# IN THE
# MISSOURI SUPREME COURT

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

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

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## APPELLANT'S REPLY BRIEF

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## CORRECTIONS

1. Appellant inadvertently omitted several words from his Point II. Point II, with the omitted words underlined, should have read as follows:

**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 <u>preventing him from</u> 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.**

## REPLY ARGUMENT

*Batson* Error – Respondent's Argument I: The state discriminated against African-American male juror Mr. Murphy and Asian-American female juror Ms. Gilbert. The state "jumped over" eight jurors – who, like Ms. Gilbert, were "minorless" jurors – to strike Ms. Gilbert, whom the state never questioned. Instead of striking Mr. Travers, who had close relatives with mental illness and was thus not a favorable state's juror, the state struck Ms. Gilbert who said nothing unfavorable to the state. The state may not rely on reasons (unemployment) it did not mention at trial. Bypassing *Batson*'s third step is reversible error.

The state argues that its explanation (jurors without minor children were undesirable state's jurors because the victim was a minor) is credible because all its strikes were used against such "minorless" jurors (Resp.Br. 28). Given the large number of minorless jurors, it was inevitable that the state would use many of its strikes – if not all – against such jurors: of the 28 jurors remaining after strikes for cause, 22 – over 75% – had no minor children; see appellant's chart of Strikes for Cause and Peremptory Strikes, A1-A2. What stands out is that the state passed up 13 opportunities to strike minorless jurors so it could strike Ms. Gilbert (LF728-40; A1-A2).

Respondent says that giving the same reason to strike similarly situated caucasian venire members shows the reason is race-neutral (Resp.Br.28). But appellant's challenge is not to *Batson*'s[1] second step: appellant's challenge is to *Batson*'s "*third* step" at which "the persuasiveness of the justification becomes relevant... ." *Purkett v. Elem*, 514 U.S. 765, 768 (1995); citations omitted.

A key question at the third stage is: were there jurors less favorable to the state who the state failed to strike and, instead, struck Murphy and Gilbert? This is crucial because the state's failure to strike less favorable jurors shows pretext: "To show pretext, the defense can present 'side-by-side comparisons' of venirepersons allegedly struck for racially discriminatory reasons with those who were allowed to serve... "*State v. McFadden*, No. SC 86857 (May 16, 2006), 2006 WL 1320052*1-2 (State struck an African-American whose phone rang instead of "striking a white venireperson who required a higher burden of proof... ."); *Miller-El v. Dretke*, 125 S.Ct. 2317, 2325 n.2, 2327-28 (2005).

In this case, the prosecutor claimed he "looked for jurors, among other things, who have children" (T760-61). Relying on the questionnaire, he gave as reasons for striking Mr. Murphy and Ms. Gilbert their lack of minor children (T760-61).

But there were minorless jurors whom the state did not strike; how did the

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

state decide which minorless jurors to strike? The record provides the answer.

During small panel questioning, the trial court asked if anyone knew about the case; Teri Johnson, no. 13, said she "read about it in the newspaper" and "live[d] about three miles away and I believe that the little girl was a niece of a former co-worker of mine" (T296). The prosecutor elicited that Ms. Johnson remembered some of the details of the offense, T296-97, and defense questioning of Ms. Johnson elicited that she had worked in the Valley Park area, and that ***her "children*** (***another reason she would have been a good state's juror***) played softball in the Valley Park area" (T298; emphasis added). With regard to the foregoing information, Ms. Johnson would appear to be a juror that the state might wish to have on its jury.

But during general voir dire, Ms. Johnson said that her mother had suffered from "severe postpartum depression" and her uncle committed suicide (T726). The son of one of Ms. Johnson's "closest personal friends ... was diagnosed with schizophrenia about ten years ago and has been on medication ever since" (T726). She had spoken with her friend about her son's schizophrenia (T726). The state struck Ms. Johnson (T765).

Mr. Schaefer, juror no. 12, also gave responses that, except for mental health matters, favored the state. During small panel questioning, when asked if he could "realistically consider a sentence of life without parole for somebody

convicted of killing a six-year-old child, being charged with attempted rape...," Mr. Schaefer responded he was scared that someone who had received "multiple life sentences" could "end up walking the streets" (T326). When defense counsel asked the small panels jurors if they could consider defense evidence from mental health professionals, Mr. Schaefer said he was "skeptical on those issues, but I would consider it" (T332-33). During general voir dire, when the prosecutor asked the jurors if they or family members or close friends or relatives had been victims of violent crime, Mr. Schaefer said he "had several friends who have been raped" (T689). He stated this might make him inclined to "see[k] also more penalty" (T690). Further, Mr. Schaefer had law enforcement connections: his uncle was a police officer who "every once in a while" would tell stories about his work (T710), his cousin was a highway patrolman, and one of his "regular customers" at a coffee shop where he worked was a detective who was "real trustworthy" (T719).

But, like Ms. Johnson, Mr. Schaefer's contacts with people who had mental health problems would not make him a favorable state's juror. Two boys in his scout troop had "pretty severe" mental health issues and "over the years" he had "learned a lot about them" (T724). Mr. Schaefer's grandmother, his great uncle, and his mother had all suffered depression and various levels of schizophrenia" (T724). He agreed that "schizophrenia" was "real mental illness" (T724).

Mr. Hoover, juror no. 27, said very little during voir dire. He did say that his "brother went through depression problems ten to twelve years ago" (T728). He did not know if his brother was ever diagnosed with schizophrenia although schizophrenia "was brought up at one point" (T728). He, too, indicated that schizophrenia was a real mental illness not made up by doctors (T728-29).

Juror Travers, juror no. 46, also said little *except* that he, too, had relatives with mental health problems: "a cousin severely mentally ill and physically disabled and another cousin – I don't know if he was diagnosed. He's a little slow" (T730). The severely mentally ill cousin "definitely" took "medication," and Mr. Travers said that his cousin's mental illness "absolutely" was real (T730).

Because the defense was based on Johnny Johnson's mental illness, jurors who had relatives or closer friends with mental illness and knew it was a "real" illness would likely be jurors the state would not want on the jury. Thus, it makes sense that, even though Ms. Johnson's and Mr. Schaefer's answers favored the state in general, the state used peremptory strikes against them (T765; LF730-31). Likewise, it makes sense that the state used a peremptory strike against Mr. Hoover who, like Ms. Johnson and Mr. Schaefer, had contact with people who experienced mental health problems (T765; LF734).

Inexplicably, the state did not use a peremptory strike against Mr. Travers who said nothing during voir dire *except that he had relatives with mental health*

*problems* (LF739). Instead, the state struck Ms. Gilbert – who had no relatives or close friends with mental health issues – although she would appear to be a more favorable state's juror than Mr. Travers.

These facts show the prosecutor's speculative explanation – that Ms. Gilbert was a "student" who seemed older than the usual student therefore might be a professional student lacking "life experiences" – is a pretext. If this was a real concern, why didn't the prosecutor question Ms. Gilbert about being a student, or "life experiences"? "'[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" *McFadden*, supra, *3 citing *Miller-El*, 125 S.Ct. at 2328

All the prosecutor knew about Mr. Travers was that he was a caucasian man who had mentally ill relatives. The prosecutor knew nothing about Ms. Gilbert except that her questionnaire said, "Student." He struck Ms. Gilbert, an Asian woman. The record in this case demonstrates pretext.

On appeal, the state tries to add reasons for its peremptory strikes not proffered at trial saying, "relative employments (or lack thereof) were important factors in making the strikes, as the prosecutor specifically indicated that minor children alone was not the reason for these strikes" (Resp.Br 29; citing T761-63). The prosecutor's non specific claim of "other" reasons does not reserve to the

state the right to come up with a new reason on appeal. Vague references at trial to some unarticulated "mannerism" or "other matters" is not the *Batson* equivalent of a "player to be named later." It is too late to claim employment and as a reason for striking Ms. Gilbert:

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

*Miller-El*, 125 S.Ct. at 2332. If not even an appellate court can provide reasons for a strike not given by the prosecutor at trial, counsel for respondent certainly cannot do so.

The state says the fact that it "did not use all of its strikes" against minorities its strikes were not racially motivated (Resp.Br. 30). This Court rejected that argument over ten years ago: "The removal of even one African-American person from the venire for racial reasons constitutes a violation of the equal protection clause regardless of the racial composition of the selected jury." *State v. Parker*, 836 S.W.2d 930, 940 (Mo.banc 1992); citations omitted.

Respondent – objecting to appellant's argument that after defense counsel pointed to similarly situated, not struck, white, jurors Travers and Maloney, the prosecutor claimed there were "other matters" and "mannerisms" involved in his strikes – claims appellant misrepresents the record (Resp.Br. 30).

Appellant has not misrepresented anything. The prosecutor added a claim that "responses, at least by mannerism" played a role in deciding who to strike and he referred to "other matters" that he "thought were important in consideration of striking the others" (T763; App.Br. 54). The point is: whether the "mannerism" in question or the "other matters" referred to the challenged jurors or other struck jurors or those not struck, they were reasons the prosecutor attempted to advance after-the-fact to rebut the defense *Batson* challenges.

Attempting to excuse the prosecutor's failure to ask any questions about the reasons given for his strikes, the state claims defense counsel "did the same thing" (Resp.Br. 31; citing T766-69). The transcript pages cited by respondent do not support this argument; those pages, and other portions of the voir dire transcript show that defense counsel's reasons reflect information obtained during questioning (see T281, 285, 706-08, 766-69).

More importantly, two wrongs do not make a right. If defense counsel in any way discriminated on the basis of race or sex during voir dire, this too, is structural error, *Georgia v. McCollum*, 505 U.S. 42 (1992), and requires the cause be

reversed and remanded for a new trial.

Respondent disputes "a pattern or practice of the [St. Louis County] prosecutor's office of discrimination" (Resp.Br. 32 citing App.Br. 58). To the contrary: the pattern and practice of discrimination in the St. Louis County prosecutor's office continues: *State v. McFadden*, *supra*. Respondent's citation to the "numerous *Batson* claims [raised] on appeal" against the St. Louis County prosecutor's office refutes its own argument (Resp.Br. 33).

Respondent tries to minimize the trial court court's error in failing to allow appellant an opportunity to prove pretext and discrimination and consider appellant's proof in ruling (Resp.Br. 33). First, respondent says that appellant has relied on dicta from *State v. Phillips*, 941 S.W.2d 599, 604 (Mo.App.E.D. 1997). Respondent is incorrect: *Phillips* expressly ruled on a claim presented and such ruling is a holding – not dicta.

> In the instant case, however, we cannot review the trial court's denial of Defendant's *Batson* motion because it failed to conduct the third step of the analysis; namely, whether the State's rationale for the strike was a pretext for purposeful discrimination. The trial court found the State had given a race-neutral reason for its strike of venireperson Reese; but rather than turn to Defendant and ask for its proof on the question of whether the race-neutral explanation was a pretext for purposeful

> discrimination, it denied Defendant's *Batson* motion as to venireperson Reese and *then* allowed Defendant to make a record of proof on the question of pretext. Although the State argues Defendant was given an opportunity to present his case, we are unpersuaded because Defendant's "opportunity" came after the trial court had denied the motion. Denying a *Batson* motion without allowing Defendant an opportunity to carry his burden of proving purposeful discrimination constitutes trial court error... .

*Phillips*, 941 S.W.2d at 604 *citing State v. Parker*, 836 S.W.2d at 939, *State v. Antwine*, 743 S.W.2d 51 (Mo.banc 1987); *Elem v. Purkett*, 115 S.Ct. at 1771.

When an issue is raised on appeal, argued by the parties, and ruled on by the Court, it is not dicta even though the case is ultimately disposed of on another issue. "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum." *Union Pacific Railroad Company v. Mason City & Fort Dodge Railroad Company*, 199 U.S. 160, 166 (1905) *citing Florida Central Railroad Company v. Schutte*, 103 U. S. 118, 143 (1880):

> It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which

disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

*Id*. "Where the record properly presents a question, a decision thereon is not obiter dictum, though the decision might have rested on another ground." *State ex rel. Weast v. Moore*, 164 Mo.App. 649, 147 S.W. 551, 552 (Mo.App.Spf. 1912) citing, e.g., *Kane v. McCown*, 55 Mo. 181, 1874 WL 8167 * (Mo. 1874).

As the *Phillips* opinion shows, the appellant in that case alleged the trial court's precipitate ruling was error, the state disputed that claim, and therefore the Eastern District's ruling was not dicta.

Further, this holding of *Phillips* is the law:

In *State v. Parker*, cited in *Phillips*, this Court set forth the procedure to be followed when a defendant makes a *Batson* challenge. First, a defendant must challenge one or more specific venirepersons struck by the State and identify the cognizable racial group to which they belong. Second, the State must provide a race-neutral reason that is more than an unsubstantiated denial of discriminatory purpose. Third, the defense must show that the State's explanation was pretextual and the true reason for

the strike was racial.

*State v. McFadden*, *supra*, 2006 WL 1320052*1.

Respondent next argues that, in any event, appellant got to make a record and thus preserved the claim for this Court's appellate review. Respondent forgets that it is the trial court's ruling that is the point of error preserved for review; because the trial court ruled precipitately, without completing the *Batson* procedure, the ruling was made in error. This is exactly the same argument the state made in *Phillips* and the Eastern District rejected:

> Although the State argues Defendant was given an opportunity to present his case, we are unpersuaded because Defendant's "opportunity" came after the trial court had denied the motion. Denying a *Batson* motion without allowing Defendant an opportunity to carry his burden of proving purposeful discrimination constitutes trial court error.

*Phillips*, 941 S.W.2d at 604.

Respondent is correct that because *Phillips* reversed on another point, the Eastern District did not address the remedy for an incomplete *Batson* hearing. The trial court here conducted a hearing but failed to complete the third step of the *Batson* inquiry under the procedure required by *Parker*, 836 S.W.2d 930, 934.

Appellant believes there are three possible remedies for the trial court's

failure to allow the defendant an opportunity to prove pretext before it ruled. First, the Court could remand the cause to the circuit court for completion of the *Batson* hearing by allowing the defense a full opportunity to establish discrimination and prove pretext. Since, under *Miller-El*, *supra*, this Court may take notice of facts in the record to determine if the state's explanations are pretextual, an alternative remedy would be for this Court to simply decide the question on the record as it now exists; because the trial court's ruling was made without benefit of the third step, this Court should review the record *de novo*, without according deference to the trial court's incompletely informed ruling. Finally, because the question involves structural error in selection of the jury, the Court may choose simply to find the error was *per se* reversible error and remand for a new trial

The state has had a full opportunity to offer explanations and the trial court had the opportunity to conduct the *Batson* hearing as required by *Parker*. For this reason, if the Court does choose to remand to the trial court, it should only be done with directions that the remand is for the sole purpose of allowing appellant to prove pretext – not for the purpose of allowing the state to provide, at this late date, additional explanations for its strikes.

Appellant believes the best option would be to find the trial court committed structural, reversible, error and to grant a new trial. Alternatively, appellant

respectfully requests that the Court review the record *de novo*. Appellant believes that when the Court does so, it will find the record establishes pretext and grant appellant a new trial.

Restricted Voir Dire – Respondent's Argument II:

"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... . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. [FN9 That certain prospective jurors maintain such inconsistent beliefs--that they can follow the law, but that they will always vote to impose death for conviction of a capital offense--has been demonstrated... .] A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." *Morgan v. Illinois*, 504 U.S. 719, 730, 735-36 (1992). Section 494.470, RSMo., which respondent does not address, is to the same effect.

Missing from respondent's argument is any explanation why it is reasonable

to preclude defense counsel from making sure that prospective jurors provide accurate answers during life-qualification voir dire. Respondent fails to explain *why* the trial court does not abuse its discretion in preventing counsel from making sure that jurors who say they can consider a sentence of life imprisonment without probation or parole for first degree murder know that first degree murder is a coolly reflected upon killing. Instead, respondent simply relies on *State v. Johns*, 34 S.W.3d 93 (Mo.banc 2000), *State v. Morrow*, 968 S.W.2d 100 (Mo.banc 1998), *State v. Hall*, 955 S.W.2d 198 (Mo.banc 1997), and *State v. Brown*, 902 S.W.2d 278 (Mo.banc 1995), to support its argument: that the trial court's discretion extends to preventing the jury from being informed that first degree murder is a deliberate, coolly reflected, killing before stating that they can consider a sentence of life imprisonment without probation or parole for a person convicted of first degree murder.

*Johns*, *Morrow*, *Hall*, and *Brown* are contrary to *Morgan v. Illinois*, *supra*. And they are distinguishable from the instant case. *Johns*, dealt with "defense counsel's attempt to define several lesser-included offenses for prospective jurors." 34 S.W.3d at 109. The Court held that limiting counsel to asking the jurors if they "would be able to consider lesser-included offenses if so instructed" was not "an abuse of discretion." *Id*.

*Johns* cited *State v. Morrow*, *supra*, for the proposition that "'Counsel may not

tell prospective jurors what law will be applied in the case or what instructions will be given."" *Id*. at 109-10 quoting *Morrow,* 968 S.W.2d at 111. Although the trial court in *Morrow* did not allow counsel to go into "the difference between first and second degree murder," or "refer to the element of deliberation," and "the trial court also refused to provide the prospective jurors with a definition of first and second degree murder during voir dire," the court went "to great lengths to help Morrow's counsel come up with proper questions...." *Morrow*, 968 S.W.2d at 111. "Morrow ... abandoned this line of questioning after being permitted to ask the following questions:

> "If the court were to instruct you on different degrees of homicide, can you keep an open mind and listen to the evidence that you hear and apply that to those instructions?"
>
> "Is there anyone here who cannot consider a lesser degree of homicide when someone is charged with murder in the first degree?"
>
> "Is there anyone who believes that if a gun is involved in a shooting it was a planned act, simply because a gun was involved in the shooting?"
>
> "I explained to you that there were different degrees of homicide … And in all of these homicides a gun could be used, a weapon or gun involved. Do any of you believe just because a gun is used that it is a

murder first degree case, and that you would not consider a lesser degree of homicide?"

*Id*.

In *State v. Brown*, *supra*, defense counsel was ostensibly questioning a juror, McClain, about his "views on the effect of drug use on guilt." 902 S.W.2d at 285; emphasis added.

McClain: Maybe he wasn't in control of himself. And that brings in a whole different picture, doesn't it?

[Defense Counsel]: Well, that's what I want to ask you about because, well, basically, you know, there are some elements to First Degree Murder that you're going to have to decide because the State's charging First Degree Murder. You're going to first of all be instructed that the State has the burden of proving this beyond a reasonable doubt. And by burden of proof it's going to mean that they have to come forward with the proof to prove every element of what First Degree Murder is, and by every element there's different parts of Murder First Degree. First, you'd have to decide whether it was Janet Perkins that was killed and she was actually killed, okay? Second of all, you'd have to find and believe beyond a reasonable doubt that Vernon Brown caused the death; and then third-

Prosecutor: I object to counsel instructing as to the law.

The Court: Sustained.

[Defense Counsel]: Would you have any problem considering if you were instructed that the defendant had to act with premeditation and deliberation for Murder First Degree?

Prosecutor: Same objection. He's instructing as to the law.

The Court: Sustained, improper during voir dire.

[Defense Counsel]: Well, she [the prosecutor] was allowed to go into matters of law in her voir dire and as to what circumstances would justify this and I think I'm entitled to go into whether or not they believe there was a premeditation and deliberation, whether they would consider that in conjunction with the Murder First Degree conviction. I don't see anything improper about that at all.

The Court: You're not permitted to go into the proposed charge to the jury during voir dire. *You may ask to consider all the elements of the offense*, which they must consider beyond a reasonable doubt, but you cannot give them the charge or the proposed charge of the Court at this time.

*Id*. at 285-86; emphasis added. This Court upheld the trial court: "Counsel may not tell prospective jurors what law will be applied in the case or what instructions will be given to them." *Id*. at 286.

The specific questions that defense counsel asked in *Brown* were not only rambling and confusing – "Would you have any problem considering if you were instructed that the defendant had to act with premeditation and deliberation for Murder First Degree?" – but also went well beyond what defense counsel in this case attempted to do. In *Brown*, the attorney was quite literally going step by step through the instructions. Here, defense counsel wanted only to ensure that when the jurors were asked about their ability to consider a sentence of life imprisonment without probation or parole, their answers would be informed and accurate.

In *State v. Hall*, *supra*, the defendant's trial attorney attempted to ask questions similar to those in the present case:

> Hall contends that the trial court erred in sustaining the State's objection to using the definition of first-degree murder during voir dire. Hall's counsel wanted to ask the members of the venirepanel if they could recommend a sentence of life imprisonment for a defendant who had "deliberated" and "coolly reflected" before committing a murder. The trial court ruled that the question was improper in voir dire, as it is the role of the court to instruct the persons who eventually serve on the jury as to the legal definitions regarding intent. The trial court then instructed defense counsel to limit this line of questioning to whether

the veniremembers could consider the full range of punishment for first-degree murder authorized by law-life imprisonment without parole and the death penalty.

955 S.W.2d at 203. This Court upheld the trial court's ruling:

> A trial court's ruling on whether to allow a voir dire question will be reversed only for abuse of discretion.... During voir dire, neither side may tell the panel what law will be applied in the case.... Voir dire is not the proper arena for the legal definitions that appear in jury instructions as the venirepanel is not the jury, nor does it have evidence before it. The trial court correctly sustained the State's objection.

*Id.*; citations omitted.

To the extent that *Johns*, *Morrow*, *Hall*, *Brown*, or any other similar case may be read as authority to limit voir dire in a capital case to "can you follow the instructions and law" type questions without providing any information about the elements of first degree murder, these cases are directly in conflict with *Morgan v. Illinois*, *supra*. They are also inconsistent with cases such as cited in Appellant's initial brief[2] in which this Court approved ***state*** voir dires on such

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[2] App.Br. 66-67: *State v. Gray*, 887 S.W.2d 369 (Mo.banc 1994); *State v. Ramsey*, 864 S.W.2d 320 (Mo.banc 1992); *State v. Gill*, 167 S.W.2d 184 (Mo.banc 2005).

legal concepts and principles as accessory and accomplice liability, reasonable doubt, felony murder, plea bargaining, and circumstantial evidence; s*ee also State v. Edwards*, 116 S.W.3d 511, 528-30 (Mo.banc 2003) (proposed voir dire question – "could [jurors] consider imposing a sentence of life without probation or parole 'if the state proved that appellant had hired another to kill his ex-wife, the mother of his child'" - was permissible though facts involved were not "critical," since it "did relate to an alleged motive for the crime—to avoid child support").

Of greater concern, restricting voir dire as the trial court did in the present case violates the Eighth Amendment's "high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988).

Although respondent says "[t]hat the trial court in this case may have been within its discretion to possibly allow some of the questions appellant wanted to ask," respondent goes on to say it is not conceding that point and that not allowing the questions is not improper (Resp.Br. 41). Respondent thus admits that the trial court *could have* allowed defense counsel to preface their life qualification questions with a brief description of the elements of first degree murder. The state made no objections and the trial court did not interrupt defense counsel when, during the second defense death qualification voir dire, counsel asked:

> I want to be sure you understand when we talk about murder first degree that we are talking about a deliberate act. We are not talking about an accidental killing and we are not talking about a killing that happened in self defense. We are not talking about a kind of killing where a spouse comes home and catches the other spouse in bed with somebody and shoots one of them. We are talking about coolly reflected upon murder in the first degree.

(T320).

If, in his discretion, the trial court saw fit to allow find this line of questioning for one small voir dire panel , how can it be objectionable and improper for another? If discretion can be stretched so far as to subsume directly contrary rulings, it becomes unreviewable because it permits everything, it can never be arbitrary, it can never be abused.

The fact remains, as the Supreme Court said in *Morgan*, "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." 504 U.S. at 729-30. Or, as this Court recognized in *State v. Leisure*, "*Voir dire* is both an educational and a discovery process." 749 S.W.2d 366, 375 (Mo.banc 1988).

Appellant suggests: what is truly objectionable and improper are confusing

and inaccurate questions that would mislead or misinform the prospective jurors. This explains why cases such as *Hall* have said that the parties are not to "tell the panel what law will be applied in the case" or attempt to give the jury "legal definitions that appear in jury instructions." *Hall*, *supra*, 955 S.W.2d at 203.

There are alternatives. If the Court does not want the attorneys to ask the jurors if they can consider a sentence of life imprisonment without probation or parole for a person who is convicted of first degree murder – a deliberate, coolly reflected, killing – the trial court could instruct the jury on the law when MAI-CR3d 300.03AA is read to the jury prior to death (life) qualification voir dire.

Perhaps MAI-CR3d 300.03AA could be modified to include a definition of first degree murder. The second paragraph of that instruction provides:

> The possible punishments for the offense of murder in the first degree are imprisonment for life by the Department of Corrections without eligibility for probation or parole, or death. The purpose of this questioning is to discover whether or not you are able to consider both of these punishments as possible punishments.

It would not be a difficult matter to add language to that paragraph, or to add an additional paragraph, explaining that first degree murder is a coolly reflected upon, deliberate killing.

"'[T]he impartiality of the adjudicator goes to the very integrity of the legal system,' and 'harmless-error analysis cannot apply.'" *State v. Baumruk*, 85 S.W.3d 644, 651 (Mo.banc 2002) *quoting Gray v. Mississippi,* 481 U.S. 648, 668 (1987). The error in this instance concerned the "impartiality of the adjudicator" with regard to penalty phase. The cause must be reversed and remanded for a new penalty phase trial.

Error to Submit MAI-CR3d 310.50 – Respondent's IV:

In responding to defense counsel's objection to MAI-CR3d 310.50, counsel for respondent relied on the grounds that formed the basis for the trial court's ruling and may not now complain (Resp.Br. 55) that appellant's challenge to that ruling is not preserved for appeal since it was respondent who offered these grounds to the trial court.

In overruling defense counsel's objection to MAI-CR3d 310.50, Instruction 6, the trial court relied on the grounds presented in the state's argument: that there was sufficient evidence to support the instruction (T1890-92). Because the state specifically requested the trial court to submit the instruction on the grounds that it was supported by the evidence, and because the trial court could have rejected the grounds proffered by the state, the trial court would necessarily be aware that this was a matter at issue. Therefore, the Court should reject respondent's

argument that this point is not preserved. *State v. Wandix*, 590 S.W.2d 82, 83-84 (Mo.banc 1979) (Rejecting respondent's argument that "appellant failed to properly raise and preserve the issue [of disclosure of police informant's identity] at trial" because it was apparent "from the record that the trial court and the parties recognized that identity was a crucial issue in the case").

If however, the Court finds the point is not preserved, appellant would respectfully request that the Court review for plain error, Rule 30.20, because submitting this instruction was a manifest injustice.

With regard to the injustice engendered by this instruction, appellant will not repeat here the arguments made in his initial brief. Suffice it to say that through various expert and lay witnesses, evidence of appellant's persistent problems with drugs and alcohol was put before the jury. To defend against the state's case that Johnny was hanging around the Williamson family because he wanted to have sex with Casey, the defense presented evidence that Johnny was in Valley Park to get drugs and alcohol, and, specifically, at Michelle's house to get drugs from her boyfriend Eddy (e.g., T815-818, 843-44, 1527-28, 1551-54).

Although there was testimony concerning Johnny's use of drugs and alcohol, there was no evidence that he was ***intoxicated***, and it was error to give the instruction. *State v. Bristow*, No. SD26825 (Mo.App.S.D. March 31, 2006) 2006 WL 825619. The instruction prejudiced Johnny by inviting the jury to find that

appellant was attempting - to paraphrase the instruction – use an intoxicated or a drugged condition to relieve himself of responsibility for his conduct. Combined with the evidence of drugs and alcohol before the jury, the instruction would mislead the jury about Johnny's defense which was, quite simply, that because of his mental illness, he could not and did not coolly reflect on killing Casey; it was an intentional killing – not a deliberated killing (T1939-41). Instruction 6 could not help but confuse the jury. *Id.*, 2006 WL 825619 *6.

The Court should reject respondent's arguments concerning evidence of intoxication. In his initial brief, appellant fully discussed the distinction between using alcohol and drugs and being intoxicated, that none of the state's witnesses who saw Johnny right after the offense saw anything out of the ordinary about him or his behavior and will not repeat that discussion here.

Respondent cites no authority to support his claim that the testimony of experts Dr's Dean and English constituted evidence of intoxication, and the Court should reject its arguments (Resp.Br. 56-59).

Error to Submit Vague Depravity of Mind Aggravator – Respondent's VI:

Appellant did not change his theory on Appeal.

Contrary to respondent's argument, Resp.Br. 69, appellant has not changed his theory on appeal. At trial, appellant objected to Instruction 23 and the

statutory aggravator based on §565.032.2(7) on the grounds that this aggravator was unconstitutionally vague. Appellant raises the same claim in his point and argument on appeal (App.Br. 41-42,99-100).[3]

Anticipating that the state would argue that the narrowing construction saves the statute (which it has done, Resp.Br. 70-71), appellant argued in his initial brief that the narrowing construction does not save the statute (App.Br. 100-103). Anticipating and addressing the state's argument in appellant's initial brief is not changing the claim on appeal.

Suffice it to say that the narrowing construction also violates the Missouri Constitution's Separation of Powers Doctrine. Mo.Const., Art. II, § I; *Charleston ex rel. Brady v. McCutcheon*, 227 S.W.2d 736, 739 (Mo.banc 1950).

Error to Submit MAI-CR3d 314.44 and 314.48 – Respondent's VIII:

The Court has never addressed appellant's argument that MAI-CR3d 314.44 and 314.48 add a requirement of unanimity not in the statute and omit the statutory requirement that only aggravating evidence that the jury has "found" be weighed against the mitigating evidence.

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[3] Respondent's brief at 99 mistakenly cites to appellant's brief at 82.

In *State v. Zink*, 181 S.W.3d 66 (2005), this Court recited Zink's claim that the penalty phase instructions based on MAI-CR3d 314.44 and MAI-CR3d 314.48 "improperly raised his burden to obtain a ***unanimous*** jury decision that evidence in mitigation of punishment was sufficient to outweigh the evidence in aggravation" and "improperly lack[ed] a limitation on the use of aggravating evidence when performing this balancing test." *Id*. at 74.

The Court denied these claims saying it had "previously rejected these and similar arguments concerning these MAI patterned instructions... ." *Id*. The Court cited *State v. Gill,* 167 S.W.3d 184, 193 (Mo.banc 2005); *State v. Glass,* 136 S.W.3d 496, 520-21 (Mo.banc 2004); *State v. Taylor,* 134 S.W.3d 21,30 (Mo.banc 2004); *State v. Tisius,* 92 S.W.3d 751,770 (Mo. banc 2002); *State v. Cole,* 71 S.W.3d 163,176 (Mo.banc 2002).

Those cases did not raise the specific challenges presented here: that these instructions adds a requirement of unanimity not required by the statute and that these instructions omit the statute's restriction of aggravating evidence that may be weighed to only aggravating evidence "found" by the jury. *Tisius* and *Cole* did not raise challenges to MAI-CR3d 314.44 and 314.48.

*Gill*, *Glass*, and *Taylor* challenged instructions patterned after MAI-CR3d 314.44 and 314.48, but those challenges were made on the grounds that the instructions failed to require the jury to find the third death-eligibility step -

§565.030.4(3) – against defendant, beyond a reasonable doubt. To the best of appellant's knowledge, no other case has previously raised the two much plainer statutory challenges evidently raised in *Zink* and raised here.

Specifically, the challenges not previously raised and presented for the first time here are as follows. First, MAI-CR3d 314.44 and 314.48 require the jury to *unanimously* find that the mitigating evidence is insufficient to outweigh the aggravating evidence, but §565.030.4(3) does not require the jurors to make this finding "unanimously." Second, although MAI-CR3d 314.44 and 314.48 fail to instruct the jurors that in determining whether the mitigating evidence is sufficient to outweigh the aggravating evidence, they may only use the aggravating evidence they have "found" even though §565.030.4(3) contains this express limitation.

The Court in *Zink* thought that it had "ruled on these issues previously," 181 S.W.3d at 74. But that is not the case; appellant respectfully requests the Court to review – for the first time - these challenges to MAI-CR3d 314.44 and 314.48.

The state claims that the instructions' omission of the statutory limitation – only aggravating evidence "found by the trier" may be weighed against the mitigating evidence – does not put the instruction in conflict with the statute and does not affect the meaning of the statute (Resp.Br. 86). The state says that the instructions' use of the phrase "facts or circumstances in aggravation of

punishment" "clearly assumes that the jury made a finding of those 'facts or circumstances' or it could not have completed this step" (Resp.Br.86).

But the argument fails: MAI-CR3d 314.44 includes language to entirely the opposite effect. The instruction does not tell the jury it is limited, at this step, to facts and circumstances it has found. The instruction tells the jury it may consider "all the evidence presented." It does not say, "assuming you find that evidence as fact."

> In deciding this question, ***you may consider all of the evidence presented*** in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstance(s) submitted in Instruction No. ___, and evidence presented in support of mitigating circumstances submitted in this instruction.

(MAI-CR3d 314.44; LF791; emphasis added).

The state argues that "conclude" may only be interpreted as requiring a unanimous jury. But §565.030.4(3) the statute does not say that and respondent cites no authority so holding.

Civil juries need not be unanimous to "conclude" that one side or the other has prevailed. "Conclude" is commonly understood to mean decide, determine or finish; there is no need to resort to statutory construction (Resp.Br. 85) since the language is not obscure. Webster's New World Dictionary, 3rd College Ed.

The prejudice that resulted from imposing a requirement of unanimity on a jury determination that does not exist in the statute and from omitting the restriction of aggravating evidence to only that evidence "found" by the jury, it cannot and should not be underestimated.

For the foregoing reasons, the Court should reject respondent's argument and grant appellant a new penalty phase trial.

## CONCLUSION

For the foregoing reasons, appellant prays that this Court will reverse the judgment of the circuit court and remand for a new trial or, alternatively, a new penalty phase proceeding, or, alternatively, reduce appellant's 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 Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 7,481 words.

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

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were personally served this 26th day of May, 2006, to Richard A. Starnes, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102. A copy of the same was emailed on the 24th day of May, 2006, to: Richard.Starnes@ago.mo.gov.

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