No. SC85235

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MICHAEL TAYLOR,

Appellant.

APPEAL FROM ST. CHARLES COUNTY CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE LUCY D. RAUCH, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from Appellant's conviction for first-degree murder (§ 565.020, RSMo 2000) and death sentence. Because Appellant was sentenced to death, this Court has exclusive appellate jurisdiction over this appeal. Mo. Const. art. V, § 3.

STATEMENT OF FACTS

Appellant was indicted in Washington County Circuit Court on one count of first-degree murder for the October 3, 1999, killing of Shackrein Thomas, his cell mate at the Potosi Correctional Center. (Tr. 873; L.F. 41). After a change of venue to St. Charles County, a jury trial on the murder charge was held before Judge Lucy D. Rauch from January 13-18, 2003. (L.F. 21; 282-91). The sufficiency of the evidence to support Appellant's murder conviction is not challenged. In fact, Appellant never disputed that he killed Mr. Thomas, his only defense at trial was that he suffered from a mental disease relieving him of responsibility for the crime. (Tr. 785-86, 789). Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

The Facts Pertaining To The Murder

When he committed this murder, Appellant, who had been convicted of first-degree murder and forcible rape in 1998, was serving a life sentence without probation or parole based on his 1995 killing of Christine Smetzer, a fifteen-year old high school student. (Tr. 1505-06, 1509, 1511-12; State's Ex. 40). Appellant raped Ms. Smetzer in a bathroom at McCluer North High School (St. Louis County) and then asphyxiated her by forcing her neck against a toilet with her face in the water. (Tr. 1099, 1101-02, 1505-09).

Before being put in the same cell with Mr. Thomas, Appellant had been in "the hole" for refusing to take a cell mate ("cellee"). (State's Ex. 24).[1] To get out of the hole, Appellant agreed to take a cell mate, and he and Mr. Thomas were assigned to a cell together. (Tr. 873; State's Ex. 24). Appellant and Mr. Thomas got along well, apparently so much so that they engaged in anal intercourse together. (Tr. 974, 989; State's Ex. 24). Appellant even gave his medication to Mr. Thomas, who would ingest it. (Tr. 986; State's Ex. 24).

At approximately 7:30 p.m. on October 3, 1999, only their ninth day in the same cell together, Appellant was reading a book ("Pillars of the Earth") when he put it down and got off his bunk. (Tr. 1035; State's Ex. 24). Appellant put his shoes on for stability and then struck Mr. Thomas in the face, who in turn began swinging his arms at Appellant. (State's Ex. 24). Appellant then got behind Mr. Thomas and used a choke hold to strangle him. (Tr. 982; State's Ex. 24). Appellant strangled Mr. Thomas for "ten to twenty" minutes until he finally died. (Tr. 975-76; State's Ex. 24).[2]

Because Mr. Thomas's body was in front of the toilet, Appellant kicked it out of the way so he could urinate. (Tr. State's Ex. 24). Appellant also put a pillow under Mr.

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[1]State's Exhibit 24 is Appellant's videotaped confession to the murder. (Tr. 979).

[2]Appellant would reapply pressure to Mr. Thomas's neck after noticing that he was still moving and alive. (State's Ex. 24).

Thomas's head while his body was still on the floor. (State's Exs. 4, 6, 24). Appellant then resumed reading his book. (State's Ex. 24). At approximately 8:30 p.m., a prison nurse came to Appellant's cell and gave Appellant his anti-depressant medication, Trazadone, which he actually took for the first time since he had been in the same cell with Mr. Thomas. (Tr. 872, 887, 986, 1166; L.F. 279).

Before the ten o'clock count had been completed, Appellant pushed the emergency button in his cell to call correctional officers to his cell. (Tr. 803-06; 839). Appellant later said that he did this so that Mr. Thomas's body could be removed because it was in his way. (State's Ex. 24). The officers arrived and asked Appellant what was wrong, but he did not answer. (Tr. 806-07). One officer opened the "chuck hole" in the cell door and told Appellant to "cuff up," meaning that Appellant should turn around and put his hands through the opening so that restraints could be applied. (Tr. 810, 843). At this point the officers could see Mr. Thomas's body lying in the cell. (Tr. 814, 879). Appellant told the officers that his "father" made him do it. (Tr. 811, 845). After several requests to "cuff up," Appellant finally complied and was taken out of the cell. (Tr. 810-12, 843-44).

The officers found Mr. Thomas's lifeless body on the cell floor. (Tr. 848, 851). The body had a bite mark in the middle of the back and one of Mr. Thomas's eyeballs was nearly out of the socket. (Tr. 883, 921, 926, 966-67). A white creamy substance was present between Mr. Thomas's buttocks. (Tr. 967). Although an attempt was made to

test the white creamy substance, not enough DNA material was present to conduct a valid test. (Tr. 954). But later testing revealed the presence of Appellant's DNA on the backside of Mr. Thomas's boxer shorts. (Tr. 951, 956).

Mr. Thomas's cause of death was asphyxiation caused by neck compression. (Tr. 930). He also suffered from a swollen left eye, caused by a blunt impact, and abrasions to the abdomen and left cheek. (Tr. 920-21). A toxicology report showed that Mr. Thomas's blood contained Trazadone. (Tr. 933).

Later that night (actually in the early morning hours of October 4, 1999) and again on October 5, 1999, Appellant freely admitted to a Department of Corrections investigator that he had strangled Mr. Thomas to death. (Tr. 975-76). Appellant said that his "father" from the "dark side" told Appellant to "send" Mr. Thomas to him. (Tr. 974-75, 987-88). Appellant denied that this voice commanded him to kill Mr. Thomas, but he knew what sending Mr. Thomas to his "father" meant that he had to do. (Tr. 975, 986-87). During his confession on October 5, 1999, Appellant even demonstrated the choke hold with which he used to strangle Mr. Thomas. (Tr. 982; State's Ex. 24).

Appellant's Insanity Defense

After the State rested its case, Appellant presented the testimony of several witnesses in an attempt to prove that he suffered from a mental disease that excluded him from responsibility for killing Mr. Thomas.

Dr. John Rabun, a forensic psychiatrist, evaluated Appellant for criminal responsibility. (Tr. 1012). Dr. Rabun diagnosed Appellant with paranoid schizophrenia and anti-social personality disorder, though he conceded that no test existed to prove someone has schizophrenia (Tr. 1056, 1068, 1081). Dr. Rabun based this diagnosis on the fact that Appellant reported suffering from delusions and hallucinations, including an auditory hallucination involving what Appellant described as the voice of his "father of darkness." (Tr. 1031, 1036).

Dr. Rabun also testified that Appellant was not malingering, which he explained as the false reporting or exaggeration of medical symptoms for external reasons, such as to avoid a conviction. (Tr. 1037-39). Dr. Rabun reached this conclusion because (1) Appellant had been diagnosed at Fulton State Hospital with paranoid schizophrenia for which he was taking medication; (2) Appellant did not try to blame the killing on the fact that he heard voices; (3) Appellant described the voices as coming from "outside" his head and that the voices were not always present; and, (4) that Appellant did not claim he was hearing voices at the moment he strangled Mr. Thomas. (Tr. 1071-72). Dr. Rabun also opined that Appellant's condition was chronic as evidenced by his eight-month stay at Fulton State Hospital. (Tr. 1061).

Dr. Rabun concluded that when Appellant killed Mr. Thomas, Appellant suffered from schizophrenia and lacked the capacity to know and appreciate the nature, quality, and wrongfulness of his conduct. (Tr. 1075-76).

Dr. William Eikermann, a clinical psychiatrist on the DOC Ward at Fulton State Hospital, treated Appellant at Fulton not long after Appellant had killed Mr. Thomas and also treated him at Crossroads Correctional Center. (Tr. 1115, 1124-25). Dr. Eikermann noted that Appellant was delusional and psychotic, suffering from auditory hallucinations. (Tr. 1127, 1130). He diagnosed Appellant with paranoid schizophrenia and testified that Appellant's behavior improved after Appellant was prescribed Clozaril, a drug with potentially severe side-effects. (Tr. 1128-30). Dr Eikermann, who was chief resident the year before he testified in this case, conceded that he was not a forensic psychiatrist, but denied that Appellant was malingering. (Tr. 1116, 1134). He did testify, however, that Appellant would stop taking his medications (Tr. 1131-32).

Dr. Bruce Harry, a staff psychiatrist at Fulton State Hospital, testified that while substituting for another doctor he saw Appellant a total of three times in 1999 and 2000, less than one-half hour each time. (Tr. 1151-52, 1161-62). Dr. Harry simply repeated some of the symptoms and diagnosis reported by the other doctors, but stated that he did no testing on Appellant and offered no opinion about Appellant's mental condition. (Tr. 1156-61).

Dr. Ahsam Syed, a DOC psychiatric consultant at Fulton Reception and Diagnostic Center, testified that he evaluated Appellant when he entered the corrections

system in 1998. (Ex. F, pp. 4-5).[3] He stated that Appellant reported auditory hallucinations, including hearing the voice of the "father of darkness." (Ex. F, pp. 7-8, 11, 15). Dr. Syed diagnosed Appellant with major depression with psychotic features. (Ex. F, pp. 11, 16). Dr. Syed also testified that Appellant refused to take his medication. (Ex. F, pp. 15-16).

The State's Rebuttal Evidence

After Appellant presented his defense, the State presented rebuttal evidence to show that Appellant suffered from no mental disease or defect, but was simply malingering.

Dr. Richard Scott, a forensic psychologist and certified forensic examiner, evaluated Appellant on two separate occasions in 1996 and 1997 in connection with the Smetzer case. (Tr. 1173-75, 1179-81). Dr. Scott interviewed Appellant for four-and-one-half hours during the first interview and three-and-one-half hours during the second. (Tr. 1184-85, 1200). Dr. Scott reviewed all of Appellant's records generated to that point in Appellant's life, including psychiatric, school, family court, and police records. (Tr. 1182, 1187). Dr. Scott concluded that Appellant did not suffer from a mental disease or

[3]Although only the videotaped deposition was admitted into evidence, the parties are filing by stipulation the paginated transcript of Dr. Syed's deposition, thus explaining the reference to a page number in this citation.

defect, but diagnosed him with conduct disorder, adjustment disorder, and mood disturbance. (Tr. 1188-89). In Dr. Scott's opinion, Appellant was aggressive, had a history of violating the rights of others, and he concluded that Appellant had a conduct disorder, but no mental disease or defect as defined by law (Tr. 1189-90, 1192, 1196-97). Dr. Scott found no evidence that Appellant was psychotic, delusional, or suffered from hallucinations, and he found no thought disorder typical of psychosis (Tr. 1190).[4] He concluded that Appellant was not insane and was criminally responsible for the Smetzer murder. (Tr. 1199-1200).

After Appellant was evaluated by a defense expert, Dr. Scott re-interviewed Appellant in 1997. (Tr. 1200). During this interview, Appellant reported for the first time suffering from hallucinations and hearing voices. (Tr. 1198-99, 1203, 1208). Appellant describe florid visual and auditory hallucinations, including hearing the voice of his "father of darkness" and a visual hallucination of a devilish looking individual with horns; and he directed Dr. Scott's attention to these hallucinations (Tr. 1202, 1209-10).

In Dr. Scott's opinion, Appellant was not genuinely suffering from these symptoms. (Tr. 1204). He also did not find these hallucinations typical of a schizophrenic, and he stated that visual hallucinations were extremely rare and usually

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[4]Dr. Scott also performed intelligence testing on Appellant and concluded that Appellant was not mentally retarded. (Tr. 1192, 1194).

brought about by organic psychosis caused by drug use. (Tr. 1210). Also, Appellant did not have the mannerisms of someone suffering from schizophrenia. (Tr. 1204). Typically schizophrenics do not draw attention to the voices they hear and try to cover up their symptoms. (Tr. 1210). After his second evaluation, Dr. Scott confirmed his original diagnosis, but added the clinical finding of malingering. (Tr. 1212).

Dr. Christy Blanchard, a psychologist, testified that in October 2002 she performed psychological testing on Appellant by giving him the Minnesota Multi-Phasic Inventory II. (Tr. 1298, 1301-02). She testified that the validity scales suggested that Appellant was "over reporting, exaggerating, or feigning symptoms," and that the scores in this respect were "extreme." (Tr. 1311). She testified that a score of over 90 on the F-Scale, the scale that determines the validity of the test, was extremely rare. (Tr. 1312-13). When the F-score is elevated the test is reporting far in excess of what an average person with those mental problems would report as symptoms. (Tr. 1312-13). Appellant's F-scale score was 110, which put Appellant within the "fake-bad" profile. (Tr. 1312-13).

Dr. David Vlach, a forensic psychiatrist and certified forensic examiner, evaluated Appellant in this case for both competency to stand trial and criminal responsibility (Tr. 1321-24, 1327-28, 1363). He interviewed Appellant on four different dates for a total of five hours and fifteen minutes and reviewed all of Appellant's records, including those from the Smetzer case. (Tr. 1331, 1334-35, 1364). Dr. Vlach looked for signs of

schizophrenia when he evaluated Appellant, but instead found things inconsistent with someone suffering from that disease, including that Appellant was well-groomed, was able to socialize, his speech was normal, and he did not suffer from mania (Tr. 1339, 1340-42).

During these interviews, Appellant volunteered and repeatedly drew attention to the voices he heard–the "father of darkness" and "Tashua." (Tr. 1343, 1345-47). This was unusual for people with mental illness, as they attempt to hide these types of symptoms, but it is typical of people who are malingering. (Tr. 1346-47). Appellant would ask the doctors if he had told them about "my voice," and he would bring a chair with him when he spoke with these doctors, telling them that the chair was for his invisible friend, the crime victim. (Tr. 1354-55). Dr. Vlach testified that this was a highly atypical symptom, one that he had never seen before. (Tr. 1354-55).

Appellant also claimed to have suffered visual hallucinations (blood on his hands), which are extremely rare.[5] (Tr. 1348-49). Also most people are troubled by hallucinations, but Appellant seemed to enjoy them. (Tr. 1349-50). Also, after Appellant spent several months at Fulton after murdering Mr. Thomas, he would report new

[5]Only 4% of people with psychosis have visual hallucinations. (Tr. 1348-49).

symptoms in an effort to avoid returning to prison.[6] (Tr. 1351-54). In addition, Appellant's prolonged stay at Fulton was also explained by his inconsistent reporting of symptoms and ever-changing diagnosis. (Tr. 1379). At first, Appellant was diagnosed with major depression with psychotic features, three months later he was diagnosed with disassociative identity disorder, and two months after that he was diagnosed with paranoid schizophrenia. (Tr. 1379). Dr. Vlach testified that this sequence is indicative of malingering, because malingerers do not present a consistent clinical picture. (Tr. 1379).

Dr. Vlach also testified that schizophrenics try to avoid obeying what the voices tell them to do, especially if it is violent. (Tr. 1356). But Appellant said he had to do what the "father" told him. (Tr. 1357). Also, Appellant had the highly unusual symptom of having hallucinations in his sleep. (Tr. 1357). Appellant also claimed that he could summon the "father of darkness" when he was alone in his cell, but the chemical imbalance that causes schizophrenia does not allow a true schizophrenic to control such things. (Tr. 1358-59). But this type of claim is consistent with a malingerer who is trying to convince others that he is insane. (Tr. 1359).

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[6]On one date Appellant was to return to prison, he reported that he could not leave the room because "Tashua" told him not to. (Tr. 1351). On another occasion Appellant told the nurses that voices were telling him to hurt himself, yet later in the day Appellant was seen playing cards, laughing, and listening to the radio. (Tr. 1354-55).

In addition to the MMPI scores which showed that Appellant was faking, Dr. Vlach gave Appellant another test designed to detect malingering. (Tr. 1360). Appellant's score on that test showed that it was highly likely that Appellant was malingering. (Tr. 1361).

In Dr. Vlach's opinion, Appellant did not suffer a mental disease or defect, but was simply malingering. (Tr. 1361). Dr. Vlach concluded that Appellant did not have a mental disease or defect that made him unable to understand the wrongfulness of his conduct, that Appellant was responsible for the crime from a mental aspect, that Appellant knew killing Mr. Thomas was wrong, and that Appellant could have refrained from doing so if he had wanted (Tr. 1366-67). He also concluded that Appellant did not suffer from schizophrenia. (Tr. 1366).

The jury rejected Appellant's insanity defense and found Appellant guilty of first-degree murder. (Tr. 1467; L.F. 319).

The Penalty Phase

During the penalty phase the parties each presented only one witness. The State presented the testimony of a detective who investigated the Smetzer murder. (Tr. 1505-16). Appellant presented the videotaped testimony of the superintendent at Crossroads Correctional Center, where Appellant was then incarcerated. (Tr. 1517; Defendant's Ex. P). The jury found the only statutory aggravating circumstance presented to it: that Appellant had been previously convicted of first-degree murder on April 3, 1998. (L.F.

339). The jury unanimously voted to recommended a sentence of death for Appellant (L.F. 339; Tr. 1561-62). After overruling Appellant's motion for new trial, the trial court sentenced Appellant to death (Sent. Tr. 13, 19; L.F.).

ARGUMENT

I.

The trial court did not err in refusing Appellant's request not to give the jury Instruction No. 5, patterned after MAI-CR 3d 306.04, concerning the jury's consideration of statements made by expert witnesses testifying about a defendant's mental condition, because the Notes on Use to this instruction require that it be given whether or not the defendant requests it, and this Court has held that this instruction properly states the law and does not confuse or mislead jurors.

At trial, Appellant readily conceded that he had killed Mr. Thomas. Appellant's sole defense was that he was not criminally responsible based on his mental condition at the time of the murder. Consequently, the only guilt-phase issue was whether Appellant suffered from a "mental disease or defect" rendering him "incapable of knowing and appreciating the nature, quality, or wrongfulness" of his actions. Section 552.030.1, RSMo 2000. The primary evidence on this issue consisted of testimony from expert witnesses concerning their evaluations of Appellant's mental condition.

Because these types of evaluations will likely involve interviews with the defendant and the gathering of information from other persons, state law provides safeguards concerning admission of this evidence to protect defendants' rights against self-incrimination and to confront witnesses against them. As a result, the statute

prohibits the use of this evidence for the purpose of proving that the accused actually committed the act with which they are charged:

> No statement made by the accused in the course of any such examination and no information received by any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon the accused's motion or upon that of others, shall be admitted in evidence against the accused on the issue of whether the accused committed the act charged against the accused in any criminal proceeding then or thereafter pending in any court, state of federal.

Section 552.030.5.

Finally, to insure that the jury understands for what purpose this evidence is admissible, the statute requires that the jury be informed that it may consider this evidence only on the issue of the defendant's mental condition, not on whether the defendant committed the act charged against them:

> If the statement or information is admitted for or against the accused on the issue of the accused's mental condition, the court shall both orally at the time of its admission and later by instruction, inform the jury that it must not consider such statement or information as any evidence of whether the accused committed the act charged against the accused.

MAI-CR 3d 300.20MAI-CR 3d 300.20, Note on Use 1.

In this case, however, this oral instruction was not read to the jury before the various doctors testified. Although the parties discovered this oversight during the middle of trial, both sides informed the trial court after all the evidence had been presented that they had agreed to continue the trial without reading that instruction (Tr.1392). Appellant makes no claim of error regarding this situation, and, in fact, Note on Use 5 to the instruction anticipates that situations like this might occur: "If the Court overlooks the instruction it is the duty of counsel to remind the Court to give it." Missouri courts have held that a defendant may waive the right to have this instruction given by failing to remind the court to read it. State v. Thompson, 985 S.W.2d 779, 786, 789 n.2 (Mo. banc 1999); State v. Scott, 841 S.W.2d 787, 790 (Mo. App. E.D. 1992).

Appellant's claim of error concerns the trial court's giving of Instruction No. 5, patterned after MAI-CR 3d 306.04, which provided:

> You will recall that certain doctors testified to statements that they said were made to them and information that they said had been received by them during or in connection with their inquiry into the mental condition of the defendant.
>
> In that connection, the Court instructs you that under no circumstances should you consider that testimony as evidence that the defendant did or did not commit the acts charged against him.

(L.F. 309). Appellant claims that the trial court erred in giving this instruction because it may have confused and misled the jurors to believe that they could not consider whether the defendant had a mental disease or defect. Appellant contends that a defendant should be allowed to waive this instruction.

The most glaring deficiency with Appellant's argument is that the trial court was required to give this instruction, despite Appellant's request to waive it:

> When statements and information acquired as a result of the mental examinations made pursuant to Section 552.030 are admitted into evidence on the issue of the accused's mental condition, *this instruction must be given, whether requested or not*.

Rule 28.02*State v. Roberts*, 948 S.W.2d 577 (Mo. banc 1997),

cert. denied, 522 U.S. 1056 (1998)*State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996),

cert. denied, 519 U.S. 1083 (1997) *Id.* at 871.

Appellant's argument here is much broader than the one made in *Kreutzer*. Appellant suggests that the wording of this instruction was so deficient that jurors were led to believe that they could not rely on any of the expert testimony produced at trial and that they could not consider whether Appellant had a mental disease or defect. This Court's opinion in *Kreutzer* demonstrates that this highly speculative claim is without merit.

The *Kruetzer* court held that this instruction "is a correct statement of the law" and that "[i]t cannot be said to have confused or misled the jury." *Id.*

Undaunted, Appellant urges this Court to reconsider the holding in *Kreutzer* by suggesting that it conflicts with this Court's opinion in *Thompson*. Appellant seizes on language in *Thompson* suggesting that a defendant may have good reason not to request a limiting instruction on the mental illness issue because such an instruction diminishes the jury's ability to consider out-of-court statements favorable to the defense. *Id.* Moreover, the *Thompson* opinion does not specifically identify which limiting instruction (MAI-CR 3d 300.02 or 306.04) the court was referring to. Like *Kruetzer*, other instructions told jury to consider Appellant's mental condition. Also, whether defense counsel has a trial strategy reason for not requesting the instruction if it is overlooked, as described by the *Thompson* court, does not change the law requiring that the instruction be given whether it is requested or not.

Finally, this limiting instruction was not given during the penalty phase. Appellant's claim that giving this instruction during guilt phase prevented the jury from considering this evidence during penalty phase is unavailing. The trial court did not err in giving the jury this required instruction.

II.

The trial court did not plainly err in overruling Appellant's objection to the prosecutor's cross-examination of his expert witness concerning the details of Appellant's previous murder conviction because the jury was already aware of the circumstances surrounding that conviction, the "details" revealed by the question were not much beyond what the jury already knew, and the prosecutor was permitted to ask such questions to test this witness's opinion concerning Appellant's mental condition.

Appellant argues that the trial court plainly erred in allowing the prosecutor to cross-examine Appellant's expert witness concerning the details of Appellant's prior murder conviction.

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20. The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. State v. Hibler, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000). A plain error is one that "must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected." State v. Driscoll, 711 S.W.2d 512, 515 (Mo. banc 1986), *cert. denied*, 479 U.S. 922 (1986).

During trial, Appellant never disputed that when he killed Mr. Thomas he was in prison serving a sentence for killing fifteen-year old Christine Smetzer in a high school restroom. These admissions began during voir dire when Appellant's counsel informed the venire that Appellant had been convicted of first-degree murder and forcible rape for raping and killing fifteen-year old Christine Smetzer in a restroom at McCluer North High School in St. Louis County (Tr. 418, 578). During opening statements, Appellant's counsel again told the jury that Appellant had done "something terrible" and committed a "horrible act." She told them that "[h]e killed Christine Smetzer in the bathroom at McClure [sic] North High School." (Tr. 782).

After the State rested its case, Appellant presented the testimony of Dr. John Rabun, a forensic psychiatrist, who evaluated Appellant concerning his criminal responsibility for killing Mr. Thomas. (Tr. 1003, 1008-09, 1012). Dr. Rabun testified that he had reviewed numerous records concerning Appellant's mental condition, including "some prior evaluations for a case that resulted in him [Appellant] going to the Department of Corrections." (Tr. 1014). These prior evaluations had been performed after Appellant had been charged with Christine Smetzer's murder. (Tr. 180-81).

During cross-examination, the prosecutor asked Dr. Rabun whether he was aware that after the Smetzer murder Appellant made claims about hearing voices. (Tr. 1099). Dr. Rabun denied that Appellant had blamed "voices" for his killing of Smetzer, but

agreed that Appellant first claimed to have heard voices in his second interview with Dr. Richard Scott, who evaluated Appellant during the prosecution of the Smetzer murder :

Q. Are you aware that after the murder of Christine Smetzer he made very similar claims about hearing voices?

A. No, he never tried to link–he has never tried linking the voice to the behavior. He only has made those statements at some point in the County Justice Center before he stood trial for that case, but he never has said "voices" told me to do this at McClure [sic] North. He has never said that.

Q. But he started in his second interview with Dr. Scott, at least started to claim that he heard voices?

A. That's correct.

Q. And he did not say that to Dr. Scott in the first interview?

A. No, he did not.

Q. All right. With regard to–are you familiar with the facts of that first murder

A. I have never read the police report, no.

Q. Are you aware that Christine Smetzer died of asphyxiation from having her throat forced up against the side of the toilet and her face into the water?

(Tr. 1099). At this point, Appellant's counsel objected, approached the bench, and explained to the trial court her concern about how much detail the prosecutor was going to reveal about the Smetzer murder in cross-examining Appellant's expert witness:

[Appellant's Counsel]: Judge, I want to object at this point. I don't know how far counsel is planning on taking this line of questioning, but we had filed a pre-trial motion about this, and I understand the jury has already heard the basic facts of this Smetzer case, and it's just my concern that counsel is getting ready to go through a long and very detailed and very gory recitation of the facts from the Smetzer case.

[The Prosecutor]: Well, Your Honor, I think the facts, particularly with their similarity to what happened in the second murder, are such that it's something that is reasonable to ask the doctor if he considered this, because he said there is no motive for this killing, and I think this shows that sex may well have been the motive.

The Court: Okay. I think so far he hasn't violated the order, because he just talked about the asphyxiation, and I'll allow you a very brief description of that. And what else do you want to get into?

[The Prosecutor]: Well, as I understand your order I'm permitted to bring forth– I'm permitted, I think that your ruling limited me to a description of how this young lady was killed and her cause of death. I don't intend to go further that that.

The Court: Well, are you going to get into the sexual aspect of that?

[The Prosecutor]: I intend to mention that this occurred while he was raping her.

The Court: Okay. Just that mere statement, okay, but just a very brief factual statement.

[The Prosecutor]: Yes, ma'am.

The Court: Okay. On those guidelines I'll allow you to proceed, and the objection will be overruled.

(Tr. 1100-01).

The prosecutor then simply repeated the question that precipitated the bench conference: "Doctor, again, were you aware that the defendant in murdering Christine Smetzer caused he death by asphyxiation, by thrusting her throat up against the toilet and her head into the water of that toilet and raping her?" (Tr. 1101-02). In response, Dr. Rabun admitted that he was "not aware of the details" of the Smetzer murder and that because he had "not read the police report" concerning the Smetzer murder that "he was relying on Dr. Scott's synopsis" of it. (Tr. 1102).[7]

The prosecutor offered no further details or descriptions of the Smetzer murder, but questioned Dr. Rabun concerning the similarities of the two crimes and tested the basis of Dr. Rabun's opinions, including his opinion that sex was not a motive in either

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[7]Dr. Scott, who later testified for the prosecution in this case, opined that Appellant suffered from no mental disease or defect with respect to the Smetzer case, but was simply malingering. (Tr. 1199-1200, 1212, 1214).

murder. During this questioning, Dr. Rabun conceded that he only had a "limited knowledge" of the Smetzer murder and agreed that sex might have been a possible motive in both cases:

> [The Prosecutor]: The point is, however, and what I'm trying to get to here, is that there is some indication that the defendant had anal intercourse with Mr. Thomas at or near the time Mr. Thomas was murdered. That's very similar behavior; is it not?
>
> A. He mentioned to me that he had anal intercourse with him the day before. I don't know if there is strong evidence to suggest that he did at the time.
>
> Q. If there were would you accept the premise that there is similar behavior in the two incidents?
>
> A. It is and it is not. It's too [sic] very different types of victims, a young white female and an older black inmate.
>
> Q. Well, in each instance that's what was available.
>
> A. I'm just pointing out there is stark differences.
>
> Q. Of course. But my point is that there are also very stark similarities.
>
> A. There are some similarities, yes.
>
> Q. With regard to that, does that not suggest that contrary to your opinion that in fact sex may well have been the motive?

A. Again, I have only a limited knowledge base on which to draw from on the McClure [sic] North, only Dr. Scott's synopsis, and that suggests there were other individuals involved.

Q. But that–

A. And in this case we have an individual who reports consistently that voices told him to do this incident.

Q. All right. I understand that you are saying that, but the question remains, do not the similarities suggest that, in fact, there may have been the common motive of sex?

A. It's possible.

(Tr. 1103-04).

Although evidence of prior bad acts or crimes is generally inadmissible unless logically and legally relevant, "[t]rial courts retain broad discretion in deciding the permissible scope cross-examination, and an appellate court will not reverse a conviction absent an abuse of that discretion." State v. Goodwin, 43 S.W.3d 805, 817 (Mo. banc 2001), *cert. denied*, 534 U.S. 903 (2001). "Where a psychological expert's opinion of mental illness is before the court, the validity and weight of the opinion may be tested on cross-examination concerning the expert's knowledge of fact surrounding the defendant's mental status, including the accused's past interactions that bear on the opinion." *Id.*; *see also* State v. Parker, 886 S.W.2d 908, 927 (Mo. banc 1994), *cert. denied*, 514 U.S. 1098

(1995) (Prosecutors have wide latitude in cross-examining psychological experts because the factual basis for psychiatric testimony is particularly important."); State v. Dewey, 86 S.W.3d 434, 439 (Mo. App. W.D. 2002).

In *Goodwin*, the defendant, who was charged with first-degree murder, complained that the State elicited details about his prior bad acts in cross-examining his expert witness, a psychologist. *Id.* This Court held that in cases such as that, "psychological expert testimony is particularly crucial." *Id.*

Here, the prosecutor's questions properly tested the basis for the opinion of Appellant's expert. This expert testified that he had reviewed records on the Smetzer murder in forming his opinion on Appellant's mental condition in this case. Moreover, he testified that Appellant suffered from paranoid schizophrenia and that he committed the murders after hearing voices. (Tr. 1068, 1075-76). As the testimony quoted above demonstrates, Dr. Rabun also disagreed with the prosecutor's suggestion that sex may have been a motive in the murder of Mr. Thomas and denied that this case was similar to the Smetzer case. The propriety of the prosecutor's cross-examination is demonstrated by the fact that Appellant's expert admitted that he was not familiar with the details of the Smetzer murder, but relied on the synopsis of Dr. Scott, who later testified for the State in this case. Appellant's witness also ultimately conceded that this case had similarities with the Smetzer and that sex may have been a possible motive in both the Smetzer case and this case.

In addition, the transcript reveals that Appellant's counsel simply wanted to insure that the prosecutor was not going to exceed the scope of the court's pre-trial order about the amount of detail to which the jury would be exposed concerning the Smetzer murder. The court determined that the prosecutor's proposed question would not violate the order, and that question did not include any "gory" recitation of facts beyond what the jury already knew. One could reasonably conclude from reading the transcript that Appellant's counsel was satisfied that the prosecutor's question was not excessive from the fact that no further objection was made and that no limiting instruction was sought.

Notwithstanding these circumstances, Appellant contends that the trial court committed plain error by relying on two cases that do not even involve the issue of cross-examination of a psychological expert. In State v. Burnfin, 771 S.W.2d 908 (Mo. App. W.D. 1989), the court held that evidence which showed that the defendant was seen smoking marijuana in the town square immediately before the events leading to the murder had no bearing on any issue in the case and did not tend to prove that the defendant was guilty of second-degree murder. *Id.* at 911-12. During cross-examination of the expert, the State questioned her about details of Appellant's medical records, including treatment at various mental health facilities. *Id.* at 912. The court held that while the prosecutor could have argued that the opinion of the defendant's expert was suspect based on the defendant's past acts, it was improper for the prosecutor to suggest that the defendant was guilty of murder because he had acted aggressively in the past.

Driscoll, 55 S.W.3d at 354-55. Again, nothing in *Driscoll* pertained to the cross-examination of an expert witness concerning the defendant's mental health.

Appellant suffered no manifest injustice from the prosecutor's cross-examination of Appellant's expert witness. The extent of cross-examination the trial court permitted of Appellant's expert witness was a proper test of the expert's opinion. The trial court did not abuse its discretion, much less commit plain error, in allowing this cross-examination.

III.

The trial court did not err in quashing subpoenas and failing to review *in camera* the mental health records of a rebuttal witness called by the State because Appellant failed to make any showing that this witness was incompetent to testify or that these records contained any specific evidence pertaining to that issue, and this rebuttal witness was not the victim of the crime or a "key witness" for the prosecution.

Appellant contends that trial court erred in refusing to issue a subpoena for the psychological medical records of an inmate who testified as a rebuttal witness for the State.

Before trial, Appellant filed a motion to have the State disclose any psychiatric medical records pertaining to Scott Perschbacher, an inmate who later testified as a rebuttal witness for the State. (L.F. 265). The basis for this request was a statement in a police report that in 2002 Mr. Perschbacher "escaped" from St. Anthony's Hospital's Psychiatric Ward and another statement that Mr. Perschbacher was unable to attend a court hearing in 2002 because he was hospitalized at the Metropolitan St. Louis Psychiatric Center. (L.F. 265). Appellant suggested that he needed the psychiatric records from these facilities "to determine *if* there are records of mental conditions affecting his ability to be a competent witness." (L.F. 265) (emphasis added).

Appellant renewed his request for a court order to obtain these records just before voir dire began. (Tr. 20). The court denied this request because Appellant failed to show that these records were discoverable. (Tr. 21). The trial court did order that Mr. Perschbacher's entire Department of Corrections's file and the records regarding a then current charge against him be produced to Appellant. (Tr. 23, 27).

After the State rested its case, Appellant put on evidence to show that he suffered from paranoid schizophrenia. In addition to various mental health witnesses the State called to rebut this case, the State also called Scott Perschbacher to the stand. Mr. Perschbacher testified that after the murder, Appellant was put into a cell next to Mr. Perschbacher and that they communicated on several occasions through a common ventilation duct (Tr. 1259-62). Mr. Perschbacher said that Appellant admitted having sex with Mr. Thomas on two or three occasions before the murder and that Appellant knew that Mr. Thomas had wanted to get out of the cell, but that Appellant did not want to let him go. (Tr. 1262-64). Although Appellant initially told Mr. Perschbacher that his "father" told him to kill Mr. Thomas, Appellant later admitted that he didn't want "the bitch," meaning Mr. Thomas, to get out of the cell. (Tr. 1265).

Mr. Perschbacher also described "Cadillacs," which was a system of passing notes between inmates not in adjoining cells. (Tr. 1268). Mr. Perschbacher said he read notes from another inmate addressed to Appellant, which Appellant received and commented

upon, that gave Appellant advice on how to act "crazy" and stated that Appellant needed to "act the nut role" in this case. (Tr. 1269-70).

Appellant's counsel extensively cross-examined Mr. Perschbacher on his current charges, previous convictions, and bad conduct violations during his several stays in prison. (Tr. 1271-76, 1282-83, 1287-89). Mr. Perschbacher admitted that he was a drug addict, having taken heroin, cocaine, and methamphetamine. (Tr. 1279-80). He stated that he anticipated receiving a seven-year sentence with drug treatment on the charges pending against him at the time he testified in this case. (Tr. 1276).

Appellant's counsel asked Mr. Perschbacher if he had been "in any treatment facilities in 2002." When Mr. Perschbacher asked "[w]hat kind of treatments," Appellant's counsel simply said "any kind of treatment." (Tr. 1282). Mr. Perschbacher said that he had been in the St. Louis Metro Psychiatric Ward to get his medication, but denied that he had been in St. Anthony's psychiatric unit. (Tr. 1281-82). Appellant's counsel did not ask any further questions about the medication Mr. Perschbacher received.

Although defendants have the right to confront the witnesses against them, that right is satisfied by giving the defendant wide latitude at trial to cross-examine these witnesses. *State v. Goodwin*, 65 S.W.3d 17 (Mo. App. S.D. 2001)*See Parker*, 886 S.W.2d at 916.

A "defendant is not entitled to information on the mere possibility that it might be helpful, but must make 'some plausible showing' how the information would have been material and favorable." *Id.Goodwin*, 65 S.W.3d at 21. Here, Appellant asserts that the records *might* have had a bearing on Mr. Perschbacher's competency to testify. Determination of a witness's competency to testify is within the discretion of the trial court. State v. Robinson, 835 S.W.2d 303, 307 (Mo. banc 1992). To be incompetent to testify, "a witness must exhibit some mental infirmity *and* fail to meet the traditional criteria for witness competence." *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991),

cert. denied, 501 U.S. 1262 (1991)*State v. Seiter*, 949 S.W.2d 218 (Mo. App. E.D. 1997)65 S.W.3d at 21. The defendant argued that the victim's use of these drugs would affect her ability to remember and relate the events that occurred. *Id.* The court also held that defendant's failure to articulate specific facts supporting the claimed need for these records demonstrated that an *in camera* review of the records was also not warranted. 949 S.W.2d at 220. The trial court quashed the subpoenas and on appeal the defendant argued that this constituted error because the records may include "possibly exculpatory" evidence and "possible impeachment evidence." *Id.*

The court of appeals expressly noted that the defendant was seeking evidence in the records "which might 'possibly' be exculpatory or impeaching" and held that the "[d]efendant was not entitled to the production of the records on the mere possibility that the information contained" in them "might be helpful to his case. *Id.* at 221-22

The cases on which Appellant relies to support his claim that the trial court erred in failing to issue the subpoena or in conducting an *in camera* inspection in this case are readily distinguishable.

In State v. Harger, 804 S.W.2d 35 (Mo. App. E.D. 1991), the defendant, who was charged with rape, sought the victim's drug treatment records to determine if the victim took drugs on the day of the assault. *Id.* The defendant wanted the records for use as evidence of a prior inconsistent statement because the victim denied using cocaine on the day of the assault. The court remanded the case for an *in camera* inspection of those records.

In State v. Newton, 925 S.W.2d 468 (Mo. App. E.D. 1996), the defendant, who was charged with first-degree murder, kidnapping, and armed criminal action, sought the psychological records of the only eyewitness identifying the defendant as a participant in the kidnapping and murder of the victim. *Id.* at 472.[8] The court's opinion also noted that

[8]Later, after the trial court had conducted this in camera interview and the court of appeals affirmed its ruling finding that the records contained no evidence questioning the witness's competency to testify, this Court ordered the court of appeals to conduct its own in camera review. *See State v. Newton*, 963 S.W.2d 295 (Mo. App. E.D. 1998)State v. Newton, 963 S.W.2d 295 (Mo. App. E.D. 1998). The court of appeals did so and also concluded

a competency hearing had been held and that the defendant had specific information that the witness had previously suffered from hallucinations before the defendant sought her psychological medical records. *Robinson*, 835 S.W.2d at 307.

Appellant sought the subpoena for the treatment records because they *might* contain some evidence concerning Mr. Perschbacher's ability to testify. Appellant's failure to make any showing demonstrating that the records contained any specific information pertaining to Mr. Perschbacher's competency to testify is fatal to his claim for even an *in camera* inspection. A cursory review of Mr. Perschbacher's testimony shows that any claim that he was incompetent to testify was unfounded. Mr. Perschbacher's testimony reflects that he satisfied each and every component regarding competency to testify as a witness. Appellant's claim of need for these types of records in this case is less compelling than those in *Goodwin* and *Seiter*. In both of those cases, the defendants sought the crime victims' own medical records, but the courts refused to

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that the records contained no evidence suggesting that the witness was incompetent to testify. *Id.* at 297-98.

[9]Appellant also based his claim on the fact that Mr. Perschbacher threw excrement while in prison. While this may seem like bizarre behavior outside of prison, the record shows that it was not unusual behavior for inmates to engage in. One guard testified that an entire wing at Potosi was dedicated to "spitters and throwers." (Tr. 823).

find error not only for the trial courts' quashing subpoenas for those records, but also for the trial courts' refusals to conduct an *in camera* inspection of them.

To allow defendants access to any witness's medical records, especially those involving psychological or psychiatric conditions or treatment, by simply claiming that such records "might" contain impeachment evidence or information concerning the witness's competency to testify would open the door to mischief and abuse. Defendants could use such tactics to harass and intimidate not only victims, but also any other witness the State may call to prove its case. Most witnesses are nervous, or even hesitant, enough about testifying without the specter of having a criminal defendant peruse their private medical records. Even if a defendant succeeds in only forcing an *in camera* review of such records, this is enough to prompt some witnesses to resist testifying. **.**

The trial court did not plainly err or abuse its discretion in "allowing" the prosecutor to make "speaking objections during Appellant's counsel's closing argument because the trial court did not "allow" these objections to be made, and the prosecutor did not improperly expose the jury to facts outside the record and never accused defense counsel of lying or misleading the jury.

Appellant contends that the trial court abused its discretion in allowing the prosecutor to make "speaking objections" during Appellant's counsel's closing argument. Appellant argues that in making these objections the prosecutor referred to facts outside the record and suggested that defense counsel was lying or attempting to mislead the jury.

The first incident about which Appellant complains occurred during Appellant's guilt-phase closing argument when Appellant's counsel attacked the testimony of the State's expert witness, Dr. David Vlach:

> Appellant's Counsel: Dr. Vlach says he relied upon reports from the Potosi Correctional Center, and he relied upon a report from the officer who did the count in which that officer supposedly said, well, [Appellant] said his cell number and victim's cell number when he did the count. Why is that important? It's important because you heard the officer who did that 10:00 count. His name was Jerry Govreau. He came in here and he told you I didn't do the count. I was walking around knocking on doors. He didn't ask for name and number, and he was downstairs. That never occurred. I don't know where Dr. Vlach got that. He didn't get it from Jerry Govreau. I don't know where, I don't know where he got that. Why would that be in his report? It's not true.
>
> [The Prosecutor]: I'm going to object, Your Honor, that's a blatant misstatement of the evidence. She knows very well there is a statement that says that.
>
> The Court: I'll sustain as to the statement that is not true.

(Tr. 1433-34).

The next "speaking objection" about which Appellant complains occurred later during that same argument:

Appellant's counsel: By finding [Appellant] not guilty by reason of insanity he would be sent to Fulton State Hospital.

[The Prosecutor]: I'm going to object to this, Your Honor. This is the very material counsel didn't want in the instruction.

The Court: I'll sustain the objection.

(Tr. 1444). The trial court later refused Appellant's counsel's request for a curative instruction telling the jury that the court had determined that the instructions were proper. (Tr. 1457-58).

Appellant's final complaint concerns an objection that the prosecutor made during Appellant's counsel's penalty-phase closing argument:

[Appellant's Counsel]: We do not need to execute the mentally ill. I can't overstate the importance of this. Dr. Vlach, the psychiatrist told you that to this day the State, [Appellant] is being treated by the State with medications for schizophrenia to this day. If he does not have significant mental health problems, why? Why?

[The Prosecutor]: Object to this, Your Honor, that calls for speculation beyond the record. There may be very good reasons that are not in evidence.

The Court: The objection will be sustained.

(Tr. 1546-47). Appellant's counsel then continued with his argument that the evidence suggested that Appellant had significant mental health problems based on his treatment at Fulton State Hospital. (Tr. 1547).

Appellant's Point Relied On does not claim that the trial court erred in handling the prosecutor's various objections, but contends that the court erred in "letting the state make speaking objections that referred to matters completely outside the record" and that its "approval of this improper 'testimony'" was also error. (Appellant's Brief, p. 48). Appellant does not make any other claim, such as the court erred in the way it ruled on the objections or that it erred in refusing the one request for a curative instruction. Essentially, what Appellant is arguing is that the trial court erred in refusing to *sua sponte* declare a mistrial as a consequence of the prosecutor's "speaking objections."

But the declaration of a mistrial is a drastic remedy which should only be employed in the most extraordinary circumstances. State v. Sidebottom, 753 S.W.2d 915, 919-20 (Mo. banc 1988), *cert. denied*, 488 U.S. 975 (1989); State v. Drewel, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). Because the trial court is in a better position than an appellate court to evaluate the prejudicial effect of the incident giving rise to the mistrial request, this Court's review extends only to determining whether, as a matter of law, the trial court abused its discretion in refusing to declare a mistrial. State v. Young, 701 S.W.2d 429, 434 (Mo. banc 1985), *cert. denied*, 476 U.S. 1109 (1986). "Appellate courts are loath to reverse judgments for failure to declare a mistrial unless they are

convinced the trial court abused its discretion as a matter of law in refusing to do to." State v. Hill, 906 S.W.2d 420, 425 (Mo. App. S.D. 1995).

> The trial court has wide discretion in controlling the scope of closing argument and determining what constituted impermissible references and it is the trial judge who occupies the best position to observe the effect of contested statements on the jury. Unless that discretion is clearly abused to the prejudice of the accused, the trial court's rulings on such issues should not be disturbed on appeal. To find an abuse of discretion the prosecutor's statement must be clearly unwarranted."

State v. Castillo, 853 S.W.2d 381, 386 (Mo. App. E.D. 1993) (citations omitted).

The primary case on which Appellant relies to support his argument is not one dealing with "speaking objections" made by the prosecutor to a defendant's closing argument, but one in which the court held that a statement made during the prosecutor's own argument was improper. In State v. Greene, 820 S.W.2d 345 (Mo. App. S.D. 1991), the defendant's counsel argued that the photo array shown to the robbery victim was prepared in a manner suggesting that the police believed a "snitch" who had given information identifying the defendant as the perpetrator. Defense counsel then stated that:

> We don't even know who the snitch is. I never had the opportunity to cross-examine. [Defendant] never had an opportunity to confront.

Id. After the trial court overruled an objection to this argument, the prosecutor continued to argue that defense counsel knew the snitch's identity, but was telling the jury that he didn't:

> He knew who it was, he's the one–he knew before I did. He's the one that told me who it was. He pointed it out right in the hall today. He knew it, he stood up here and tells you he didn't know.

Id. at 347.

The court of appeals noted that the prosecutor's statements were "beyond the record and imply that defendant's counsel either lied or sought to mislead the jury, neither of which is supported by the record." *Id.* In *Castillo*, the court implied that the rule in *Greene* applied to situations where the prosecutor accuses the defense counsel of lying or misleading the jury. **.**

The trial court did not err in refusing Appellant's request that the jurors be allowed to take notes because Rule 27.08, the note-taking rule for criminal cases, leaves that decision to the sound discretion of the trial court, and the trial court properly exercised that discretion to insure that jurors would not be distracted and would pay attention to the evidence.

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[10]The particular discussion referred to by the prosecutor is also not included in the transcript.

Appellant argues that the trial court abused its discretion in refusing his request that the jurors be allowed to take notes in this case. But the rule applicable to juror note-taking in criminal cases gives the trial judge sole discretion to determine whether to allow the jurors to take notes:

> *If the court allows juror note-taking*, the court shall supply each juror with notebooks and pencils. Jurors shall not have their notes during recesses but may use their notes during deliberations. The court shall collect all juror notes immediately before discharge of the jury. After the jury is discharged, the court shall destroy the notes promptly without permitting their review by the court or any other person. Juror notes shall not be used to impeach a verdict.

Rule 27.08 (emphasis added).

Appellant's counsel requested that the trial court permit juror note-taking because the case was going to involve the testimony of a number of expert witnesses. (Tr. 742). The prosecutor expressed concern about allowing jurors to take notes because in his experience it tended to distract jurors from listening to the evidence. (Tr. 742-43). After determining that it had the discretion to determine whether to allow note-taking, the trial court decided not to let the jurors take notes in this case because it might distract them from listening to the evidence:

> Well, I think it's really interesting that the criminal rule and civil rules differ, because the civil [sic] rule simply starts out, "if the Court allows juror

notetaking," which is completely different from the civil rule which says that it shall be allowed.

So this explicitly allows that judicial discretion, and what I'm quite concerned about is not as it may have appeared earlier that I was concerned about finding tablets, because we've got them downstairs. We have pencils and all of that. It's my concern that people are going to be distracted by trying to take notes. They are going to miss hearing the next things for writing down one thing that they have. And I realize that the Supreme Court looked at this and studied the issue, but I think the fact that they left it up to the Court's discretion indicates that there is not an easy answer to this, and it's not just a cut and dried thing that for sure people should be allowed to take notes. At this point I'm going to deny the request to have the jurors take notes, and I'm going to give them the version of MAI-CR 3d 302.01 without notes.

(Tr. 743-44).

The trial court correctly concluded that Rule 27.08 gives it the sole discretion to decide whether jurors should take notes. Not only is this grant of discretion evidenced by the first sentence in that rule, it is amplified when Rule 27.08 is compared to its civil counterpart, Rule 69.03. The note-taking rule applicable in civil cases states "[u]pon the court's own motion or upon request of any party, the court *shall* permit jurors to take

notes." Rule 69.03. In other words, unlike the criminal rule, the civil rule requires the trial court to permit note-taking if either party requests it.

Although many criticisms against juror note-taking may be countered with reasons to permit it, the one irrefutable criticism against the practice is the one the trial court relied on in this case in exercising its discretion not to permit it:

> None of the reasons given opposing note-taking are particularly persuasive with the exception that the practice may divert a jurors [sic] attention from the activities in the courtroom. The court must be concerned about the jury's attentiveness to the witnesses [sic] demeanor because the jury determines the credibility of witnesses. . . . The question becomes whether an individual is able is able to take notes while remaining attentive to the evidence. We should entrust that observation to the trial attorneys and the decision to the sound discretion of the trial judge.

State v. Trujillo, 869 S.W.2d 844, 849 (Mo. App. W.D. 1994). Although *Trujillo* was decided before the effective date of the criminal note-taking rule, its statement that the decision on whether to permit note-taking should be left to the sound discretion of the trial court was apparently adopted by this Court in drafting Rule 27.03. Despite whether this was a case involving many expert witnesses, the trial court's reasons for not permitting note-taking were sound and it did not abuse its discretion in refusing Appellant's request to allow it.

VI.

The trial court did not plainly err in failing to *sua sponte* submit an instruction to the jury during the penalty phase telling it to sentence Appellant to life imprisonment if it found by a preponderance of the evidence that Appellant was mentally retarded because: (1) Appellant never requested such an instruction be given, even though the statute making this a potential issue in capital cases had been in effect since 2001; (2) the MAI-CR instruction on this issue was unavailable when this case was tried; (3) the statute making mental retardation an issue in capital cases applied only to crimes occurring after the date of the murder in this case; and, (4) Appellant was not entitled to such an instruction because he presented insufficient evidence from which a reasonable juror could find that he was mentally retarded.

Appellant argues that the trial court plainly erred during the penalty phase by not *sua sponte* instructing the jury on the mental retardation issue, even though the MAI-CR instruction was unavailable when Appellant's trial occurred. Even if such an instruction had been available, Appellant suffered no manifest injustice because the record shows that he was not entitled to such an instruction in that the evidence was insufficient for Appellant to carry his burden of proving by a preponderance of the evidence that he was mentally retarded.

In 2001 the General Assembly amended § 565.030 to provide that a defendant convicted of first-degree murder is ineligible for the death penalty if the jury finds by a preponderance of the evidence that the defendant is mentally retarded:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded;

Section 565.030.4, RSMo Supp. 2001. Subsection 6 of the amended statute defines mental retardation:

> As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

Section 565.030.7. Because Appellant's crime occurred on October 3, 1999, the amended version of the law did not apply to his trial. *See* Johnson v. State, 102 S.W.3d 535, 537 (Mo. banc 2003).

Before Appellant's trial began, the United States Supreme Court had decided Atkins v. Virginia, 536 U.S. 304 (2002), which held that "death is not a suitable punishment for a mentally retarded criminal." *Id.* at 310. The Virginia Supreme Court did not decide the case on the issue of whether the defendant was, in fact, mentally retarded, an issue on which conflicting evidence had been adduced.*Penry v. Lynaugh*, 492 U.S. 302 (1989)*Id.* at 335. The Court in *Atkins* held only that the Eighth Amendment prohibited the execution of the mentally retarded and remanded the case. MAI-CR 3d 313.38*State v. Wright*, 30 S.W.3d 906 (Mo. App. E.D. 2000)*Wright*, 30 S.W.3d at 912.

No plain error occurred here because the failure to instruct the jury on this issue did not affect its verdict. Not only does the record contain insufficient evidence from which the jury could have found by a preponderance of the evidence that Appellant is mentally retarded, Appellant failed to present enough evidence that would have required the court to even submit such an instruction.

The only evidence Appellant presented remotely relating to this issue came from the videotaped testimony of Dr. Syed, a psychiatrist and Department of Corrections consultant. (Defendant's Ex. F, pp. 4-5). Dr. Syed testified that he interviewed Appellant twice–once for thirty minutes and the other for fifteen minutes–in 1998 at the Fulton Reception and Diagnostic Center as part of an evaluation when Appellant entered the correctional system. (Defendant's Ex. F, pp. 5-6,17). Dr. Syed also testified that he did a "quick review" of Appellant's records that were "available" to him. (Ex. F, p. 6).

Dr. Syed did not perform any intelligence testing on Appellant, but testified that the records he saw showed that Appellant functioned in the borderline range of intellectual abilities:

> [Appellant's Counsel]: Okay. Did you also–did the records also contain some previous intelligence testing?
>
> [Dr. Syed]: Yes. The intelligence testing indicated that he was functioning at what appeared to be the borderline range of intellectual abilities.

(Defendant's Ex. F, p. 7). In response to a leading question from Appellant's counsel, Dr. Syed agreed that Appellant had some scores in the mildly retarded range and other scores in the low average range:

> [Appellant's Counsel]: Okay. Did he have some scores, verbal scores, for example, in the mildly retarded range and then some other scores in the low average range?
>
> [Dr. Syed]: That's correct.

(Defendant's Ex. F, p. 7). Dr. Syed conceded that his interaction with Appellant was simply an evaluation and that one could not do a comprehensive examination in that limited time period. (Defendant's Ex. F, p. 18). He also testified that his evaluation was based only on what Appellant had told him and on the records he reviewed. (Defendant's Ex. F, p. 18).

Appellant presented no other evidence to prove that he was mentally retarded. Significantly, no witness testified that Appellant "fit the definition of 'mental retardation' set out in section 565.030.6." *See* Taylor v. State, No. SC85119 (Mo. banc Jan. 27, 2004). This statutory definition, adopted in 2001, was known to Appellant at the time of his trial in January 2003, yet he offered no evidence whatsoever to demonstrate that he fit under it. Also, that subsection does not define mental retardation with respect to any particular intelligence test score. The remaining evidence Appellant cites in support of his claim of mental retardation simply consists of his recitation of other evidence surrounding his childhood and his interpretation of the Diagnostic and Statistical Manual of Mental Disorders as applied to that evidence.

"In Missouri, an expert is permitted to rely on hearsay evidence to support an opinion, even though the hearsay evidence is not independently admissible, if that evidence is of a type reasonably relied upon by other experts in that field." State v. Gary, 913 S.W.2d 822, 830 (Mo. App. E.D. 1995), *overruled on other grounds*, State v. Carson, 941 S.W.2d 518, 520 (Mo. banc 1997). Such hearsay statements may be considered only on the credibility of the expert's opinion, but they are not substantive evidence of the truth of the statement's assertions. *State v. Brown*, 996 S.W.2d 719 (Mo. App. W.D. 1999).

The trial court did not abuse its discretion in striking veniremember Janette Salmon for cause during death-qualification voir dire because the record shows that

this veniremember was equivocal in her responses in that she stated she could not vote for the death penalty, but then suggested that she could do so only in the case of mass murder, and then later returned to her initial position that she could never vote for it.

Appellant contends that the trial court abused its discretion in striking veniremember Salmon for cause during death-qualification voir dire. The trial court properly exercised its discretion, however, when Ms. Salmon equivocated on whether she could consider the death penalty, and her answers suggested that she could not follow the court's instructions on this issue.

During the prosecutor's death-qualification voir dire, Ms. Salmon flatly stated that she could not vote for the death penalty:

> [The Prosecutor]: Ms. Salmon, is it. Same question, final point of decision, could you vote for the death penalty?
>
> Venireperson Salmon: Since I filled out this questionnaire I have given this a great deal of thought, and I don't think I could vote for the death penalty.
>
> [The Prosecutor]: No matter what the evidence was?
>
> Venireperson Salmon: Not unless it was a mass murderer or something like– something like at the Towers.
>
> [The Prosecutor]: I can understand that, but whatever the defendant is accused of, he's not accused of being a mass murderer. That's not what we're dealing

with here. All of you can sit here and say, sure, and say, well, if it were Adolph Hitler or something like that, but in a reasonable situation you're saying you could not?

Venireperson Salmon: No.

[The Prosecutor]: I'm not going to try and change your mind, but I take it that that is your final answer on the subject?

Venireperson Salmon: Yes, it is. I have given it a great deal of thought since the questionnaire came out about this.

(Tr. 244-45). Although Appellant's counsel attempted to rehabilitate Ms. Salmon during her turn at voir dire, Ms. Salmon unequivocally stated that she would not consider the death penalty even in light of Appellant's counsel's statement to the venire that Appellant had a prior murder conviction:

[Appellant's Counsel]: Ms. Salmon, anything about what I have just said, does that change your position at all?

Venireperson Salmon: No.

[Appellant's Counsel]: From earlier?

Venireperson Salmon: Not really.

(Tr. 299-300).

The standard for determining whether a prospective juror may be excused for cause based upon his or her views on punishment is whether those views would "'prevent

or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985), *quoting* Adams v. Texas, 448 U.S. 38, 45 (1980). The qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. State v. Christeson, 50 S.W.3d 251, 265 (Mo. banc 2001), *cert. denied*, 534 U.S. 978 (2001). The trial court is in the best position to evaluate the qualifications of a veniremember and has broad discretion in making that determination. *State v. Rousan*, 961 S.W.2d 831 (Mo. banc 1998),

cert. denied, 524 U.S. 961 (1998)*Christeson*, 50 S.W.3d at 265. The trial judge's exercise of discretion in excusing a prospective juror has been upheld in cases similar to this one. *See, e.g.*, State v. Storey, 40 S.W.3d 898, 905 (Mo. banc 2001), *cert. denied*, 534 U.S. 921 (2001) (veniremember initially said he could never return a death sentence, then said he could in a "very severe case"); State v. Winfield, 5 S.W.3d 505, 510-511 (Mo. banc 1999), *cert. denied*, 528 U.S. 1130 (2000) (veniremember initially said she "[didn't] think she could" assess death, then said that she could follow the law); State v. Clayton, 995 S.W.2d 468, 475-76 (Mo. banc 1999), *cert. denied*, 528 U.S. 1027 (1999) (veniremember stated that he could only vote for death in "extreme cases").

Even aside from the self-contradictory nature of Ms. Salmon's voir dire testimony on this issue, the closest she ever came to saying that she could vote for the death penalty was in a case of mass murder like that which occurred at the World Trade Center on

September 11. The term "mass murder" obviously has no objectively-identifiable meaning. Moreover, Missouri law permits application of the death penalty in substantially more cases than those involving mass murder. *See* § 565.032, RSMo 2000. Even setting aside Ms. Salmon's statement that she could never vote for the death penalty, her requirement that a case would required mass murder if she ever did vote for it reveals that her beliefs would substantially impair her ability to follow the law.

The trial court did not abuse its discretion in striking veniremember Janette Salmon for cause.

VIII.

The trial court did not err in failing to sua sponte revise Instructions 16 and 17 to include language requiring that the determinations required by those instructions be found beyond a reasonable doubt because the MAI-CR pattern instructions on which these instructions were based does not contain this language, and neither this Court's decision in *State v. Whitfield*, nor the Constitution, requires that this language be included in those instructions.

Appellant, relying on this Court's opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), contends that the trial court plainly erred in submitting penalty-phase Instructions Nos. 16 and 17 because those instructions did not tell the jury that the State bore the burden of proving beyond a reasonable doubt: (1) that the circumstances in aggravation of punishment, taken as a whole, warranted the death sentence (No. 16); and, (2) that the evidence in mitigation was not sufficient to outweigh the evidence in aggravation (No. 17).

Instruction 16, patterned after MAI-CR 3d 313.41A (10-1-94), provided:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 15 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

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 submitted in Instruction No. 15. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 329). Instruction No. 17, patterned after MAI-CR 3d 313.44A (10-1-94), provided:

If you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.

As circumstances that may be in mitigation of punishment, you shall consider:

1. Whether the murder of Shakrein Thomas was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. The age of the defendant at the time of the offense.

You shall also consider any facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 331).

Instructions Nos. 16 and 17 are derived from § 565.030.4 which provides in pertinent part:

The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) 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;

Section 565.030.4 (2) and (3).[11]

For appellant's argument to succeed, this Court must accept a premise which is untrue–that the jury must find the existence of the non-statutory aggravating circumstances beyond a reasonable doubt to find that the defendant is eligible for a death sentence. But this Court has held–even after *Whitfield*–that the existence of one statutory

[11]"In 2001, . . . the legislature eliminated step 2 as a required separate finding." *Whitfield*, 107 S.W.3d at 259 n.5; *see also* § 565.030, RSMo Supp 2002.

aggravating circumstance is sufficient to support a death sentence. *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000)*State v. Smith*, 649 S.W.2d 417 (Mo. banc 1983),

cert. denied, 464 U.S. 908 (1983)*State v. Bolder*, 635 S.W.2d 673 (Mo. banc 1982),

cert. denied, 459 U.S. 1137 (1983)*Gregg v. Georgia*, 428 U.S. 153 (1976)*Smith*, 649 S.W.2d at 430. The use of discretionary judgment in making this factual determination is apparent: "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no 'central issue' from which the jury's attention may be diverted. . . . In this sense, the jury's choice between life and death must be individualized." California v. Ramos, 463 U.S. 992, 1008 (1983).

Because of the qualitative, individualized nature of the factual determinations to be made in determining whether death is warranted in a particular case, and the constitutional requirement that no specific legal rule, beyond finding a statutory aggravating circumstance, may be applied to the jury's consideration of this issue, the

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[12]Before that amendment, this subsection provided: "If the trier does not find beyond a reasonable doubt that anyone or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together with any other authorized aggravating circumstances found, warrant imposing the death sentence; . . . ."

Constitution does not require that these determinations be made beyond a reasonable doubt. "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in consideration of aggravating and mitigating circumstances[.]" Zant v. Stephens, 462 U.S. 862, 890 (1983).

> We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." . . . Equally settled is the corollary that the Constitution does not require the State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

Harris v. Alabama, 513 U.S. 504, 512 (1995) (citation omitted).

For example, in this case the statutory aggravating circumstance was that Appellant had been previously convicted of first-degree murder. This statutory aggravating circumstance, like all others, can be objectively applied to the facts of every murder case in determining whether a particular defendant is eligible for the death penalty. If a particular defendant has been so convicted, then he is eligible for the death penalty. If he has not been so convicted, then he are not. This determination can be made beyond a reasonable doubt. It simply involves applying the statutorily defined aggravating circumstance, *i.e.*, prior conviction for first-degree murder, to the factual circumstances of the case.

But making a determination of whether the circumstances in a case taken as whole warrant imposition of the death penalty, or whether the mitigating circumstances in a particular case outweigh the aggravating circumstances, is something entirely different. No statutory definition can be crafted to cover all the cases that might be considered. Consequently, a jury can make no finding beyond a reasonable doubt of an identifiable fact in such a case since the determination is made by considering all the circumstances of a particular case. And all would agree that no two cases are exactly alike.

Appellant argues that Ring v. Arizona, 536 U.S. 584 (2002), which was spawned by the Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), and which requires that a jury, not a judge, determine whether a statutory aggravating circumstance is proved in capital cases, raised the burden of proof for every step (except step 4) in penalty-phase deliberations under Missouri law. But the issue in *Ring* was limited only to whether a statutory aggravating circumstance must be found by a jury instead of the judge–the Court expressly stated that it was not considering any claim regarding mitigating circumstances or whether a jury must make the ultimate decision whether to impose a death sentence. *Id.* at 609, *quoting Ring*, 536 U.S. at 602, *citing People v.*

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[13]Any doubt about the limitation of the Court's holding in *Ring* is resolved by the concurring opinion of Justice Scalia: "What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed." *Id.* at 612 (Scalia, J., concurring)

Danks, 82 P.3d 1249 (Cal. 2004)*Oken v. State*, 835 A.3d 1105 (Md. 2003)*Torres v. State*, 58 P.3d 214 (Okla. Crim. App. 2002),

cert. denied, 538 U.S. 928 (2003)*Whitfield*, 107 S.W.3d at 262. While the opinion quotes language from *Ring* (which quoted *Apprendi*) about the jury having to find "beyond a reasonable doubt" the facts increasing the authorized punishment, this language was not relied upon by this Court in its holding, nor was it necessary for either the constitutional violations in *Ring* or *Whitfield* to be remedied, since in both cases judges, not juries, found all the facts necessary to impose punishment, including the existence of a statutory aggravating circumstance. *Whitfield*, 107 S.W.3d at 261-62.

Other than this one quote, the *Whitfield* opinion does not say that steps 2 and 3 must be found beyond a reasonable doubt. Even in its analysis finding that steps 2 and 3 were "facts" requiring jury determination, this Court recognized the evaluative nature of these two steps, identifying them not as "elements" or "provable facts," but as "case-by-case factual determination[s] based on all the aggravating facts the trier of fact finds . . . present in the case" and "factual finding that are prerequisites to the trier of fact's determination" of death eligibility. *Whitfield*, 107 S.W.3d at 269. Had this Court's

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(emphasis in original). Although six Justices joined the majority opinion, two of those were Justices Scalia and Thomas, and Justice Thomas also joined Justice Scalia's concurring opinion. Without these two votes, the Court's opinion in *Ring* does not command a majority of the Court.

holding been as extensive as Appellant suggests, there would undoubtedly have been far more cases–perhaps every case resulting in a death sentence–that would have been affected by the holding. *Whitfield* should not be read as broadly as Appellant suggests.

Even more tellingly, in October 2003, less than four months after issuing its opinion in *Whitfield*, this Court promulgated new jury instructions pertaining to penalty-phase deliberations in capital cases. *See* Order, In re: Revisions and withdrawals to MACH-CR and MAI-CR 3d (Mo. banc Oct. 7, 2003); MAI-CR 3d 313.48, 313.48A, 313.48B. Even under the revised instructions, the beyond a reasonable doubt standard still applies only to the finding of a statutory aggravating circumstance. The revised instructions do not require the jury to find beyond a reasonable doubt either that the facts and circumstances in aggravation of punishment taken as a whole warrant imposition of a death sentence, or that the mitigating circumstances do not outweigh aggravating circumstances. MAI-CR 3d 313.48A. This Court obviously considered *Whitfield* in revising its instructions because the penalty-phase verdict forms require the jurors to answer special interrogatories when it cannot agree on punishment so that the court can determine at what stage of deliberations the jurors deadlocked. MAI-CR 3d 313.58, 313.58A, 313.58B.

In light of this Court's approval of the revised instructions, Appellant's argument that *Whitfield* requires proof beyond a reasonable doubt of the determinations made in steps 2 and 3 misapprehends the holding of *Whitfield*, which is simply that the jury, not

the court, must make the determinations required by all but the last stage of penalty-phase deliberations.

In sum, the Constitution requires only that a jury find a statutory aggravating circumstance beyond a reasonable doubt to make a defendant is eligible for the death penalty. Whatever else is required under § 565.030 in addition to this constitutional requirement to make a defendant either eligible or selectable for a death sentence is not required by the Constitution, and a jury need not make these determinations, whether they involve finding facts or exercising discretion, beyond a reasonable doubt.

IX.

The trial court did not commit error, plain or otherwise, in overruling Appellant's Motion to Quash the Information and the court did not exceed its jurisdiction in sentencing Appellant to death because the State is not required to plead the statutory aggravating circumstances or any other facts on which it intends to rely under § 565.030.4(1), (2), or (3), RSMo 2000, in the Information in that: (1) this claim has been repeatedly rejected by this Court; (2) neither *Apprendi v. New Jersey, Ring v. Arizona*, nor *State v. Whitfield* contain such a requirement; and (3) Appellant received pretrial notice of these circumstances according to § 565.005, RSMo 2000, which satisfied Appellant's rights under the Sixth and Fourteenth Amendments to be informed of the nature and cause of the accusation against him.

Appellant attacks the information on the ground that the statutory aggravating circumstances or other determinations required to be made under § 565.030.4 were not pleaded in the information filed against Appellant. But the only claim in Appellant's motion to quash the information was that the information failed to charge the statutory aggravating circumstances on which the State would rely at trial. (L.F. 188-89). This precise claim was recently rejected by this Court in State v. Tisius, 92 S.W.3d 751 (Mo. banc 2002), *cert. denied*, 123 S.Ct. 2287 (2003):

> The Appellant's contention of a violation of *Apprendi* is without merit: pursuant to section 565.005.1, the State gave Appellant notice that it would seek the death

> penalty, and the aggravating circumstances were proved to a jury beyond a reasonable doubt. "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty."

Id. at 766-67, *quoting* State v. Cole, 71 S.W.3d 163, 171 (Mo. banc 2002), *cert. denied*, 537 U.S. 865 (2002); *see also* State v. Edwards, 116 S.W.3d 511, 543-44 (Mo. banc 2003) ("Where . . . the state gave the defendant pretrial notice, pursuant to section 565.005, of the aggravating circumstances it intended to prove at the penalty phase of trial, it was not required to list them in the indictment."); State v. Gilbert, 103 S.W.3d 743, 747 (Mo. banc 2003). This Court's decision in *Whitfield* offers Appellant no assistance on his claim that the information or indictment must allege these facts. Nothing in *Whitfield* suggests that the notice provided under § 565.005 is constitutionally inadequate.

Under § 565.005.1, RSMo 2000, the state is required to give the defendant notice "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The State did so in this case (L.F.42). Although phrased as a challenge to the charging document in this case, Appellant's real contention is that § 565.005.1 is unconstitutional under *Apprendi*.

Appellant's construction of *Apprendi* as creating a requirement that statutory aggravating circumstances be pleaded in the indictment or information is refuted by the language of that decision. The issue presented to the Court in that case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id.* at 476, 490. Thus, the holding of *Apprendi* concerned what matters must be submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the *Apprendi* Court's holding is insufficient to dispose of Appellant's reliance on that case, then the Court's express statement that it was not addressing what must be alleged in the charging document should be:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in *Almendarez-Torres v. United States*. We thus do not address the indictment question separately today.

Jones v. United States, 526 U.S. 227 (1999)*Apprendi*, 530 U.S. at 476.

The issue in *Jones* concerned the construction of the federal carjacking statute. In particular, the issue focused on whether particular statutory language was an "element" of

the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a "sentencing factor" that need not be charged and could be found by the court. *Id.* at 240-50.[15] The majority's view was that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 122 S.Ct. at 2443. An examination of that decision confirms that it does not, any more than *Apprendi*, hold that statutory aggravating circumstances must be

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[14]This distinction between "elements" and "sentencing factors" was later abolished in *Apprendi*. 530 U.S. at 478-90.

[15]That this was *dicta* was confirmed in *Apprendi*. 530 U.S. at 472-73.

[16]*See e.g.*, *Poole v. State*, 846 So.2d 370 (Ala. Crim. App. 2001)Poole v. State, 846 So.2d 370, 385-87 (Ala. Crim. App. 2001); *State v. Nichols*, 33 P.3d 1172 (Ariz. App. 2001)State v. Nichols, 33 P.3d 1172, 1174-76 (Ariz. App. 2001); *State v. Mitchell*, 543 S.E.2d 830 (N.C. 2001),

cert. denied,122 S.Ct. 475 (2001)State v. Mitchell, 543 S.E.2d 830, 842 (N.C. 2001), *cert. denied*,122 S.Ct. 475 (2001); *United States v. Sanchez*, 269 F.3d 1250 (CA11 2001),

cert. denied, 122 S.Ct. 1327 (2002)United States v. Sanchez, 269 F.3d 1250, 1257-62 (CA11 2001), *cert. denied*, 122 S.Ct. 1327 (2002).

pleaded in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n.3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Apprendi, 530 U.S. at 477 n.3. The only constitutional provision relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. Blair v. Armontrout, 916 F.2d 1310, 1329 (CA8 1990). The difference between the rights guaranteed by the Fifth Amendment and those guaranteed by the Sixth and Fourteenth Amendments is instructive. The Fifth Amendment's Indictment Clause specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and do not specify

the form that this notice must take.[17] Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. *Hartman*, 283 F.3d at 194-96; *Blair*, 916 F.2d at 1329. Under Missouri law, Appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in *Apprendi*, *Ring*, or any other case supports Appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Appellant's reliance on State v. Nolan, 418 S.W.2d 51 (Mo. 1967), is also misplaced. In *Nolan*, the defendant was convicted and sentenced of the crime of first-degree robbery by means of a dangerous and deadly weapon, which carried a greater penalty than the crime of first-degree robbery. *Id.* at 54. Here, by contrast, Appellant was given notice of the statutory aggravating circumstances upon which the State intended to rely. Also, this Court's later decisions in *Cole*, *Tisius*, *Edwards*, and *Gilbert* control over the holding in *Nolan*, which is distinguishable on its facts.

Appellant bases his claim on his contention that Missouri law recognizes two distinct offenses, "aggravated" and "unaggravated" first-degree murder. Because the

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[17] "[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. *Blair*, 916 F.2d at 1329. Fifth Amendment decisions

State failed to include that statutory aggravating circumstances in the information, Appellant claims that he was charged with only the "unaggravated" offense and was thus ineligible to receive the death penalty. But this Court squarely rejected this argument in *Tisius*. *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003)*Id.* at 739. Moreover, this statement was included in Part III of the opinion, which was joined by only three Justices.

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are therefore of "little value" in evaluating state indictments or informations. *Hartman v. Lee*, 283 F.3d 190 (CA4 2002)Hartman v. Lee, 283 F.3d 190, 195 n.4 (CA4 2002).

XI.

This Court should, in the exercise of its independent statutory review, affirm Appellant's death sentence because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's findings of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.

Appellant does not challenge the proportionality of his sentence, and this Court should exercise its discretion to affirm Appellant's sentence in this case. Under the mandatory independent review procedure contained in § 565.035.3, RSMo 2000, this Court must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the strength of the evidence and the defendant.

This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. State v. Ramsey, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1994).

Nothing in the record suggests that Appellant's sentence was imposed under the influence of prejudice, passion, or any other improper factor.

A comparison of the crime and the defendant in this case with those in similar cases further, and overwhelmingly, supports the imposition of the death penalty in this case. Defendant, who was already serving a life sentence for the first-degree murder of Christine Smetzer, was convicted of first-degree murder in this case for killing his cell mate, Mr. Thomas, while both were in the lawful custody of the Department of Corrections. This Court has consistently found death sentences imposed in such cases to be neither excessive nor disproportionate. *See, e.g.,* State v. Clemmons, 753 S.W.2d 901, 913-14 (Mo. banc 1988), *cert. denied,* 488 U.S. 948 (1988); State v. Schlup, 724 S.W.2d 236, 242-43 (Mo. banc), *cert. denied,* 482 U.S. 920 (1987); State v. Driscoll, 711 S.W.2d 512, 517 (Mo. banc 1986), *cert. denied,* 479 U.S. 922 (1986).

Moreover, the death penalty is appropriate when the defendant commits murder while serving a sentence on a previous murder. *See* State v. O'Neal, 718 S.W.2d 498 (Mo. banc 1986), *cert. denied,* 480 U.S. 926 (1987); State v. Zeitvogel, 707 S.W.2d 365 (Mo. banc 1986), *cert. denied,* 479 U.S. 871 (1986); State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982), *cert. denied,* 459 U.S. 928 (1982); *Clemmons*, 753 S.W.2d at 914.

Moreover, the facts of this case are undisputed. Appellant readily admitted that he killed his cell mate. The only issue pertained to whether Appellant was legally insane at the time of the murder. The weight of the evidence shows that he was not, and the jury properly concluded that Appellant was criminally responsible for this murder.

Finally, "[m]urder to avoid inconvenience to the murderer exhibits a lack of respect for human life that has been held to warrant the harshest penalty." State v. Skillicorn, 944 S.W.2d 877, 899 (Mo. banc 1997), *cert. denied*, 522 U.S. 999 (1997); State v. Gray, 887 S.W.2d 369, 389, *cert. denied*, 514 U.S. 1042 (1995);

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 21,661 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on March 1, 2004, to:

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818 Grand Boulevard, Suite 200
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_____

Assistant Attorney General