;

U.S.Const., Amend. VI;

U.S.Const., Amend. XIV.

POINT TEN

The trial court plainly erred in failing to admonish the prosecutor and

give a corrective instruction to the jury when, in his guilt phase closing argument, the prosecutor told the jury to find Johnny guilty of first degree murder based on prior misconduct and, "for once," to hold him responsible for it. This violated Johnny's rights to due process, jury trial, trial of only the charged offense, and reliable sentencing. U.S.Const., Amend's VI,VIII, & XIV; Mo.Const., Art.1, §§10, 17, & 18(a). The argument was improper because it was based on information obtained by and testified to by experts with regard to whether Johnny had a mental disease or defect that diminished his capacity to deliberate and it was not substantive evidence of guilt. The prosecutor asked the jury to find Johnny guilty of killing Casey because of other instances of misconduct and bad acts and to punish him for his uncharged bad acts.

State ex rel. Missouri Highway and Transportation Commission v. Delmar Gardens of Chesterfield, 872 S.W.2d 178 (Mo.App.E.D. 1994); *State v. Burns*, 978 S.W.2d 759 (Mo.banc 1998);

ARGUMENT

AS TO POINT ONE: *BATSON* ERROR

The trial court clearly erred in overruling Johnny's *Batson* challenge to the state's peremptory strikes of African-American, male juror Murphy and Asian, female juror Gilbert. This violated Johnny's and the excluded jurors' rights to equal protection, due process, and fair jury trial, U.S.Const., Amend's V,VI,&XIV; Mo.Const., Art.1 §§2,10,&18(a), and his right to justice in Missouri's courts, Mo.Const., Art.1, §14. Excluding Mr. Murphy–because he was single, childless, and a DYS youth specialist who has "contact with kids" and "works with troubled kids," and Ms. Gilbert–because "although married" she had no minor children, might be a "professional student" and might lack important life experiences "with kids and ... being something other than a student," is pretext concealing discriminatory purpose in that: 1) similarly situated childless jurors were not struck, 2) informed of similarly situated jurors, he added a "makeweight," "afterthought" explanation – "mannerism" and "other matters ... were important" in striking Mr. Murphy and Ms. Gilbert, and 3) failing to voir dire on subjects later given as reasons undermined the plausibility of his explanations. The trial court's ruling on the *Batson* challenges immediately after the prosecutor gave reasons without giving

the defense an opportunity to prove pretext compounded the error. This is structural, *per se* reversible, error.

Additional Facts:

Relying on *Batson v. Kentucky*, 476 U.S. 79 (1986), Johnny challenges the prosecutor's peremptory strike of African-American, male, juror Joseph Murphy and Asian, female, juror Jesselin Gilbert (T760;LF728). The prosecutor proffers:

> Regarding Mr. Murphy, in the information provided, although he said (sic) nothing at all to say, the information is that he is single, not married, with no children. As we know this case involves the death of a very young child and so I looked for jurors, among other things, who have children.
>
> He's also a youth specialist so he has some contact with kids working for the Division of Youth Services for a number of years, if not an actual social worker or towards social work, works with troubled kids.
>
> My concern, he might see himself in the position to save the defendant or could identify with one of the kids he works with and treats for the past three years.

(T760-61).

Bypassing Johnny's opportunity to show that the strike was pretextual and discriminatory, the judge rules: "I think that's a viable reason to deny the

Batson challenge"(T761).

Regarding Ms. Gilbert, the prosecutor proffers:

> Also Mrs. Gilbert, although a married woman, indicates she has no minor children. She is a student, she lists her occupation as a student, and I'm trying to figure out how to be polite, she doesn't look to be the typical student age range, which leads me to believe she may be a professional student.
>
> Students tend not to have the sort of life experiences I think would be important life experiences you would have with kids and life experiences being something other than a student.

(T761-62). The prosecutor does not describe what he terms "life experiences ... with kids and life experiences being something other than a student."

Pretermitting Johnny's opportunity to respond, the judge overrules the *Batson* challenges(T762). Nevertheless, since the judge has ruled, defense counsel perseveres in "making a record" pointing out that two white, male jurors – #46-Mr. Travers and #47-Mr. Maloney –do not have children(T762). The prosecutor says,

> Mr. McCulloch: Both Travers and Maloney, the reasons I struck the others, it's not just for people with children, that's not the sole consideration. They also had responses, at least by mannerism, certainly would appear to be favoring the State's position.
>
> Ms. Beimdiek [Defense Counsel]: I'm pointing out that those jurors are

similarly situated, they don't have children. I think that's part of the record we need to make.

Mr. McCulloch: They are not just students, they don't work for the Division of Youth Services. While they didn't have children, they also don't have some of the other matters that I thought were important in consideration of striking the others.

(T762-63). The prosecutor does not identify the allegedly problematic "other matters" or "mannerism." Defense counsel points out: the prosecutor never questioned the jurors on the matter of "no children" (T764).

The trial court's denial of the *Batson* challenges is preserved for this court's review in the motion for new trial(LF861-62).

Argument Summary:

The prosecutor's behavior during voir dire is inconsistent with his explanations and demonstrates his strikes are pretextual. He does not strike similarly situated jurors – those with no children – given as the primary explanation for striking jurors Murphy and Gilbert. When defense counsel confronts him with two similarly situated white jurors who were not struck, he resorts to an explanation "reeking of afterthought," *Miller-El v. Dretke*, 125 S.Ct. 2317,2328 (2005): "other matters" and some "mannerism" are involved.

Not only is this "makeweight" explanation, *Id.*, devoid of specific reasons for excluding the jurors, the prosecutor never alerts opposing counsel and the court to these "demeanor" matters: a practice condemned in *State v. Metts*, 829

S.W.2d 525,587-88 (Mo.App.E.D. 1992); *see also State v. Kempker*, 824 S.W.2d 909,911 (Mo.banc 1992). His voir dire does not inquire about subjects later used as reasons for his strikes. Since he obtains no information from the excluded jurors about the subjects subsequently forming the reasons for his strikes, his explanations are too speculative to be supported even as "horse sense" or "hunches." *State v. Kempker*.

Creating additional error, the trial court rules without giving the defense an opportunity to establish the facts to prove pretext. "*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason *in light of all evidence with a bearing on it*." *Miller-El*, 125 S.Ct. at 2331 (emphasis added).

The instant case is a prosecution brought by the St. Louis County prosecutor in a state circuit court. Johnny is summoned into court as the defendant; Mr. Murphy and Ms. Gilbert are summoned as prospective jurors.

Article 1, §14 of the Missouri Constitution provides: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Section 14's guarantee of "right and justice" in the courts of Missouri applies to Johnny and the jurors. The state trial court's cursory treatment of the *Batson* motion in this case violates §14's requirement of "right and justice" for "every person" including Johnny and the excluded jurors.

For these reasons, and those that follow, the trial court clearly erred; the cause must be reversed and remanded for a new trial.

Argument:

A party's exclusion of a prospective juror for reasons of "race, gender, or ethnicity" violates the Equal Protection Clause of the Fourteenth Amendment. *Batson, supra; J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Hernandez v. New York*, 500 U.S. 352 (1991). "[S]triking even a single juror for a discriminatory purpose is unconstitutional...." *Walker v. Girdich*, 410 F.3d 120 (2nd Cir. 2005) *citing Batson*, 476 U.S. at 95.

Missouri uses a three-part procedure for resolving *Batson* challenges: 1) the strike's opponent must challenge it before the venire is excused and the jury sworn, 2) the strike's proponent may provide an explanation for the strikes, and 3) the opponent must show the explanation is pretextual. *State v. Marlowe*, 89 S.W.3d 464,468-69 (Mo.banc 2002). In the present case, the state's explanations are – on their face – non discriminatory. The issue concerns the third *Batson* stage: are the explanations pretextual.

The primary, "crucial" factor in determining pretext is whether similarly situated jurors are struck. *Marlowe*, 89 S.W.3d at 469. A seemingly plausible explanation is "undercut" if similar jurors, including those in the same racial, ethnic, or gender category as the struck juror, are not excluded. *Miller-El*, 125 S.Ct. at 2329-30. *Miller-El* clarifies: "similarly situated" is not "identical."

None of our cases announces a rule that no comparison is probative

> unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.... A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El at 2329,n.6.

Argument

In the present case, defense counsel identifies two similarly situated white jurors, Mr. Travers and Mr. Maloney, who are not struck and are on the petit jury (T762;LF739,802). Alone, non exclusion of just these two jurors may show pretext. *Marlowe*, 89 S.W.3d at 469; *Miller-El*, 125 S.Ct. at 2329-30.

But the record reveals more: the questionnaire the prosecutor relies on to determine who has children shows – in addition to jurors Travers and Maloney – seven other childless jurors not struck and seated on the jury (LF728-40). That the petit jury includes nine childless jurors is a fact substantially undermining the prosecutor's claim that he struck jurors Murphy and Gilbert because they did not have children.

"Afterthoughts" – reasons given only after the opponent of the strike has pointed out problems with the explanation – also indicate pretext. *Id*. at 2328. In *Miller-El*, a reason proffered by the prosecutor *only after defense counsel had pointed out the defects in his previously given explanation* cast doubt on the validity of the initial explanation. And, the "afterthought" explanation

lacked credibility. "[T]he State's new explanation," said the Court, "reeks of afterthought" and "[t]here is no good reason to doubt that the State's afterthought ... was anything but makeweight." *Id*.

Here, when defense counsel points to similarly situated white jurors not struck, the prosecutor immediately minimizes his initial explanation claiming "children" is "not the sole consideration" (T762-63). Now, he adds new reasons for his strikes: unidentified "mannerism[s]" and "other matters"(T762-63).

This makeweight afterthought – devoid of any substantive information explaining the strikes – undermines the prosecutor's plausibility. His retreat from his original position – that his goal is to find jurors with children and he struck jurors who did not have minor children – further weakens his initial explanation. *Id*.

The "degree of logical relevance between the proffered explanation and the case to be tried" is another factor in determining pretext. *Marlowe*, 89 S.W.3d at 469. Confuting the seeming relevance of the "no children" explanation, this prosecutor fails to inquire about the subject on voir dire "as [he] probably would have done if the [subject] had actually mattered...." *Miller-El*, 125 S.Ct. at 2328. A prosecutor's failure to inquire 'is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" *Id*. *quoting Ex parte Travis*, 776 So.2d 874,881 (Ala.2000); *Id*. at 2330,n.8.

One explanation the prosecutor gives for striking Mr. Murphy is that he is "a youth specialist" who works for DYS, has "contact" with and "works with

troubled kids," and "might see himself in the position to save the defendant or could identify with one of the kids he works with and treats" for the past three years. On its face, this explanation appears plausible.

But the prosecutor's failure to question the venire panel about this subject refutes the plausibility of the explanation because it could equally apply to jurors who are parents of "troubled kids." Even more than Mr. Murphy, these jurors, too, could "identify with," and "see [themselves] in the position to save the defendant" Johnny(T761).

If truly concerned about jurors identifying with troubled children, the prosecutor would want to know which jurors are parents of troubled children. This prosecutor does not ask if any jurors have troubled children or have worked with or have experience with troubled children.

Perhaps inquiring on this subject will reveal other jurors who, like Mr. Murphy, have experience with troubled children; perhaps this will eliminate his reason for striking African-American juror Murphy. The prosecutor's failure to voir dire on this subject undermines the plausibility of the explanation. *Davidson v. Harris*, 30 F.3d 963,965-66 (8th Cir. 1994); *State v. Payton*, 747 S.W.2d 290,293-94 (Mo.App.E.D. 1988); *State v. Butler*, 731 S.W.2d 265,271-72 (Mo.App.W.D. 1987).

Likewise, the prosecutor's failure to ask about children diminishes his claim that he excluded Mr. Murphy and Ms. Gilbert because they had none. Indeed, Mr. Murphy's employment as a youth counselor suggests he has compassion for

children. He may well have some of the same "life experiences ... with kids and life experiences being something other than a student" that the prosecutor claims he values (T762).

Instead of inquiring on this subject during voir dire, the prosecutor relies solely on the juror questionnaire which only indicates whether jurors *currently* have *minor* children. The prosecutor must be aware that "single" people have children; that Mr. Murphy was single does not rule out the possibility that he is a parent. Because the prosecutor does not inquire, he does not know if Mr. Murphy and Ms. Gilbert have children who – perhaps recently – were minors.

The prosecutor's failure to question Ms. Gilbert about being a student undercuts his claim that he struck her for that reason. His only information is the word "student" conveniently appearing below her name on her questionnaire(LF737). But "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis." *Miller-El* at 2332.

Inquiring, the prosecutor might learn Ms. Gilbert is a "professional" student. Yet he might learn she has deferred going to school to provide childcare for nieces and nephews, or after years of working – perhaps at a day-care center – she has returned to school to pursue her heart's desire of being a kindergarten teacher, or that she was the oldest of seven children and helped cared for them.

The prosecutor does not inquire; he does not know. He can only give a speculative reason drawn from the word "student" on her jury questionnaire.

Recently the Court warned against using a juror's occupation as a reason for

a peremptory strike. In *State v. Edwards*, 116 S.W.3d 511 (Mo.banc 2003), a case involving the same circuit, division, and prosecutor's office as the instant case, Judge Teitelman noted "the importance of careful judicial scrutiny of *Batson* claims...." *Id*. at 550, Teitelman, J., concurring. "As the principal opinion notes, courts should review more carefully peremptory strikes based upon occupation because, in the vast majority of cases, a prospective juror's employment has nothing to do with his or her ability to fairly weigh the evidence and arrive at a just decision." *Id*.

The law disfavors using questionnaires to pick a jury. *State v. Parker*, 886 S.W.2d 908,921 (Mo.banc 1994) (There is no constitutional right to conduct voir dire by questionnaire; indeed, oral voir dire is preferred because it reveals credibility) *citing State v. Morehouse*, 811 S.W.2d 783,785 (Mo.App.W.D. 1991) ("It is not the function of the juror qualification form to replace voir dire; voir dire is necessary to discover the state of mind of prospective jurors and determine by examination which harbor bias or prejudice against either party, rendering them unfit to serve as a juror in that case.... [T]he juror qualification form ... is not meant to be a substitute for voir dire, and it is more properly used to determine the qualifications, not the attitudes and prejudices of jurors....")

In *State v. Hopkins*, the prosecutor peremptorily struck two jurors based on matters not addressed in his voir dire. 140 S.W.3d 143,149-52 (Mo.App.E.D. 2004). Information the prosecutor used to strike one juror was elicited by defense counsel's questioning. *Id*. at 149-51. To strike the other juror, the

prosecutor relied solely on the juror's questionnaire. *Id*. at 151-52. Holding the explanations pretextual, the Eastern District cited the prosecutor's lack of questioning about the matters used as reasons for the strikes: the prosecutor's "behavior is inconsistent with his stated reasoning...." *Id*. at 151.

Marlowe instructs that the trial court should also consider "the prosecutor's credibility, based on 'the prosecutor's demeanor or statements during voir dire,' and the 'court's past experiences with the prosecutor....'" *Id*., 89 S.W.3d at 469. Because the trial court did not reach the third stage, the trial court made no findings on the prosecutor's credibility.[5]

"Known evidence" of discriminatory practices of the prosecutor's office may be considered in reviewing a *Batson* claim on appeal. *Miller-El*. at 2332-33, 2338-40. Twice, recently, this prosecutor's office has been found to discriminate in jury selection. *See State v. Hampton*, 163 S.W.3d 903 (Mo.banc 1995); *State v. Hopkins*, *supra*.

"The ultimate burden of persuasion regarding [discriminatory motive] rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Appellate review of a *Batson* challenge is for clear error according deference to the trial court's findings of fact. *Hernandez v. New*

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[5] Likewise, because the judge ruled immediately after the prosecutor gave his reason, the judge made no findings on "'the demeanor of the excluded venirepersons.'" *Marlowe*, 89 S.W.3d at 470.

York, 500 U.S. at 364-67; *State v. Parker*, *supra*, 836 S.W.2d at 940, n. 7. Clear error" exists if examination of the entire record leaves the appellate court "with a definite and firm conviction that a mistake has been made." *Id*.

As shown above, this prosecutor's facially plausible explanations crumble when scrutinized against his behavior. This prosecutor did discriminate, and the trial court's approval of the state's racially motivated strikes violated the Equal Protection rights of appellant and those of excluded jurors Joseph Murphy and Jesselin Gilbert.

There is additional error: the trial court's treatment of defendant's *Batson* claim is also error. "Denying a Batson motion without allowing Defendant an opportunity to carry his burden of proving purposeful discrimination constitutes trial court error." *State v. Phillips*, 941 S.W.2d 599,604 (Mo.App.E.D. 1997) (rejecting state's argument that giving defendant "an opportunity" to make a record after the court had ruled was sufficient). Here, contrary to the law, the trial court denies the *Batson* motion before considering "all evidence ... bearing on" the plausibility of the prosecutor's explanations: the trial court never reaches *Batson*'s third stage.

"[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' ... and undermines public confidence in adjudication...." *Miller-El*, 125 S.Ct. at 2324; citations omitted. So, too, with the trial court's truncated consideration of the *Batson* claim in this case.

A mistake has clearly been made. For the foregoing reasons, the Court must find that the trial court's denial of Johnny's *Batson* challenge was clear, reversible error and grant him a new trial.

AS TO POINT TWO: RESTRICTING DEFENSE VOIR DIRE

The trial court erred in sustaining the state's objection and precluding the defense from asking prospective jurors whether, knowing that first degree murder is a coolly-reflected-upon, deliberated killing, they could consider a sentence of life imprisonment without probation or parole. This violated Johnny's rights to jury trial, due process, counsel, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV, Mo.Const.,Art.I, §§10, 18(a) & 21. Disallowing the question prevented counsel from ensuring that when jurors said they could consider a sentence of life imprisonment without probation or parole, they understood that first degree murder was a cool, reflected, deliberate act and not another kind of homicide or a killing in self-defense or accident. It prejudiced Johnny by ascertaining which jurors truly could consider a sentence of life imprisonment for a person convicted of first degree murder, follow the law, and were qualified to serve in a death penalty case as §§494.470.1 & .2 require. It also prevented Johnny and counsel from intelligently making strikes for cause and peremptory challenges thereby

denying effective assistance of counsel.

Additional Facts:

During small group, "death qualification" voir dire, (T257-667), the state objects to defense counsel's "life qualification"[6] question asking whether prospective jurors could consider a sentence of life imprisonment for a person convicted of first degree murder: a non accidental, "coolly reflected upon," deliberate killing (*e.g.*, T277-78,412-13). Counsel explains: she asks this question because, in her experience, prospective jurors who say they could consider a life sentence for first degree murder often have in mind an accidental killing or self-defense as opposed to a coolly-reflected-upon, deliberated, killing (T413;A51). Sustaining the state's objections would deny defendant's "right to explore the jurors' views on the issue of punishment and assure they have an understanding of what that is and not be mistaking murder first degree for an accidental killing or something of that nature" (T414;A52).

The prosecutor disagrees: "the Court adequately covers that by reading the

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[6] "'Life qualification' refers to the process by which counsel or the court identifies and excludes prospective jurors who have a fixed opinion that a sentence of death should always be imposed for a conviction of first degree murder." *Commonwealth v. Boxley*, 575 Pa.611,619,838 A.2d 608,612-13,n.2 (Pa. 2003).

verdict director then they have the definition of deliberation, all the elements of murder first degree...." (T414;A52). He calls counsel's voir dire "inappropriate" – "an attempt to define murder first degree" (T414;A52).

Defense counsel reiterates that without asking the question, she will not know whether jurors who say they could consider a sentence of life have in mind a killing in self defense or an accidental killing (T415;A53). "[W]hen they say they can give life, we need to know for what kind of murder. That's denying us the right to find a proper jury" (T415;A53).

The trial court rejects the question: "I think the question invades the province of the Court. If the question is: Can you give life without probation and parole if you find him guilty of first degree murder, that's fine. That's one way, but to start defining it for them I think is improper." (T415;A53).

Defense counsel tries again:

> So you're telling me I can't ask this jury if they understand they only consider life without parole for coolly reflected on murder and that coolly reflected is not self defense, not in the heat of passion. I would like to know whether they understand the difference between murder first degree or other killings when they say [they can] impose a sentence of life [if] they're thinking of an accident, self defense, heat of passion.

(T416;A54). The trial court adheres to his ruling but gives counsel "a running objection" for future panels (T416;A54). The defense preserves this issue in the motion for new trial (LF816-17).

Summary of Argument:

Although a trial court has discretion in conducting voir dire, it is limited by the defendant's right to a voir dire adequate to ensure a fair and impartial jury. The scope of voir dire must be broad enough to ensure that jurors who say they could consider a sentence of life imprisonment for a person convicted of first degree murder have an accurate understanding of that offense.

The problem is this:

Juror X is a prospective juror. Juror X does not know how the law defines first degree murder. Juror X believes he could consider a punishment of life without parole for a person who kills another if it happened in the heat of passion or spontaneously, in anger without forethought, or if the victim somehow provoked the defendant. Juror X believes that justice requires an eye for an eye if the killing was done on purpose or deliberately or with any forethought or planning upon the matter.

Defense counsel, limited to the question approved by the judge, asks, "Can you consider life without probation or parole if you find him guilty of murder first degree?" Unless Juror X on his or her own somehow learns exactly what "murder first degree" is, Juror X's response may well be "yes" – which will not reflect his true views and will be inaccurate. It will mislead the trial court and counsel as to Juror X's suitability as a juror. *State v. Clark*, 981 S.W.2d 143,146 (Mo.banc 1998) *citing Morgan v. Illinois*, 504 U.S. 719,729-30 (1992) ("'Without an adequate *voir dire* the trial judge's responsibility to remove

prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."')

Counsel, who will not learn that she should move to strike Juror X for cause or, if necessary, peremptorily, will fail to strike Juror X; defendant will be denied effective assistance of counsel. *Knese v. State*, 85 S.W3d 628 (Mo.banc 2002).

The proposed question in this case was reasonable, appropriate, and relevant. It was directed to the jurors' abilities and qualifications to fairly and impartially determine a primary issue in a death penalty case: whether the sentence for a person convicted, as charged, of first degree murder should be life imprisonment without probation or parole or death. Unless the attorney asking the question misstates what murder first is, an action which would draw an objection, no valid purpose if served by precluding such a question.

The trial court's ruling in this case is contrary to the opinions of this Court regarding the scope of voir dire in other death penalty cases and to the statutory requirement of qualified jurors. §§494.470.1 & .2. The ruling denied Johnny his Sixth, Eighth, and Fourteenth Amendment rights to trial by a fair and impartial jury and reliable sentencing. The cause must be reversed and remanded for a new penalty phase.

Argument:

The trial judge's "wide discretion" in conducting voir dire includes determining "the appropriateness of specific questions," and such rulings are

reviewed for abuse of discretion. *State v. Oates*, 12 S.W.3d 307,310-11 (Mo.banc 2000). The party claiming abuse of discretion must prove 'a "real probability" of prejudice....' *Id.* at 311.

But this discretion is not unlimited. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, *supra*, 504 U.S. at 729. In a capital case, voir dire must be adequate to identify "prospective jurors who will not be able impartially to follow the court's instructions...." *Id*. at 729-30. Jurors in a capital case are excludable for cause if their "'views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.'" *Id*. at 732-33 (1992) *quoting Wainwright v. Witt*, 469 U.S. 412,424,n.5 (1985).

Over a decade ago the Supreme Court rejected the very notion accepted by the trial court in this case: "that general fairness and 'follow the law' questions" ... are enough to detect those in the venire who automatically would vote for the death penalty." *Morgan v. Illinois*, 504 U.S. at 734-36. "[A]s mere general fairness questions are rarely sufficient to shed light on possible preconceived prejudices, it is important to permit a defendant to reveal critical facts in order to protect his right to search the venire panel for possible prejudice or bias." *State v. Oates*, *supra*, 12 S.W.3d at 311. "[C]ritical facts, those facts with a substantial potential for disqualifying bias, need [to] be revealed." *Id*. *citing State v. Clark*, *supra*, 981 S.W.2d at 147.

This Court recognizes that "to discover bias of potential jurors, it is often necessary to reveal some factual or legal detail in voir dire." *State v. Gray*, 887 S.W.2d 369,379,381-82 (Mo.banc 1994) (upholding, in a capital case, both the trial court's and the prosecutors' voir dires on the legal concepts of accessory liability and reasonable doubt although cautioning that questions "should be brief, clear and carefully crafted in advance to ensure that the questioner, whether the trial court or an attorney, avoids the appearance of giving an instruction of law or commenting on the evidence"). In *State v. Ramsey*, also a capital case, this Court held the prosecutor could properly ask the jurors about the legal concepts of "felony murder, accomplice liability, plea bargaining, and circumstantial evidence" to learn "if members of the panel had difficulty with" these concepts. 864 S.W.2d 320,335 (Mo.banc 1992). And in yet another capital case, *State v. Gill*, this Court repudiated defendant's challenge to the prosecutor's voir dire concerning the legal principles of "accomplice liability." 167 S.W.3d 184,192 (Mo.banc 2005).

The prosecutor's voir dire approved in *Gill* is particularly instructive; it anticipated the trial court's instructions on the legal principle of accomplice liability and gave the jury an example of that legal concept:

> The Judge will tell you that in Missouri a person is respons[ible] not only for his own conduct, but also for the conduct of another person in committing a crime. The typical example that is given in law school, that if two guys are robbing a bank and one waits out in the car as the guy

driving a get-away vehicle and the other one goes in and does the robbery, then both of them are guilty of robbery.

Id. This Court said,

A trial court may permit parties to inquire as to whether potential jurors have preconceived notions on the law that will impede their ability to follow instructions on issues that will arise in the case. [Citation omitted.] Prosecutors are entitled to use hypotheticals to make an inquiry on accomplice liability. When a prosecutor does not misstate the "basic concept" of accomplice or accessory liability, even if the description is incomplete, there is no error.

Id., *citing State v. Ramsey*, *supra*, 84 S.W.2d at 335.

As this Court said in *State v. Leisure*,

> *Voir dire* is both an educational and a discovery process. A determination of the existence and depth of bias and prejudice can be made accurately only after a potential juror understands the legal requirements of her responsibility as a juror. We do not expect veniremen to come to court with a legally sufficient or unerringly correct understanding of the requirements the law imposes on jurors.

749 S.W.2d 366,375 (Mo.banc 1988).

The foregoing opinions of this Court are in accord with §494.470, concerning juror qualifications:

1. No ... person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may

influence the judgment of such person ... shall be sworn as a juror in the same cause.

2. Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case.

This statute underscores the importance of questions designed to elicit facts to uncover bias, prejudice or "predisposition," and they also secure the right to ask such questions. If voir dire is not adequate to ensure that a person is truly able to follow the law and the instructions, these provisions are meaningless.

Without first ascertaining that the jurors understood the nature of first degree murder, their answers to a question such as the judge approved – "Can you give life without probation and parole if you find him guilty of first degree murder?" – are unreliable. This does not satisfy the Eighth Amendment's requirement of a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320,323 (1985) *quoting Woodson v. North Carolina*, 428 U.S. 280,305 (1976).

A question similar to that presented here arose in *State v. Thomas*, 680 So.2d 37 (La.App. 1996). As here, the *Thomas* trial court restricted "defense counsel's examination on issues of law, such as elements of the offense, reasonable doubt, and specific intent." *Id*. at 41. Although defense counsel in *Thomas* was "allowed to read the statutory definitions of pertinent offenses and

managed some discussion of these issues," the appellate court took a dim view of the trial court's failure to give defense counsel greater latitude in examining prospective jurors: "the pattern of the rulings clearly impaired defense efforts to plumb the prospective juror's understanding of the nuances of applicable law and legal principles. *Id*. This ability to understand the law was particularly critical in a case such as the present one, where the facts were virtually undisputed and the case would turn on issues such as whether the killing was manslaughter or murder and whether there was evidence to support the elements of first degree murder."

As here, the *Thomas* trial court maintained "the only relevant question was whether the jurors could accept the law as given to them by the court." *Id*. The Louisiana appellate court found the trial court's restriction of defense counsel's voir dire was reversible error. "[T]his court has rejected the contention that unjustified restrictions on voir dire can be cured by a response on the part of a prospective juror that he will follow the law as given to him by the judge when the juror is unaware of the complexity of the law and where that law involves such a basic right of the defendant." *Id*.; citations omitted.

The very limited inquiry defense counsel proposed was appropriate under the rules and principles articulated by this Court in its capital cases – cases such as *Clark*, *Gill*, *Ramsey*, and *Leisure*, *supra*. Counsel sought only to clarify that first degree murder was a "coolly reflected on murder" which "is not self defense, not in the heat of passion" and not "an accident" and to make sure that

when jurors said they could consider a sentence of life for first degree murder, they would have in mind a coolly reflected upon killing (T416;A54). If the voir dires of the prosecutors and trial court in those cases were permissible, counsel's proposed questioning here cannot be impermissible. The two cannot be reconciled.

Counsel's proposed inquiry was relevant to the issues and not excessive. As in *Thomas*, it was "particularly critical" because there was no real dispute about whether Johnny committed the act: the question was whether Johnny coolly reflected on the killing. The proposed voir dire was crucial to the defense, and the trial court's ruling was extremely prejudicial. *State v. Clark*, *supra*, 981 S.W.2d at 147 ("If jurors are not exposed to critical facts during voir dire, the parties lose the opportunity directly to explore potentially biased views, which all concerned have a duty to investigate thoroughly").

The trial court's restriction of defendant's voir dire simply does not make sense. Waiting until the instructions are read to introduce the jurors to the nature of the charged offense will not ensure that the jurors selected are able to consider a sentence of life imprisonment for a person convicted of first degree murder.

The trial court's restriction of the defense voir dire prejudiced Johnny. For the foregoing reasons, the cause must be reversed and remanded for a new penalty phase.

AS TO POINT THREE: EVIDENCE OF OTHER CRIMES

The trial court erred in overruling defense objections and allowing the state to elicit evidence that Johnny committed uncharged crimes of "stalking" children in the days preceding his crime. This violated his rights to due process, trial of only the offense charged, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const., Art. 1,§§10,17,18(a), & 21. Angel Friese's testimony that two days before killing Casey, Johnny followed Chelsea and Angel when they were riding bikes and pursued them to Chelsea's grandfather's, Jim Wideman's, house is evidence of the uncharged crime of stalking; it did not fit any exception to the rule against admission of uncharged crimes and was neither logically nor legally relevant. Angel's testimony that the day before the crime, she and Chelsea were in the Wideman house with Casey and two other children when Johnny started knocking on the door is a second incident of uncharged stalking also logically and legally irrelevant. It was pure propensity evidence used to prejudice the jury against Johnny's defense of diminished capacity and convict him of first degree murder. Evidence of the uncharged stalkings allowed the jury to find Johnny had a scary propensity to commit crimes against children and use that as proof that he planned and deliberated on killing Casey.

Additional Facts:

Throughout his case, the prosecutor says that Casey was not Johnny's only intended victim – that other children have been at risk. He opens his case by telling the jury that the day before he killed Casey, Johnny stalked two other little girls: Casey's sister, Chelsea, and Angel Friese (T797-99). The girls are riding their bikes and notice Johnny is following them (T798). Johnny is "a half block behind" the girls and they are concerned (T798). As fast as they can "without looking back," the girls ride to Jim Wideman's house and go inside (T798). Through the window they see "Johnny Johnson, the same guy that was following them, sitting in a chair in the yard outside their house" (T798). They lock the doors (T798). They hear knocking on the door and do not look outside (T798). The knocking stops, they look out, and Johnny is no longer there (T799).

In the evidentiary stage, the prosecutor calls Angel who testifies that two days before Casey disappears, she and Chelsea are riding their bikes on Benton Street and notice Johnny following them (T982,985,995). Johnny is within "a half block" of the girls (T982). The girls are on Seventh Street and see Johnny; again, he is a half-block behind them (T983). They speed up and ride around the block toward the Wideman house (T983-84). They ride fast and do not look back; they reach the house and go inside without seeing Johnny again (T983-84).

The next day, Angel and Chelsea are at the Wideman house and see Johnny

again (T985). Chelsea, Angel, Casey, and two other children from the neighborhood are all inside the house; no adults are there (T986). Angel looks out the window and sees Johnny sitting in a chair by the deck (T986-87).

Angel's mother calls and says to lock the doors (T987). There are still no adults in the house (T987). The children lock the doors; then they hear someone knocking (T987). They do not look outside (T987-88).

During closing argument, the prosecutor reminds the jury that Johnny stalked other "little girls" in the days before the crime:

> They're in the alley, he's out as quickly as he can get out of public view. He's in the back of some of those houses and anybody who walked out of the front of those houses isn't going to see little Casey that they know with a strange guy that they saw some of the people saw the day before, stalking these little girls inside that house, that Angel's mother saw stalking up and down in front of that house with just the little girls inside, concerned enough to call her daughter and say, lock the door, this guy is out in front. He's up banging on the doors.

(T1917).

Summary of Argument

The rule against admission of other crimes provides that evidence of uncharged crimes, wrongs, or misconduct for which the accused is not on trial is inadmissible to demonstrate the defendant's propensity for similar acts. Evidence of other crimes may be admissible if it falls within an exception to the

rule and if it is legally relevant: if its prejudicial effect does not outweigh its probative value. Exceptions to the rule include evidence that shows motive, intent, absence of mistake or accident, common scheme or plan, and identity.

In the present case, Angel's testimony relates two separate incidents of Johnny stalking children. The first incident involves only Chelsea and Angel. The circumstances of that incident –stalking two, different, older children riding their bikes – are completely different than the circumstances of the charged offense. It is not logically relevant because it has no connection to, and is not probative of, any matter at issue in the charged offense. But the evidence is prejudicial: it does tend to show that Johnny had a propensity to commit crimes against children.

The second incident – Johnny's mid-day stalking of 5 children who are all in a house together without adults – is, again, too dissimilar to the charged offense to be probative of the only real questions at issue in the case being tried: whether Johnny could deliberate and whether he did deliberate on taking Casey out of the house to have sex with her and kill her (*e.g.*, T1926, 1933). Even assuming this incident is somehow logically relevant – because Casey is one of the 5 children in the house – it is not legally relevant. Its prejudicial effect outweighs its probative value because it allows the jury to find Johnny had evil intentions toward every child in that house and to generalize that finding to a propensity to commit crimes against chidren.

These two instances of uncharged stalking were pure, prejudicial, propensity evidence. Because the uncharged stalking offenses involved children, because they were close to the time of the charged offense, because the prosecutor emphasized this evidence in his closing argument, and because propensity evidence could persuade a juror who was not sure about Johnny's intent – whether he could deliberate and whether he did deliberate – to reject the diminished capacity defense and convict him, it cannot be said that the evidence was not prejudicial. The cause must be reversed and remanded for a new trial.

Argument:

Evidence of uncharged crimes, wrongs, or acts for which the accused is not on trial is inadmissible to demonstrate the defendant's propensity for similar acts. *Id*. at 13 citing *State v. Reese*, 364 Mo. 1221, 274 S.W.2d 304,307 (1954). The rule applies to conduct that "could have been the subject of a criminal charge" and other acts and conduct that the jury would perceive to be wrongful, criminal or that would arouse in the jury the same kind of prejudice against the defendant that would be created by "a disclosure that the defendant has engaged in criminal conduct." *State v. Sladek*, 835 S.W.2d 208, 313 n. 1 (Mo. banc 1992).

This Court has recognized that showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence: 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.banc 1998) *citing State v. Bernard*, 849 S.W.2d 10,16 (Mo.1993). Exceptions to this rule do permit admission of evidence of the defendant's prior misconduct "if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, *Id*., 835 S.W.2d at 311 ... and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." *Id*.; citations omitted. Recognized exceptions include evidence that tends to establish motive, intent, absence of mistake or accident, common scheme or plan (meaning the crimes are so closely "related to each other that proof of one tends to establish the other"), and identity of the person charged. *Bernard*, 849 S.W.2d at 13.

Error in the admission of evidence of other crimes is reviewed for abuse of discretion, *Id*.; abuse of the trial court's discretion requires reversal when the erroneous admission of evidence prejudices the defendant. *State v. Bell*, 950 S.W.2d 482,484 (Mo. banc 1997). When admission of evidence of uncharged misconduct is an issue on appeal, '"the dangerous tendency and misleading probative force of this class of evidence" requires the Court's "rigid scrutiny."' *State v. Burns*, 978 S.W.2d at 761 *quoting State v. Holbert*, 416 S.W.2d 129,132 (Mo. 1967).

In the instant case, the prosecutor proffers various theories to support admission of the two stalking incidents. He says it is admissible as "evidence of

certainly state of mind of the defendant at the time" (T784-85). He adds, the stalking incidents are "direct evidence, certainly inferential evidence of his intent, his purpose and goes with his statements later that he had been thinking for some time of abducting this kid and having sex with her" (T785).

The stalking incidents may be evidence of Johnny's state of mind at the time of the stalking, but the incident involving Casey was on a different day at a different time under different circumstances. The present case is unlike *State v. Ewanchen*, 587 S.W.2d 610 (Mo.App.E.D. 1979), in which the uncharged misconduct, admissible to show state of mind, was a hit-and-run accident that occurred immediately prior to the charged offense. *Id*. at 610-11. The stalking incidents are not admissible to show Johnny's state of mind.

The stalking incidents are too dissimilar to the charged offenses of kidnapping Casey, attempting to have sex with her, and killing her to be evidence of Johnny's intent and purpose—also reasons given by the prosecutor. The only similarity in the charged and uncharged offenses is that children are involved. The Courts of this state have rejected a "children were involved in both the charged and uncharged incidents" exception to the rule against evidence of uncharged crimes. *E.g.*, *State v. Vowell*, 863 S.W.2d 954, 955-56 (Mo.App.S.D. 1993) (citing cases).

The prosecutor also claims that evidence of the uncharged stalking crimes "goes to motive, intent, everything else that this guy is in the neighborhood following little girls around and the next day he walks off with one.... how could

it not be more relevant, including the fact that Casey, the ultimate victim, is in the house at the time he's following these two girls" (T975). The trial court finds this "indicates a pattern of conduct that certainly might be relevant" and apparently relies on that in overruling Johnny's objection (T976). But this Court has rejected a rule that would sweep so broadly:

> The common scheme or plan theory is not a "series of crimes" theory in which the evidence of one crime may be offered to show the defendant's propensity to engage in the crime charged. Rather, the traditional common scheme or plan exception permits evidence of other crimes which are so interrelated to the charged crime that the proof of one tends to establish the other.

State v. Conley, 873 S.W.2d 233,236 (Mo.banc 1994); *see also State v. Brooks*, 810 S.W.2d 627,631-33 (Mo.App.E.D. 1991)

Although uncharged crimes committed against Casey might be logically relevant, the evidence must also be legally relevant to be admissible. Its probative value must not be outweighed by its prejudicial effect.

Here, Angel's testimony establishes that the first stalking incident involves only herself and Chelsea. As noted, *supra*, the uncharged stalking of Angel and Chelsea, dissimilar to the charged offenses committed against Casey, is simply not probative of the charged offenses involving Casey. That Chelsea is Casey's sister is not enough to make Johnny's stalking of Chelsea and Angel logically relevant, *i.e.*, probative. *See, e.g.*, *State v. Lancaster*, 954 S.W.2d 27

(Mo.App.E.D. 1997) (admission of evidence of defendant's uncharged abuse of other family members was prejudicial error requiring reversal); *State v. Post*, 901 S.W.2d 231,237 (Mo.App.E.D. 1995); *State v. Sexton*, 890 S.W.2d 389 (Mo.App.W.D. 1995); *State v. Olson*, 854 S.W.2d 14 (Mo.App.W.D. 1993).

The second stalking incident involved four children in addition to Casey. Even if this incident involved only Casey, its probative value would not necessarily outweigh its prejudicial effect. *State v. Wallace*, 943 S.W.2d 721,724-25 (Mo.App.W.D. 1997) (reversing for admission of evidence of a tape of a prior uncharged incident in which the defendant assaulted the victim even though arguably probative of the charged assault).

The second incident, however, does not involve only Casey: four other children were in the house making the logical relevance of the incident questionable at best. The prejudicial effect of allowing the jury to hear that Johnny was stalking four other children substantially outweighs whatever minimal probative value this dissimilar crime might have.

Error in admitting evidence requires reversal when it is prejudicial, meaning "outcome-determinative," — that "the erroneously admitted evidence so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence." *State v. Berwald*, 2005 WL 3526517*10 (Mo.App.W.D. Dec. 27, 2005) *quoting State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001). In judicially determining whether

"'there is no reasonable probability that the jury would have acquitted but for the erroneously admitted evidence,' *Black*, 50 S.W.3d at 786, ... "the State is 'not entitled to the benefit of all reasonable inferences from the evidence, as in a review for the sufficiency of the evidence.'" *Id*. *citing State v. Driscoll*, 55 S.W.3d 350, 357 (Mo.banc 2001).

Nothing prevented the jurors from using these two stalking incidents as proof that Johnny planned and deliberated on killing Casey: the prosecutor's comments encouraged that. It was evidence that invited the jury to imagine the worst regarding Johnny's intentions toward children and served no legally relevant purpose.

This evidence served only to improperly suggest to the jury that Johnny had a propensity to prey upon children and was generally of bad character. The jury was free to use the evidence that Johnny stalked children on two different occasions as proof that Johnny had evil intentions toward children in general and towards Casey in particular. *See State v. Randolph*, 698 S.W.2d 535, 539-41 (Mo.App.E.D. 1988) (noting the highly prejudicial effect of evidence of uncharged crimes that bears similarities to the charged offense).

The prosecutor's argument stoked this prejudice. It blended the scary, uncharged, stalking offenses into the charged offense of killing Casey:

> little Casey that they know with a strange guy that they saw some of the people saw the day before, stalking these little girls inside that house, that Angel's mother saw stalking up and down in front of that house with

just the little girls inside, concerned enough to call her daughter and say, lock the door....

(T1917).

Substantial evidence supported Johnny's defense of the true issue in this case – whether, because of his mental illness, Johnny could deliberate and whether he did deliberate. Every mental health expert that testified at guilt phase – even the state's expert witness, Dr. English - agreed that Johnny was mentally ill: Dr. Rabun, T1473; Dr. Dean, T1633-34; and Dr. English, T1815. Dr. Rehmani and Dr. Cotton-Williigor, who were not called to offer opinions, testified they provided treatment for Johnny's schizophrenia while he was in the St. Louis County Jail (T1754,1775). The evidence showed Johnny's mental illness is severe and it goes back to his early years.

Even with this propensity evidence, and even though Johnny admitted killing Casey, it took the jury approximately four hours to reject the defense of diminished capacity and return a verdict of first degree murder (T1957,1971).

In light of all the circumstances of the case – the strength of the defense evidence, the extremely prejudicial nature of the other crimes evidence and the prosecutor's use of that evidence throughout his case, and the fact that the jury did not reach its verdict quickly – it cannot be said that the stalking evidence did not affect the outcome of this cause. The cause must be reversed and remanded for a new trial.

AS TO POINT FOUR: ERROR IN SUBMITTING "VOLUNTARY INTOXICATION"

The trial court erred in overruling Johnny's objections and submitting Instruction No. 6: MAI-CR3d 310.50—"voluntary intoxication." This violated his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VIII & XIV; Mo.Const., Art. 1, §§10, 18(a), & 21. Despite the lack of substantive evidence that Johnny was in "an intoxicated or drugged condition ... from drugs or alcohol," the instruction posited this as presumptive fact violating Johnny's 6th and 14th Amendment rights to jury, not judge, fact-finding. It injected a false issue misleading the jury: that Johnny's defense was that his intoxicated or drugged condition at the time of the crime excused it. It prejudiced Johnny at guilt phase by drawing the jury's attention away from the true issue and his true defense: whether, as a result of his mental illness, Johnny was unable to deliberate at the time of the crime and could not and did not coolly reflect on killing Casey. The instruction's prejudicial effect extended into penalty phase with the prosecutor's argument criticizing the mitigating circumstance that Johnny was "under the influence of extreme mental or emotional disturbance" because "ample evidence" showed that if Johnny was under the influence of anything, it was drugs.

Additional Facts:

At guilt phase, the state submits Instruction 6 – MAI-CR3d310.50 – regarding voluntary intoxication:

> The state must prove every element of the crime beyond a reasonable doubt. However, in determining the defendant's guilt or innocence, you are instructed that an intoxicated or a drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct.

(LF764).

The defense objects: it conflicts with MAI-CR3d 308.03 – Instruction 10 – which tells the jury an abnormality manifested only by repeated antisocial conduct or alcoholism or drug use without psychosis is not a mental disease or defect; because the evidence that was presented is that the "drug use is related to psychosis," 310.50 is inapplicable(T1890-91).

But the prosecutor claims evidence supporting this instruction:

> Evidence of drug use was brought in both by the defendant and the State through Delaney Dean and Byron English.... I think 310.50 is proper to be given in this case on the basis of voluntary intoxication, without psychosis, as Dr. English testified, is not a defense to this case and the jury needs to be told that that is not a legal defense.

(T1891-92). The trial court overrules Johnny's objections and submits "voluntary intoxication" to the jury(T1892;LF764). Counsel preserves the issue in the motion for new trial (LF840-41).

Post-trial, using a Missouri Supreme Court questionnaire, the judge prepares the Trial Judge's Report ("Report"), and solicits comments from the prosecutor and defense counsel (A26-36). The judge Reports "No" "evidence the defendant was under the influence of alcohol, narcotics or dangerous drugs at the time of the offense" (A30: Part B, Question 11).

Defense counsel comments on Question B.11 pointing out the judge reports "no evidence defendant was under the influence of alcohol, narcotics, or dangerous drugs at the time of the offense," but at trial "the court submitted MAI-CR 310.50 which deals with the intoxication of the defendant" (A33-34). Counsel notes expert testimony that Johnny drank and used drugs the night before the offense, and Dr. English's testimony of "drug-induced hallucinations at the time of the offense" (A34).

The prosecutor comments on Question B.11:

> No direct evidence was produced during the trial concerning defendant's use of drugs at the time of the offense. The defendant's statements to the police shortly after the murder do not indicate he was under the influence of any substance. The defendant's companions from the night before denied any drug or alcohol use by them or the defendant the night before the murder. *The only statements concerning drug use were those hearsay statements defendant made to mental health witnesses during their evaluations. These statements are only relevant to the conclusions reached by those witnesses and do not establish that*

defendant was under the influence of alcohol, narcotics or dangerous drugs at the time of the offense. Defense counsel's claim that Dr. English testified that defendant was suffering from drug-induced hallucinations at the time of the offense is a misstatement of the testimony. Dr. English testified that he found no evidence of controlling hallucinations in defendant's actions in murdering Casey Williamson but that if, as defendant claimed, he was experiencing hallucinations they would have been drug induced from his history of past substance abuse.

(A36; emphasis added).

At trial, the prosecutor elicits from the policemen in contact with Johnny shortly after the crime – Officers Louis, Grothe, and Neske – that Johnny gave no cause for concern and there was nothing unusual, strange, or bizarre about him (T1021-22,1073-74,1239). Johnny understood the officers and answered appropriately; they did not restrain him (T1022-23,1073,1237-39).

Defense counsel elicits from Ernie Williamson that Eddy and Johnny sat on the couch, playing video games and drinking the evening before Casey was killed; they had a half pint of "Ten High" and offered some to Ernie(T843-44). Angie testifies this was around 10:00 p.m. (T876-77).

Defense expert, Dr. Dean, testifies Johnny reported using methamphetamines 1-3 days before the crime(T1575-79,1620). He also did "some drinking, not a lot," and used "some marijuana" (T1623). The night before the crime, he and Eddy "spent pretty much the whole night together

using drugs" (T1623).

State expert, Dr. English, testifies Johnny reported abusing alcohol and injecting methamphetamine the day before the incident (T1821). Diagnosing Johnny with "Methamphetamine intoxication with perceptual disturbances, polysubstance dependence," Dr. English relied on what Johnny said: "that he was abusing alcohol or methamphetamines at the time of the crime and, you know, from what he was describing he was intoxicated on the methamphetamine at that time" (T1840). Dr. English opined the voices Johnny heard were the result of his drug abuse (T1840).

Summary of Argument:

An instruction must be supported by substantive evidence. Nothing excepts MAI-CR3d 310.50 from this rule.

Statements made by a defendant and other information obtained by an expert in the course of a Chapter 552 evaluation to determine competency or whether a mental disease or defect affects the accused's responsibility for an offense are admissible only on the issue of his mental condition. *See* §§552.020.14 and 552.030.5. Such information may not be used as "substantive evidence" of guilt.

Here, no substantive evidence supports the voluntary intoxication instruction. Neither the expert nor lay testimony provides substantive evidence that Johnny was intoxicated at the time of the crime. Even the prosecutor, albeit long after submission of the instruction, acknowledges there is no

substantive evidence that Johnny was intoxicated (A36).

The trial court erred in submitting Instruction 6 to the jury because its presumption of fact injected a false issue misleading the jury. Johnny's defense was diminished capacity – inability to coolly reflect – based on mental disease or defect; he did not claim drugs, alcohol, or intoxication excused his crime (T1923-24,1926,1933,1937-41). The prosecutor capitalizes on this error at penalty phase belittling the mitigating circumstance of "under extreme mental or emotional disturbance" and arguing there was ample evidence to show that if he was under the influence of anything, it was drugs.

Argument:

"[I]t is settled law that it is error in the court to give an instruction when there is no evidence in the case to support the theory of fact which it assumes." *Case of Tweed*, 83 U.S. 504,518 (1872). An instruction unsupported by evidence "will be error in the court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue...." *Goodman v. Simonds*, 61 U.S. 343,359 (1857). "[S]parse evidence" is not enough to support an instruction. *State v. Taylor*, 134 S.W.3d 21, 29 (Mo.banc 2004).

Whether to submit an instruction is within the trial court's discretion, *State v. Kuhlenberg*, 981 S.W.2d 617,623 (Mo.App.E.D. 1998). "An appellate court will reverse only if there is error in submitting the instruction and prejudice to the defendant." *State v. Taylor*, 944 S.W.2d 925,936 (Mo. banc 1997).

"[P]rejudice is judicially determined by considering the facts and instruction together." *State v. Brown*, 958 S.W.2d 574,581 (Mo.App.W.D. 1997).

Section 552.030.5, concerning examinations to determine if, as a result of mental disease or defect, the accused is not responsible, precludes admission into evidence of statements made by the defendant during such an examination "on the issue of whether the accused committed the act charged against the accused in any criminal proceeding then or thereafter pending...." Section 552.030.5 restricts use of a defendant's statement to "the issue of the accused's mental condition...." *See also* §552.020.14 (defendant's statements made during competency examinations may not "be admitted in evidence against the accused on the issue of guilt in any criminal proceeding...").

Although experts may rely on a defendant's statements in forming opinions and may relate those statements to show the foundation for the opinion, the statements are not admissible as substantive evidence. *State v. Barnes*, 740 S.W.2d 340,343 (Mo.App.E.D. 1987); *State v. Gary*, 913 S.W.2d 822,830 (Mo.App.E.D. 1995) (defendant's "out-of-court statements in *Barnes*" properly admitted because "not offered for the truth of the statements' assertions" but to show "the effects of the statements on the expert's opinion") *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo.banc 1997); *see also State ex rel. Missouri Highway and Transportation Commission v. Delmar Gardens of Chesterfield*, 872 S.W.2d 178,181-82 (Mo.App.E.D. 1994) (An expert may rely "on information and opinions of others" to form and explain his opinion when

testifying, but "such sources" are not "independent substantive evidence....").

Appellant's research has located no authority providing an exception for MAI-CR3d-310.50 from the rule requiring substantive evidence to support an instruction. Here, there was no substantive evidence that Johnny was intoxicated or high on drugs or alcohol at the time of the crime. Johnny's statements to Dr's Dean and English – that he ingested alcohol and drugs in the days before his offense – are not substantive evidence. Ernie Williamson's testimony–Johnny was drinking at 10 p.m. the night before the offense–is not evidence he was intoxicated; it does not even indicate how much alcohol Johnny had. Officers Louis, Grothe, and Neske – in contact with Johnny an hour or two after the crime – provide no evidence Johnny was intoxicated at the time of the crime; in fact, their testimony is that Johnny did not appear in the least bit out of the ordinary.

In an about-face abandonment of his instruction-conference argument (that there is evidence supporting the instruction, T1891-92), the prosecutor's post-trial letter commenting on the Trial Judge's Report correctly states there was no substantive evidence of intoxication(A36). By then, however, the damage has been done; the jury has already been given the instruction and found Johnny guilty. The prosecutor has achieved his goal of obtaining a conviction and sentence of death. His previous position – that there was substantive evidence of "drug use" and "voluntary intoxication" – is no longer helpful. Now, substantive evidence of drug or alcohol intoxication may be considered by this

Court in its §565.035.3(3) review of Johnny's sentence of death.

In *State v. Erwin*, the Court noted "MAI-CR3d 310.50 ... stands by itself as a comment on the evidence of intoxication." 848 S.W.2d 476,483 (Mo.banc 1993). The Court cautioned:

> MAI-CR3d 310.50 is unique among all approved instructions in that it is a comment on evidence, albeit irrelevant evidence.... As a general principle, singling out specific facts for comment in a jury instruction is impermissible. Such instruction diverts attention away from other relevant evidence and threatens a defendant's right to have a jury decide factual issues.

Id.,n.4; *citing State v. Denison,* 178 S.W.2d 449,456-57 (1944); *State v. Swarens,* 241 S.W. 934,939 (1922).

The court's "comment" in this case – the instruction's specific reference to "an intoxicated condition whether from drugs or alcohol" – placed excessive and prejudicial emphasis on Johnny's drug and alcohol use thus suggesting to the jury that this was, in fact, evidence. The instruction prejudices Johnny by erroneously implying he is claiming "an intoxicated condition" that excuses him from responsibility.

The instruction does not submit to the jury the question of whether Johnny was "in an intoxicated or drugged condition." It posits this as predetermined fact improperly taking from the jury the opportunity to make a different finding, *State v. Swarens, supra*. This violates the Sixth Amendment right to

jury fact-finding. "The right to trial by jury includes the right to have the jury and the jury alone find the facts of the case...." *Turner v. United States*, 396 U.S. 398,431 (1970), Black, J., *dissenting*.

Although the primary prejudicial effect of this instruction is at guilt phase, there is prejudice at penalty phase, also. In his penalty phase closing argument, the prosecutor criticizes the mitigating circumstance that the defendant was "under the influence of extreme mental or emotional disturbance" because "ample evidence" showed the only thing he was under the influence of was drugs (T2281). Once again, the jury is improperly asked and allowed to consider non substantive evidence in making its decision.

For the foregoing reasons, the cause must be reversed and remanded for a new trial.

POINT FIVE: DETECTIVE NEWSHAM AND COERCED, UNRELIABLE STATEMENTS

The trial court erred in overruling Johnny's motion to suppress statements, and admitting the statements he made for Detective Newsham. This violated Johnny's rights to due process, to be free from self-incrimination, and reliable sentencing. U.S.Const., Amend's V,VIII, & XIV; Mo.Const., Art. 1, §§10, 19 & 21. The total circumstances show the statements were unreliable and involuntary: jail records show Johnny was being evaluated by the nurse and sent to the jail's psychiatric unit

exactly at the time that Detective Newsham claimed he and Johnny were waiting to see the nurse and discussing Poe and "eternal salvation." If the jail records are correct, Detective Newsham was lying about the circumstances under which Johnny made his statement. If Detective Newsham was truthful, he coerced Johnny by telling him he would not achieve eternal salvation or be forgiven for the crime unless he was provided every detail and did not leave anything out. Johnny failed to complete ninth grade, he had been in police custody for approximately 16 hours when he made the statement for Detective Newsham, and he is a schizophrenic who was in need of his medication when he made the statement to Detective Newsham. Detective Newsham did not make a recording of what Johnny initially told him. The total circumstances show the risk that Johnny's statement was coerced and is unreliable is too great for it to have been admitted as evidence against him. Johnny was prejudiced by the admission this evidence because it was critical direct evidence of deliberation.

Summary of Argument

The state must prove by a preponderance of the evidence that Johnny's statement was voluntary. If the nurse's notes are correct, Detective Newsham is lying about what led to Johnny making a statement to him. Under these

circumstances, the trial court's denial of the motion to suppress and admission of evidence of Johnny's statement to Detective Newsham clearly erroneous because Detective Newsham's statements are unreliable and not substantive evidence.

If the nurse's notes are wrong and Detective Newsham is not lying, then the trial court's denial of the motion suppress and admission of evidence of Johnny's statement to Detective Newsham are clearly erroneous because Detective Newsham's testimony shows he coerced the statements by telling Johnny he would have to make such statements to obtain eternal salvation.

Either way, the state has not proved by a preponderance of the evidence that Johnny's statements are voluntary. Either way, the statements are unreliable. Admission of these statements violated Johnny's right to due process of law and prejudiced him by putting before the jury unreliable evidence that he deliberated on killing Casey.

Argument

"Once the admissibility of a statement has been challenged, the State has the burden of proof to demonstrate by a preponderance of the evidence that the statement was voluntary." *State v. Smith*, 944 S.W.2d 901,910 (Mo.banc 1997); citation omitted. Review of a trial court's ruling on a motion to suppress is limited to determining whether the evidence is sufficient to support the ruling. *State v. Wood*, 128 S.W.3d 913,915 (Mo. App.W.D. 2004). A trial court's ruling will not be reversed unless it is clearly erroneous, that is, if the Court is left with

a definite and firm impression that a mistake has been made. *Id*. The facts and reasonable inferences from the facts are viewed in a light most favorable to the ruling. *Id*. Deference is given to the trial court's factual findings, but questions of law are reviewed *de novo*. *Id*.

'"(R)eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."' *Jackson v. Denno*, 378 U.S. 368,384,n.11 (1964); citation omitted. Confessions induced by "any direct or implied promises..." have long been recognized as involuntary. *Bram v. United States*, 168 U.S. 532, 542-43 (1987). When a promise made by the police overbears the will of the defendant, the promise is coercive and the confession thus produced is involuntary. *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991). The Court must consider the "totality of the circumstances to determine whether a confession is voluntary." *Id*. at 285-86.

The fact that Detective Newsham administered *Miranda*[7] warnings to Johnny does not resolve the question of whether Johnny's statement was voluntary. Advising a suspect of his rights as required by *Miranda* does not ensure that a subsequent statement has been freely and voluntarily made and will not immunize a post-*Miranda* statement from scrutiny. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir.1991); *State v. Vinson*, 854 S.W.2d 615 (Mo.App.S.D.

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

1993) (post-*Miranda* statements of defendant made in exchange for prosecutor's promise to provide immunity from prosecution held not voluntary); *see also State v. Williamson*, 99 S.W.2d 76 (Mo. 1936) (defendant's confession, induced by sheriff's and deputy's promises that they would recommend that defendant be returned, as he wished, to Illinois State Penitentiary was not voluntary).

If the St. Louis County Jail Records are correct, then Detective Newsham's testimony regarding the circumstances leading to Johnny's statement is false. If so, the true circumstances of how Johnny came to make the statement are unknown. In ruling on the suppression motion, the trial court was unwittingly ruling on untrue evidence and that ruling cannot be accorded the usual deference. The state was unable to prove, and did not prove, by a preponderance of the evidence that Johnny's statement was freely and voluntarily made because the evidence was a lie.

The effect is that the jury has heard improperly heard evidence of a confession that cannot be said to be reliable. If Detective Newsham was lying, the admission of Johnny's statement to him undermines the reliability of both the guilt and penalty phases. Its admission violates the Due Process Clause and the Eighth Amendment's guarantee and requires reversal.

The other alternative is that the Jail Records are incorrect and Detective Newsham's account of the circumstances giving rise to Johnny's statement is accurate. If this is so, admission of the statement is still unconstitutional,

reversible error because the totality of the circumstances, including Detective Newsham's testimony, shows that he coerced Johnny into making a statement. A coerced statement is unreliable and its admission violates the Due Process Clause. *Ryan v. Miller*, 303 F.3d 231,237 (2d Cir. 2002) (confession improperly obtained from juvenile "after lengthy custodial questioning" in circumstances suggesting "it was induced by the hope of leniency" was "unreliable as a matter of federal law" and should not have been placed before this jury as evidence of defendant's guilt").

The totality of the circumstances giving rise to Johnny's statement is as follows: At the time he gives a statement to Detective Newsham, Johnny has been in custody for approximately 16 hours. Johnny has learning disabilities and schizophrenia and he has not had any medicine for some time. He is cold and scared. Detective Newsham is telling Johnny that he will only receive "eternal salvation" if he tells the full truth: he will only "be forgiven for this crime" by being "completely honest about every single detail" (T1368). Detective Newsham lets Johnny know if he "leave[s] anything out" he will not be forgiven; he will not receive eternal salvation (T1368).

Extreme measures such as the "eternal salvation" tactic employed here by Detective Newsham appear to be relatively infrequent. But two courts that have considered the effect of similar tactics have found them to be coercive.

In *Carley v. State*, 739 So.2d 1046 (Miss.App. 1999), police officers obtained Carley's confession by advising him "that the only way he could go to heaven

was to "'come forward and tell the truth of his sins.'" *Id*. at 1050. On appeal, Carley argued "that his youthful age, mental illness, and learning disability, coupled with the police officer's promises of religious salvation, leniency, and reward, rendered his confessions involuntary." *Id*. Reversing, the Court stated, "Exhortations to tell the truth and adhere to religious teachings are the equivalent of inducements which render a statement inadmissible."

In *State v. Nelson*, 69 Haw. 461, 748 P.2d 365 (Hawaii 1987), a police officer "'talked [to Nelson] about the Lord' and read him passages from the Bible." *Id*. at 470, 748 P.2d at 371. "The passages selected for reading carried messages that 'confession brings salvation' and 'can save one from the wrath of God' and that 'God could deliver one from his persecutors.'" *Id*. The officer also gave the Nelson a Bible and prayed with him. *Id*.

The trial court suppressed Nelson's statement finding "'[t]he techniques employed by [the officer] on an individual with Defendant's obviously fragile state of mind had the effect of overbearing Defendant's will.'" *Id*. at 471. On appeal, the Hawaii Supreme Court "discern[ed] no basis for disturbing the trial court's finding that Nelson's will was overborne." *Id*.

Another important circumstance is that Detective Newsham does not record everything that goes on between him and Johnny when he is obtaining Johnny's statement; he only records what Johnny says after first talking with Detective Newsham about the additional details Johnny's statement provides. Detective Newsham could have recorded, on audio or video tape, everything

that transpired with regard to getting a statement from Johnny statement (T1396-97). But Detective Newsham chose not to do so. Under the St. Louis County Police Department's current rules, Detective Newsham would have been required to make a videotape of everything that passed between him and Johnny (T1397-98).

In 1994, the Minnesota Supreme Court decided that "the fair administration of justice" required all custodial interrogations to be recorded:

> We choose not to determine at this time whether under the Due Process Clause of the Minnesota Constitution a criminal suspect has a right to have his or her custodial interrogation recorded. Rather, in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.

State v. Scales, 518 N.W.2d 587,592 (Minn. 1994); *see also Stephan v. State*, 711 P.2d 1156,1158 (Alaska 1985) (an unexcused failure to record a custodial interrogation violates the Due Process Clause of the state constitution).

In sum, either way, whether Detective Newsham was lying or not, the admission of Johnny's statements violated his rights to Due Process of Law and

reliable sentencing. And Johnny was prejudiced. Detective Newsham's testimony was critical for the state because it was the only evidence that Johnny "planned" to take Casey to the glass factor, have sex with her, and kill her. It was unique, valuable evidence in that it was the only direct evidence supporting a finding that Johnny deliberated.

For the foregoing reasons, the trial court erred in failing to suppress Johnny's statement to Detective Newsham. It was error prejudicing Johnny. The cause must be reversed and remanded for a new trial.

AS TO POINT SIX: INVALID STATUTORY AGGRAVATOR

The trial court erred in overruling defendant's objections, submitting Instruction No. 23 to the jury, and sentencing Johnny to death. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's XIV, VI and VIII. Instruction 23 submitted a statutory aggravator based on §565.032.2(7) – that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind" – which was unconstitutionally vague. Johnny was prejudiced because if this statutory aggravator had not been given, it cannot be said that the outcome of the weighing of aggravators and mitigators would have been the same.

Additional Facts:

Johnny timely objected to Instruction 23 which submitted the statutory aggravators (T2129). The trial court overruled his objection and Johnny preserved the point in his new trial motion (LF855-56).

Argument:

A meaningful basis must exist for distinguishing the few cases where death is appropriately imposed from the many where it is not. *Furman v. Georgia*, 408 U.S. 238,313 (1972). A statutory aggravator that fails to provide adequate guidance for making this distinction is unconstitutional. *Maynard v. Cartwright*, 486 U.S. 356,365 (1988).

As written, without further definition, Missouri's depravity of mind statutory aggravator is too vague to provide adequate guidance. *Godfrey v. Georgia*, 446 U.S. 420,428 (1980);*State v. Feltrop*, 803 S.W.2d 1,14 (Mo.banc 1991). To provide the additional, constitutionally required guidance, this Court has at least twice adopted "limiting constructions." *See State v. Griffin*, 756 S.W.2d 475,490 (Mo.banc 1998) and *State v. Preston*, 673 S.W.2d 1,11 (Mo.banc 1984). As appropriate, based on the evidence, appropriate limiting language is included in the instructions submitting §565.032.2(7) to the jury.

The problem is that the limiting definitions or constructions are judicial, not legislative, creations. The legislature has never modified the language of §565.032.2(7) to provide the needed guidance to Missouri juries.

The "narrowing construction" given to 565.032.2(7) by the Court cannot save this statute because it violates the federal and state constitutional separation of powers and the Sixth, Fourteenth, and Eighth Amendments. *Loving v. United States*, 517 U.S. 748,757 (1996) (it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another). The limiting language added by the Court infringes on the Constitutional requirements that legislatures, not the judiciary, legislate.

Further, the limiting language inserted into the instructions is also a kind of judicial fact-finding violating the Constitutional requirement that juries, not judges, determine what facts, if any, exist that support the finding of a statutory aggravating circumstance. Recently, in *Bell v. Cone*, 543 U.S. 447, 125 S.Ct. 847 (2005), the Supreme Court raised a similar question:

> In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating circumstance that renders a defendant death-eligible. *Id.*, at 609, 122 S.Ct. 2428. Because *Ring* does not apply retroactively, *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004), this case does not present the question whether an appellate court may, consistently with *Ring*, cure the finding of a vague aggravating circumstance by applying a narrower construction.

Id., 125 S.Ct. at 852,n.6.

In the instant case, Instruction 23 submitted §565.032.2(7) as follows; the language added by the Court, not found in the statute, is underlined:

> "Whether the murder of Cassandra "Casey" Williamson involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. <u>You can make a determination of depravity of mind only if you find: That the defendant committed repeated and excessive acts of physical abuse upon Cassandra "Casey" Williamson and the killing was therefore unreasonably brutal</u>.

(LF789;A42).

The underlined, court-created language is an amendment adding a requirement to the statutory provision enacted by the legislature. It thus usurps the legislative prerogative. It is also a specific determination of the facts that will satisfy the §565.032.2(7) statutory aggravator. It thus usurps the prerogative of the jury to determine what facts exist that satisfy this statutory aggravator.

For these reasons, the first aggravating circumstance of Instruction 23 was invalid. Because the mitigating evidence was strong, and the state's penalty phase evidence was not overwhelming, it cannot be said that the result at penalty phase would have been the same if this statutory aggravator

had not been submitted. In all, it took the jury almost seven and a half hours to reach a verdict (T2314,2318). At one point, it appeared the jury might hang (T2317). For the foregoing reasons, the cause must be reversed and remanded for a new penalty phase.

AS TO POINT SEVEN: DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE

The trial court erred in overruling Johnny's new trial motion and sentencing him to death. This violated his rights to due process, reliable and proportionate sentencing, and freedom from cruel, unusual, and excessive punishment. U.S.Const., Amend's VIII&XIV; Mo.Const., Art.1, §§ 10 & 21; Mo.Rev.Stat,§565.035.3(3). Johnny's death sentence is excessive, unreliable, and disproprtionate. His severe, childhood-onset, mental illness and mental disabilities, documented by extensive evidence at trial and post-trial, distinguishes him from other, similarly situated, capital defendants. Further, there are defendants in similar cases – charged with first degree murder of a child or children – who were not sentenced to death. The evidence is adequate to support Johnny's conviction but only adequate on the critical question of whether he had the capacity to deliberate and did deliberate; this is not enough to support a sentence of death. Johnny's severe, long-term mental illness plus other trial errors, undermine the reliability of the death sentence in this case.

His sentence must be reduced to non parolable life imprisonment.

In *Atkins v. Virginia*, 526 U.S. 304 (2002), the Supreme Court held that imposing a death sentence on a mentally retarded offender is excessive and violates the Eighth Amendment. "'The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Atkins*, 536 U.S. at 311-12 *citing Trop v. Dulles*, 356 U.S. 86,100-01 (1985). The same considerations leading the Court to find it cruel and unusual to sentence a mentally retarded person to death apply also to severely mentally ill defendants – to Johnny:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses ... they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

Id. at 306-07. The evidence at Johnny's trial documents that his mental disabilities are indistinguishable from these. His illness impairs his reasoning, judgment, and ability to control his actions. It began at an early age as indicated by his suicide attempts at age 13 requiring the first of many psychiatric hospitalizations (T159-61,2086,2184-85,2193).

Although, as yet, only the state of Connecticut has enacted legislation prohibiting execution of the mentally ill, commentators and some judges have

argued that the rationale of *Atkins* applies with equal force to those who are *severely* mentally ill.

> [T]he underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.... In that regard I associate myself with the dissenting opinion of Justice Pfeifer of the Ohio Supreme Court who noted:
>
> > Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so.... I believe that executing a convict with a severe mental illness is a cruel and unusual punishment....

Corcoran v. State, 774 N.E.2d 495,502-03 (Ind. 2002), Rucker, J., dissenting, *quoting Ohio v. Scott*, 92 Ohio St.3d 1,748 N.E.2d 11,20 (2001) (Pfeifer, J., dissenting); *State v. Nelson*, 173 N.J. 417,482-83,803 A.2d 1,41 (N.J. 2002) Zazzali, J., concurring ("I agree with defendant that her execution for crimes that are inextricably bound to her mental illness violates our State Constitution. The State's legitimate penological interests that purportedly are served by the death penalty are unconstitutionally diminished if the State executes such a mentally ill and psychologically disturbed person...."); *see also e.g.*, Laurie T.

Izutsu, Applying *Atkins v. Virginia* to Capital Defendants With Severe Mental Illness, 70 Brook. L. Rev. 995 (Spring 2005); John H. Blume & Sherri Lynn Johnson, Killing the Non-Willing: *Atkins*, the Volitionally Incapacitated, and the Death Penalty, 55 S.C. L.Rev. 93 (Fall 2003).

Johnny Johnson became mentally ill long before his crime; he was mentally ill when he committed his crime; he is still mentally ill. He will always require antipsychotic and antidepressant medication.

The severity of Johnny's mental illness is illustrated by the fact that, because he ordinarily requires so much medication to control his illness, someone at the court ordered his morning and afternoon medicines withheld to make sure that he would not be too sedated for trial. This came to light only because the penalty phase verdict was returned at 10:45 p.m.: 90 minutes after Johnny had received his evening medication and well past the time he ordinarily left court for the day (T2324,2336-40,2345- DefEx-AAA). Johnny's appearance concerned counsel:

> When we first had contact with him in the back corner of the hallway, he was having trouble standing up. One eye wasn't open and the other there was a little slit. He was drooling. He was sort of tipping over as he walked. He was immediately brought into the courtroom and seated and the verdict was taken....

(T2324). Dr. Rehmani, the psychiatrist who treated Johnny at the St. Louis County jail, testified that at 9:00 p.m., Johnny was given his standard dose of

the four medications he received every night: Novane-an anti-psychotic, Imipramine-an antidepressant also used to treat anxiety, Seroquel-an anti-psychotic, and Valium-for anxiety (T2336-40,2345; DefEx-AAA). Each medication has a sedative effect (T2336-41).

Dr. Rehmani was told at the jail that "for Johnny Johnson to appear in court and understand the proceedings his medicines were to be decreased or held in the morning so that he's not sedated" (T2342). The nursing staff told Dr. Rehmani "that they received a call from the Court" and that "his attorney might have called to lower his medication because he was sedated in the courtroom"(T2324). Dr. Rehmani testified that neither of Johnny's attorneys ever asked that Johnny's medication be withheld (T2342-43).

As a result of the call from the unknown caller, the medications that Johnny should have received each morning and each afternoon were withheld during the trial (T2343). Johnny was given his medicine only in the evening (T2346).

Under §565.035.3(3), in reviewing Johnny's sentence, this Court must consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, *the strength of the evidence and the defendant*." Critical to the Court's §565.035.3(3) analysis concerning both "the strength of the evidence and the defendant" is the evidence going to the only real issue at the guilt phase: whether, because of his mental illness, at the time of the crime Johnny could not and did not deliberate.

As shown throughout the trial and in this brief, Johnny's mental illness was

severe and of the most serious kind. It was with him, affecting his actions every day of his life, for over a decade before the crime. Although the jury found Johnny's mental illness did not diminish his capacity to deliberate, and thus the evidence on that issue may be sufficient to support his conviction of murder, it is not strong enough to satisfy the Eighth Amendment's requirement of a "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320,323 (1985) *quoting Woodson v. North Carolina*, 428 U.S. 280,305 (1976).

Crook v. State, 908 So.2d 350 (Fla. 2005) is particularly instructive because the aggravating and mitigating aspects of the case parallel those in Johnny's case. Like Johnny, "Crook was tried and found guilty of first-degree murder" and other crimes including a sexual offense: "sexual battery" *Id*. at 352. As in Johnny's case, Crook "brutally killed the victim...." *Id*.

Both Johnny and Crook presented extensive mitigating evidence; one difference is that Crook's mental health evidence was "uncontroverted" and his IQ was "borderline." *Id*. at 352-53. The nature of Crook's mitigating evidence was comparable to, if not identical to, Johnny's. It showed that "Crook sustained head injuries at age four when he was beaten with a metal pipe, that subsequently Crook failed kindergarten and posed substantial discipline problems in the ten different schools he had attended 'by the time he reached sixth grade and finally dropped out of school in eighth grade,' and that by age twelve Crook began using alcohol and drugs and huffing paint." *Id*.

Crook challenged the proportionality of his death sentence "because his crime, while substantially aggravated, is not one of the least mitigated, and in fact, is one of the most mitigated." *Id*. at 356. The court agreed with Crook.

"'[B]ecause death is a unique and final punishment,'" Florida's proportionality review seeks to make sure the death penalty is "'reserved only for those cases that are the most aggravated and least mitigated.'" *Id*. at 357; citations omitted. To do so, the court "'compare[s] the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders.'" *Id*.

The Court found that Crook's case was "among the most case aggravated of murders." *Id*. But based on the extensive mitigating evidence, "'especially that evidence connecting the mental mitigation to the crime,'" Crook's case was also one of the "most mitigated." Despite Crook's crime being among the "most aggravated," the Court found that the extensive mitigating evidence required that his sentence be reduced to life imprisonment. *Id*. at 359.

In light of the wealth of mitigating evidence in the present case, this Court should, as the Florida Court did in Crook, reduce Johnny's sentence to life imprisonment without probation or parole. But there are other substantial reasons for reducing Johnny's sentence that should not be overlooked.

To the best of undersigned counsel's knowledge, only two cases in Missouri have been reversed because the death sentence was disproportionate under §565.035.3(3). These cases are *State v. Chaney*, 967 S.W.2d 47,60 (Mo.banc

1998) (despite strong aggravating circumstances, the weak, but not insufficient, evidence supporting conviction of first degree murder for killing a young girl and the defendant's minimal prior misconduct required sentence to be reduced to life imprisonment; relying on "*State v. Watson*, 61 Ohio St.3d 1, 572 N.E.2d 97 (1991) (finding the evidence sufficient to convict, but setting aside the sentence of death based on a statutorily mandated independent review of the evidence)") and *State v. McIlvoy*, 629 S.W.2d 333,341-42 (Mo.banc 1982) (sentence of death was "excessive and disproportionate" in comparison with other cases; defendant had "minimal juvenile criminal record, limited education (9th grade) and limited intelligence (81 IQ), substantial alcohol problems, and ... appears to be but a weakling and follower in executing the murder scheme perpetrated by [codefendant]...." This Court also noted defendant "telephoned St. Louis police from Dallas, Texas, and voluntarily turned himself in and patiently waited for the St. Louis police to come to Dallas to pick him up....").

The reasons given by the Court in finding Mr. Chaney's and Mr. McIlvoy's death sentences disproportionate apply to the present case. As in *Chaney*, the strength of the evidence in the present case is adequate to convict but not to support a death sentence. In particular, the evidence supporting the finding that Johnny deliberated is not strong enough for a death sentence.

As in *McIlvoy*, Johnny cooperated with the police albeit after initially denying involvement. McIlvoy fled to Dallas and waited three days to contact

the police, *Id*. at 335-36; Johnny began cooperating the same day as the murder. And Johnny's mental problems far exceeded Mr. McIlvoy's.

Although the Court has never done so, it may also consider similar cases in which a defendant charged with first degree murder for killing a child was convicted of a lesser offense or was sentenced to life. Such similar, non death-sentence cases include:

State v. Lingle, 140 S.W.3d 178 (Mo.App.S.D. 2004) (defendant convicted of first degree murder as accomplice in murder of a woman and her three children);

State v. Rush, 872 S.W.2d 127,128 (Mo.App.E.D. 1994) (defendant convicted of two counts of first degree murder for killing a 6-year-old and 8-year-old; murder committed using "an ice pick, several knives and boards");

State v. Adkins, 867 S.W.2d 262 (Mo.App.E.D. 1993) (defendant convicted of two counts of first-degree for killing former wife's two children);

State v. Fleer, 851 S.W.2d 582 (Mo.App.E.D. 1993) (defendant murdered 15-year-old baby-sitter and 3-year-old child; 3-year-old was murdered in retaliation for drug deal gone bad; baby-sitter was murdered because she witnessed child's murder);

State v. Baskerville, 616 S.W.2d 839,845 (Mo.banc 1981) (three victims included 7-year-old boy who was shot after begging for his life).

Finally, the risk that serious and prejudicial errors occurring at both the guilt and penalty phases of trial improperly influenced the jury's determination

of sentence undermines the reliability of the verdict of death. Numerous errors pervaded the trial. Even if the Court should find that the errors themselves do not warrant reversal of the conviction or sentence, they are matters the Court must, under the Due Process Clause, consider in evaluating the reliability and proportionality of the verdict of death. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424,441-43 (2001). The errors and their effect on the reliability of the verdict include the following:

The trial court's refusal to allow defense counsel to make sure that the jurors who said they could consider a sentence of life imprisonment for first degree murder knew that it was a "coolly reflected" killing – not self-defense or accident or some other kind of killing – created doubt about whether a qualified, fair, and impartial jury was actually seated. This and the trial court's erroneous treatment of the *Batson* motion were structural errors undermining the integrity of the entire proceeding. Submitting the 310.50 instruction and admitting evidence of the uncharged stalking offenses – coupled with the prosecutor's improper argument – prejudiced the jury against Johnny.

The circumstances of Johnny's statement Detective Newsham are troubling and raise serious questions about the reliability of that statement. Johnny has been in police custody for approximately 16 hours when he makes his statement to Detective Newsham (T1396). Detective Newsham's account of how and when Johnny made his statement is inconsistent with the times in the nurses' notes.

Why, upon Johnny's return to the jail with Detective Newsham at 1:20 a.m., does the nurse put the following comments in her notes: "patient returned with county detectives, stated [steady] gate, with no apparent injuries. Patient states: 'Quote, I feel fine, same as before, close quote'" (T1654;StEx-95).

Finally, the penalty phase instructions gave the jury ambiguous, misleading and inaccurate information and directions. This, too, undermines confidence in the reliability of the verdict.

For the foregoing reasons, Johnny's death sentence is excessive and disproportionate. His sentence must be vacated and he must be resentenced to life imprisonment without probation or parole.

AS TO POINT EIGHT: PENALTY PHASE INSTRUCTIONS VIOLATE *RING*

The trial court erred in overruling Johnny's objections and giving Instructions 24, MAI-CR3d-314.44, and 26, MAI-CR3d-314.48 which failed to instruct that unless the state proved beyond a reasonable doubt that the mitigators were insufficient to outweigh aggravators "found" by the jury, 565.030.4(3), the verdict must be life imprisonment and failed to tell the jury what to do if not unanimous or if equally divided on whether mitigators outweighed "found" aggravators. This violated his rights to due process, jury trial, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, & XIV; Mo.Const.,Art.1,§§ 10,18(a),&21; it violates §565.030.4(3).

Because the weighing step is a death-eligibility requirement, the state must prove beyond a reasonable doubt that the mitigators are insufficient to outweigh the found aggravators. Instructions 24 and 26 were silent, therefore ambiguous, regarding the burden of proving the weighing step. Johnny was prejudiced: the jury would interpret these instructions as eliminating or lessening the state's burden of proof thus diminishing its burden of establishing Johnny's death-eligibility.

There was also plain error: §565.030.4(3) limits weighing to those aggravators "found" by the jury and does not require jury unanimity in determining mitigators outweigh aggravators, but the instructions did not restrict the aggravators to be weighed to only aggravators found by the jury and they imposed a requirement that the jury be unanimous in finding mitigators outweigh aggravators.

Additional Facts:

At the penalty phase instruction conference, renewing pretrial motions and objections, Johnny timely objected to Instructions 24—MAI-CR3d-314.44 and 26—MAI-CR3d-314.48 on the grounds that they either reduced the state's burden of proof at this step or shifted the state's burden to the defense, and they failed to instruct the jury "what to do" if "tied between aggravators and mitigators" or if not unanimous (T70,2129-35;LF227-29,269-76,707-13,791,793-95; A44-47). The trial court overruled the objections

(T2131,2133,2135). The rulings were preserved in the motion for new trial (LF809-10,856-57).[8]

Johnny did not object that the instructions violated §565.030.4(3) because they failed to tell the jury it could only weigh against the mitigators those aggravators it had "found" and because they imposed a requirement that the jury "unanimously" find the mitigators outweigh the aggravators not required by §565.030.4(3). Johnny seeks review of this part of his argument for plain error. Rule 30.20.

Summary of Argument

The trial court erred in overruling Johnny's objections to Instructions 24 and 26, MAI-CR3d-314.44 and 314.48 because they violate the law. Relying on *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held in *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), that the steps of §565.030.4 must "be determined against defendant before a death sentence can be imposed." *Id*. at 258.

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[8] Johnny acknowledges this Court has denied similar claims, *e.g.*, *State v. Gill*, 167 S.W.3d 184,193 (Mo.banc 2005). Johnny has preserved this point and requests full review because it includes state law arguments based on §565.030.4(3)'s requirements that, to the best of his knowledge, previously have not been presented and because it includes several federal constitutional issues that have not yet been ruled on by the United States Supreme Court.

Whitfield held §565.030.4(3) "require[s] factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *Id*. at 261. Therefore, as to §565.030.4(3), under *Ring*, the state must bear the burden of proof beyond a reasonable doubt.

The pattern instructions challenged are ambiguous because they are silent as to the burden of proof; they simply told the jury that to return a verdict of life imprisonment, they must determine that the mitigators outweighed the aggravators. The jurors would logically interpret this, contrary to the law, as requiring Johnny to bear the burden of proving non death-eligibility." This stands *Ring* and *Whitfield* on their heads. Adding to their confusing, ambiguous, and misleading character, the instructions don't tell the jurors what to do if not unanimous or if in equipoise as to aggravators and mitigators.

Plain error, but equally egregious, occurred because the trial court gave instructions in conflict with and in violation of §565.030.4(3). The instructions required the jury to unanimously find the mitigators outweigh the aggravators; §565.030.4(3) has no such requirement. The instructions omitted §565.030.4(3)'s restriction of aggravating evidence that may be weighed against mitigating evidence to only the aggravating evidence "found" by the "trier."

Argument

In *Apprendi v. New Jersey*, the Supreme Court held that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed... must be established by proof beyond a reasonable doubt." 500 U.S. 466,490

(2000). In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court applied *Apprendi* to capital cases. "[A]ll facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt." *Id*. at 610, Scalia, J., concurring.

In *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), this Court found that the four steps of §565.030.4 must "be determined against defendant before a death sentence can be imposed." *Id*. at 258. The Court held that §565.030.4(3) "require[s] factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *Id*. at 261.

Thus, under *Whitfield*, the §565.030.4 factual findings are necessary to increase the sentence from life imprisonment without probation or parole to death. Because §565.030.4(3) is a death-eligibility requirement, under *Ring*, *Apprendi*, and *Whitfield*, the state must bear the burden of proof beyond a reasonable doubt as to §565.030.4(3). *See also Schlup v. Delo*, 513 U.S. 298,328 (1995); *Bullington v. Missouri*, 451 U.S. 430 (1981) (the state bears the burden of proving, beyond a reasonable doubt, the existence of the facts required to prove a defendant eligible for death).

When ambiguity in an instruction creates "a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence," it violates the Eighth Amendment. *Boyde v. California*, 494 U.S. 370,380 (1990). "[I]nstructional error 'will be held

harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt.'" *State v. Ferguson*, 887 S.W.2d 585,587 (Mo.banc 1994) citing *State v. Erwin*, 848 S.W.2d 476,484 (Mo.banc 1993). "[T]he "beneficiary of a constitutional error," the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Whitfield*, 107 S.W.3d at 262; citations omitted. When "instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings," the error is "structural" and harmless error analysis does not apply. *Sullivan v. Louisiana*, 508 U.S. 275,281 (1993).

Whitfield acknowledged the instruction's ambiguity in not expressly directing the jury what to do if it did not unanimously find the mitigators outweighed the aggravators. 107 S.W.3d at 264. The instructions are ambiguous. They prejudiced Johnny by misleading the jury to think, contrary to the law, the defense had the burden of proof as to §565.030.4(3).

In the penalty phase instructions, specific references to the state's burden of proving beyond a reasonable doubt the existence of at least one statutory aggravator contrasted with complete silence regarding the burden of proof on the death-eligibility step requiring weighing of aggravators and mitigators. *E.g.*, MAI-CR3d-300.03AA, read before death punishment voir dire; Instruction 18--MAI-CR3d-314.30 (LF783-84). Instruction 23--MAI-CR3d 314.40, listed the statutory aggravators and stated, "the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable

doubt" (LF789-90;A42-A43). Twice more, the instruction reminded the jury of the state's "reasonable doubt" burden as to the finding of statutory aggravators (LF789-90;A42-A43).

Instruction 24—MAI-CR3d-314.44 juxtaposed the state's burden of proving beyond a reasonable doubt at least one statutory aggravator against silence as to §565.030.4(3)'s burden of proof: "if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 23 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" (LF791; A44).

Instruction 26—MAI-CR3d314.48 reiterated the state's reasonable doubt burden as to statutory aggravators (LF794;A46). It told the jury if it unanimously found the mitigators outweighed the aggravators, Johnny's punishment must be life but said nothing about who had the burden of proof on that question and did not specify a burden of proof (LF793-95;A45-A47).

Even without this stark instructional contrast, a reasonable juror reading Instructions 24 and 26, based on the language alone, would logically think it was the responsibility—or burden—of the defense to prove the mitigating circumstances outweighed the aggravating circumstances. Alternatively, the jurors might believe the state had the burden of proof but a burden less than "beyond a reasonable doubt."

The jurors' mistaken beliefs that Johnny had the burden of proving the mitigators outweighed the aggravators and the state had no burden of proof on that step, would affect how the jury weighed the evidence and the outcome of the weighing process. In light of the substantial mitigating evidence in this case, the state cannot show that the correct burden of proof would have made no difference. It is not possible to say the jury would have inevitably sentenced Johnny to death.

If Johnny's jury believed the burden was on the defense to prove the mitigating evidence outweighed the aggravating evidence, then even if all jurors agreed that the evidence of mitigation and aggravation was equal, the defense would not sustain its burden. Or, if the jurors were equally divided, the defense would not sustain its burden. Either way, the defense would not get the benefit of a tie and the jurors could proceed to the final step of determining punishment. This would violate Johnny's rights to due process of law, jury trial, freedom from cruel, unusual punishment, and reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See State v. Marsh*, 102 P.3d 445,457-64 (Kan. 2004) (finding Kansas statute facially unconstitutional and overruling previous opinion in *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), but reaffirming *Kleypas*' determination that under the Eighth and Fourteenth Amendments, 'fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue').

But had the instructions informed the jury the burden was on the state to prove beyond a reasonable doubt the mitigating evidence was insufficient to outweigh the aggravating evidence, it would take more than a "tie" for the state to sustain its burden. Even acknowledging the state had substantial aggravating evidence, given the substantial mitigating evidence, it cannot be said beyond a reasonable doubt that the jury would have found the mitigating evidence insufficient to outweigh the aggravating evidence.

As this Court has said, 'the evaluation "'of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt.'"' *State v. Mayes*, 63 S.W.3d 615,637 (Mo.banc 2001); *citing State v. Storey*, 986 S.W.2d 462,464 (Mo.banc 1999) *quoting State v. Johnson*, 968 S.W.2d 686,701 (Mo.banc 1998). Again, given the strength of the mitigating evidence, *see* Statement of Facts, *supra*, it cannot be said the same result would have obtained even if the jurors had been correctly and explicitly instructed as to the state's burden of proof.

The state has the burden of proof as to the weighing step, and the instructions diminish that burden by directing a jury that does not unanimously find beyond a reasonable doubt the state has carried its burden (of proving the death-eligibility fact that the mitigating circumstances are insufficient to outweigh the aggravating circumstances) to proceed to

determine punishment. The effect is: the state need not prove the facts required by this death-eligibility step.

In addition to the foregoing, preserved error, there was plain error, equally egregious, that occurred because the instructions added a requirement not found in §565.030.4(3): that the jury must unanimously find the mitigators outweigh the aggravators. Still further error occurred, also violating §565.030.4(3), because the instructions omitted the statutory restriction that limits the aggravating evidence that may be weighed against the mitigating evidence to that "found" by the "trier."

Section 565.030.4(3) provides the sentence must be life "If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier...." There is no requirement that the jury be unanimous in finding the mitigators outweigh the aggravators, but the Instructions imposed that requirement. There *is*, however, a restriction limiting the aggravating evidence that may be weighed to the aggravation "found by the trier." The instructions omitted that limitation. These instructional departures from – violations of – the requirements of §565.030.4(3) increased Johnny's burden of proof on this step and worked a manifest injustice.

In the present case, the preserved instructional error in the instructions here was not merely a misdescription of the state's burden of proving the mitigating circumstances were insufficient to outweigh the aggravating circumstances. *Sullivan v. Louisiana*, *supra*. The error here was failing, altogether, to instruct the jury the state's burden was to prove beyond a reasonable doubt the facts the must be found under §565.030.4(3) to establish death-eligibility. It was structural *per se* reversible error. The Court must vacate Johnny's sentence and remand for a new penalty phase trial.

AS TO POINT NINE: STATUTORY AGGRAVATORS MUST BE CHARGED

The trial court erred in overruling Johnny's motion to quash the information or, alternatively, preclude the death penalty, and sentencing him to death. This violated his rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const. Amend's V,VI,&XIV; Mo.Const., Art. 1, §§10,17,18(a)&21. In Missouri, at least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death. Statutory aggravators function as alternate elements of the greater offense of first-degree murder and must be pled in the charging document for the charged murder to be punishable by death. Because the amended information failed to plead any statutory

aggravators, Johnny's death sentence was unauthorized; it must be reduced to life imprisonment.

Additional Facts and Preservation:

Before trial, relying on *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Jones v. United States*, 526 U.S. 227 (1999), Johnny moved to quash the information or preclude the death penalty; the trial court overruled his motions and subsequent objections at trial (*E.g.*, LF219-48;Tr.62-64;1973). Johnny preserved these rulings in his new trial motion (LF809).[9]

Argument:

In *Apprendi*, *supra*, the Supreme Court ruled that under the Due Process Clause, a factual determination authorizing an increase in the maximum prison sentence must be made by a jury based on proof beyond a reasonable doubt." 530 U.S. at 469. Subsequently, in *Ring v. Arizona*, 536 U.S. 584 (2002), a capital case applying *Apprendi* to hold the factual finding that a statutory

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[9] Johnny acknowledges this Court has denied similar claims, *e.g.*, *State v. Glass*, 136 S.W.3d 184,193-94 (Mo.banc 2005). Johnny has preserved this point and requests full review because it raises a federal constitutional issue that has not yet been ruled on by the United States Supreme Court.

aggravating circumstance exists must be made by a jury, the Court explained: the Sixth Amendment requires jury fact finding beyond a reasonable doubt "[b]ecause *Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense...,'" Id.* at 609 *citing Apprendi,* 530 U.S. at 494, n.19; emphasis added.

In Missouri, a defendant convicted of first-degree murder may not be death-sentenced unless a jury additionally finds, beyond a reasonable doubt, at least one statutory aggravator. Section 565.030.4(2), RSMo. (Supp. 2004); *see e.g., State v. Whitfield*, 107 S.W.3d 253,258-61 (Mo.banc 2003); *State v. Taylor*, 18 S.W.3d 366,378 n. 18 (Mo.banc 2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); *State v. Shaw*, 636 S.W.2d 667,675 (Mo.banc 1982) *quoting State v. Bolder*, 635 S.W.2d 673,683 (Mo.banc 1982) (At least one statutory aggravating circumstance "is the threshold requirement" for a sentence of death).

Missouri's statutory aggravators, like Arizona's, are facts required to increase the punishment for a defendant convicted of first-degree murder from life imprisonment to death. Missouri's statutory aggravators have precisely the same effect as Arizona's statutory aggravators: they serve as "the functional equivalent of an element of a greater offense...." *Ring v. Arizona*, 536 U.S. at 609 *citing Apprendi,* 530 U.S. at 494,n.19. Because statutory aggravators authorize an increase in punishment and serve as elements of the greater offense of aggravated first-degree murder, the state must plead in the charging

document the statutory aggravators it will rely on at trial to establish the offense as death-eligible.

"An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224,228 (1998). "[C]onviction 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); *Cokeley v. Lockhart*, 951 F.2d 916 (8th Cir. 1991). In Missouri, "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information... ." Mo. Const., Art. I,§17. An indictment or information must "contain all of the elements of the offense and clearly apprise the defendant of the facts constituting the offense." *State v. Barnes*, 942 S.W.2d 362, 367 (Mo. banc 1997). A person may not be convicted of a crime not charged unless it is a lesser included offense. *State v. Parkhurst*, 845 S.W.2d 31,35 (Mo.banc 1992).

Although §565.020 ostensibly establishes a single offense of first-degree murder punishable by either life imprisonment or death, under *Blakely*, *Ring*, *Apprendi*, *Jones*, and *Whitfield*, the combined effect of §§565.020, 565.030.4, and 565.032.2 is to create two kinds of first-degree murder: *unaggravated* first-degree murder which does not require proof of a statutory aggravating circumstance, and the greater offense of *aggravated* first-degree murder which requires the additional finding of fact, and includes as an additional element, at least one statutory aggravator. To charge aggravated first-degree murder, the

state must plead in the charging document the statutory aggravators on which it will rely at trial to obtain a death sentence.

Missouri law supports this argument. In *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), the defendant was charged with first-degree robbery. Although the robbery statute authorized an enhanced punishment of ten years imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the information failed to charge this aggravating fact. *Id*. at 52. The jury, however, found the defendant guilty of "[r]obbery first degree, by means of a dangerous and deadly weapon" and based on this aggravator, enhanced his punishment. *Id*.

The question on appeal was whether the "aggravating circumstances" authorizing additional punishment must be pled in the charging document. *Id*. at 53. The state claimed the defendant had adequate notice "of the cause and the nature of the offense for which he was convicted," so it was not necessary to charge the aggravating circumstance in the information. *Id*. at 53-54. The state argued the defendant had "notice" from other language in the charge referring to a weapon; further, the defendant's motion to vacate his sentence indicated he knew the state would try the case as an aggravated robbery. *Id*. at 53-54.

This Court rejected these arguments holding that other language in the charging document, "with force and arms," was insufficient to charge the aggravator: that the robbery was committed by means of a dangerous and deadly weapon. *Id*. at 54. "The sentence here, being based upon a finding of

the jury of an aggravated fact not charged in the information, is illegal" and "[t]he trial court was without power or jurisdiction to impose that sentence." *Id*. *See also State v. Cain*, 980 S.W.2d 145,146 (Mo.App.E.D. 1998) (Defendant charged with two class B felonies of first-degree assault cannot be convicted and sentenced for two class A felonies of first-degree assault); *State v. White*, 431 S.W.2d 182,186 (Mo. 1968) ("One cannot be charged with one offense, or with one form of an offense, and convicted of another").

Recently, the Illinois Supreme Court ruled that because "[t]he jury's finding of [an] aggravating factor increased the maximum penalty for [murder] to death ... [u]nder *Apprendi* and *Ring*, the aggravating factor is the functional equivalent of an element of a greater offense." *People v. Mata*, No. 99890 (Ill., Dec. 15, 2005) slip op. at 8, 2006 WL 177427.

Here, the state did not plead any statutory aggravators in the Information, (LF79-84). Under *Nolan*, *supra*, the Information did not charge Johnny with an offense punishable by death. The state charged Johnny only with unaggravated first-degree murder for which the maximum sentence is life imprisonment. Johnny's death sentence cannot stand.

Johnny acknowledges the United States Supreme Court has never directly addressed this precise point and that the language in its opinions supporting this claim is dicta. But in *United States v. Booker*, 125 S.Ct. 738 (2005), holding the federal sentencing guidelines violated the principles expressed in *Blakely*, *Ring*, and *Apprendi*, Justice Stevens suggested the remedy is to

include the aggravators in the charging document:

> [P]rosecutors could avoid an *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence.... The Government has already directed its prosecutors to allege facts [required to enhance punishment] ... and prove them to the jury beyond a reasonable doubt.

Id., 125 S.Ct. at 775-76, Stevens, J., dissenting in part.

For the foregoing reasons, the Court should find the state charged only unaggravated first-degree murder and the trial court exceeded its jurisdiction in sentencing Johnny to death. Johnny's sentence must be vacated and he must be resentenced to life imprisonment without probation or parole.

AS TO POINT TEN: IMPROPER GUILT PHASE CLOSING ARGUMENT

The trial court plainly erred in failing to admonish the prosecutor and give a corrective instruction to the jury when, in his guilt phase closing argument, the prosecutor told the jury to find Johnny guilty of first degree murder based on prior misconduct and, "for once," to hold him responsible for it. This violated Johnny's rights to due process, jury trial, trial of only the charged offense, and reliable sentencing. U.S.Const., Amend's VI,VIII, & XIV; Mo.Const., Art.1, §§10, 17, & 18(a). The argument was improper because it was based on information obtained by

and testified to by experts with regard to whether Johnny had a mental disease or defect that diminished his capacity to deliberate and it was not substantive evidence of guilt. The prosecutor asked the jury to find Johnny guilty of killing Casey because of other instances of misconduct and bad acts and to punish him for his uncharged bad acts.

Additional Facts:

The expert witnesses who testified on the issue of whether Johnny's mental illness diminished his capacity to deliberate all mentioned prior misconduct: use and abuse of drugs and alcohol beginning in his early teens, and bringing a knife to school (*e.g.*, T1454-55,1810, 2035,2086, 2090). For example, Dr. English, testifying in rebuttal of the defendant's expert witnesses, told the jury Johnny "had problems in school because he had stolen money from the teacher... he was truant from school a lot ... [and] got kicked out of school once for carrying a knife to school" (T1808). Dr. English told the jury Johnny said "he took a cat and tied it to a tree and set it on fire [and] set several trees on fire" (T1809).

In the first portion of his closing argument, the prosecutor introduced the suggestion that Johnny had never been held responsible for his past misconduct: "And when Angel confronted him, she said, where's Casey [and he said "I don't know what you're talking about" (T1921). The same

thing he said his entire life, everytime somebody confronts him with a bad act, I don't know what you're talking about...." (T1921).

In the final moments of his guilt phase closing argument, just before the jury retired to deliberate, the prosecutor returned to Johnny's prior misconduct and bad acts:

> [A]ll I'm asking you to do is consider all of that evidence and for once see Johnny – [interrupted by the Court] – for once in his entire life hold him, hold him completely, not paritally, not like all the other nonsense he's gone through. He's spent his entire life in various deliberate attempts to manipulate the system....

(T1956).

> I'm asking you for once in his entire life to hold him not just responsible, completely responsible, completely responsible for what he did, murder in the first degree, armed criminal action, kidnapping and attempted rape, the only verdicts that are true and just in this particular case. Thank you.

(T1957).

No objection was made to this argument. Johnny respectfully requests the Court to review this point for plain error. Rule 30.20.

Argument:

This was a manifestly unjust argument based on information that §§552.030.5 and 552.020.14 prohibit from being used as substantive evidence. Under these statutory provisions, experts may rely on such information in forming opinions and may testify to that information to show the foundation for the opinion, but it is not admissible as substantive evidence. *State ex rel. Missouri Highway and Transportation Commission v. Delmar Gardens of Chesterfield*, 872 S.W.2d 178,181-82 (Mo.App.E.D. 1994) (An expert may rely "on information and opinions of others" to form and explain his opinion when testifying, but "such sources" are not "independent substantive evidence....").

In addition to being improper because it violated the statute, the prosecutor's argument was also improper because it told the jury to rely on uncharged misconduct to convict Johnny. This violated Johnny's right to be tried only on the offense charged. *State v. Burns*, 978 S.W.2d 759 (Mo.banc 1998).

The argument was never corrected. The jury was free to use every bad act, every instance of misconduct disclosed by the experts – under what should have been the protections of §§552.030.5 and 552.020.14 – to do what the prosecutor asked: punish Johnny for those prior uncharged bad acts by using them to find Johnny guilty of first degree murder.

The question of diminished capacity – the only real issue in the guilt phase of this case – was very close. The timing of the argument, immediately before

the jury retired, urging the jury to use evidence of Johnny's bad acts - mentioned by experts testifying on the question of Johnny's diminished capacity - to reject that defense, was manifestly unjust. Rule 30.20.

For the foregoing reasons, the cause must be reversed and remanded for a new trial.

CONCLUSION

Wherefore, for the foregoing reasons, as to Points 1, 3, 4, and 5, Johnny asks that the Court reverse the judgment and sentences and remand for a new trial, or, in the alternative, for a new penalty phase trial; as to Points 2, 6, 7, 8, 9, and 10, he asks the Court to reverse his sentence of death and remand for a new penalty phase trial, or, in the alternative, reduce his sentence to life imprisonment without probation or parole. In particular, as to Point 7, he prays that the Court will reverse his sentence of death and reduce his sentence to life imprisonment without probation or parole

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 29,665 words according to Microsoft word count.

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

A true and correct copy of the attached brief, the separately bound appendix, and a floppy disk containing a copy of this brief were delivered, this ___ day of _____, 20___, to the Office of the Attorney General, Supreme Court Building, 207 West High Street, Jefferson City, Missouri 65101.

_____
Attorney for Appellant