Sup. Ct. # 85235

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MICHAEL TAYLOR,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Charles County, Missouri,
11th Judicial Circuit, Division 3
The Honorable Lucy D. Rauch, Judge

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Michael Taylor was convicted of first-degree murder, §565.020, and was sentenced to death. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

STATEMENT OF FACTS

From birth to age two, Michael lived with his maternal grandparents, with whom he was very close (Tr.1019).[1] At two, he was separated from his beloved grandmother and returned to his mother and father (Tr.1019). He regressed, hating to leave his grandmother (Tr.1019).

Between the developmentally crucial ages of two and six, Michael was physically abused by his father (Tr.1018-19). Michael's father would beat him with a coat hanger wrapped in tape to discipline him for normal childhood behavior (Tr.1018). Michael witnessed acts of violence by his father against his mother, like seeing his father pull a knife on his mother and kick and beat her while she was pregnant with Michael's younger sister (Tr.1018-19).

[1] References to the records are as follows: trial transcript (Tr.); legal file (L.F.); transcript of pretrial proceedings on November 12, 2002 and December 3, 2002 (11/12/02 Tr.; 12/3/02 Tr.); sentencing transcript (Sent. Tr.); deposition of Ahsan Syed (Syed Tr.); and deposition of Michael Kemna (Kemna Tr.).

When Michael was not yet eight years old, he was sexually abused on a school bus (Tr.1020). He was held down by several boys and forced to perform oral sex on one of those boys (Tr.1020). Afterwards, the other boys urinated in Michael's mouth (Tr.1020). The bus driver reported the incident, and Michael was transferred to another school (Tr.1020).

Michael's mother abused him by hitting him with a plastic pipe after he ran away from home (Tr.1022). When a teacher noticed the bruises, the Department of Family Services intervened (Tr.1022). Michael's mother resisted their intervention, stating that she would discipline her child as she saw fit (Tr.1227).

Michael had a history of suicide attempts and depression over the years (Ex.F, at 9). At age seven or eight, Michael was evaluated for the first time, at St. Louis University, and showed evidence of a behavior disorder (Tr.1021). When he was a little older, he received counseling from two child psychiatrists at Washington University (Tr.1021). Throughout these contacts, it was recommended that Michael receive further treatment (Tr.1022). Any treatment he actually received, however, was very sporadic (Tr.1022,1024). He was placed in special education classes (Tr.1222; Ex.F, at 7).

In 1991, at twelve, Michael reported hearing voices telling him to kill himself (Tr.1023). Michael is genetically predisposed to psychotic illness (Tr.1016). His father and paternal uncle had schizophrenia, a paternal aunt had bipolar illness, and his paternal grandparents suffered from some unknown mental illness (Tr.1016; Ex.F, at 8).

Michael was admitted to residential treatment at Hawthorne Children's Psychiatric Hospital (Tr.1021-23). Although residential treatment had been recommended previously, this was his first in-patient treatment (Tr.1023-24). Michael stayed for two months and showed improvement (Tr.1024, 1226). He was diagnosed with a conduct disorder and post traumatic stress disorder (Tr.1025). The doctors recommended that Michael be put on medication, but his mother refused (Tr.1022).

In 1994, at age 15, Michael's behavior again changed with the death of his grandmother (Tr.1019). By the time Michael was 15, he had attended eleven schools (Tr.1222).

Michael's Prior Conviction

In January 1995, 15-year-old Michael was in attendance at his eleventh school, McClure North High School, when he was accused of raping and killing another student in the girl's bathroom (Tr.1513-14). He was placed in custody at the St. Louis County Jail, where he was placed on psychotropic medication (Tr.1108).

Awaiting trial, Michael was evaluated by a psychiatrist, Dr. Jeffries Caul, who diagnosed Michael with major depression with psychotic features (Tr.1079-80). Michael was also evaluated by Dr. Richard Scott, who found Michael competent to stand trial and concluded that he did not have a mental disease or defect excluding responsibility; instead, he had an adjustment disorder with anxiety; depressed mood chronic; and conduct disorder (Tr.1188-89,1216).

Dr. Scott reviewed Michael's records and interviewed Michael three times, totaling four-and-a-half hours (Tr.1186). Dr. Scott concluded that Michael was not hallucinating, had no delusions, and was not psychotic (Tr.1190). He believed Michael was a very disturbed, aggressive young man who was not able to function in structured settings and committed a wide range of acts against other children (Tr.1189). Dr. Scott acknowledged that Michael had significant problems, including an extremely abusive childhood (Tr.1217).

Dr. Scott believed that Michael's psychiatric records support a severe behavior disorder, but contained no reports of anything other than mild depression and no reports of psychosis that were sustained after evaluation (Tr.1191-92,1220-21). Dr. Scott noted that Dr. Banton, at Washington University, medicated Michael, thinking that the medications would help him whether he was psychotic or not, but did not confirm a diagnosis of psychosis (Tr.1205-1206,1227).

Dr. Scott conducted intelligence and personality testing (Tr.1192-93). Michael's IQ was 89, which is in the low average range (Tr.1194). The personality test showed a lot of different psychological problems but no indication of psychosis (Tr.1195-96). The Rorshak blot test indicated very significant symptoms of depression and a lot of trouble coping, but no thought disorder (Tr.1197). He acknowledged that stress can exaggerate psychological problems and that a possible interpretation of the personality tests was that Michael was making a "cry for help" (Tr. 1216,1230).

In his report, Dr. Scott stated that Michael did not need to be hospitalized (Tr.1229). But he noted that if Michael's anxiety and mood symptoms became much more severe, he should get inpatient treatment (Tr.1229).

In 1997, Dr. Scott did a supplemental report and re-interviewed Michael for three-and-a-half hours (Tr.1200). His conclusion did not change: Michael was competent to stand trial; he did not have a mental disease or defect excluding responsibility; and he was faking psychosis (Tr.1212).

Dr. Scott contacted Dr. Krasnoff, a psychologist at the St. Louis County Jail where Michael was in custody (Tr.1203). Dr. Krasnoff noted that as time progressed, Michael talked more about the hallucinations and got more specific about them (Tr.1203-1204). Dr. Krasnoff questioned the truth of the reported hallucinations and noted what he thought were Michael's attempts to manipulate the staff at the jail, consistent with faking his symptoms (Tr.1204-1205).

During the second examination, Michael was more restricted in his emotions and expressed less, but his thought processes were the same (Tr.1202,1206). He did not exhibit the mannerisms of people with schizophrenia (Tr.1207).

For the first time, Michael revealed to Dr. Scott that he heard voices (Tr.1208). He stated that since he was five, he had florid visual and auditory hallucinations (Tr.1202). He stated that since he was five, the Father of Darkness talked to him and told him to do things, and he explained much of harming others as relating to the hallucinations (Tr.1202,1209). Oddly, the Father of Darkness

was devilish looking and had horns (Tr.1210). Schizophrenics typically do not bring attention to the voices, as Michael was (Tr.1210). Dr. Scott concluded that Michael was malingering (Tr.1211).

At nineteen, Michael was convicted and sentenced to life imprisonment without the possibility of parole (Tr.1511-12). Michael arrived at the Department of Corrections in April, 1998 (Tr.1030). He was initially sent to the Fulton Reception and Diagnostic Center, where he was examined by a psychiatrist and received psychiatric treatment (Tr.1029-30).

The Charged Crime

Michael was then sent to Potosi Correctional Center, where he was diagnosed with major depression with psychotic features (Tr.1030). He reported auditory hallucinations from the Father of Darkness, continuing as late as August, 1999, to a psychiatrist and a psychologist (Tr.1030-31). He received medication but sometimes would not take it (Tr.1030-31).

On Sunday, October 3, 1999, Michael had been housed with Shackrein Thomas in Cell 28B in Housing Unit 3 for nine days (Tr.974). Because this was an administrative segregation unit, the inmates were restricted to their cells most of the time (Tr.794,828,833).

The cells were designed to house just one man (Tr.818,984-85). They were about 7-9 feet wide and 10-15 feet long (Tr.795,984). Each had a steel door, with a thin rectangular window and a "chuck hole" – a small hinged door within the

door through which the inmates would receive their meals or medications (Tr.797,888-89).

That night, two guards conducted the 7:00 count and noted nothing unusual in Cell 28B (Tr. 801,820-21,832,861). At 8:30, a guard and a nurse uneventfully distributed medication to Michael through the chuck hole (Tr.830,887).

At 10:30, another count commenced (Tr.830). Michael pressed a buzzer in his cell that notified the guards that he had an emergency (Tr.802-803,839). A guard left the control room and yelled up to Michael's cell (Tr.803). Receiving no answer, the guard went to Cell 28B and again asked why Michael had pushed the emergency button (Tr.806-807,877-78). Michael was standing in front of the cell door's window and did not respond (Tr.807-808). The guard could not see past Michael into the cell (Tr.808). He asked Michael to move, and asked where Shackrein was (Tr.809). Michael did not respond and did not move out of the way (Tr.809). The guard called for assistance (Tr.809).

The guard told Michael to cuff up – to turn around and place his hands behind his back and through the chuck hole (Tr.798,810). Although the guard opened the chuck hole, Michael refused to be cuffed (Tr.810-11). Two more guards arrived (Tr.811). They repeatedly asked what was wrong, but Michael did not reply (Tr.879).

Michael was "looking pretty much straight ahead, rocking his head slightly back and forth a little bit, you know, it was just bouncing a little bit just slightly" (Tr.879). He stared "straight ahead, rocking his head … kind of back and forth,

moving it around in such a way, it was just odd" (Tr.890). Michael was swaying back and forth (Tr.844,862). He finally leaned over and whispered something unintelligible (Tr.845). The guards eventually realized that Michael said, "my father told me to do it" (Tr.811,822,845,862). The guards again ordered Michael to cuff up, and Michael cooperated (Tr.811-12,845-46).

A guard took Michael out of the cell and locked him inside a steel phone cage (Tr.813,847-48). In the cell, Shackrein lay dead on the floor, his head resting on a pillow (Tr.812,848,895). Shackrein had scrapes to his neck and left cheek, and his left eye was swollen like "boxer's eye" (Tr.896,920-21,932,966). He had what appeared to be a bite mark on his lower middle back, and small cuts to his inside lip (Tr.920-21,925). He had cigarette burn marks on the inside of his forearms (Tr.883,966-67). He had slight defecation between the cheeks of his buttocks and a white creamy wet substance, but no evidence of anal trauma (Tr.931,967).[2] He had trazadone – an antidepressant – in his system (Tr.933). Shackrein died from asphyxiation by compression of his neck (Tr.908,930).

That night, Michael was questioned from 1:30 a.m. to 1:50 a.m. (Tr.976, 981; Ex.22). Michael explained that after the 7:00 count, he was sitting on his bunk, reading a book (Ex.22). His father – the Father of the Dark Side, or of Darkness – told him to send his cellmate to him (Ex.22). The Father of Darkness

[2] DNA testing confirmed that the white creamy substance found on Shackrein's boxer shorts matched Michael's DNA profile (Tr.950-51,954).

did not tell Michael how to kill Shackrein, but merely to send him to him (Ex.22). Michael knew death was the only way to travel to the dark side (Ex.22). He explained that his father talks to him often, which is why he sees the psychiatrist (Ex.22).

Michael hopped off the bunk and put on his shoes (Ex.22). Shackrein asked him what he was doing, and Michael told him he was going to send him to his father (Ex.22). Shackrein asked him who his father was and told Michael he wasn't going anywhere (Ex.22). Michael repeated that he was going to send him to his father and told him to "suit up" (Ex.22). Shackrein thought Michael was joking, so Michael hit him (Ex.22). Shackrein jumped up and rushed at Michael swinging (Ex.22). Michael put his arms up to block the blows and then swung back, striking Shackrein in the face (Ex.22). Shackrein stumbled backwards and sideways, and Michael slipped behind him and choked him (Ex.22). One arm choked Shackrein from the front while the other choked from behind (Ex.22). Shackrein fell to the floor (Ex.22). The struggle took less than twenty minutes (Ex.22).

Michael rolled Shackrein onto his back and put a pillow under his head (Ex.22). Michael didn't remember doing anything else to Shackrein (Ex.22). He used the toilet and then got back on his bunk to continue reading (Ex.22). He pushed the emergency button during the 10:00 count (Ex.22). At first he did not cooperate with the officers, because the Father of Darkness was telling him not to

cuff up (Ex.22). Once he was placed in the steel cage, Michael ran his head into the cage's wall, causing a noticeable lump on his forehead (Ex.22).

The next day, Michael gave a second statement with additional detail, as follows (Tr.976). He explained that after the 7:00 count, he was reading a book, when he thought he heard someone call his name (Ex.24). He asked Shackrein if he had called his name, but Shackrein said he hadn't (Ex.24). Michael returned to reading his book (Ex.24). Michael has been hearing these voices since he was five years old (Ex.24). The father tells Michael what to do, and Michael does it (Ex.24).

Michael choked Shackrein for ten to twenty minutes (Ex.24). As Shackrein slumped down, Michael slid down too (Ex.24). Three times, Michael said, "Father, it's done" but then Shackrein would move, so Michael would choke him for another couple of minutes (Ex.24). Finally, when Michael released his grip, Shackrein just fell to the floor (Ex.24).

Michael had to use the toilet, so he rolled Shackrein over and put his head on a pillow (Ex.24). He got back in his bunk and returned to reading (Ex.24). He tried to sleep but couldn't (Ex.24).

Michael looked down at Shackrein and said, "man, I don't know what you did … I don't know what you did to make my father tell me… what ya did, that was stupid … you know stupid… stupid" (Ex.24). Michael couldn't sleep (Ex.24). "I just hopped down off the bunk and I said, move out my way. That was stupid of you to do some shit like that. Then I sit down on the toilet. I just

got to lookin' at him, rocking back and forth, shaking my head. And you know … my father looking at me, he was like, you're not done… you're not done. I said what you mean I'm not done? I done did what you told me to do. He was like, you're not done…you're not done. And I just sit there and I said I don't know what you're talking about" (Ex.24).

Michael explained that the cigarette burn marks on his and Shackrein's arms were like keys to the different levels of the dark side (Ex.24). On Saturday, Michael made two burns on his arms, and then Shackrein did two (Ex.24). They also did two on their knees (Ex.24). With himself, Michael pushed down until the cigarette went out, but he said it did not hurt (Ex.24). Michael did some more on Sunday, but Shackrein didn't (Ex.24).

While Michael was sitting on the toilet, rocking back and forth, he heard an officer calling count (Ex.24). The officer did not stop at Michael's cell (Ex.24). The lights were off in the cell (Ex.24). Michael pushed the emergency button so the officers would take Shackrein away (Ex.24).

Michael denied that he had been having problems with Shackrein (Ex.24; Tr.989). In the first interview, he denied having sexual intercourse with Shackrein (Ex. 22; Tr.974), but in the second interview, he admitted that they had had consensual anal sex late Saturday (Ex.22,24; Tr.974,989).

In late October, 1999, the state charged Michael with first-degree murder and gave notice that it would seek the death penalty (L.F.29,41-42).

Michael is Sent to Fulton State Hospital

In November, Michael was transferred to the Fulton State Hospital at the request of Potosi's psychiatrist, because Michael was engaging in "para-suicidal behavior" by banging his head on the wall (Tr.1045). Fulton State Hospital is a maximum security forensic psychiatric hospital (Tr.1045). It has 30-50 beds for mentally ill prisoners (Tr.1046). As soon as prisoners were stabilized, they were returned to the Department of Corrections (Tr.1046,1091). The staff was especially attuned to watch for malingering and would quickly return malingerers to prison (Tr.1049,1055).

Although the average time a mentally disturbed prisoner spent at the hospital was one to two-and-a-half weeks, Michael was there approximately eight months (Tr.1046,1131,1156). He was watched 24 hours a day (Tr.1049). Three staff psychiatrists who treated Michael were Dr. William Eickerman, Dr. Ahsan Syed, and Dr. Bruce Harry. The team diagnosis was that Michael had paranoid schizophrenia in partial remission and anti-social personality disorder (Tr.1050,1159).

Dr. Eickerman:

Dr. Eickermann runs the Department of Corrections ward at the Fulton State Hospital (Tr.1115). He treated Michael there and later at Crossroads Correctional Center (Tr.1124).

Michael was quite psychotic, suffering from persecutory delusions and very specific and fixed auditory hallucinations (Tr.1051,1127). He was given a variety

of new, novel anti-psychotic medications but none were effective (Tr.1052,1127). Dr. Eickermann then resorted to Clozaril, an expensive and potentially life-threatening drug that required weekly blood monitoring to ensure that the white blood cells had not dropped too low (Tr.1052-53,1128-29). Given its dangerous side effects, Clozaril is only given as a last resort when a patient does not respond to other medications (Tr.1128). It would not be given to a patient simply to calm him down (Tr.1052). If the patient was not schizophrenic, Clozaril would sedate him beyond belief; Michael responded well to the Clozaril and was not overly sedated with it (Tr.1128-29).

When Michael left the hospital, Dr. Eickermann wrote a nine-page discharge summary, the longest he has ever written (Tr.1133). He was very concerned about Michael (Tr.1133). The discharge summary noted that Michael had auditory hallucinations, delusions, and self-mutilating behavior (Tr.1130). The discharge diagnosis was that he had schizophrenia, paranoid type, chronic, in partial remission (meaning that he could improve further on Clozaril) (Tr.1130). Dr. Eickermann did not think Michael was malingering (Tr.1134).

Dr. Syed:

Dr. Syed formed a working diagnosis of major depression with psychotic features (Ex.F, at 11). At the time of the exam, Michael had a flat affect and somber facial expression (Ex.F, at 10). There were undertones of depression (Ex.F, at 10). He reported mood swings from depressed, irritable, angry and distressed (Ex.F, at 10). Michael also reported that he talked to someone he knew

as the Father of Darkness, who told him to hurt others or himself (Ex.F, at 11). He has made over twenty suicide attempts (Ex.F, at 11).

Dr. Syed recommended that Michael be given an antidepressant, Paxil; to stabilize his mood, valproic acid; and Ativan to help control his anxiety (Ex.F, at 13). He also recommended individual therapy (Ex.F, at 14). Dr. Syed planned to see Michael again in 30 days but instead saw him two weeks later (Ex.F, at 14). Michael had stopped taking his medication, believing that he no longer needed them (Ex.F, at 15). Dr. Syed urged him to take the medications so that Michael's anxiety did not worsen or the voices get stronger (Ex.F, at 15-16).

Dr. Syed noted that intelligence testing indicated Michael was functioning at what appeared to be the borderline range of intellectual abilities – he had some scores in the mildly mentally retarded range and others in the low average range (Ex.F, at 7,12-13).

Dr. Harry:

Dr. Harry saw Michael three times while substituting for another doctor (Tr.1156,1161-62). Michael talked to himself and responded to things that other people couldn't hear (Tr.1157). At times, he had to be restrained because of his auditory hallucinations (Tr.1158). His records reference repeated incidents of self-mutilating, once even requiring restraints, and paranoid thoughts (Tr.1050,1160). He heard a voice from "Tashua" telling him that he would be better off dead and should kill himself (Tr.1160-61). He also had paranoid thoughts about staff members doing things to him and conspiring against him (Tr.1161).

When Michael left Fulton, he was housed at the Crossroads Correctional Center until trial (Kemna Tr.12,22).

Dr. John Rabun

Dr. John Rabun is a forensic psychiatrist who works at the St. Louis State Hospital conducting court-ordered pretrial evaluations and treating people who have been found incompetent to stand trial or not guilty by reason of insanity (Tr.1003,1008). He conducts forensic exams on a contractual basis and typically testifies for the state, since he seldom finds that a defendant has a mental disease or defect (Tr.1008,1010).

Dr. Rabun was retained by the defense to determine Michael's mental state at the time of the crime (Tr.1009,1012). In November 2000, he met with Michael for three hours (Tr.1013-14).

Dr. Rabun concluded within a reasonable degree of medical certainty that Michael was suffering from a mental disease – schizophrenia – at the time of the crime and that as a result, he lacked the capacity to know and appreciate the nature, quality, or wrongfulness of his conduct (Tr.1075-76). Dr. Rabun based his opinion on his meeting with Michael, interviewing Michael's mother, and reviewing the police reports, DFS records, and Michael's treatment records from Fulton State Hospital, Hawthorne Children's Psychiatric Hospital, Washington University, and St. Louis University; and the mental health evaluations from Michael's prior criminal case (Tr.1013-14). He also relied on the records and findings of Drs. Eickermann, Syed, and Harry (Tr.1044).

Dr. Rabun diagnosed Michael with paranoid schizophrenia and anti-social personality disorder (Tr.1056). Paranoid schizophrenia is a sub-type of schizophrenia (Tr.1067). With paranoid schizophrenia, the patient has prominent hallucinations or very strong paranoid delusions (Tr.1068). But the patient has otherwise organized speech, can dress himself, and is not catatonic (Tr.1067-68).

To be diagnosed with this mental disease, a patient must have (1) two or more symptoms; (2) the symptoms must have caused impairment in the patient's ability to function in society; and (3) the symptoms must have lasted at least six months (Tr.1060-63). Michael had two symptoms – delusions and hallucinations – and also had a negative symptom, a flat affect (Tr.1061). His symptoms by themselves and also perhaps by combination with his childhood abuse, have caused him a marked difficulty in forming relationships with others (Tr.1063). Michael's eight-month stay at Fulton State Hospital was itself long enough to show the illness was chronic (Tr.1064). Michael was not malingering (Tr.1071).

Dr. Rabun noted that long before Michael arrived at the Department of Corrections, he reported auditory hallucinations (Tr.1137). At twelve, Michael was in a psychiatric center and reported that he heard voices telling him to kill himself (Tr.1109). The voices come from two sources (Tr.1068). The way Michael describes the voices is characteristic of hallucinations (Tr.1072). The hallucinations may stem from Michael's past, since his father was extremely abusive to him and his mother (Tr.1070). Michael now assigns aggressive, violent behavior to the Father of Darkness (Tr.1070).

Dr. Rabun noted that Michael intertwines delusion with his auditory hallucinations (Tr.1044,1068). Michael hears voices outside his head from two sources – the Father of Darkness and Tashua (Tr.1036,1041). The voices are male and command Michael to harm himself and at times to harm others (Tr.1042). The voices are connected to a delusional level system comprised of seven levels (Tr.1042-43). Michael believes he needs to advance in the level system, and as he does so, he gets closer to the father (Tr.1042). The marks on his arms, caused by cigarette burns, are "keys" to the different levels (Tr.1043). Michael also displayed paranoid delusions, thinking that people at the hospital were trying to poison him (Tr.1068).

Michael displayed other symptoms of schizophrenia. He had a flat affect, typical of people with schizophrenia (Tr.1132). When Michael arrived at Fulton State Hospital, he did not think he was mentally ill and did not want to take medication (Tr.1053). This was significant, in that mentally ill people typically do not want to accept their illness (Tr.1054).

People with schizophrenia don't feel physical pain as sharply as "normal" people (Tr.1068). They often have self-mutilating habits such as Michael's burning his arms and legs (Tr.1069). At Fulton State Hospital, Michael banged his head against the wall repeatedly and scratched himself until he bled (Tr.1108-1109).

Of particular interest was the fact that Michael killed his cellmate within the cell, so that there was no question about who did it (Tr.1032-33). He called

officers to the cell, consistently admitted his involvement, and did not try to hide it (Tr.1033). In contrast, a person who knows what he did was wrong would try to conceal his actions (Tr.1033).

Dr. Rabun noted that Michael had not been taking his medication for at least nine days prior to Shackrein's death (Tr.1035). Michael had not heard any voices until right before the crime (Tr.1035). When Michael heard the voice initially, he thought Shackrein had said something (Tr.1036). If he were malingering, he would have said that he had been hearing the voices for days, or that he heard them the entire time he was strangling Shackrein (Tr.1072-73).

Dr. Rabun also noted that Michael did not claim that the Father of Darkness commanded him to kill Shackrein (Tr.1036-37). Instead, when the voice told Michael that it was time to send Shackrein to the father, Michael interpreted it to mean that he had to kill Shackrein (Tr.1036-37). If Michael were malingering, he would have stated that the voice commanded him to kill Shackrein (Tr.1037).

Dr. David Vlach

The state sought an evaluation of Michael and Dr. David Vlach, a forensic psychiatrist, conducted it (Tr.1322). He initially met with Michael three times in August 2001, for a total of about three and a half hours, to determine if Michael was competent to go to trial (Tr.1326,1328,1331). He reviewed a number of documents, including Dr. Rabun's reports and the reports from the prior case by Dr. Scott and Dr. Caul (Tr.1335,1374).

The records indicated that Michael had serious conduct behavior problems as a child, and that doctors disagreed as to whether he had schizophrenia or was malingering; he had been diagnosed with both (Tr.1339). In his evaluation, Dr. Vlach looked for symptoms of both schizophrenia and malingering (Tr.1339). He also considered whether Michael was a sexual sadist (Tr.1339).

Dr. Vlach concluded that Michael was competent to stand trial (Tr.1361). He concluded that Michael did not have schizophrenia and was malingering (Tr.1362). Although there was some evidence of schizophrenia, it was outweighed by the evidence of malingering (Tr.1361-62).

Dr. Vlach diagnosed Michael with depression (Tr.1344). He noted that Michael was soft-spoken and a relative lack of facial expression, which could be signs of depression (Tr.1344). Dr. Vlach believed the depression stemmed from Michael's current legal troubles (Tr.1345).

Michael was able to socialize well, an ability that is often lost in schizophrenia (Tr.1341). He had no obvious oddness, and his speech patterns were normal (Tr.1341-42).

Typically, people with mental illness don't like to think they are ill, so they are reluctant to discuss their symptoms (Tr.1347). Michael, however, volunteered that he hears voices from the Father of Darkness, and he discussed the voices often and out of context (Tr.1345,1347). He felt compelled to do whatever the voices tell him, although people who hear command hallucinations typically try not to do what the voice tells them, especially if it's violent (Tr.1345,1356-57).

Michael also stated that he could summon the voices by sitting alone in his cell and concentrating (Tr.1358-59). True schizophrenics have a chemical imbalance that cannot be controlled by concentrating, and the symptoms arise no matter who is present (Tr.1359).

Dr. Vlach noted that, at the St. Louis County Jail, Michael reported that he saw blood on his hands and started receiving psychotropic medications (Tr.1348,1373). Visual hallucinations are very rare; only four percent of people with psychosis have them (Tr.1349). Almost all the time, a delusion explains the hallucination, but Michael did not have a delusion to explain the blood on his hands (Tr.1349). Michael also reported that he enjoyed seeing the visual hallucinations of blood, which is very unusual (Tr.1349).

Dr. Vlach also noted that, at the St. Louis County Jail, Michael asked the psychologist questions about competence to stand trial, which seemed to suggest that Michael had an agenda (Tr.1350). Michael then started to complain about other symptoms (Tr.1350). For example, he told the psychologist that he had a lump under his chin and stated that it was part of the body of the Father of Darkness (Tr.1350). But five days later, he told someone else he had gotten a lump from shaving (Tr.1350).

Michael said he would hallucinate while he was sleeping (Tr.1357). He could tell the difference between sleep and when the Father of Darkness comes to him in his dreams (Tr.1357). That is very unusual (Tr.1357).

Dr. Vlach noted that at Fulton State Hospital, Michael often talked about being in fear and that the Father of Darkness or other people were threatening his life (Tr.1350-51). Yet Michael did not appear fearful and for the most part, showed no outward signs of being distressed (Tr.1351,1353).

Toward the end of his hospitalization at Fulton, Michael discussed new symptoms on the days when he knew he was to be sent back to the Department of Corrections (Tr.1351). He later admitted that he had these symptoms because he didn't want to go back (Tr.1353). He would tell someone that he was hearing voices telling him to hurt himself, and he would be given medicine; but then later in the day, he would be laughing, singing and playing cards or volleyball (Tr.1354). Genuine symptoms develop slowly; they don't suddenly start and stop (Tr.1352).

When a person is malingering, but doesn't think it is working, he will make up even more blatant reports (Tr.1354). Toward the end of Michael's stay at Fulton State Hospital, he reported a new voice (Tr.1354). He brought a chair around with him in the day room and introduced the doctor to his invisible friend, the victim of his crime (Tr.1355). Dr. Vlach had never seen such conduct in someone with schizophrenia, and he believed Michael was endorsing blatant symptoms (Tr.1355).

Dr. Vlach has never seen a case of schizophrenia that could not improve somewhat with medication (Tr.1358). Michael stated that nothing ever helped with his hallucinations (Tr.1358). Dr. Vlach did not believe Michael had a very

bad case of schizophrenia; he thought that Michael was not experiencing the hallucinations in the first place (Tr.1358). Yet Dr. Vlach acknowledged that Michael is on medication for schizophrenia to the time of trial (Tr.1372).

Dr. Vlach gave Michael a test[3] specifically designed to detect malingering, and Michael's score showed he was very highly likely malingering (Tr.1360). Michael was also given the Minnesota multi-phasic personality test, second Edition (MMPI-II) and scored extremely high on two scales, which seemed to indicate that he was over reporting, exaggerating, or feigning symptoms (Tr.1311-13). When these scales are elevated, the person is reporting in excess of what the average person with those mental problems would report (Tr.1318).

Dr. Vlach conducted a supplemental evaluation to determine Michael's responsibility for the crime and interviewed Michael for about two more hours (Tr.1363-64). He again concluded that Michael did not have a mental disease or defect that excluded responsibility for the crime (Tr.1366). Dr. Vlach explored whether there could be another psychological motivation for the crime and concluded that the crime was motivated by Michael's sexual sadism, which is not a mental disease or defect under Missouri law (Tr.1366-67). Before Dr. Vlach, no other doctor felt the need to consider the possibility that Michael was a sexual sadist (Tr.1380). Dr. Vlach concluded that Michael was a sexual sadist because he believed the crime was sexual in nature, and he believed that Michael was doing

[3] The test was the structured interview of reported symptoms (Tr.1360).

things to avoid detection (Tr.1372-73). He erroneously believed that Michael had given Shackrein's name and number during the 10:00 count (Tr.1373).

The Trial

The case went to trial in January, 2003 (Tr.1-8). The facts of the crime as set forth above, were presented through various witnesses. The defense then presented the testimony of Dr. Rabun; Dr. Eickermann; Dr. Syed; and Dr. Harry. The State presented the testimony of Dr. Vlach; Dr. Scott; and Dr. Blanchard, who conducted testing for Dr. Vlach. That evidence also is as set forth above.

The state additionally presented the testimony of Scott Perschbacher. Perschbacher is an admitted burglar and drug addict (Tr.1274,1279-80). In 1983, he was convicted of forgery and second-degree burglary and received a two year sentence (Tr.1257-58,1272). In March, 1986, he was convicted of second-degree burglary and first-degree tampering (Tr.1272). He received a seven-year sentence and served every day of it (Tr.1272). While serving that sentence, he was convicted of offering entry into a correctional facility and received another three-year sentence (Tr.1272-73). In 1994, he was convicted of three counts of first-degree tampering, received another seven-year sentence, and served every day of it (Tr.1273). While serving that sentence, Perschbacher was convicted of attempted escape (Tr.1257-58,1274).

After trying to escape from Farmington Correctional Center, he was sent to Jefferson City Correctional Center (Tr.1258). From there, he went to Crossroads, and then to Potosi (Tr.1258). By October, 1999, Perschbacher had landed at

Potosi for inciting a riot and then was placed in administrative segregation (Tr.1258,1271,1282). He estimated that he had anywhere from 100 to 300 conduct violations in prison (Tr.1283).

In early October, Perschbacher heard that Shackrein had been killed (Tr.1258). Michael was moved into the one-man cell next to Perschbacher's (Tr.1259). Several times, Perschbacher and Michael spoke through the ventilation duct between the cells (Tr.1261-62). Initially, Michael told Perschbacher that his father told him to commit the crime (Tr.1263). But later, Michael admitted that he and Shackrein had sex two or three times, and that Shackrein wanted out of the cell (Tr.1262-63). Michael did not want Shackrein to leave the cell (Tr.1262-65). On the night Shackrein was killed, they were having sex, and Michael ended up strangling Shackrein and then did other physical things to him (Tr.1263).

Perschbacher passed notes to Michael from another inmate housed six or seven cells away (Tr.1266-67). Perschbacher read each note before passing them along to Michael, and he also spoke with Michael about the notes (Tr.1267,1269). Michael told Perschbacher that the other inmate told him that he needed to pretend he's crazy to beat the case (Tr.1267,1269).

When released from Potosi, Perschbacher picked up new charges: second-degree robbery, first-degree burglary, and two counts of second-degree burglary (Tr.1257,1274-75). Over the years, Perschbacher has given information to the authorities on at least four to five homicide cases, where inmates have confessed to him (Tr.1277). He hoped the information he gave about Michael would help

him, and he had written to the prosecutor's investigator, the two prosecutors, and Potosi's investigator to ask for favors, such as getting community release, or that they use their influence to help him (Tr.1285-86). Perschbacher asked for help with some Jefferson County charges, and the charges were dismissed (Tr.1287-89).

Perschbacher denied that he received any favorable treatment in exchange for his testimony (Tr.1294). He expected to get a seven year sentence on the new charges, with drug treatment (Tr.1276). In effect, he would be required to serve 12-18 months at a drug treatment center and then would be released (Tr.1276-77).

Perschbacher admitted that he had written a letter espousing his view that blacks and whites should not live together, and there should be no interbreeding (Tr.1291). He wrote another letter to the Director of Nursing, complaining that black inmates were treated better than white inmates, and stating, "But, of course, they were niggers, and as I well know, you got to take care of the poor niggers" (Tr.1292). He wrote another letter, to the assistant superintendent at the Lincoln Correctional Center, complaining that, "The niggers get away with anything" (Tr.1292-93).[4]

Perschbacher has been a drug addict since his early teen years (Tr.1279-80). He has been addicted to heroin, cocaine, methamphetamine, and pharmaceuticals (Tr.1280). Perschbacher denied that he was in a psychiatric ward at St. Anthony's

[4] Michael is African-American (Tr.1291).

in 2002 (Tr.1281). He admitted he was at "St. Louis metro psychiatric facilities" to get his medication (Tr.1282).

Procedural Highlights

Prior to trial, defense counsel requested that the court issue an order for Perschbacher's records from the Metropolitan St. Louis Psychiatric Center and St. Anthony's Hospital (Tr.20; L.F.265). Alternatively, defense counsel requested that the court order the institutions to produce the records for the court under seal and conduct an *in camera* review of the records (Tr.20; L.F.265). Defense counsel explained that during his deposition, Perschbacher vouched that he had not had a psychiatric or psychological examination in any of his criminal cases (L.F.265). But defense counsel then obtained documents from Perschbacher's pending St. Louis County criminal court file which indicated that Perschbacher "escaped" from a psychiatric ward at St. Anthony's Hospital on August 29, 2002 (Tr.19-20; L.F.265,268). Another document in the file, dated September 9, 2002, indicated that Perschbacher was unable to attend a court hearing due to hospitalization at the Metropolitan St. Louis Psychiatric Center (Tr.19-20; L.F.265). Additionally, defense counsel informed the court that another inmate disclosed in deposition that he had seen Perschbacher engaging in bizarre behavior, such as throwing excrement at other inmates (11/12/02 Tr.45). The court denied the request (Tr.21).

During voir dire, the prosecutor asked Venireperson Janette Salmon if she could vote for the death penalty (Tr.244). Initially, she responded that she didn't think she could (Tr.244). She then stated that she could if "it was a mass murderer

or something like – something like at The Towers" (Tr.244). The prosecutor asked her if she could impose death in a "reasonable" situation, and she said that she could not (Tr.244-45). Ms. Salmon stated that knowing that Michael had committed a prior murder would not change her position (Tr.300). The state moved to strike Ms. Salmon for cause, defense counsel objected, and the court overruled the objection and struck Ms. Salmon for cause (Tr.311-12).

After voir dire, defense counsel requested that the jury be allowed to take notes (Tr.738). The court expressed its concern that note-taking would distract the jurors; or that the jurors would give more weight to the notes of some jurors than others (Tr.738-39,744). Defense counsel argued that the civil rules allow note-taking upon the request of either party, so it also should be allowed at the request of a criminal defendant, especially where there would be many experts testifying (Tr.741-42,791). The court denied the request (Tr.744,791).

The state cross-examined Dr. Rabun on whether he was familiar with the facts of Michael's first conviction (Tr.1099). After Dr. Rabun stated that he had not read the police reports, Assistant Attorney General Robert Ahsens asked, "[a]re 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). Defense counsel objected based on the pre-trial motion that the state was about to go into gory details of the first crime (Tr.1100). Mr. Ahsens responded that he believed that the facts of the case were similar enough that they showed that sex may have motivated the second crime; Mr. Ahsens wanted to ask

Dr. Rabun if he had considered this, since Dr. Rabun testified that there was no motive for the crime (Tr.1100). The court overruled the objection, ruling that the state could make a very brief factual statement of the asphyxiation and the sexual aspect of the first crime (Tr.1100-1101). Mr. Ahsens continued, "Doctor, again, were you aware that the defendant in murdering Christine Smetzer caused her death by asphyxiation, by thrusting her throat up against the toilet and her head into the water of that toilet and raping her?" (Tr.1101-1102).

During the instructional conference, defense counsel requested that Instruction 5, modeled after MAI-Cr3d 306.04, not be given to the jury (Tr.1389-96). The court responded, "I agree with you. I don't think it's an appropriate instruction" (Tr.1390). But since the instruction was required by the M.A.I., the court gave the instruction over defense counsel's objection (Tr.1396). The court had forgotten to give the corollary instruction prior to the experts' testimony (Tr.1392).

In guilt phase closing, defense counsel challenged Dr. Vlach's conclusion that Michael must have killed Shackrein in order to have sex with him (Tr.1433). Defense counsel argued that Dr. Vlach's findings were faulty, because he based his opinion in part on his faulty belief that Michael had given Shackrein's name and number during the 10:00 count and therefore was trying to hide what he had done (Tr.1433). Defense counsel questioned why Vlach would put information in his report when there was no basis for it, and it was not true (Tr.1433). The prosecutor objected, "[T]hat's a blatant misstatement of the evidence. She knows

very well there is a statement that says that" (Tr.1434). The court sustained, "as to the statement that is not true" (Tr.1434).

Later, defense counsel argued that by finding Michael not guilty by reason of insanity, he would be sent to Fulton State Hospital (Tr.1444). The prosecutor objected, "This is the very material counsel didn't want in the instruction" (Tr.1444). The court sustained the objection (Tr.1444). After the state's rebuttal argument, defense counsel objected to the state's speaking objection (Tr.1457). Defense counsel requested that the court instruct the jury that the instructions are the court's and that the court has determined that the instructions are proper (Tr.1458). The court denied the request (Tr.1458).

During deliberations, the jury requested all the photographs, and all psychiatric and psychological records presented by the defense (L.F.316). The court sent the photographs to the jury but otherwise responded that "they must be guided by the evidence as you remember it and the instructions of the court" (L.F.317). The jury found Michael guilty of first-degree murder (L.F.319).

Penalty Phase

In penalty phase, the state presented the testimony of Detective Reichmuth regarding Michael's prior conviction (Tr.1505-17). On January 24, 1995, Christine Smetzer's body was found in a bathroom stall of her high school (Tr.1505-1506). Her pants and underpants had been pulled down to her knees, and her shirt was pulled up over her bra (Tr.1508-1509). She had injuries to her face; bruising to her chest, and bruising and tearing of her vaginal wall (Tr.1509). Ms.

Smetzer's head had been forced into the toilet (Tr. 1515-16). Michael was convicted of her rape and murder and sentenced to life imprisonment without the possibility of parole (Tr.1511-12).

The defense presented the testimony of Michael Kemna, Superintendent of Crossroads Correctional Center (Kemna Tr.3). Since he left Fulton State Hospital, Michael was housed in the most severe administrative segregation unit at Crossroads and did well there (Kemna Tr.12,22). Inmates in that unit live in one-man cells and have no physical contact with any other inmates; the only physical contact with the guards is while the inmate is handcuffed and perhaps even leg-cuffed; and they have no physical contact with anyone else (Kemna Tr.13-17). No inmate has ever escaped from this unit, and there is no limit on the amount of time an inmate can spend in this unit (Kemna Tr.19). Potentially, Michael could be released from this unit in the future, if the Superintendent approved it (Kemna Tr.19-20).

In penalty phase closing, defense counsel stressed that Dr. Vlach testified that to this day Michael is being treated by the state with medications for schizophrenia (Tr.1546). Defense counsel asked the jury to ask why Michael would receive that medication if he did not have significant mental health problems (Tr.1546). The prosecutor objected that the argument, "calls for speculation beyond the record. There may be very good reasons that are not in evidence" (Tr.1547). The court sustained the objection (Tr.1547).

The court instructed the jury to consider whether the State had proven beyond a reasonable doubt that Michael had a prior conviction for first-degree murder (L.F.328). It was instructed to consider as statutory mitigators whether (1) Michael murdered Shackrein while under the influence of extreme mental or emotional disturbance; (2) Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) Michael's age at the time of the offense (L.F.331). The jury found the aggravator and recommended that Michael be sentenced to death (L.F.339). The court overruled Michael's motion for new trial and imposed a death sentence (Sent Tr.13,19). To the date he was sentenced to death, Michael was on medication for schizophrenia, prescribed by state doctors (Tr.1108-1109).

POINT I

The trial court erred in overruling defense counsel's objection to instructing the jury, as patterned after MAI-CR3d 306.04, that under no circumstances should it consider the psychiatric testimony as evidence that Michael did or did not commit the charged acts, because the instruction violated Michael's rights to due process of law, to present a defense, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the instruction likely misled the jurors to believe that they should not consider statements made to the experts on the issue of whether Michael was guilty of committing the crime of first-degree murder – an issue which necessarily entailed consideration of whether Michael had a mental disease or defect that excluded responsibility – and also likely impeded the jury's consideration of the statutory mitigators submitted to them in penalty phase.

Chambers v. Mississippi, 410 U.S. 284 (1973);

State v. Kreutzer, 928 S.W.2d 845 (Mo. banc 1996);

State v. Thompson, 985 S.W.2d 779 (Mo. 1999);

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

Mo. Const., Art. I, Secs. 10,18(a),21;

Section 552.030; and

MAI-CR3d 300.20, 304.11,306.04.

POINT II

The trial court plainly erred and abused its discretion in overruling defense counsel's objections to the prosecutor's questions in guilt phase which disclosed graphic details of the conviction which landed Michael in prison and which occurred almost five years before the charged crime. The disclosure of these facts in guilt phase violated Michael's rights to be tried only for the crimes with which he was charged, to confront and cross-examine the witnesses against him, to a fair trial and due process. U.S.Const., Amends. V,VI,XIV; Mo.Const., Art. I, §§10,17,18(a). The testimony constituted inadmissible evidence of an uncharged crime which was neither legally nor logically relevant and was not strictly necessary to prove the charge against Michael. Michael suffered manifest injustice, because the state used the gruesome facts of the prior crime – that Michael had thrust the prior victim's head into the toilet to kill her – solely as a propensity argument that Michael killed the current victim because of his propensity and not because he had a mental disease or defect; and the state thereby improperly urged the jury to consider facts gleaned through the psychiatric testimony as proof of Michael's guilt of the charged crime.

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

State v. Burnfin, 771 S.W.2d 908 (Mo.App. 1989);

State v. Conley, 873 S.W.2d 233 (Mo.banc 1994);

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

Mo. Const., Art. I, Secs. 10,17,18(a); and

Rule 30.20.

POINT III

The trial court abused its discretion in denying Michael's motion requesting that the court order two psychiatric care centers to disclose the mental health records of key state witness Scott Perschbacher, or alternatively, that the court conduct an *in camera* review of those records. The trial court's action denied Michael his rights to due process, confrontation and cross-examination, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and his right to pre-trial discovery as guaranteed by Supreme Court Rule 25.03(A)(9). Michael was prejudiced, because court documents indicate that in August and September 2002, Perschbacher escaped from a psychiatric ward and had been a resident of another psychiatric care center; and Perschbacher was seen engaging in bizarre behavior in prison, such as throwing excrement at other inmates. At trial (in March 2003), Perschbacher provided damaging testimony that Michael had admitted in prison that (1) he killed Shackrein to prevent him from moving to another cell; and (2) he had received tips on how to act crazy in order to avoid responsibility for Shackrein's death. Since Perschbacher was such a crucial witness for the state, the defense should have been allowed to challenge whether he truly had the ability to perceive and recollect events accurately, and whether he had lied during his deposition.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987);

State v. Robinson, 835 S.W.2d 303 (Mo.banc 1992);

United States v. Nixon, 418 U.S. 683 (1974);

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

Mo. Const., Art. I, Secs. 10,18(a),21;

Section 491.060; and

Rule 25.03.

POINT IV

The trial court abused its discretion during defense counsel's guilt phase closing argument in letting the state make speaking objections that referred to matters completely outside the record, amounted to testimony by the prosecutor, and disparaged defense counsel. The trial court also abused its discretion during defense counsel's penalty phase closing argument in letting the state make a speaking objection that encouraged the jury to speculate about matters not on the record, amounted to testimony by the prosecutor, and implied that defense counsel had hidden facts from the jury. The state's repeated violations during the closing arguments deprived Michael of his rights to due process, a trial before a fair/impartial jury, confrontation and cross-examination of the witnesses, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. The trial court's approval of this improper "testimony" by the prosecutor encouraged the jury to believe that there were matters outside the record that it should be considering and that defense counsel, and hence the defense, was untrustworthy and unbelievable.

State v. Barton, 936 S.W.2d 781 (Mo.banc 1996);

State v. Greene, 820 S.W.2d 345 (Mo.App. 1991);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

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

Mo. Const., Art. I, Secs. 10,18(a),21; and

11th Cir., Rule 21.3.

POINT V

The trial court abused its discretion when it refused to allow the jury to take notes during the trial, because the refusal violated Michael's rights to due process, equal protection, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§2,10,14,18(a),21. While the civil rules of procedure allow note-taking at the request of either party, the criminal rules of procedure leave the decision solely up to the discretion of the court. The court's refusal to allow note-taking prejudiced Michael, because (1) this was a factually complex case, with nine doctors who testified and also referred to the findings and observations of yet other doctors who did not testify; and (2) the jury could not recall all the pertinent information needed to decide the key issue of the case, as evidenced by its request – denied by the court – to review during deliberation the psychiatric and psychological reports submitted by Michael.

Esaw v. Friedman, 586 A.2d 1164 (Conn. 1991)

People v. Hues, 704 N.E.2d 779 (N.Y. App. 1998)

State v. Trujillo, 869 S.W.2d 844, 850 (Mo. App. 1994)

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

Mo. Const.,Art. I, Secs.2,10,14,18(a),21;

Rules 27.08, 69.03; and

MAI-Cr3d 302.01.

POINT VI

The trial court plainly erred in failing to instruct the jury that it could not impose a death sentence if it found it was more likely than not that Michael was mentally retarded, because the lack of those instructions deprived Michael of due process, equal protection, a fair trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII, XIV; Mo.Const., Art. I, §§ 2,10,18(a),21. Evidence was presented at trial from which a reasonable juror could conclude by a preponderance of the evidence that Michael was mentally retarded. Michael suffered manifest injustice by the lack of the instructions, because the jury could not have imposed a death sentence if it had found that he was mentally retarded.

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

Johnson v. State, 102 S.W.3d 535 (Mo.banc 2003);

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

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

Mo. Const.,Art. I, Secs.2,10,18(a),21;

565.030, RSMo Cum. Supp. 2001;

Rule 28.02, 30.20; and

MAI-CR3d 300.03A, 313.38, 313.40, 313.48A.

POINT VII

The trial court abused its discretion in overruling Michael's objection and sustaining the state's motion to strike Venireperson Janette Salmon for cause, in violation of Michael's rights to due process, fundamental fairness, trial by a fair, impartial and fairly selected jury, and freedom from cruel and unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art I,§§10,18(a), 21. The state argued that Ms. Salmon was "very unequivocal concerning her unwillingness to vote for the death penalty" but, in fact, Ms. Salmon was not unequivocal in her opposition to the death penalty and gave an example of a situation in which she could vote to impose a sentence of death. The erroneous exclusion of this juror who at no time indicated that her beliefs would prevent her from following the court's instructions requires that Michael's death sentence be vacated and he be re-sentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial.

Szuchon v. Lehman, 273 F.3d 299 (3rd Cir. 2001);

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

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

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

Mo. Const.,Art. I, Secs.10,18(a),21.

POINT VIII

The trial court plainly erred in submitting Instructions 16 and 17, because the instructions violated Michael's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. The instructions failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was not sufficient to outweigh the evidence in aggravation. Because Michael was sentenced to death by a jury that was improperly instructed on the burden of proof for two of the three steps required to find that Michael was "death-eligible," he suffered manifest injustice and must receive a new penalty phase.

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

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

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

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

Mo. Const.,Art. I, Secs.10,18(a),21;

Section 565.030; and

Rule 30.20.

POINT IX

The trial court lacked jurisdiction and authority to sentence Michael to death because the state never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The state failed to plead in the indictment those facts, required by Section 565.030.4(1), (2), and (3), that the jury must find beyond a reasonable doubt before a defendant may be sentenced to death. Michael was charged with the lesser offense of *unaggravated* first degree murder, not punishable by death and, as a result, his death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10, 17, 18(a), and 21 of the Missouri Constitution.

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

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

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

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

Mo. Const.,Art. I, Secs.10,17,18(a),21; and

Sections 565.020,565.030.

ARGUMENT I

The trial court erred in overruling defense counsel's objection to instructing the jury, as patterned after MAI-CR3d 306.04, that under no circumstances should it consider the psychiatric testimony as evidence that Michael did or did not commit the charged acts, because the instruction violated Michael's rights to due process of law, to present a defense, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the instruction likely misled the jurors to believe that they should not consider statements made to the experts on the issue of whether Michael was guilty of committing the crime of first-degree murder – an issue which necessarily entailed consideration of whether Michael had a mental disease or defect that excluded responsibility – and also likely impeded the jury's consideration of the statutory mitigators submitted to them in penalty phase.

Michael Taylor strangled his cell-mate. This was never in issue. Defense counsel admitted in opening statement and several times in closing argument that Michael killed Shackrein (Tr. 785, 789, 1423, 1430). The only issue in guilt phase was whether Michael was not guilty by reason of mental disease or defect. Michael underwent several exams to determine if he suffered from a mental disease or defect that would exclude responsibility. The doctor who evaluated

Michael for the state concluded that Michael did not have a mental defect excluding responsibility, while the doctor who evaluated Michael for the defense concluded that he did. In reaching their conclusions, these doctors relied upon the records, statements, and conclusions of many other people.

Section 552.030.5 provides that:

> No statement made by the accused in the course of [a 552.030] examination and no information received by any physician or other person in the course thereof ... shall be admitted in evidence against the accused on the issue of whether he committed the act charged against him in any criminal proceeding.... The statement or information shall be admissible in evidence for or against him only on the issue of his mental condition, whether or not it would otherwise be deemed to be a privileged communication.

Thus, under the statute, the jury should be able to consider the statements of the doctors in determining the defendant's mental state (his *mens rea*) but not whether he committed the crime (the *actus reus*). State v. Roberts**,** 948 S.W.2d 577, 587-88 (Mo. banc 1997).

Section 552.030.5 was enacted to protect defendants who plead not guilty by reason of mental disease or defect. State v. McGautha, 617 S.W.2d 554 (Mo. App. 1981). Chapter 552 requires these defendants to undergo at least one mental evaluation, in which they typically would be required to describe the events surrounding the crime. Section 552.030.3. Because Chapter 552 requires such an examination, statements given by the defendant in the examination are considered

coerced and cannot be used to prove the defendant's guilt of the charged crime. 552.030.5; McGautha, 617 S.W.2d at 560. The jury can consider these statements only to the extent that they relate to whether the defendant has a mental disease or defect that excludes responsibility for the crime or had a mental state that otherwise lessens the degree of the defendant's culpability. *Id*.

Missouri courts have consistently recognized the goal of Section 552.030.5 as protecting the defendant who pleads not guilty by reason of mental disease or defect. State v. Kreutzer, 928 S.W.2d 845, 870 (Mo. banc 1996). The statute "undertakes to protect an accused who submits to psychiatric examination by a grant of immunity from prosecution on the disclosures." McGautha, 617 S.W.2d at 554. It "purports to remove a compelling reason for an accused to be reluctant to enter [a plea of not guilty by reason of mental disease or defect]." State v. Speedy, 543 S.W.2d 251, 256 (Mo. App. 1976).

Section 552.030.5 references two instructions designed to protect the defendant: MAI-Cr3d 300.20 and 306.04. The court must read MAI-Cr3d 300.20 to the jury before any expert testifies on the defendant's mental state. *Note 3*, MAI-Cr3d 300.20. But here, the court forgot to provide this instruction. When the attorneys realized the error, they conferred and agreed to waive the reading of the instruction (Tr. 1392). They did not mention it until the instructional conference, when the court realized the omission (Tr. 1392). The court took no steps to correct the defect. The instruction would have been modeled after the following:

The next witness to testify is [*name of doctor*]. He will testify concerning the mental condition of the defendant at the time of the alleged offense. In the course of his testimony, [*name of doctor*] may testify to statements and information that were received by him during or in connection with his 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.

MAI-Cr3d 300.20.

During the instructional conference, defense counsel requested that Instruction 5, modeled after MAI-Cr3d 306.04, not be given to the jury (Tr.1389-96). The court responded, "I agree with you. I don't think it's an appropriate instruction" (Tr. 1390). But since the instruction was required by the M.A.I., the court gave the instruction over defense counsel's objection (Tr. 1396):

Instruction No. 5

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). The issue is included in the motion for new trial (L.F. 342-44).

Michael Should Have Been Allowed to Waive the Instruction

The MAI text discussing verdict directors and other instructions recognizes that, at times, even instructions that are "required" may be waived by the parties:

> In a number of instances, the Notes on Use provide that certain instructions "must be given" when the evidence supports them. This is not intended to prohibit the trial judge, in an appropriate case and in the judge's sole discretion, from permitting the parties, on the record, to waive the giving of such an instruction.

MAI Cr-3d 304.11.

Clearly, the protection of Section 552.030.5 "is personal to the accused, and may be waived by him." Speedy, 543 S.W.2d at 256. Furthermore, Missouri courts have found no error when the courts have neglected to give the required instructions. *See, e.g.*, State v. Scott, 841 S.W.2d 787, 790 (Mo. App. 1992) (by failing to request MAI-Cr3d 300.20, required instruction was waived).

This Court has recognized that when the defendant has admitted to the crime, as is the case here, the instruction is not necessary:

> By conceding that he killed the victim, Roberts could not have been harmed by the failure of the trial court to give the limiting instructions. This is because the only issue before the jury after the admission was whether Roberts deliberated prior to doing what he admitted he did. The jury did not need to be warned that it should not use the mental health experts' testimony

> as proof that Roberts committed the murder. Roberts's trial admission removed that issue from the jury's consideration.

Roberts, 948 S.W.2d at 587; *see also* Speedy v. State, 611 S.W.2d 253, 254 (Mo. App. 1980) (finding no clear error in the trial court's conclusion that "[s]ince the evidence conclusively showed the culpability of defendant, there was no occasion to orally advise the jury that the statements made by doctors could not be considered as evidence whether the defendants committed the acts charged").

This Court has also recognized that it may benefit the defendant not to have the instruction read:

> Because the instruction diminishes the jury's ability to consider out-of-court statements made by defendant favorable to him, defendant may have had good reason not to request such instruction. For example, Dr. Smith related defendant's statement that he did not remember striking the [victims]. He also recounted remarks defendant made to him about the deep emotional stress he was feeling at the time of the killings. These are important statements for defendant's case because they show that even if he was not mentally ill, his mental state fell short of the "cool reflection" required for a first-degree murder conviction.

State v. Thompson, 985 S.W.2d 779, 788 fn2 (Mo. 1999).

The parties waived the first "required" instruction, MAI-Cr3d 300.20, which was basically the same instruction as 306.04. There is no reason that the defense should not have been allowed to waive the reading of the second

"required" instruction. After all, the instruction was designed to help defendants; if the instruction served no purpose given the facts of the case, and instead raised the significant potential for confusing the jury on the key issue of the case; and the defendant expressly requested that it be waived, the instruction certainly should not have been given.

Standard of Review

Reversal is warranted when there is both error in submitting an instruction and prejudice to the defendant. State v. Taylor, 944 S.W.2d 925, 936 (Mo. banc 1997). When instructional error arises, prejudice is judicially determined by considering the facts and the instruction together. State v. Perry, 35 S.W.3d 397, 398 (Mo. App. 2000). A defendant is prejudiced by an erroneous instruction when the jury may have been adversely influenced by it, as when there exists the potential for misleading or confusing the jury. State v. Caldwell, 956 S.W.2d 265, 267 (Mo. banc 1997); State v. Green, 812 S.W.2d 779, 787 (Mo. App. 1991). The appellate court must consider whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 1197, 108 L.Ed.2d 316 (1989).

The Jury Was Misled By The Instruction

It is the duty of the court to instruct the jury directly and precisely on the law of the case, and the jury is to determine the facts and apply them to the law as instructed. State v. McKeever, 339 Mo. 1066, 101 S.W.2d 22, 28 (1936).

Instructions are statements of the law applicable to the facts. State v. Winters**,** 579 S.W.2d 715 (Mo. App. 1979). Logically, then, instructions that are not at all applicable have no place before the jury.

Instruction 5 was not applicable to the facts of this case and should not have been given. Since defense counsel had admitted that Michael killed Shackrein, there was absolutely no need to give the instruction to the jury. "When a defendant makes a voluntary judicial admission of fact before a jury, it serves as a substitute for evidence and dispenses with proof of the actual fact and the admission is conclusive on him for the purposes of the case." *Id*., *quoting* State v. Olinger, 396 S.W.2d 617, 621-22 (Mo. banc 1965). Thus, in Roberts, this Court acknowledged that the 306.04 instruction served no purpose, since the defendant had conceded that he committed the crime. 948 S.W.2d at 587. So too, here, the jury did not need to be warned that it should not use the mental health experts' testimony as proof that Michael committed the crime, because Michael had already conceded that fact (Tr. 785, 789, 1423, 1430).

The jurors must have presumed that since the court provided that instruction, it must bear some meaning in the case. The jurors were not lawyers. We cannot assume they understood that every crime has an *actus reus* and a *mens rea*. We cannot assume that the jury understood that Instruction No. 5 was telling them not to consider the testimony of the doctors as to Michael's *actus reus,* but only to his *mens rea*. Since Michael had conceded his commission of the crime, the only remaining issue was whether he had a mental disease or defect excluding

responsibility for the crime. Since the court had bothered to give the instruction, the jury must have inferred that it precluded the jury from considering the statements made to the experts on the issue of whether Michael had a mental disease or defect.

In State v. Kreutzer, 928 S.W.2d 854, 869 (Mo. banc 1996), the defendant gave notice of his intent to rely on the defense of not guilty by reason of mental disease or defect, pursuant to Section 552.030. At trial, he argued that because of his diminished capacity, he lacked the mental state necessary to deliberate and thus could not be guilty of first-degree murder. *Id*., at 870. The defendant objected to the instruction modeled after MAI-CR3d 306.04, arguing that it mis-directed the jury not to consider expert testimony supporting the defense of diminished capacity. *Id*.

This Court held that the instruction correctly set forth the law under Section 552.030.5. *Id.,* at 871. The Court held that although the defendant never seriously contended that he did not commit the charged acts, the State nevertheless had the burden of proving beyond a reasonable doubt that he knowingly caused the victim's death after deliberation. *Id*., at 870. The Court held that the "acts" referred to in the instruction refer to just those acts that culminated in the victim's death, the *actus reus*. *Id*., at 871. It did not direct the jury not to consider testimony of the doctors on the defendant's mental condition, the *mens rea*. *Id*.

The Court also held that the jury could not have been misled given the two instructions immediately preceding the 306.04 instruction. *Id*. Those instructions

were (1) the defendant's converse, which highlighted the necessity of finding deliberation beyond a reasonable doubt; and (2) an instruction that told the jury to consider whether the defendant had a mental disease or defect in determining whether he had the requisite mental state for first-degree murder. *Id*.

This Court should reconsider Kreutzer's holding that MAI-CR3d 306.04 correctly sets forth the law under Section 552.030.5. While the instruction mirrors part of the statute, it omits another essential part. The statute mandates both that (1) the psychiatric testimony not be used to show that the defendant committed the charged crime (*actus reus*); and (2) the psychiatric testimony should be considered on the issue of the defendant's mental condition (*mens rea*). The instruction, on the other hand, only sets forth the mandate that the psychiatric testimony cannot be used to show that the defendant committed the *actus reus*; it fails to instruct the jury to consider the evidence for the defendant's *mens rea*.

Perhaps if the instruction referred to both the *actus reus* and *mens rea*, the jury could be trusted to differentiate between the two. A modification to the instruction would alleviate the problem:

> 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. **You must consider that testimony only to determine the defendant's mental condition at the time of the charged acts**.

Without that highlighted language, however, there is no assurance that the jury understood what it was supposed to consider. This danger was especially heightened here, where the jury knew that the fact of the defendant's commission of the crime was not at all in issue; yet the court had bothered to instruct the jury not to consider the psychiatric testimony as to whether the defendant had committed the charged acts. The jury must have been left with the impression that they were not to consider the psychiatric testimony as to whether Michael was guilty of first-degree murder, *i.e.*, whether he had a mental disease or defect that would exclude responsibility.

Kreutzer appears to conflict with this Court's discussion of the instruction in Thompson, 985 S.W.2d at 788 fn.2. Thompson stated that the instruction "diminishes the jury's ability to consider out-of-court statements made [during a 552.030 examination] favorable to him." *Id*. The Court implied that, if the 306.04 instruction had been given, the jury would not have been able to consider facts relating to the defendant's *mens rea* at the time of the crimes:

> For example, Dr. Smith related defendant's statement that he did not remember striking the [victims]. He also recounted remarks defendant made to him about the deep emotional stress he was feeling at the time of the killings. These are important statements for defendant's case because they

show that even if he was not mentally ill, his mental state fell short of the "cool reflection" required for a first-degree murder conviction.

Id. Thompson appears to conflict with Kreutzer's holding that the instruction does not direct the jury not to consider testimony of the doctors on the defendant's mental condition, the *mens rea*. Kreutzer, 928 S.W.2d at 870.

Jurors are presumed to follow the instructions and understand the words used in the instructions when they arrive at their verdict. State v. Shurn, 866 S.W.2d 447, 465 (Mo.1993); State v. Lay, 427 S.W.2d 394, 400 (Mo.1968). But here, the court itself believed that the instruction was inappropriate (Tr. 1390). Before Judge Rauch realized that the instruction was "required," she stated that she agreed with defense counsel's claim that the instruction was confusing (Tr. 1390). She stated, "I agree with you. I don't think it's an appropriate instruction" (Tr. 1390). But, apparently, the court did not believe it had any discretion to refuse the instruction.

The instruction is confusing for attorneys well versed in criminal law. Surely it was confusing for lay people such as the jurors.

Due process requires that a criminal defendant be permitted to offer the testimony of witnesses in his defense. Washington v. Texas, 388 U.S. 14, 18-19 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Taylor v. Illinois, 484 U.S. 400, 417, n.23 (1988). When a defendant is denied the ability to respond to the state's case against him, he is deprived of "his

fundamental constitutional right to a fair opportunity to present a defense." Crane v. Kentucky, 476 U.S. 683, 687 (1986).

Despite these fundamental rights, the jurors were told that they should not consider the testimony of doctors about statements and information they received, as to whether Michael committed first-degree murder. The crucial issue in guilt phase was whether Michael had a mental disease or defect that excluded responsibility. The parties presented extensive and drastically conflicting views on this issue. Each side presented the testimony of one doctor who had evaluated Michael for responsibility for this crime, and each of those doctors relied on a spate of treatment records, interviews, prior diagnoses, and prior evaluations. This testimony was the crux of the defense, and the jury should have been completely free to consider it.

The limitation also must have affected the jury's deliberations at penalty phase. The jury was told that in determining punishment, it should consider the evidence presented in guilt phase as well as in penalty phase (L.F. 330-31). But if the jurors believed that they were not to consider the statements or information made to experts, they would not have considered the full range of the mitigating evidence. The jurors should have been able to consider the psychiatric testimony as support for two of the three statutory mitigating circumstances submitted to it: (1) the murder was committed while Michael was under the influence of extreme mental or emotional disturbance; and (2) Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law

was substantially impaired (L.F. 331). Under Thompson, however, the instruction would diminish the jury's ability to consider these factors. 985 S.W.2d at 788 fn.2.

The U.S. Supreme Court has spelled out repeatedly that a capital jury must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). So, too, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 4 (1987). In a capital case, where a barrier to the jury's consideration of mitigation is imposed, the verdict is unreliable. Mills v. Maryland, 486 U.S. 367, 375 (1988).

A death sentence obtained by the jury's consideration of only part of the relevant evidence cannot stand. Instruction 5, patterned after MAI-CR3d 306.04, violated Michael's rights to due process of law, to present a defense, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court must reverse Michael's conviction and remand for a new trial.

ARGUMENT II

The trial court plainly erred and abused its discretion in overruling defense counsel's objections to the prosecutor's questions in guilt phase which disclosed graphic details of the conviction which landed Michael in prison and which occurred almost five years before the charged crime. The disclosure of these facts in guilt phase violated Michael's rights to be tried only for the crimes with which he was charged, to confront and cross-examine the witnesses against him, to a fair trial and due process. U.S.Const., Amends. V,VI,XIV; Mo.Const., Art. I, §§10,17,18(a). The testimony constituted inadmissible evidence of an uncharged crime which was neither legally nor logically relevant and was not strictly necessary to prove the charge against Michael. Michael suffered manifest injustice, because the state used the gruesome facts of the prior crime – that Michael had thrust the prior victim's head into the toilet to kill her – solely as a propensity argument that Michael killed the current victim because of his propensity and not because he had a mental disease or defect; and the state thereby improperly urged the jury to consider facts gleaned through the psychiatric testimony as proof of Michael's guilt of the charged crime.

The state desperately wanted the jury to hear the facts of Michael's first conviction in guilt phase. After all, those facts were much more gruesome than the facts in the charged case. The state tried to imply that Michael blamed the

voices in his head for the first murder, even though the facts simply did not support that inference. When that failed, the state elicited the facts of the first crime under the premise that it would show that Michael's motive in killing Shackrein was sex. The state's actions constituted no more than a thinly veiled plan to seek a conviction based on propensity.

During its cross-examination of Dr. Rabun, the state implied that Michael had made similar claims of hearing voices after he was arrested for the murder of Christine Smetzer almost five years earlier (Tr. 1099). Dr. Rabun tried to refute the implication, stating that Michael had not linked his behavior in the earlier case with hearing voices (Tr. 1099). Dr. Rabun explained that although Michael admitted after the first crime that he hears voices, he did not claim that the voices had told him to kill Ms. Smetzer (Tr. 1099).

The state then asked Dr. Rabun if he was familiar with the facts of Michael's first conviction (Tr. 1099). After Dr. Rabun stated that he had never read the police reports, Assistant Attorney General Robert Ahsens asked, "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). Defense counsel objected based on the pre-trial motion that the state was about to go into gory details of the first crime (Tr. 1100). Mr. Ahsens responded that he believed that the facts of the case were similar enough that they showed that sex may have motivated the second crime; Mr. Ahsens wanted to ask Dr. Rabun if he had considered this, since Dr. Rabun testified that there was no motive for the crime

(Tr. 1100). The court overruled the objection, ruling that the state could make a very brief factual statement of the asphyxiation and the sexual aspect of the first crime (Tr. 1100-1101).

Mr. Ahsens continued, "Doctor, again, were you aware that the defendant in murdering Christine Smetzer caused her death by asphyxiation, by thrusting her throat up against the toilet and her head into the water of that toilet and raping her?" (Tr. 1101-1102). Dr. Rabun stated that he was aware that it happened although he did not know all the details (Tr. 1102). Dr. Rabun and Mr. Ahsens then discussed some of the evidence and the defense from that first trial (Tr. 1102). Dr. Rabun stated that he relied on the state's psychologist's synopsis of the police reports from the first case (Tr. 1102). Mr. Ahsens again asked whether Michael had claimed to hear voices at the time of the first trial, and Dr. Rabun again testified that Michael has never stated that voices told him to commit the first killing (Tr. 1102).

Mr. Ahsens insisted that there were similarities between the two crimes, since there was some evidence that Michael had had anal intercourse with Shackrein at or near the time of Shackrein's death (Tr. 1102-1103). Dr. Rabun testified that the two crimes had stark differences and some similarities (Tr. 1103). He stated that the two victims were very different; and the two men having intercourse the day before the crime was not similar to the first crime (Tr. 1103). After lengthy discussion, Dr. Rabun finally relented that it's "possible" that the

similarities suggest that sex could have been the motive in the current case (Tr. 1104).

In its closing argument, the state argued that Michael and Shackrein were in a sexual relationship that was about to end; and to escape responsibility for Shackrein's death, Michael faked mental illness (Tr. 1448). The state argued that Michael has been learning about mental illness since he was a child; he made an isolated report of hearing voices at age 12; and had no other reports of hearing voices until after his arrest for the first crime (Tr. 1448-49). The state argued that the claim of hearing voices only truly started after the first murder (Tr. 1449). "The first murder, which I must point out, since we know a good bit about it, has some very peculiar similarities to this one. Sex is involved in both cases" (Tr. 1449-50). Defense counsel objected to the misstatement of facts, and Mr. Ahsens responded, "He's been convicted of murder and rape" (Tr. 1450). The court overruled the objection (Tr. 1450). Mr. Ahsens continued, "As is apparently asphyxiation, which is the cause of death in both cases" (Tr. 1450).

Defense counsel did not include this issue in the motion for new trial, so Michael requests that the court review it for plain error. Rule 30.20. A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *See, e.g.*, State v. Henderson, 826 S.W.2d 371,376 (Mo.App.1992). Its rulings will not be overturned absent a clear abuse of discretion. *Id.*, at 374. Unless a claim of plain error establishes that the alleged error has produced a manifest injustice, an

appellate court will decline to exercise its discretion to review for plain error. State v. Chaney, 967 S.W.2d 47, 59 (Mo. banc 1998).

The general rule concerning the admission of evidence of uncharged crimes, wrongs, or acts is that evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. State v. Reese, 274 S.W.2d 304, 307 (Mo. 1954). The details of Michael's prior crime amounted to inadmissible propensity evidence unless the state, as its proponent, could show that the evidence was both logically and legally relevant. To be logically relevant, the evidence must have a legitimate tendency to clearly establish Michael's guilt of the charged offense, or tend to establish his motive, intent, absence of mistake or accident, or common plan or identity. State v. Conley, 873 S.W.2d 233, 237 (Mo.1994). Evidence may also be logically relevant if it establishes the defendant's modus operandi, when the defendant's charged and uncharged crimes are "nearly 'identical' and their methodology 'so unusual and distinctive' that they resemble a 'signature' of the defendant's involvement in both crimes." State v. Bernard, 849 S.W.2d 10, 17 (Mo. banc 1993).

The state argued that the facts of the first conviction were logically relevant to expose Michael's motive for committing this crime – sex. The problem with this argument is that the jury did not need to know the facts of the first crime to make that inference. The jury had heard that a white creamy substance was found on Shackrein's buttocks and that Michael's DNA was found on Shackrein's shorts

(Tr. 926, 950-51, 967). From those basic facts, the jury could conclude that Michael and Shackrein had had anal sex. The jury was free to reject Michael's statement that the sex took place the day before Shackrein died and conclude that Michael killed Shackrein so he could have sex with him.

The jury already had heard that Michael was at Potosi for raping and murdering 15-year-old Christine Smetzer in a high school bathroom when Michael was fifteen (Tr. 137, 295-96, 418). The jury did not need to hear that Michael caused Ms. Smetzer's death "by asphyxiation, by thrusting her throat up against the toilet and her head into the water of that toilet and raping her" (Tr. 1101-1102). Missouri courts regularly warn that evidence of other crime should not be presented to the jury in guilt phase unless it is "strictly necessary." State v. Collins, 669 S.W.2d 933,936 (Mo.1984). The facts of Ms. Smetzer's death were not necessary to show motive and should have been excluded. What the state argued as showing motive, truly just showed propensity. The state wanted the jury to believe that Michael has a propensity toward committing sexual assault and murder.

The State also seemed to imply that the jury needed to hear the facts of the first crime because they were so similar to the charged crime (Tr. 1100). But the facts of the first crime were not so similar to the second crime as to establish Michael's "signature," as is required to show a defendant's modus operandi. Furthermore, the modus operandi exception only is applicable to show the identity

of the perpetrator. State v. Barriner, 34 S.W.3d 139, 145 (Mo.banc 2000). Here, identity was not at issue, so the modus operandi exception is not applicable.

Even so, the modus operandi exception is not applicable because the crimes have only some vague similarity – they are not "nearly identical" as in Bernard, 849 S.W.2d at 17. There, this Court held that evidence that the defendant had committed other sexual crimes – showing other boys pictures of naked boys and arranging sleepovers with them in order to abuse them sexually – was not so unusual and distinctive as to be a signature of the defendant's *modus operandi*. *Id.*, at 18-20. But evidence that the defendant had the other boys run naked around the car or in front of the moving car, just as he did in the charged crime, was "so unusual and distinctive as to 'earmark' it as the conduct" of the defendant and therefore was admissible. *Id.*, at 18-19.

Here, the first crime took place in a high school bathroom (Tr. 1505-1506). The female victim was drowned in a toilet, either before or after she was raped (Tr. 1102). Michael did not claim to hear voices that told him to commit the crime (Tr. 1102).

In sharp contrast are the facts of the charged crime. The second crime took place in the cell that Michael and Shackrein shared (Tr. 964). Instead of drowning Shackrein in the toilet – a prominent feature in the cell – Michael choked him with his arms (Tr. 975). While the first victim was left half-clad, bloody and wet (Tr. 1508), Shackrein's shorts were not disarranged (Tr. 965); he had no trauma to his anus (Tr. 931); and was neatly "resting" upon a pillow (Tr. 848). Michael

immediately confessed to the crime and explained that he heard the voice of the Father of Darkness telling him to send Shackrein to him (Tr. 811, 845, 974-76).

The details regarding the first crime should not have been before the jury in guilt phase. Nothing about a crime that took place almost five years earlier proved that the desire for sex motivated Michael to kill Shackrein. The jury could not say that because it knew the details of the first crime it could understand why Michael would be motivated to commit the second crime. Nothing about Michael drowning Ms. Smetzer in a toilet makes it any more likely that he strangled Shackrein or makes it less likely that he has a mental disease or defect.

Michael acknowledges that substantial inquiry into the factual basis of an expert opinion is a proper object of cross-examination. State v. Thompson, 985 S.W.2d 779, 787 (Mo. 1999). The state had the right to probe into the bases for Dr. Rabun's conclusion that Michael had a mental disease or defect that excluded responsibility. Dr. Rabun did in fact admit that he had not read the police reports about the prior crime; his knowledge about the prior crime was taken from the reports written by Dr. Smith, who evaluated Michael twice after the first crime on behalf of the state (Tr. 1102). Once Dr. Rabun admitted that he had not read those specific reports, any legitimate impeachment on that issue was complete. The prosecutor did not need to go into the details of the first crime in order to challenge Dr. Rabun's diagnosis. The details about how Michael "thrust" or "forced" the victim's head into the toilet were immaterial to whether sex motivated Michael to commit the second crime almost five years later.

Pure and simple, revealing the details about Ms. Smetzer's death was designed to enflame the passion of the jury. State v. Wallace, 943 S.W.2d 721,724-25 (Mo.App.1997) (other crimes evidence "would inflame the passions of any reasonable juror and instill in them the desire to punish the defendant for the [other crime], an act for which he was not on trial").

The prosecutor's purpose is evident from the language he chose. He didn't merely state that Michael asphyxiated Ms. Smetzer; instead, he stated that Michael asphyxiated her by "thrusting her throat up against the toilet and her head into the water of that toilet" (Tr. 1101-1102). He also stated that she had "her throat forced up against the side of the toilet and her face into the water" (Tr. 1099). The prosecutor chose highly inflammatory words engendered to evoke revulsion toward Michael.

Revealing those details was also intended to provide an improper answer to the question of why Michael would commit this crime. The answer begged by the state through its propensity evidence is that Michael likes to rape and kill; he did it once before, and now he's done it again.

The state also intended the facts to resolve the question of whether Michael raped Shackrein. Evidence was presented that they had anal intercourse. Although Michael vouched that it was consensual, and there was no trauma to Shackrein's anus, the state argued that Michael raped Shackrein in the course of killing him. It used the facts of Michael's prior uncharged crime – that he once

before had raped and killed – to prove that he raped and killed again and was using the insanity defense as a ruse.

Finally, the state stressed its propensity argument in closing. "The first murder, which I must point out, since we know a good bit about it, has some very peculiar similarities to this one. Sex is involved in both cases. … As is apparently asphyxiation, which is the cause of death in both cases" (Tr. 1450). The state thus urged the jury to remember the facts of the first crime when considering whether Michael was guilty of the charged crime.

When evidence that the defendant committed uncharged crimes is improperly received, admission of the evidence is presumed prejudicial. State v. Lancaster, 954 S.W.2d 27, 29 (Mo.App.1997); State v. Brooks, 810 S.W.2d 627, 634 (Mo.App.1991). Thus, in State v. Driscoll**,** 55 S.W.3d 350, 354-55 (Mo. 2001), this Court granted a new trial despite the state's argument that introduction of evidence that the defendant was a member of a white supremacist gang was logically relevant to show the defendant's motive for killing a prison guard.

In State v. Burnfin, 771 S.W.2d 908, 911 (Mo. App. 1989), the defendant presented medical testimony in support of his defense of diminished capacity. The prosecutor cross-examined the doctor regarding details of the defendant's prior in-patient psychiatric treatment. *Id*. The state argued in closing that the jury, in determining guilt, should consider the defendant's aggressive acts in the past, including incidents that occurred at the psychiatric treatment centers. *Id*., at 911-12.

The Court of Appeals for the Western District reversed. *Id*., at 914. The court acknowledged that it would have been proper for the state to challenge the doctor's opinion of diminished capacity as ill-founded, considering the defendant's history of prior treatment. *Id*., at 912. But the prosecutor used the defendant's prior acts – gained through the competency exam – to argue that the defendant was a violent person and likely was guilty of the charged crime. *Id*. Not only was the argument inflammatory and designed to appeal to the jury's prejudice, but it urged the jury to consider evidence from the defendant's medical record as proof that he was guilty of the charged crime. *Id*. The court held that "the entire content of [the doctor's] testimony on cross-examination [was] outside the record so far as the issue of guilt was concerned." *Id*.

This case is markedly similar to Burnfin. The state used the details of Michael's prior crime to argue that he should be found guilty of the charged crime. The state stretched way beyond the proper range of impeachment of Dr. Rabun to reveal the gory details of Michael's first crime, committed almost five years earlier. The state knew that the facts of the prior crime could not be used to prove guilt, but nevertheless used the details of the first crime – elicited only through the cross-examination of Dr. Rabun – to argue that Michael was guilty of first-degree murder:

> The first murder, which I must point out, since we know a good bit about it, has some very peculiar similarities to this one. Sex is involved in both

cases.… As is apparently asphyxiation, which is the cause of death in both cases.

(Tr. 1449-50).

Allowing the jury in guilt phase to hear the gruesome details of the first crime was completely unnecessary yet served to bias the jury against Michael. The details were aimed to "gross out" the jury and persuade them to find Michael guilty because of those gruesome details. Michael was denied his rights to due process, equal protection, and to be tried only for the offense with which he is charged. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,17,18(a). He must receive a new trial.

ARGUMENT III

The trial court abused its discretion in denying Michael's motion requesting that the court order two psychiatric care centers to disclose the mental health records of key state witness Scott Perschbacher, or alternatively, that the court conduct an *in camera* review of those records. The trial court's action denied Michael his rights to due process, confrontation and cross-examination, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and his right to pre-trial discovery as guaranteed by Supreme Court Rule 25.03(A)(9). Michael was prejudiced, because court documents indicate that in August and September 2002, Perschbacher escaped from a psychiatric ward and had been a resident of another psychiatric care center; and Perschbacher was seen engaging in bizarre behavior in prison, such as throwing excrement at other inmates. At trial (in March 2003), Perschbacher provided damaging testimony that Michael had admitted in prison that (1) he killed Shackrein to prevent him from moving to another cell; and (2) he had received tips on how to act crazy in order to avoid responsibility for Shackrein's death. Since Perschbacher was such a crucial witness for the state, the defense should have been allowed to challenge whether he truly had the ability to perceive and recollect events accurately, and whether he had lied during his deposition.

During his deposition, state witness Scott Perschbacher vouched that he had not had a psychiatric or psychological examination in any of his criminal cases (L.F. 265). Defense counsel then obtained documents from Perschbacher's pending St. Louis County criminal court file which indicated that Perschbacher "escaped" from a psychiatric ward at St. Anthony's Hospital on August 29, 2002 (Tr. 19-20; L.F. 265, 268). Another document in the file, dated September 9, 2002, indicated that Perschbacher was unable to attend a court hearing due to hospitalization at the Metropolitan St. Louis Psychiatric Center (Tr. 19-20; L.F. 265). Additionally, defense counsel informed the court that another inmate disclosed in deposition that he had seen Perschbacher engaging in bizarre behavior, such as throwing excrement at other inmates (11/12/02 Tr. 45).

Defense counsel requested that the court issue an order for the records from the Metropolitan St. Louis Psychiatric Center and St. Anthony's Hospital to determine if Perschbacher lied in his deposition and if they referenced mental conditions that would affect his ability to be a competent witness (Tr. 20; L.F. 265). Alternatively, defense counsel requested that the court order the institutions to produce the records for the court under seal and conduct an *in camera* review of the records (Tr. 20; L.F. 265). The court denied the request (Tr. 21). The issue is included in the motion for new trial (L.F. 364-65).

At trial, Perschbacher testified that he and Michael had adjoining cells and spoke several times through the ventilation duct (Tr. 1261-62). Initially, Michael told Perschbacher that he killed Shackrein because his father told him to do it (Tr. 1263). Later, Michael admitted that he and Shackrein had sex two or three times, and that Shackrein wanted to move out of the cell against Michael's wishes (Tr. 1262-65). On the night Shackrein was killed, he and Michael were having sex, and Michael choked Shackrein and then did other things to him (Tr. 1263).

Perschbacher also testified that Michael received notes from another inmate, who was housed six or seven cells away (Tr. 1266). Perschbacher passed notes from that inmate to Michael and read the notes before passing them along (Tr. 1266-67). Michael told Perschbacher that the other inmate told him that he needed to pretend he's crazy to beat the case (Tr. 1267, 1269).

Perschbacher detailed his lengthy criminal history and the hundreds of conduct violations he racked up in prison (Tr. 1257-58, 1272-73, 1283). Although he had pending charges on four new felonies and would be sentenced after he testified, he denied any sort of favorable treatment in exchange for his testimony (1257, 1274-75, 1294). Over the years, Perschbacher has given information on at least four homicide cases where other inmates allegedly confessed to him (Tr. 1277). Perschbacher admitted that he believed that blacks and whites should not live together and there should be no interbreeding (Tr. 1291); that he has written a letter using a racial epithet and complaining about black inmates being treated

better than white inmates (Tr. 1292); and that he wrote another letter complaining that, "The niggers get away with anything" (Tr. 1292-93).

Perschbacher has been a drug addict since his early teenage years (Tr. 1279-80). He has been addicted to heroin, cocaine, methamphetamine, and pharmaceuticals (Tr. 1280). Perschbacher denied that he was in St. Anthony's psychiatric ward in 2002 (Tr. 1281). He admitted he was at "the St. Louis metro psychiatric facilities" to get his medication (Tr. 1282).

A trial court enjoys broad discretion in determining the relevance of evidence and in admitting or excluding evidence at trial. State v. Newton, 963 S.W.2d 295, 297 (Mo. App. 1997); State v. Adams, 51 S.W.3d 94, 98 (Mo. App. 2001). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997).

The standard for reviewing a claim that defendant was denied meaningful discovery is whether the trial court abused its discretion in such a way as to result in fundamental unfairness. State v. Tisius**,** 92 S.W.3d 751, 762 (Mo. 2002). Fundamental unfairness occurs when the state's failure to disclose results in defendant's "genuine surprise" and the surprise prevents meaningful efforts to consider and prepare a strategy for addressing the evidence. State v. Johnston, 957 S.W.2d 734, 750 (Mo. banc 1997).

The trial court abused its discretion in completely foreclosing Michael's ability to investigate Perschbacher's records and to confront him with those records at trial. The records were essential to Michael's rights to due process, confrontation and cross-examination, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Michael was also entitled to them under Supreme Court Rule 25.03(A)(9). Perschbacher's psychiatric records related directly to his basic ability to perceive, recall or describe the events in question and to the truthfulness of the information he gave in his deposition. At the least, the court should have ordered the institutions to provide the records and then reviewed them *in camera*.

The Confrontation Clause of the United States and Missouri Constitutions guarantee to every criminal defendant the right to confront his accusers. Pointer v. Texas, 380 U.S. 400, 404 (1965); State v. Parker, 886 S.W.2d 908, 916 (Mo. banc 1994). This right is fundamental to a fair trial. State v. Sanders, 903 S.W.2d 234 (Mo. App. 1995). It necessarily includes the right to confront and cross-examine witnesses against the defendant. United States v. Owens, 484 U.S. 554, 557 (1988); Davis v. Alaska, 415 U.S. 308, 315 (1974). The purpose of the guarantee is to ferret out any bias or prejudice of the witness or to test the witness' memory and perception. Delaware v. Fensterer, 474 U.S. 15, 19 (1985); State v. Baker, 859 S.W.2d 805 (Mo. App. 1993). "The right of cross examination is more than a

desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process'." Chambers v. Mississippi, 410 U. S. 284, 295 (1973).

The Records Were Discoverable

In United States v. Nixon, 418 U.S. 683, 711-14 (1974), the United States Supreme Court held that the right to confidential communications between President Nixon and his advisors must yield to the legitimate needs of the judicial process in obtaining documents that were demonstrably relevant in a criminal trial. The Court held that the President's need for confidentiality in his office communications is general in nature, whereas the need for production of relevant evidence in a criminal proceeding is "specific and central to the fair administration of a particular criminal case in the administration of justice." *Id*., 418 U.S. at 712-13. The Court concluded:

> When the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id.; *see also* Davis v. Alaska, 415 U.S. 308, 319 (1974) (state's legitimate interest in preserving the anonymity of its juvenile offenders must give way to the defendant's paramount right to probe into possible bias of key state witness). To

provide protection against public disclosure of the confidential material, the court should conduct an *in camera* review to determine if it is relevant and material. 418 U.S. at 714-15.

In Pennsylvania v. Ritchie, 480 U.S. 39, 61 (1987), the Supreme Court held that a defendant charged with various sexual offenses against his daughter was entitled to know whether the Children & Youth Services file contained information that may have changed the outcome of his trial had it been disclosed. The proper procedure to protect both the defendant's due process rights and the state's interest in the confidentiality of the records was for the court to conduct an *in camera* review of the documents and disclose any material information. *Id*.

Missouri courts have recognized that the statutorily-recognized physician-patient privilege, Section 491.060, "may give way to some extent where there is a stronger countervailing societal interest." State ex rel. Dixon Oaks Health Center, Inc. v. Long, 929 S.W.2d 226, 230 (Mo. App. 1996). This countervailing societal interest was present in State v. Newton, 925 S.W.2d 468 (Mo. App. 1996). Newton was charged with kidnapping, and the testimony of one witness placed him at the victim's house at the time of the crime. *Id*., at 471. The witness had a history of drug abuse, mental illness, and hallucinations. *Id*., at 470. Newton believed that the witness may have experienced hallucinations at the time of the crimes, so he requested disclosure of the witness' psychological records. *Id*., at 471. The appellate record did not indicate that the trial court conducted an *in*

camera review of the psychological records, and those records were not part of the record on appeal. *Id*.

The Court of Appeals remanded the case for an *in camera* inspection of the records by the trial court. *Id*., at 472. It held that if the records did not contain any information material to the defense, the court should enter an order, restore the records to their privileged status, and return them to the records custodian. *Id*. If the records contained relevant and material information, the court should give copies to the parties and convene an evidentiary hearing. *Id*. After the hearing, the court should certify to the appellate court a record of its proceeding and finding, along with copies of the psychological records. *Id*.

In State v. Harger, 804 S.W.2d 35, 36 (Mo. App. 1991), the alleged rape victim admitted using marijuana before the attack but denied using cocaine. Two months after the attack, she was admitted to a rehabilitation center for cocaine addiction. *Id.* The defendant claimed that he and the victim had consensual sex after he promised to give her cocaine; later, when he didn't give her cocaine, she claimed that he raped her. *Id*. At trial, the defendant argued that he was entitled to view the alleged victim's records from the rehabilitation center to see if she had made any statements admitting that she had taken cocaine prior to the date of the attack. *Id*. The trial court refused defendant's request. *Id*., at 37.

The Court of Appeals for the Eastern District held that fundamental fairness mandated that the case be remanded to the trial court so that it could conduct an in camera review of the alleged victim's records. *Id*., at 37-38. The court recognized

that if the records contained an admission that the alleged victim had been using cocaine at the time of the attack, the outcome of the trial could have been affected. *Id*., at 37.

Here, the trial court, at the minimum, should have ordered the institutions to provide it with Perschbacher's records and then reviewed the records *in camera*. See State v. Middleton**,** 995 S.W.2d 443 (Mo. 1999) (trial judge conducted an *in camera* review of the department of mental health's records to determine if the records should be produced); State v. Parker**,** 886 S.W.2d 908 (Mo. 1994) (trial court properly conducted *in camera* review of personnel records of crucial police officer witness for the time period at issue); State v. Davison, 884 S.W.2d 701, 703-704 (Mo. App. 1994).

The State Had a Duty to Turn Over the Records

"The purpose of discovery is to permit defendant a decent opportunity to prepare in advance for trial and avoid surprise." State v. Mease, 842 S.W.2d 98, 108 (Mo. banc 1992). The discovery rules "aid in the truth finding aspect of the legal system." State v. Scott, 943 S.W.2d 730, 735 (Mo. App. 1997). They "seek to foster … expedited trials … and the opportunity for effective cross-examination." State v. Wells, 639 S.W.2d 563, 566 (Mo. 1982).

In State v. Robinson, 835 S.W.2d 303, 306-307 (Mo. 1992), the state argued that since it did not have possession of the victim's psychological records, it had no duty to disclose them. This Court rejected that argument:

> [The duty to disclose] rests, in part, on the unique role of prosecutors in the criminal justice system. The prosecutor, and the entire law enforcement community, represent the state. The state's interest in the criminal trial is not in convicting the innocent but that justice be done. In this case, this duty required the disclosure of the psychiatric record of the victim. As a result of this disclosure, defendant was able to show the jury an "Encyclopedia Brittanica" of psychological reports on the complainant, the previous apparently false reports, and a treating physician's view.

Id., at 306, *citing* United States v. Bagley, 473 U.S. 667, 674-77 (1985); Brady v. Maryland, 373 U.S. 83, 86-89 (1963); Rule 25.03(A)(9); *see also* Newton, 925 S.W.2d at 471 (rejecting state's argument that it had no duty to disclose the reports because it did not have possession of them).

The state must disclose evidence favorable to the accused when the evidence is material to guilt or to punishment. Rule 25.03(A)(9); *see* Brady, 373 U.S. at 87 (state's suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The state's obligation to provide evidence to the defense encompasses evidence affecting a state witness' credibility. Giglio v. United States, 405 U.S. 150, 153-54 (1972). Undisclosed evidence is favorable within the Brady rule when it could have been used for impeachment purposes. Bagley, 473 U.S. at 676.

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Middleton, 995 S.W.2d 443, 455 (Mo. 1999). The issue is not whether the defendant would more likely than not have received a different verdict with the disputed evidence, but whether in its absence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. State v. Goodwin, 43 S.W.3d 805, 812 (Mo. banc 2001); *see also* Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); United States v. Bagley, 473 U.S. 667, 682 (1985).

Other Jurisdictions Have Recognized the Relevance and Materiality of this Evidence

One of the first cases to confront this issue was United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974). The defendant wished to present evidence that the government witness, a few months prior to the charged crime, voluntarily committed himself to a hospital, reporting auditory hallucinations and also complaining that at times he thought he was some other person. *Id*. The witness had testified that he was at the hospital, but not for treatment of mental illness. *Id*.

The Court of Appeals for the Fifth Circuit held that the jury was entitled to know about the witness' psychiatric problems, especially since it refuted his prior denial that he entered the hospital for mental treatment:

> It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the

jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth.

Id., at 762. The jury should be aware, within reason, of "all matters affecting a witness's credibility to aid in their determination of the truth." *Id*. The defendant has the right to "explore every facet of relevant evidence pertaining to the credibility of those who testify against him." *Id*., at 763; *see also* United States v. Hiss, 88 F.Supp. 559 (D.C. N.Y. 1950) (evidence of witness' psychiatric problems was admissible for the preliminary question of competency and for the jury's determination of credibility); *see also* United States v. Lindstrom, 698 F.2d 1154, 1159 (11th Cir. 1983) (reversing because trial court improperly restricted the scope of cross-examination and defendant's access to records of the government's star witness regarding prior psychiatric treatment and confinement); United States v. Butt, 955 F.2d 77, 82-83 (1st Cir. 1992) (recognizing that "evidence about a prior condition of mental instability that 'provides some significant help to the jury in its efforts to evaluate the witness' ability to perceive or to recall events or to testify accurately' is relevant"); State v. Henries, 704 A.2d 24, 33-36 (N.J. App. 1997) (reversing based on newly discovered evidence that the state's star witness had extensive psychiatric disorders not evident at trial; if the evidence had been discovered prior to trial, "there could be no question but that [the defendant] would have had an absolute right to present such evidence and that a refusal to so permit would have required a reversal).

The Records Were Material and Favorable to the Defense

Defense counsel made a plausible showing that the records would have been material and favorable to Michael's defense. Although Perschbacher vouched in deposition that he had never had a psychiatric or psychological examination in any of his criminal cases, defense counsel learned from court files that Perschbacher "escaped" from a psychiatric ward at St. Anthony's Hospital on August 29, 2002 and that on September 9, 2002, Perschbacher was unable to attend a court hearing due to hospitalization at the Metropolitan St. Louis Psychiatric Center (Tr. 19-20; L.F. 265, 268). Additionally, Perschbacher had engaged in bizarre behavior in prison, such as throwing excrement at other inmates (11/12/02 Tr. 45).

Perschbacher provided very damaging testimony: (1) that Michael and Shackrein had a sexual relationship and Michael killed Shackrein to keep him from moving to a different cell (Tr. 1262-65); and (2) Michael acknowledged receiving notes from another inmate giving tips on how to act crazy to beat the case (Tr. 1267, 1269).

Although the defense attacked Perschbacher's credibility on other grounds – his extensive criminal past, career of snitching, drug abuse, racism, and self-interest – these grounds did not attack his actual ability to perceive and recall the events at issue. While the other grounds relate to why Perschbacher was motivated to lie, his psychiatric records relate to whether he was able to perceive the alleged events accurately; whether he would be prone to misinterpret what

occurred; whether he hallucinated the events; whether he had a firm grasp on reality; whether he could recollect events that took place over three years earlier; and whether he fabricated his testimony because he himself had tried to use mental illness to escape responsibility in his own cases.

Perschbacher denied that he was in a psychiatric ward at St. Anthony's in 2002 (Tr. 1281). He admitted he was at the "St. Louis metro psychiatric facilities" but stressed that he was only there to get medication (Tr. 1282). He did not state the type of medication he was receiving. Because counsel had been denied access to Perschbacher's records at these institutions, and the trial court refused to even look at the records in camera, the defense was barred from meaningful cross-examination of this key state witness.

The Supreme Court has recognized that where the state's case may stand or fall on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny. Gordon v. United States, 344 U.S. 414, 417 (1953); United States v. Summers, 598 F.2d 450, 460 (5th Cir. 1979) ("the importance of full cross-examination to disclose possible bias is necessarily increased" for witnesses providing an essential link in the prosecution's case). "Cross-examination of a witness in matters relevant to credibility ought to be given wide scope." Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981).

Michael's inability to investigate and confront Perschbacher regarding his psychiatric problems, after Perschbacher provided extremely damaging testimony on the key issue at trial, undermines confidence in the outcome of the trial. The

defense psychiatrist concluded that Michael had a mental disease or defect excluding responsibility, while the state's psychiatrist did not. The state used Perschbacher to break the "tie". Perschbacher devastated the defense by providing a motive (other than insanity) for Michael to kill Shackrein; and by testifying that Michael initially faked mental illness with him and then relented and told the truth (Tr.1263-65), and testifying that Michael had received tips on how to act crazy (Tr.1267,1269). The defense, in contrast, was not allowed to pursue a full cross-examination given the court's refusal to allow discovery or even to look at the records *in camera*. The limitations placed on Michael's ability to pursue discovery and full and effective cross-examination of the key witness against him undermines confidence in the outcome of the trial.

The court's refusal to even look at the records also undermines confidence in the outcome of the sentencing proceeding. When a jury has returned a death verdict, there is an acute need to ensure that the verdict was reliable. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett v. Ohio, 438 U.S. 586, 604 (1978). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

The trial court's capricious decision not to even look at Perschbacher's records severely hindered Michael's ability to confront evidence that was relevant to sentencing. The jury was instructed that in determining the proper sentence, it should consider the evidence presented in the guilt phase (L.F. 330-31). The

penalty phase itself was very short – much of the penalty phase evidence was front-loaded in the guilt phase. For the state, that evidence included Perschbacher's testimony that Michael was motivated by jealousy and possessiveness to kill Shackrein and did so while the two were having sex (Tr. 1262-65); and that Michael received tips on how to act crazy (Tr. 1266-67, 1269).

Perschbacher's testimony worked against the statutory mitigators submitted to the jury that (1) the murder was committed while Michael was under the influence of extreme mental or emotional disturbance; and (2) Michael's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (L.F. 331). Further, the jury could infer from Perschbacher's unchecked testimony that Michael had a callous indifference to the loss of Shackrein's life, lack of remorse, and disrespect for the justice system, and refused to accept responsibility for his crime. Limitations placed on Michael's ability to show that this key state witness did not have the ability to accurately perceive, recall and describe the events at issue undermined confidence in the death sentence.

Michael respectfully requests that the Court reverse the conviction and remand for a new trial in which the defense would have access to the psychological records of Scott Perschbacher; or alternatively, that the Court remand to the trial court for an *in camera* review and if it determines that the records do not contain any relevant material, place the records under seal for this Court to review.

ARGUMENT IV

The trial court abused its discretion during defense counsel's guilt phase closing argument in letting the state make speaking objections that referred to matters completely outside the record, amounted to testimony by the prosecutor, and disparaged defense counsel. The trial court also abused its discretion during defense counsel's penalty phase closing argument in letting the state make a speaking objection that encouraged the jury to speculate about matters not on the record, amounted to testimony by the prosecutor, and implied that defense counsel had hidden facts from the jury. The state's repeated violations during the closing arguments deprived Michael of his rights to due process, a trial before a fair/impartial jury, confrontation and cross-examination of the witnesses, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. The trial court's approval of this improper "testimony" by the prosecutor encouraged the jury to believe that there were matters outside the record that it should be considering and that defense counsel, and hence the defense, was untrustworthy and unbelievable.

Missouri courts have long held that an accused is entitled to a fair trial, and it is the duty of both the court and the prosecutor to see that he gets one. State v. Tiedt, 206 S.W.2d 524, 526 (Mo. banc 1947). As the State's representative, the

prosecutor must remain impartial, as his role is not to seek a conviction at any cost but to seek justice. State v. Storey, 901 S.W.2d 886, 901 (Mo.banc 1995).

Despite its clear duty, the prosecutor engaged in a spate of speaking objections that, in effect, amounted to testimony by the prosecutor (Tr. 1434, 1444, 1547). The speaking objections also encouraged the jury to consider matters outside the evidence and implied to the jury that defense counsel was hiding things from the jury or being deceptive regarding the evidence.

This Court has stressed that it is highly prejudicial for a prosecutor to argue facts outside the record, because the jury is likely to give those assertions much weight when they should carry none. Storey, 901 S.W.2d at 900. Argument outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes - properly - that the prosecutor has a duty to serve justice, not merely to win the case." *Id*.

Closing argument must conform to the evidence and the reasonable inferences fairly drawn from the evidence. State v. Hill, 866 S.W.2d 160, 164 (Mo. App. 1993). A prosecutor's attempts to "inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct. The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." State v. Burnfin, 771 S.W.2d 908, 912 (Mo. App. 1989).

It is well settled that personal attacks on defense counsel by a prosecutor are improper and objectionable. State v. McGee, 848 S.W.2d 512, 514 (Mo. App. 1993). Closing argument statements, made without basis in the record, that defense counsel acted improperly are error as they degrade the defense. State v. Greene, 820 S.W.2d 345, 347 (Mo. App. 1991); *see also* Higgins v. Gosney**,** 435 S.W.2d 653, 661-62 (Mo. 1968) (new trial granted based on plaintiff's speaking objection that implied that the defendant prevented the jury from hearing valid evidence on the key issue that would have helped the plaintiff).

In Greene, the prosecutor argued in rebuttal that although defense counsel stood before the jury and claimed not to know who the confidential informant was, he truly did know and had even pointed the person out to the prosecutor that day. 820 S.W.2d at 346. Defense counsel objected, but the court overruled the objection. *Id*. The prosecutor repeated the argument, and defense counsel again objected. *Id*., at 347. The court sustained the objection but refused defense counsel's request to instruct the jury to disregard the improper comments. *Id*.

The Court of Appeals found reversible error, because the prosecutor's argument went beyond the record and implied that defendant's counsel either lied or sought to mislead the jury, neither of which is supported by the record:

> Saying defense counsel lied or intentionally attempted to mislead the jury without a basis in the record cannot be allowed. The argument was outside the record and highly improper. It was error to allow even part of it.

Id. The appellate court granted a new trial, even though there was substantial evidence of guilt, because "the unsupported statement that defense counsel was lying to the jury is so serious and potentially prejudicial that it might have affected the jurors' deliberations." *Id*.; *see also* State v. Spencer, 307 S.W.2d 440, 447 (Mo.banc 1957) (finding reversible error by prosecutor's improper comment that defense counsel "browbeat the witnesses"); Burnfin, 771 S.W.2d at 912 (improper for prosecutor to argue that defense counsel had tried to hide the truth, had "trashed" a witness who could not read, and had coached its witness); State v. Hornbeck, 702 S.W.2d 90, 92-93 (Mo. App. 1985) (prosecutor accused defense counsel of conspiring to commit a crime, without any supporting evidence).

The Eleventh Judicial Circuit has a local rule that "when objecting to the introduction of any evidence, counsel shall state explicitly the ground of objection without argument." Rule 21.3(f). This rule logically would also apply to objections made during closing argument.

Although trial courts have wide discretion in controlling closing arguments, they abuse that discretion when they allow argument that is plainly unwarranted and that prejudices the defendant. State v. Newlon, 627 S.W.2d 606, 616 (Mo. 1982); State v. Barton, 936 S.W.2d 781, 783, 786 (Mo. banc 1996). Prejudice is established by showing that "there is a reasonable probability that, in the absence of the abuse, the verdict would have been different." Barton, 936 S.W.2d at 786.

Closing arguments in capital cases must receive a "greater degree of scrutiny" than those in non-capital cases. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Barton, 936 S.W.2d at 783 (closing arguments are "particularly important in capital cases, where there are unique threats to life and liberty").

Objection Improperly Bolstering the Basis for Dr. Vlach's Diagnosis

In guilt phase closing, defense counsel challenged Dr. Vlach's conclusion that Michael killed Shackrein just to have sex with him, not because he was mentally ill (Tr. 1433). Defense counsel argued that Dr. Vlach's findings were faulty, because he based his opinion in part on his incorrect belief that Michael had given Shackrein's name and number during the 10:00 count and therefore was trying to hide his guilt (Tr. 1433). The officer who conducted the count, however, testified at trial that he had not yet made it to Michael's cell when Michael alerted the officers to the situation (Tr. 1433). Defense counsel questioned why Vlach would put information in his report when there was no basis for it, and it was not true (Tr. 1433). The prosecutor objected, "[T]hat's a blatant mistatement of the evidence. She knows very well there is a statement that says that" (Tr. 1434). The court sustained, "as to the statement that is not true" (Tr. 1434). The issue is included in the motion for new trial (L.F. 361).

Through its speaking objection, the prosecutor communicated to the jury that there was some statement justifying Vlach's belief that Michael gave Shackrein's name and number during the 10:00 count. But if there was such

evidence, the prosecutor should have presented it at trial and given the defense the opportunity to counter it. By offering the information to the jury himself, the prosecutor transformed himself into a witness; a witness, however, whom the defense was unable to confront or cross-examine. Storey, 901 S.W.2d at 900. Coming from the prosecutor, the jury accepted the statement as the truth, that Dr. Vlach did indeed have a good basis for thinking that Michael had tried to conceal his crime. *Id*.

The speaking objection also communicated that defense counsel was blatantly misstating the evidence. Thus, not only did the prosecutor himself inject matters into the trial that were not in evidence – that there was a statement supporting Vlach's position – but he then accused defense counsel of misstating the evidence (Tr. 1434). In effect, he communicated to the jury that defense counsel was unworthy of belief – that the jurors must question what defense counsel told them, because defense counsel misstated the evidence and is not trustworthy.

Furthermore, by sustaining the objection, the court effectively gave the state's argument its stamp of approval. Barton, 936 S.W.2d at 788. Thus, the court implicitly confirmed that there was indeed some valid basis for Dr. Vlach's otherwise faulty premise; and defense counsel was misstating the evidence and could not be trusted.

This error was especially prejudicial, since only two doctors evaluated Michael for his responsibility for this crime: Dr. Vlach for the state and Dr.

Rabun for the defense. Through its speaking objection, the state bolstered Dr. Vlach's credibility but did so using matters completely outside the evidence. Thus, the defense was not able to counter this testimony by the prosecutor on the key point in contention.

Comments About the Instructional Conference

Later, defense counsel argued that by finding Michael not guilty by reason of insanity, he would be sent to Fulton State Hospital (Tr. 1444). The prosecutor objected, "This is the very material counsel didn't want in the instruction" (Tr. 1444). The court sustained the objection (Tr. 1444).

After the state had finished its rebuttal argument, defense counsel objected to the state's speaking objection (Tr. 1457). Defense counsel argued that it was improper to disclose to the jury things that may or may not have been said in the instruction conference (Tr. 1457). Defense counsel requested that the court instruct the jury that the instructions are the court's and that the court has determined that the instructions are proper (Tr. 1458). The court denied the request, believing that it was meaningless and would confuse the jury (Tr. 1458). The issue is included in the motion for new trial (L.F. 355-56).

By sustaining the objection, the court improperly limited defense counsel's closing. This Court has recognized:

> [D]efense counsel has the right to make any argument to the jury that is essential to the defense of the accused and is justified by the evidence and the

reasonable inferences that might be drawn therefrom. It is an abuse of discretion for the trial judge to preclude any such argument.

Barton, 936 S.W.2d at 784. Defense counsel had stated nothing improper. Defense counsel merely was advising the jury that if it found Michael not guilty by reason of mental disease or defect he would be placed in a mental hospital (Tr.1444). The prosecutor could not legitimately complain that counsel was misstating the law, because she hadn't.

Again the prosecutor referred to matters outside the evidence, the instructional conference. Anything that took place at the bench or in chambers was off limits for discussion in front of the jury. "Matters heard outside the hearing of the jury are done so for a reason" and are not a proper subject for closing arguments. State v. Nelson, 957 S.W.2d 327, 330 (Mo.App. 1997). Through its comments, the prosecutor cut off defense counsel's argument and again implied that defense counsel was not playing by the rules. Greene, 820 S.W.2d at 347; Spencer, 307 S.W.2d at 447; Hornbeck, 702 S.W.2d at 92-93.

Asking the Jury to Consider Matters Outside the Record

In penalty phase closing, defense counsel stressed that Dr. Vlach testified that to this day Michael is being treated by the state with medications for schizophrenia (Tr. 1546). Defense counsel asked the jury a rhetorical question of why Michael would receive that medication if he did not have significant mental

health problems (Tr. 1546). The prosecutor objected that the argument, "calls for speculation beyond the record. There may be very good reasons that are not in evidence" (Tr. 1547). The court sustained the objection (Tr. 1547). The issue is included in the motion for new trial (L.F. 360).

Defense counsel's rhetorical question did not ask the jury to consider matters outside the record. Instead, the answer was obvious – Michael would not be receiving medication for schizophrenia in the Department of Corrections if he were not schizophrenic. During trial, defense counsel elicited several times that Michael, to this day, receives medication for schizophrenia (Tr. 1108,1372). The reasonable inference from that testimony is that Michael receives that medication because he is in fact schizophrenic. If the state had evidence to counter the reasonable inference from that testimony, it should have elicited it at trial.

Since the state failed to counter that reasonable inference through proper means, *i.e*, evidence at trial, it resorted to a speaking objection that communicated to the jury that there was in fact some reason outside the record for why the Department of Corrections would give Michael medicine to fight schizophrenia. The prosecutor again transformed himself from an officer of the court to a witness, albeit a witness who was not subject to cross-examination. Storey, 901 S.W.2d at 900.

By its repeated, improper speaking objections, the State violated its sacred obligation "not merely to win a case, but to see that justice is done, that guilt shall

not escape nor innocence suffer." Burnfin, 771 S.W.2d at 914, *citing* Berger v. United States, 295 U.S. 78, 88 (1935). The state's repeated violations deprived Michael of his rights to due process, a trial before a fair/impartial jury, confrontation and cross-examination of the witnesses, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§10, 18(a),21. Michael must receive a new trial.

ARGUMENT V

The trial court abused its discretion when it refused to allow the jury to take notes during the trial, because the refusal violated Michael's rights to due process, equal protection, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§2,10,14,18(a),21. While the civil rules of procedure allow note-taking at the request of either party, the criminal rules of procedure leave the decision solely up to the discretion of the court. The court's refusal to allow note-taking prejudiced Michael, because (1) this was a factually complex case, with nine doctors who testified and also referred to the findings and observations of yet other doctors who did not testify; and (2) the jury could not recall all the pertinent information needed to decide the key issue of the case, as evidenced by its request – denied by the court – to review during deliberation the psychiatric and psychological reports submitted by Michael.

"The ability to take notes to aid the memory is a tool which should not be forbidden based on unpersuasive reasoning and groundless fears." State v. Trujillo, 869 S.W.2d 844, 850 (Mo. App. 1994). Yet that is exactly what occurred in Michael's trial. After voir dire, defense counsel requested that the jury be allowed to take notes (Tr. 738). The court expressed its concern that note-taking would distract the jurors; or that the jurors would give more weight to the notes of some jurors than others (Tr. 738-39, 744). Defense counsel argued that the civil

rules allow note-taking upon the request of either party, so it should be allowed here too, since there would be many experts testifying (Tr. 741-42, 791). The court denied the request (Tr. 744,791).

To date, whether to allow note-taking in criminal cases rests upon the sound discretion of the trial court. Trujillo, 869 S.W.2d at 850. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997).

The civil rules of procedure allow juror note-taking at the request of either party: "Upon the court's own motion or upon the request of any party, the court shall permit jurors to take notes." S.Ct. Rule 69.03. The criminal rules of procedure, however, only provides for it, "[i]f the court allows juror note-taking." S.Ct. Rule 27.08. Missouri's distinction between civil and criminal litigants is arbitrary and capricious.

The distinction between the civil and criminal rules may arise from the belief that civil cases at times will be more legally or factually complex than criminal cases. But Michael's case was extremely complex, and note-taking was necessary. The parties discussed Michael's psychiatric history going back to his earliest years. The jurors had to recall the names and diagnoses of nine doctors, over the course of three days of testimony, and the doctors also referred to the observations and findings of yet other doctors who did not testify. The diagnoses

differed, some in small respects and others in very large ways. Different doctors testified about the same incidents but interpreted them differently. The jury had the task of recalling the evidence, even the minute details; distinguishing the findings of the different doctors; evaluating the doctors' credibility; and finding whether Michael had proven by the weight of the credible evidence that he was not guilty by reason of mental disease or defect excluding responsibility. Hence, note-taking was essential for the jury to accurately recall the detailed, fact-specific, and conflicting testimony on the key issue of the case.

In many ways, this trial was similar to a civil trial. The facts of the crime were not in dispute. The key issue was the defendant's sanity, and the jurors were deciding the weight to be given to medical testimony. Surely, in a medical malpractice case with ten doctors testifying, the jurors would have been allowed to take notes.

It was essential to the defense especially that the jurors be able to keep the facts straight. Since the defense carried the burden of proof for the insanity defense, its evidence in that regard preceded that of the state. The jurors' memories of the defense evidence must have faded by the time the state's evidence had concluded. Note-taking would have leveled the playing field, by ensuring that the jurors recalled the defense evidence as strongly as it recalled the state's evidence.

Note-taking has recognized benefits. Where jurors are dealing with complex issues, "[n]ote-taking can serve as a legitimate aid in absorbing and

synthesizing information, as well as refreshing memory." People v. Hues, 704 N.E.2d 779, 782 (N.Y. App. 1998). Note-taking aids their memories and enables them to consider the evidence in a more informed fashion. *Id*. In fact, in a 1998 survey, 98% of jurors polled nationally and state-wide in New York indicated that they would welcome the opportunity to take notes during trial. *Id*., *citing* Aronson, Rovella and Van Voris, *Nat'l Juror Poll Finds Spirit of Independence*, N.Y.L.J., Oct. 26, 1998, at 1, col. 5.

The court's fears that the jurors would be distracted by note-taking were unfounded (Tr. 738-39). The Court of Appeals for the Western District has stressed:

> [I]t is just as likely that note-taking will increase [the jurors'] observation and attention to the matters at hand rather than diminish their concentration. There are other factors determinative of a witness' credibility; importantly, the testimony the witness gives.

Trujillo, 869 S.W.2d at 849. The appellate court recognized that, "it should not be expected that jurors will feverishly take notes. The vast majority of note-takers will more likely approach the task deliberately and sparingly jot down only important and single facts such as names, dates, figures, calculations, times, and places." *Id*. Furthermore, the court would have read the jury the instruction, modeled after MAI-CR3d 302.01, that warns, "note-taking may interfere with your ability to observe the evidence and witnesses as they are presented." *Id*. The

risk that taking notes may distract a juror is no greater than the possibility that taking notes may increase the juror's attention to the testimony. Esaw v. Friedman, 586 A.2d 1164, 1169 (Conn. 1991). The American Bar Association has endorsed juror note-taking, indicating that note-taking results in greater juror attention during the trial itself. *Am. Bar Assn. Standards for Criminal Justice*, Standard 15-3.5: Note Taking by Jurors [3d ed. 1996].

The court's belief that the jurors would give more weight to the notes of some jurors than others, is also unfounded. Although this "very well may have been a possibility in the days when fewer individuals could read or write,… [I]t is hardly a concern today. It is doubtful that a juror who takes notes will unduly influence one who listens carefully." Trujillo, 869 S.W.2d at 849. At any rate, certain jurors likely will be more influential with their fellow jurors than others anyway, so it is unlikely that note-taking will distort the deliberative process. Esaw, 586 A.2d at 1169.

Any fear that the jurors' deliberations would be skewed by jurors omitting to include certain points in their notes is also unfounded. The fear that the jurors' notes may be inaccurate or incomplete "may just as accurately be leveled at the jurors' memories." Trujillo, 869 S.W.2d at 849; Esaw, 586 A.2d at 1169.

Michael suffered prejudice from the jurors' inability to take notes. During deliberations, the jury requested all psychiatric and psychological records presented by the defense (L.F.316). The court responded that the jury "must be

guided by the evidence as you remember it and the instructions of the court" (L.F.317). The jurors obviously had difficulty recalling the testimony of the defense doctors and wanted to see the records to help them remember. Denied the ability to take notes, the jurors were also denied the ability to recall, and hence consider, Michael's evidence in their deliberations.

The purpose of a trial is to seek the truth. State v. Carter, 641 S.W.2d 54, 58 (Mo.banc 1982). The court must enable the jury, as fact-finder, to do the absolute best job it can. This duty is heightened in a capital case, where the defendant's life hangs in the balance. The trial court abused its discretion when it refused to allow the jury to take notes during the trial, because the refusal violated Michael's rights to due process, equal protection, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§2,10,14,18(a),21. Michael must be granted a new trial where the jury can take notes and properly weigh all the evidence presented.

ARGUMENT VI

The trial court plainly erred in failing to instruct the jury that it could not impose a death sentence if it found it was more likely than not that Michael was mentally retarded, because the lack of those instructions deprived Michael of due process, equal protection, a fair trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII, XIV; Mo.Const., Art. I, §§ 2,10,18(a),21. Evidence was presented at trial from which a reasonable juror could conclude by a preponderance of the evidence that Michael was mentally retarded. Michael suffered manifest injustice by the lack of the instructions, because the jury could not have imposed a death sentence if it had found that he was mentally retarded.

To ensure that Missouri does not impose death sentences upon mentally retarded defendants, the Missouri Legislature enacted Section 565.030, RSMo Cum Supp. 2001, on May 11, 2001. It provides that if the jury finds by a preponderance of the evidence that the defendant is mentally retarded, it must impose a sentence of life imprisonment without the possibility of parole. Section 565.030.4(1). The statute limits its application to cases where the crimes occurred on or after August 28, 2001. Section 565.030.7.

In June, 2002, the United States Supreme Court issued Atkins v. Virginia, 536 U.S. 304, 321 (2002), holding that "death is not a suitable punishment for a mentally retarded criminal." In Johnson v. State, 102 S.W.3d 535, 540 (Mo.

2003), this Court acknowledged that Atkins must be applied retroactively: "Missouri's statute was to apply only to crimes committed after August 28, 2001. Nonetheless, in light of Atkins, this Court holds as a bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, shall not be subject to the death penalty." *Id*.

To ensure that Missouri complies with Atkins, this Court revised the Missouri Approved Instructions to include language instructing capital juries to determine whether the defendant has shown by a preponderance of the evidence that he is mentally retarded. *See* MAI-CR3d 300.03A, 313.38, 313.40, 313.48A.[5] If the jury found that the defendant is mentally retarded, it could not impose a death sentence. The revised instructions were issued on June 27, 2003, with the directive that the "revisions and additions … must be used and followed on and after September 1, 2003, and may be used and followed prior thereto, and any such use shall not be presumed to be error." Mo. Sup. Ct. Order, June 27, 2003. The revised instructions were not limited to those crimes that had occurred after August 28, 2001. *See* MAI-CR3d 300.03A, 313.38, 313.40, 313.48A.

Although Michael's trial took place before this Court issued its revisions to the Missouri Approved Instructions, it occurred after the Missouri Legislature revised Section 565.030 and after Atkins was issued.[6] The trial court should have realized that since a defendant's mental retardation precluded a death sentence,

[5] These instructions are set forth in the Appendix.

mental retardation was a key issue to be instructed upon. Trial courts must instruct in accordance with the substantive law. State v. Carson, 941 S.W.2d 518 (Mo. banc 1997). Rule 28.02 requires that in all criminal trials, "the court shall instruct the jury in writing upon al questions of law arising in the case that are necessary for their information in giving the verdict." The trial court should have instructed the jury that if it unanimously found that it is more likely to be true than not that Michael is mentally retarded, he could not be sentenced to death.

Indeed, evidence was presented from which a juror could reasonably conclude that Michael was mentally retarded. Section 565.030.6 defines mental retardation as:

> 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.

§565.030.6, RSMo Cum.Supp.2001.

Conflicting evidence was presented at trial regarding Michael's intelligence level. Dr. Scott testified that Michael's "specific IQ" was 89 (Tr. 1194). He explained that "the average is 100. And the average range is 90 to a 109, the IQ of

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[6] The trial took place from January 13 – 18, 2003 (Tr. 2-8).

90 to 109. 80 to 89 is the low average range. It's not mentally retarded. It's above even what they call borderline" (Tr. 1194). Dr. Syed, on the other hand, testified that Michael had other IQ scores in the retarded range (Ex. F, at 7, 12-13) and functioned in the borderline range of intellectual abilities (Ex. F, at 7).

The statutory definition of mental retardation does not provide a set IQ score as the cut-off for mental retardation. §565.030.6, RSMo Cum.Supp.2001. It is understood that people with mental retardation may have a higher IQ score than others with mental retardation, but have such significant deficits in their adaptive skills as to be labeled as mentally retarded. *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed. (DSM-IV), at 45.

Michael has numerous poor adaptive skills. Evidence was presented that by age seven, Michael was referred for special education classes (Ex. F, at 7; Tr. 1222). Throughout his life, Michael has had "marked difficulty forming any kind of close relationship with anyone" (Tr. 1063). His disruptive behavior in school may have been a symptom of his poor adaptive skills: "Lack of communication skills may predispose [the individual] to disruptive and aggressive behaviors that substitute for communicative language." DSM-IV, at 42. So, too, the sexual abuse he suffered at the hands of his schoolmates may have been indicative of mental retardation: "Individuals with Mental Retardation may be vulnerable to exploitation by others (e.g., being physically and sexually abused)." *Id*. Furthermore, it is "especially difficult" to differentiate between mentally retarded

patients and patients with borderline intellectual functioning when the patient also has certain mental disorders like schizophrenia. *Id*., at 684.

Once evidence of mental retardation is presented, a fact finder must make a determination under MAI-CR3d 313.38. Johnson, 102 S.W.3d at 541. If there was any doubt as to whether to give the instruction, the doubt should have been resolved in favor of giving it to the jury to decide. State v. Derenzy**,** 89 S.W.3d 472, 474-75 (Mo. banc 2002).

Defense counsel did not ask the court to modify the then-existing pattern instructions to comply with Atkins. Michael therefore requests review for plain error under Rule 30.20. For instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." State v. Cline, 808 S.W.2d 822, 824 (Mo. banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. State v. Hibler, 21 S.W.3d 87, 96 (Mo. App. 2000).

Because the court failed to instruct as required by Atkins, Michael was denied the opportunity to have a jury decide if he is mentally retarded and therefore ineligible for the death penalty. Although evidence was presented to the jury of mental retardation, the jury was not told to decide whether the preponderance of the evidence showed that Michael was mentally retarded. Michael was entitled to have a jury decide this question. Ring v. Arizona, 536 U.S. 584 (2002).

The trial court's error deprived Michael of due process, equal protection, a fair trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 2,10,18(a),21. Because it is cruel and unusual to inflict the death penalty on those who are mentally retarded, because the court failed to instruct the jury to consider whether Michael is mentally retarded, and because evidence of Michael's mental limitations was presented, the Court should reverse the conviction and remand for a new trial.

ARGUMENT VII

The trial court abused its discretion in overruling Michael's objection and sustaining the state's motion to strike Venireperson Janette Salmon for cause, in violation of Michael's rights to due process, fundamental fairness, trial by a fair, impartial and fairly selected jury, and freedom from cruel and unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art I,§§10,18(a), 21. The state argued that Ms. Salmon was "very unequivocal concerning her unwillingness to vote for the death penalty" but, in fact, Ms. Salmon was not unequivocal in her opposition to the death penalty and gave an example of a situation in which she could vote to impose a sentence of death. The erroneous exclusion of this juror who at no time indicated that her beliefs would prevent her from following the court's instructions requires that Michael's death sentence be vacated and he be re-sentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial.

"The decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 521 fn.20 (1968). Striking Venireperson Salmon for cause improperly stacked the deck in favor of death and violated Michael's rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. Ms. Salmon did not state she would not follow the instructions of the court; she merely

indicated that she would reserve a sentence of death for only the worst of crimes. Indeed, Ms. Salmon's view mirrors the bedrock principle that the "imposition of the death penalty [must be confined] to a narrow category of the most serious crimes." Atkins v. Virginia, 536 U.S. 304, 319 (2002).

Although the trial court has broad discretion in determining the qualifications of a prospective juror, the trial court's ruling should be disturbed on appeal when it is clearly against the evidence and constitutes a clear abuse of discretion. State v. Rousan, 961 S.W.2d 831, 839 (Mo.1998).

The Supreme Court has repeatedly recognized that a venireperson's conscientious scruples against the death penalty do not, in themselves, warrant a strike for cause. A prospective juror may be excluded for cause based on his views on capital punishment only when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). A venireperson scrupled against the death penalty cannot be struck for cause unless those scruples would cause him not to be able to follow the instructions and his oath. Boulden v. Holman, 394 U.S. 478, 483-84 (1969). The Supreme Court has recognized that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him … and can thus obey the oath he takes as a juror." Witherspoon, 391 U.S., 519. It is only the "juror who in no case would vote for capital punishment, regardless of his or her

instructions" who must be removed for cause. Morgan v. Illinois, 504 U.S. 719, 728 (1992).

The following interaction took place between Assistant Attorney General Ahsens and Venireperson Salmon:

> Mr. Ahsens: Same question, final point of decision, could you vote for the death penalty?
>
> Ms. 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.
>
> Mr. Ahsens: No matter what the evidence was?
>
> Ms. Salmon: Not unless it was a mass murderer or something like – something like at The Towers.
>
> Mr. Ahsens: 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?
>
> Ms. Salmon: No.
>
> Mr. Ahsens: I'm not going to try and change your mind, but I take it that that is your final answer on the subject?
>
> Ms. Salmon: Yes, it is. I have given it a great deal of thought since the questionnaire came about this.

(Tr. 244-45). When questioned by defense counsel, Ms. Salmon stated that knowing

that Michael had committed a prior murder would not change her position (Tr. 300). Neither the prosecutor nor the trial judge questioned Ms. Salmon any further. In particular, they never specifically asked her if her views about the death penalty would prevent her from following the court's instructions.

The state moved to strike Ms. Salmon for cause on the ground that she was "very unequivocal concerning her unwillingness to vote for the death penalty" (Tr. 311). Defense counsel objected to the strike, since Ms. Salmon did not unilaterally oppose the death penalty and had even given an example of a case where she could consider it (Tr. 311-12). The court overruled the objection and struck Ms. Salmon for cause (Tr. 312).

The Supreme Court has stressed that a venireperson cannot be struck merely because he or she wouldn't impose a death sentence in certain circumstances. Witherspoon, 391 U.S. at 522 n. 21. So, too, a venireperson should not be struck because she is generally unwilling to impose death but would impose death under certain circumstances. The Supreme Court rejected the argument that the venireperson must commit to imposing death before hearing the facts of the case:

> [A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote

against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

Witherspoon, 391 U.S. at 522 n. 21.

In Szuchon v. Lehman, 273 F.3d 299, 329 (3rd Cir. 2001), the trial court struck a venireperson for cause because he had stated, "I do not believe in capital punishment." No further questions were asked of the venireperson, particularly whether he would be able to follow the instructions of the court. *Id*., at 329-30.

The Court of Appeals for the Third Circuit held that excluding the venireperson for cause was improper. *Id*. The court stressed that, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id*., at 330, *citing* Lockhart, 476 U.S. at 176. Because the prosecutor failed to ask the venireperson whether his views would prevent him from performing his duty as juror, there was insufficient basis for the trial court to strike the venireperson. Szuchon, 273 F.3d at 330.

Since the state sought Ms. Salmon's exclusion, it carried the burden of demonstrating that she lacked impartiality. Witt, 469 U.S. at 423. When the state wishes to exclude a prospective juror for cause because of her views on the death penalty, it must question that juror to make a record of the bias. Gray v. Mississippi, 481 U.S. 648, 652 n.3 (1987). The state's motion to excuse "must be supported by specified causes or reasons that demonstrate that, as a matter of law,

the venire member is not qualified to serve." *Id*. "The burden of proving bias rests on the party seeking to excuse the venire member for cause." Witt, 469 U.S. at 423; Lockhart v. McCree, 476 U.S. 162, 170 n. 7 (1986).

The state did not meet its burden. It failed to ask Ms. Salmon if she could set aside her views and follow the instructions of the court, or if she would be able to keep an open mind and consider the facts of the case. Although she stated that in a "reasonable situation" she could not impose a death sentence (Tr. 245), the record does not indicate what a "reasonable situation" would be. The record fails to show that this case was one of those "reasonable situations" where Ms. Salmon could not impose a death sentence. Ms. Salmon gave an example of one situation where she could impose a death sentence (Tr. 244), but was not asked if there were other situations in which she could impose it. Ms. Salmon did not indicate that she was already irrevocably committed to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. Significantly, Ms. Salmon never stated that her opposition to the death penalty would prevent her from following the court's instructions. The state failed to show that Ms. Salmon could not follow the court's instructions, and thus the trial court abused its discretion is sustaining the strike for cause.

The erroneous exclusion of even one potential juror based on her views on the death penalty is reversible constitutional error. Gray, 481 U.S. at 657-58, 662-68. The death sentence, imposed by a jury stacked for death, cannot stand.

ARGUMENT VIII

The trial court plainly erred in submitting Instructions 16 and 17, because the instructions violated Michael's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. The instructions failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was not sufficient to outweigh the evidence in aggravation. Because Michael was sentenced to death by a jury that was improperly instructed on the burden of proof for two of the three steps required to find that Michael was "death-eligible," he suffered manifest injustice and must receive a new penalty phase.

Section 565.030.4 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….

In State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003), this Court held that the findings required by Sections 565.030.4(1), (2), and (3) are death-eligibility factual findings that must be made by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it must be found by a jury beyond a reasonable doubt." *Id.*, 107 S.W.3d at 257, *citing* Ring v. Arizona, 536 U.S. 584, 602 (2002); *see also* Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); Jones v. United States, 526 U.S. 227, 243 n.6 (1999). Moreover, the *state* bears the burden of proving, beyond a reasonable doubt, the existence of the facts required to prove a defendant eligible for death. Schlup v. Delo, 513 U.S. 298, 328 (1995); Bullington v. Missouri, 451 U.S. 430 (1981).

Despite this constitutional mandate, the instructions failed to include the requisite language. Instruction No. 16, addressing §565.030.4(2), failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted death provided:

If you have unanimously found beyond a reasonable doubt that the statutory aggravating circumstance submitted in Instruction 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. Id 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 warant 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. 330).

So, too, Instruction 17, addressing §565.030.4(3), failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that the evidence in mitigation of punishment did not outweigh the evidence in aggravation of punishment:

If you unanimously find that the facts and circumstances in agravation 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….

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).

Michael did not raise this issue at trial and therefore requests review for plain error under Rule 30.20. For instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." State v. Cline, 808 S.W.2d 822, 824 (Mo. banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. State v. Hibler, 21 S.W.3d 87, 96 (Mo. App. 2000).

The United States Supreme Court has recognized that failure to correctly instruct the jury that the state's burden of proof is "beyond a reasonable doubt" is structural, per se, reversible error. Sullivan v. Louisiana, 508 U.S. 275 (1993).

But even under a manifest injustice standard, a new trial is warranted. While Instructions 16 and 17 failed to direct the jury that it must apply the reasonable doubt standard and that the state bore the burden of proof, the preceding instruction, No. 15 (regarding the first step of the procedure), clearly set forth that in determining whether the aggravating circumstance existed, the burden of proof was on the state to prove the aggravating circumstance beyond a reasonable doubt:

> the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance. Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life….

(L.F. 328). Instruction 12, as well, reiterated that as regards the first step (determination of whether an aggravating circumstance exists), the state bore the burden of proof beyond a reasonable doubt (L.F. 325). By setting forth that the State bears the burden of proof beyond a reasonable doubt as to step one, but not steps two and three, Instruction 12 clearly communicated that such a burden of proof did not apply to steps two and three (L.F. 325). The jurors must have inferred from the stark absence of this language in Instructions 16 and 17 that the burden of proof was not beyond a reasonable doubt, and/or that the state did not

carry the burden of proof. No instruction otherwise cures this defect.

The danger is also heightened in this case, where Michael carried the burden of proof in guilt phase in trying to show that he had a mental disease or defect excluding responsibility (L.F. 311, 313). Since much of the evidence in mitigation was presented in guilt phase, where the defendant carried the burden of proving his defense, the jurors likely believed that once again the burden was on Michael, and that he had to prove that the evidence in mitigation outweighed the evidence in aggravation in order to avoid a death sentence.

The jury found only one statutory aggravating circumstance, and the mitigating evidence was significant, including strong evidence of childhood physical and sexual abuse, mental illness, and potential mental retardation. By shifting the burden of proof, or lessening the state's burden of proof, Instructions 16 and 17 likely caused the jurors to misapply the law in a way that violated Michael's rights. State v. Erwin, 848 S.W.2d 476, 483 (Mo.banc 1993). The trial court failed to instruct the jury in accordance with the substantive law, State v. Carson, 941 S.W.2d 518 (Mo.banc 1997), and the instructions therefore violated Michael's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. Michael's sentence of death must be reversed, and he must be resentenced to life imprisonment.

ARGUMENT IX

The trial court lacked jurisdiction and authority to sentence Michael to death because the state never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The state failed to plead in the indictment those facts, required by Section 565.030.4(1), (2), and (3), that the jury must find beyond a reasonable doubt before a defendant may be sentenced to death. Michael was charged with the lesser offense of *unaggravated* first degree murder, not punishable by death and, as a result, his death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 10, 17, 18(a), and 21 of the Missouri Constitution.

In Apprendi v. New Jersey, 530 U.S.466, 469 (2000), the U.S. Supreme Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. Apprendi, 530 U.S., 484. Relying on Jones v. United States, 526 U.S. 227 (1997), the Court held that the Fifth, Sixth, and Fourteenth Amendments demand that 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. *Id*.,476,490. It deemed unconstitutional any statute that "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*. The key inquiry is whether "the required

finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.*,494.

The Supreme Court's opinions suggest that aggravating facts that must be found by a jury beyond a reasonable doubt are elements of a greater offense. In Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003), the Court held that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death." In Harris v. United States, 536 U.S. 545, 564 (2002), the Court stressed, "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." In Ring v. Arizona, 536 U.S. at 609, the Court held that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.

Missouri has expressly provided by statute that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds that the State has proven beyond a reasonable doubt certain facts. Section 565.030.4(1),(2),(3); State v. Whitfield, 107 S.W.3d 253, 258-61 (Mo. 2003).

To make the defendant "death-eligible," the State (1) must plead and prove at least one statutory aggravating circumstance; (2) must prove that evidence in

aggravation warrants imposition of a death sentence; and (3) must prove that the evidence in aggravation outweighs the evidence in mitigation. Section 565.030.4(1),(2),(3); Whitfield, 107 S.W.3d at 258-61.

Thus, while the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime – first-degree murder punishable by either LWOP or death – the "effect" of the statute is quite different. In reality, there exist in Missouri both the offense of "unaggravated" first-degree murder, for which the only authorized punishment is LWOP; and the offense of "aggravated" first-degree murder, for which the authorized punishments include both LWOP and death. To reach the offense of "aggravated" first-degree murder, the State must prove at least one aggravating circumstance.

Under Ring, Whitfield, and prior decisions of this Court, these additional facts are, in function and effect, elements of the greater offense of aggravated first degree murder. For that reason, to pass constitutional muster, these facts must be pled in the charging document. *See, e.g.*, Whitfield, *supra;* State v. Taylor, 18 S.W.3d 366, 378 n.18 (Mo.banc2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); State v. Shaw, 636 S.W.2d 667, 675 (Mo.banc1982) *quoting* State v. Bolder, 635 S.W.2d 673, 683 (Mo.banc1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence"). If the State does not prove an

aggravating circumstance beyond a reasonable doubt, the offense remains "unaggravated" first-degree murder and the punishment is limited to LWOP.

As elements of the greater offense of capital or *aggravated* murder, aggravating circumstances should be pled in the document charging capital or aggravated murder. "An indictment must set forth each element of the crime that it charges." Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 314 (1979) *citing* Cole v. Arkansas, 333 U.S. 196, 201 (1948); Presnell v. Georgia, 439 U.S. 14 (1978).

"[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense." State v. Parkhurst, 845 S.W.2d 31, 35 (Mo.1992). "The indictment or information must actually charge that a crime has been committed." State v. Stringer, 36 S.W.3d 821, 822 (Mo.App.2001).

This Court's opinion in State v. Nolan, 418 S.W.2d 51 (Mo. 1967) is instructive. In Nolan, the defendant was charged with first degree robbery. Although the robbery statute authorized an enhanced or additional punishment of ten years' imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the amended information failed to charge this aggravating fact. *Id.* at 52.

The state argued that the defendant was notified "of the cause and the

nature of the offense for which he was convicted." *Id.* at 53. The state's two-fold argument was a) it was obvious from "the words used in the information" that the offense involved the use of a weapon, and b) the defendant's motion to vacate his sentence indicated he was aware during voir dire that the state intended to try the case as an aggravated robbery and the defendant never objected. *Id*. at 53-54.

Rejecting the state's arguments, this Court held, 'The charge "with force and arms" does not include the allegation that the robbery was committed by means of a dangerous and deadly weapon.' *Id.* at 54. "The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and "[t]he trial court was without power or jurisdiction to impose that sentence." *Id.*

The Due Process Clause of the Fourteenth Amendment affords no less protection to defendants charged with murder than to those accused of robbery. If aggravating circumstances must be alleged in a robbery indictment to charge the aggravated form of robbery and to subject the defendant to an enhanced punishment, State v. Nolan, *supra*, then the Due Process Clause requires that aggravating circumstances must be alleged in the document charging first degree murder to subject a defendant to the enhanced punishment of death.

The amended information did not "charge" any facts to support the state's later allegation that Michael committed "aggravated" or "capital" first-degree murder (L.F. 41). Instead, the state charged Michael with the lesser offense of *unaggravated* first degree murder. As a result, Michael may only be convicted of

the lesser offense actually charged.

Michael raised this issue prior to trial (L.F. 186-89). The court heard argument and overruled defendant's motion to quash the indictment or preclude the state from seeking a death sentence (11/2/02 Tr. 18-31). Michael acknowledges that this Court has previously rejected similar claims, *e.g.*, State v. Edwards, 116 S.W.3d 511, 543-44 (Mo.banc 2003). In light of Whitfield, however, he respectfully requests that the Court consider its prior holdings.

The State must prove at least one aggravating circumstance to bump the maximum sentence for first-degree murder from LWOP to death. Section 565.030.4(1). By failing to allege in the information how the first-degree murder charge was "aggravated" to make the crime capital murder, the sentence could be no more than that for "unaggravated" first-degree murder: LWOP. The trial court had jurisdiction over Michael and the charge of *unaggravated* first degree murder – an offense punishable only by life imprisonment without probation or parole, but the trial court exceeded its jurisdiction and authority in sentencing Michael to death. The death sentence violated Michael's rights to jury trial, due process, freedom from cruel and unusual punishment, and reliable sentencing. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const., Art I,§§10,17,18(a),21. Michael's sentence of death must be reversed, and he must be resentenced to life imprisonment.

CONCLUSION

Based on Arguments I, II, IV(1), IV(2), V, and VI, Michael respectfully requests that the Court grant him a new trial. Based on Argument III, Michael respectfully requests that the Court reverse the conviction and remand for a new trial in which the defense would have access to the psychological records of Scott Perschbacher; or alternatively, that the Court remand to the trial court for an *in camera* review and if it determines that the records do not contain any relevant material, place the records under seal for this Court to review. Based on Arguments IV(3) and VII, Michael requests that the court vacate his death sentence and remand for a new penalty phase. Based on Arguments VIII and IX, Michael requests that the Court vacate his sentence of death and order that he be resentenced to life imprisonment without parole.

Respectfully submitted,

_____
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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed to: The Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102; on the 12th day of December, 2003.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,959 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

_____

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