IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC89429**
	)	
VINCENT McFADDEN,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION SIX
THE HONORABLE GARY M. GAERTNER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Janet M. Thompson, Mo.Bar No. 32260
Office of the State Public Defender
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, MO 65203
(573) 882-9855 ext. 421 (telephone)
(573) 884-4921 (fax)
Janet.Thompson@mspd.mo.gov (e-mail)

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JURISDICTIONAL STATEMENT

Vincent was tried and convicted in St. Louis County Circuit Court of first-degree murder,§565.020,[1] armed criminal action,§571.015, and witness tampering, §575.270. The trial court imposed sentences of death, 75 and 7 years. This Court has exclusive appellate jurisdiction.Mo.Const.,Art.V,§3.

[1] Statutory references are to Missouri Revised Statutes 2004.

STATEMENT OF FACTS[2]

This Court found, in *State v. McFadden,* 191 S.W.3d 648(Mo.banc2006) and *State v. McFadden*, 216 S.W.3d 673(Mo.banc2007), the St. Louis County Prosecutor's Office purposefully discriminated by peremptorily challenging African-Americans. This case arises on retrial from the 2007 decision.

JURY SELECTION

Assistant Prosecutor Larner struck for cause Veniremembers Behrens, Stevens and Brunetti. Behrens stated, if jurors reached "door three," he "would probably go with the death sentence" but could be persuaded otherwise if there were remorse or he weren't persuaded of the defendant's guilt.(Vol.I,T241-43). He wouldn't require the State adduce more proof to impose death, could impose either punishment, but was unwilling to sign the death verdict.(Vol.I,T242-47,248-51).

Stevens could consider both punishments.(Vol.III,T111-12). She initially stated, if foreperson, she could sign a death verdict, but later stated she could not.(Vol.III,T116). She thereafter stated she could sign and announce the verdict but, since she didn't want to be the leader, would rather do neither.(Vol.III,T118-120). She stated, "I suppose I could do it, but I wouldn't want to."(Vol.III,T120). She reiterated she could consider both punishments.(Vol.III,T121).

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[2] Record references appear as follows: Legal File—(LF_); Supplemental Legal File—(Supp.LF_); Transcript—(Vol._,T_;PT__); Exhibits—(Ex_).

Brunetti could impose death, depending on how violent and heinous the crime and its circumstances.(Vol.IV,T159-60). She could "legitimately and realistically" consider both punishments.(Vol.IV,T160-61). She could not sign the death verdict as foreperson.(Vol.IV,T162-63). Defense counsel objected to Larner's strike of Brunetti, preserving the issue in the new trial motion. (Vol.VI,T157-67;LF761).

Veniremember Williams responded during death qualification he could impose both punishments and was "okay" with considering Vincent's prior convictions, including two first-degree assaults and armed criminal actions, as aggravators.(Vol.II,T21,100-06). Williams did not respond when Judge Gaertner asked if anyone had acquired information about the offenses or Vincent from any source.(Vol.II,T8-9). Williams served on the jury.(LF619). Williams was a veniremember on St. Louis County Case No. 04CR-002658, the assault and armed criminal action case providing four statutory aggravators here.(Supp.LF 5).

Veniremembers Boyd, Heet, Davis, Bunch, Rebholz, Hornak, Linville, Merz, Gray, Williamson, Ousley, Ayidiya, Hernton, Horst, Robinson, Rohrbacker, Burgarin, Tornetto, Bonastia and Schlake expressed religious opposition to the death penalty and those beliefs precluded their imposing it.(Vol.I,T52,187-98,287-88,327,400-02;Vol.II,T30-33,40-42,43-44,54-56,107-11,114-17,134-38;Vol.III,T141-43,208-19,221-23,363,416-17,440-43;Vol.IV,T245-50). Larner struck them for cause, without objection.

Of 164 veniremembers, Larner struck 61 for cause because they could not impose death.(Vol.I,T52,180,287,313,346,361,400; Vol.II,T30,40,43,47,52,55, 107,112,114,118,137,140,144,150,156,192,194,197,254;Vol.III,T82,108,128,135, 152,178,198,204,208,219,221,274,335,363,375,393,400,413,416,427,440;Vol.IV, T58,79,81,91,120,245,255,295,297,357,391,414,419). After Larner announced peremptories, defense counsel unsuccessfully moved to quash the panel because, of 170 veniremembers called and 164 questioned, only 29—17%, were African-American, a statistically-significant difference from the 21.3% African-Americans in St. Louis County's population.(Vol.V,T238-40). Counsel unsuccessfully moved to preclude the State from seeking death since 61 veniremembers of 164 questioned, 37%, were struck for cause because they couldn't consider death.(Vol.V,T241). Counsel argued that figure demonstrated evolving standards of decency in the jurisdiction, rendering the death penalty unconstitutional.(Vol.V,T241).

GUILT PHASE

In his guilt phase opening, Larner stated Eva Addison watched and recognized Vincent, "from behind a bush, a short distance away, under a street light," shoot her sister, Leslie.(Vol.VI,T18,57). When Vincent drove to Maggie Jones' house earlier that night, "Smoke" said to leave the girls alone but Vincent responded "One of them bitches is going to die tonight. I don't care if she is my baby's mama. One of them bitches, or one of them ho's, is going to die tonight."(Vol.VI,T22). Larner described Eva's statements to police and others,

and argued Eva stayed "with the family, with them, because she feels that no one will do anything to her. None of his friends will do anything to her if she's at his house--."(Vol.VI,T34-35).

On May 15, 2003 around 11 p.m., Eva testified, Vincent and "BT" drove to Maggie's house.(Vol.VI,T62). Vincent got out, hit Eva, kissed their son, told Eva she and her sisters weren't welcome in Pine Lawn, saying, "you ho's can't come back to Pine Lawn."(Vol.VI,T62). The men left and Leslie arrived.(Vol.VI,65). Eva told Leslie what Vincent said and asked the other women to take the children away.(Vol.VI,66). Leslie and Eva remained.(Vol.VI,T66).

Vincent and BT returned, with other men in another car.(Vol.VI,T66-67). When Vincent told them to "get out," Leslie stated, "We didn't do nothing to you."(Vol.VI,67). Vincent pointed a gun at Leslie, and when it "clicked," Smoke told Vincent, "you trippin.'"(Vol.VI,T67). Vincent told Leslie she would join her brother that night.(Vol.VI,T69). The men left but Vincent returned afoot minutes later, leaving toward the alley when they heard police.(Vol.VI,T70).

Leslie decided to walk to the Skate King, over Eva's objections that Vincent and BT were returning, driving down Dardanella.(Vol.VI,T70-71,131). Eva hid behind bushes and watched as, she testified, Vincent got out of the car, argued with Leslie, who pleaded with him, and shot her.(Vol.VI,T72-73). Eva, who claimed to have good eyesight,(Vol.VI,T71) but whose records were never provided to the defense(PT44-51), asserted she knew it was Vincent because there were lights where he got out of the car and confronted Leslie, and she recognized

his face, body, clothes, gait, and hairstyle.(Vol.VI,T82-83). Eva returned to Maggie's, told what she saw, and then returned to Leslie, where ambulance and police had already arrived.(Vol.VI,T74). Eva made several statements that night, about all of which she testified multiple times, through leading questions.(Vol.VI,T74,89-93,103-104).

Eva testified Vincent called the next day, telling her to "get his name off that shit or he was going to kill" her next.(Vol.VI,104,132-33). About two weeks later, while staying at Vincent's mother's house where she "felt safe," (Vol.VI,116,138), she spoke to "Slim," with Vincent in the background. (Vol.VI,T106-8). Vincent asked Eva to sign "his lawyer papers for a new case," and they referred to "Al," who had gone to court and retracted his statement.(Vol.VI,T108). Eva stated Vincent hadn't appeared to be on drugs that night but, she said, he must have been high on "water," PCP.(Vol.VI,T123-26).

Eva visited Vincent several times in jail to ask why he killed Leslie.(Vol.VI,T136). The last time, he held up a piece of paper expressing sorrow for killing Leslie.(Vol.VI,T136). In opening, Larner stated the note had "disappeared."(Vol.VI,T56).

Stacy Stevenson, who lived in a Kienlen apartment, heard and saw two women arguing on Naylor around 11:45 p.m.(Vol.IV,T178). One returned up Naylor, while the other continued toward Kienlen.(Vol.VI,T178). He then saw and heard a man arguing with that woman, saying he told her and her sister to get out.(Vol.VI,T179,186). The woman walked fast away, and the man, who Stacy

could not identify, walked toward her.(Vol.VI,T179,187). He heard screams and shots, and, grabbing his phone, went outside.(Vol.VI,T179,194). He walked toward Leslie, who repeated, "he shot me."(Vol.VI,T180-81). No light illuminated the scene until an SUV drove up, showing her location.(VolVI,T187-88). Detective Hunnius, the scene photographer, noted the extreme darkness, with one light on Naylor's hill; Pine Lawn School's lighting illuminating just the school and one street lamp on Naylor's south side, east of Kienlen.(Vol.VI,T218,230). Hunnius recalled lights at the crosswalk where the man and woman began their altercation and speculated enough light existed to illuminate them.(Vol.VI,T237). The body was 75'10" from the Naylor/Kienlen intersection.(Vol.VI,T228-29,231).

Evelyn Carter, the Addisons' first cousin, testified Vincent called her the next day.(Vol.VI,T202-03). Evelyn accused Vincent of killing Leslie and said Eva saw it.(Vol.VI,T203). Vincent said, "tell them bitches to get my name out of that shit," and, when he returned to Pine Lawn, "it's going to be like that for any one of us he see."(Vol.VI,T203-04). Evelyn hung up and dialed 911.(Vol.VI,205-06).

Larner argued in guilt phase closing Eva "knew exactly it was" Vincent.(Vol.VII,T338). He stated, over objection, there was no evidence anyone but Vincent killed Leslie.(Vol.VII,T340-43). In his final closing, he stated Vincent never "says, I didn't do it."(Vol.VII,T389). Larner told jurors, although they wouldn't get to hear it, Eva made a taped statement, identifying Vincent.(Vol.VII,T345-47). He stated, because the case involved the killing of

Eva's sister, it's "just so much worse than any other…."(Vol.VII,T395). In closing, "this isn't going to be too tough for you. It just isn't going to be that tough. This is the easy stage."(Vol.VII,T405). Jurors convicted Vincent of first-degree murder and witness tampering.(Vol.VII,T408,415-16).

In penalty phase, Gary Lucas, who, in July, 2002, worked on Greg Hazlett's house, heard "firecrackers," and saw Todd Franklin run into Hazlett's yard, followed by Vincent and another man.(Vol.VIII,T466-67). The men spoke with Hazlett and, when Hazlett went inside, the other man pulled a pistol, shooting Todd.(Vol.VIII,T468-69). Vincent took the pistol, said, "that n** ain't dead" and shot again, kicking the body before shooting.(Vol.VIII,T469). The two men ran, as did Lucas, who left town on family advice, fearing he'd be killed.(Vol.VIII,T470-75). Tara Franklin, Todd's sister, testified she and her mother returned home just after the shooting, finding Todd dead.(Vol.VIII,T500). She said Todd testified against Corey and Lorenzo Smith.(Vol.VIII,T502).

Will Goldstein, Lorenzo's lawyer in an assault and robbery case, watched Todd's deposition testimony implicating the Smiths.(Vol.VIII,T487-90). Thereafter, Goldstein thought Lorenzo should plead.(Vol.VIII,T492).

Evelyn Carter testified again, that she knew Todd, Lorenzo and Corey.(Vol.VIII,T585). Evelyn arrived just after Todd was killed, and the next day, Vincent called her.(Vol.VIII,T585-86). She asked why people said he killed Todd.(Vol.VIII,T586). Vincent was quiet, then began laughing, saying "it felt

good."(Vol.VIII,T586)[3]. He called Todd "a snitch…soft"(Vol.VIII,T586), went into some details of the robbery, and asked her to celebrate.(Vol.VIII,T586-88). She assumed Vincent killed Todd because of Corey and Lorenzo.(Vol.VIII,T588). Jessica Addison, another of Leslie's sisters, testified Vincent told her he would kill Todd.(Vol.VIII,T611-13).

After Todd's death, Evelyn recalled Vincent moved to California, remaining several months.(Vol.VIII,T589). Upon return, Evelyn, Leslie, Eva and Vincent were at his father's house, where he and Leslie began spatting after Leslie called him a name.(Vol.VIII,T589-91,604). The fight escalated; Leslie and Eva beat Vincent up.(Vol.VIII,T591). The women returned outside and Vincent came out, holding two guns, which his father tried to take away.(Vol.VIII,T592-93). Suddenly, Vincent walked away like nothing happened.(Vol.VIII,T594-95). Evelyn never went told police until after Leslie died, because she feared death.(Vol.VIII,T607). Over objection, she stated, "The fact I used to see him go to jail and get right back out, that had a lot to do with it. He used to go to jail and get back out."(Vol.VIII,T607).

Leslie's sister, Shonte, testified that, in April, 2002, her cousin Jermaine and his friend Daryl were in their van in the driveway.(Vol.VIII,T625). She spoke to Daryl, saw Vincent approach with a gun, and tell Daryl, "Nigger, I'm getting ready to kill you."(Vol.VIII,T625). She threatened to call police; Daryl and

[3] In SC88959, Evelyn testified Vincent said "I feel good." (Vol.V,T1398).

Jermaine drove north; Vincent and his friends south.(Vol.VIII,T626). She went inside; heard gunshots. (Vol.VIII,T626). She drove around, finding the van, its windows shot out.(Vol.VIII,T626). Jermaine drove to the hospital, where Shonte helped Daryl, who had been shot, inside for treatment.(Vol.VIII,T627).

In the defense case, Lynette Hood told about Vincent caring for her young grandchildren, and becoming scared and changing after being shot in the leg(Vol.VIII,T646-52). She bought him crutches since his family did not.(Vol.VIII,652).

Vincent's maternal aunt, Fay, testified Vincent's mother often left her children alone, with Vincent caring for his little sisters, leaving them to call family for help.(Vol.VIII,T665-68). His paternal grandmother recalled they often stayed with her, weeks or months at a time, and she wasn't always certain where Vincent's mother was.(Vol.VIII,T684-87). His maternal aunt, Lisa, recalled Vincent lived with her and her husband as a child, but bounced from home to home.(Vol.VIII,T696,712-13). While a young teen, Lisa and Don asked to keep Vincent in their home, to provide stability, but his mother refused.(Vol.VIII,T699-700,713). Instead, he went to a group home.(Vol.VIII,T700,714). Vincent's father, a chronic alcoholic, was rarely present.(Vol.VIII,T687-88). Vincent, small for his age, habitually got beaten at school and a neighbor sicced his dog on Vincent as he walked home.(Vol.VIII,T669,688,697,711,712). Vincent's parents didn't support Vincent's activities, but Fay got Vincent into sports and attended games.(Vol.VIII,T671).

INSTRUCTIONS

At the penalty phase instruction conference, counsel objected to Instruction 21 because, contrary to Notes on Use, it listed six statutory aggravators—prior convictions—in separate paragraphs.(Vol.VIII,T733). Over objection, the court made factual findings the priors were "serious assaultive."(Vol.VIII,T738-39).

CLOSING ARGUMENT

Larner argued jurors could find "all six [aggravators] one at a time," opening the door toward death "six times."(Vol.IX,T770). He heard nothing mitigating; would only consider mitigating evidence Vincent was sexually molested or physically abused.(Vol.IX,T771). He called this case "different," demanding death, and Vincent wasn't remorseful.(Vol.IX,T776,778,789). He stated if jurors had ever shot a .44 caliber gun, they would know its kick.(Vol.IX,T786). He argued if Leslie were a dog, people would clamor for Vincent's death(Vol.IX,787). He argued, "that Todd and Leslie are totally innocent victims is aggravating"(Vol.IX,T790,797); they should consider Leslie was a good person.(Vol.IX,T797). He said it was aggravating Vincent was never abused or sexually molested; wasn't crazy, insane, retarded.(Vol.IX,T795,812). He argued Vincent never exhibited remorse and, in the olden days, the Addison and Franklin families would have hunted "him down like he deserves and get retribution."(Vol.IX,T813-14). Larner repeatedly argued they consider the "terror" Leslie, Eva, Tara and Todd's mom felt.(Vol.IX,T818-19). Larner exhorted, "I leave you with Leslie and Todd. Hold them. Hug them. Tell them you

love them. But most of all, don't let them down. This verdict is for Leslie and Todd."(Vol.IX,T822).

Jurors returned a death verdict.(Vol.IX,T826).

Points Relied On

I. The trial court plainly erred in convicting Vincent of first-degree murder and sentencing him to death since Veniremember 44, Jimmy Williams, was seated as a juror because those actions denied Vincent a fair, impartial jury, due process, a fair trial, freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VIII,XIV; Mo.Const.Art.I,§§10,18(a),21 in that, despite specific questioning from Judge Gaertner, Williams failed to disclose he was a veniremember for Vincent's assault and armed criminal action trial, which provided four of six statutory aggravators here.

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548(1984);

United States v. Gonzalez-Lopez, 548 U.S. 140(2006);

Fields v. Brown, 503 F.3d 755(9th Cir.2007);

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

Mo.Const.,Art.I,§§10,18(a),21.

II. The trial court erred in overruling Vincent's objections to and submitting Instruction 21, patterned after MAI-CR3d 314.40, rejecting Instruction B, and accepting the jury's verdict because those actions denied Vincent due process, a properly-instructed jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that, contrary to the MAI-CR3d and the Notes on Use, Instruction 21 submitted, in six separately-numbered paragraphs, Vincent's convictions for first-degree assault, first-degree murder, and armed criminal action. This prejudiced Vincent because, when jurors weighed aggravators and mitigators, they were encouraged to believe more aggravators were on "death's" side of the scales and death was the appropriate penalty.

State v. Taylor, 134 S.W.3d 21(Mo.banc2004);

State ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219(Mo.banc1986);

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

MAI-CR3d 314.40;

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

Mo.Const.,Art.I,§§10,18(a),21.

III. The trial court abused his discretion and plainly erred in granting the State's cause strikes of Veniremembers Behrens, Stevens, and Brunetti because these rulings denied Vincent due process, a fair, impartial jury, and freedom from cruel and unusual punishment,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that their responses revealed they could impose both punishments and apply the law. That Behrens could impose either punishment but couldn't sign a death verdict; Stevens could impose either punishment but wasn't 100% certain she could sign the verdict; and Brunetti could impose either punishment, wasn't sure she could sign but could announce the verdict, did not reveal an inability to follow the law. Further, since inability to sign the verdict is not a statutory disqualification, it may not form the basis for a cause strike.

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

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

Alderman v. Austin, 663 F.2d 558(5th Cir.1981);

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

Mo.Const.,Art.I,§§10,18(a),21.

IV. The trial court erred in finding Vincent's prior convictions were "serious assaultive," overruling Vincent's objections to Instruction 21, submitting that Instruction, rejecting Instruction B, and accepting the jury's death verdict based, in part, on findings of six statutory aggravators purporting to be "serious assaultive convictions," because this denied Vincent due process, a properly-instructed jury, jury sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21, in that, although the Instruction purported to let the jury determine whether the convictions were "serious assaultive," it failed to submit the "serious assaultive" facts; Instruction B would have required they make factual findings of "serious assaultive" for any prior conviction and there was insufficient evidence upon which a "serious assaultive conviction" finding could rest for all six convictions.

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

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

State v. Schlup, 724 S.W.2d 236(Mo.banc1987);

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

Mo.Const.,Art.I,§§10,18(a),21.

V. The trial court erred in submitting Instructions 22 and 24 over objection; rejecting proposed Instruction D, which would have cured the errors in Instruction 22, and admitting over objection evidence of non-statutory aggravators, because those actions denied Vincent due process, a properly-instructed jury, appellate review, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21 in that Instructions 22 and 24 place the burden of proof on the defense; fail to require the State prove eligibility steps beyond a reasonable doubt; contravene §565.030 by requiring jurors unanimously find mitigators outweigh aggravators to impose life; let jurors consider constitutionally-impermissible evidence as aggravation; and insulate jurors' decision from appellate review by not requiring written findings on this step and jurors likely considered that evidence in sentencing Vincent to death.

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

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

Mills v. Maryland, 486 U.S. 367(1988);

Abu-Jamal v. Horn, 520 F.3d 272(3rdCir.2008);

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

Mo.Const.,Art.I,§§10,18(a),21.

VI. The trial court erred and plainly erred in overruling Vincent's objections and mistrial requests, and not granting a mistrial *sua sponte* based on the State's arguments in:

Voir Dire

That: They work for Bob McCulloch, for whom jurors may have voted, and represent the citizens of St. Louis County; in phase two's weighing step, the State bore no burden, and, if jurors unanimously found mitigators outweighed aggravators, a life without parole sentence would result but, if only one juror found aggravators outweighed mitigators, jurors would move toward death.

Guilt Phase

That: Vincent would kill more people; jurors heard of nobody else with a motive to kill Leslie; there was no evidence Vincent was anywhere but the scene of the crime; Vincent never said he didn't do it; even evidence jurors hadn't heard showed Eva's statements were consistent; he believed Eva was an "incredibly great eyewitness;" the worst place to shoot a woman is in the face; since Leslie couldn't speak, he spoke for her; the defense wanted a murder second verdict but the State only wanted murder first and Vincent would only be held accountable through a murder first conviction; and jurors' decisions would be easy.

Penalty Phase

That: Jurors should consider Vincent's prior convictions as separate statutory aggravators; the prosecutor didn't find the defense's evidence mitigating; jurors should balance one aggravator against one mitigator; jurors should consider Vincent's sentence in the Franklin case; jurors should send a message and support the justice system with their verdict; their verdict is important because this case is different; Vincent showed no remorse; Vincent's family, good people, knew he was wanted and hid him; Vincent is evil and mean, not like he was as a baby; Vincent has enjoyed life, unlike Leslie and Todd; shooting a .44 produces a big kick; if Leslie were a dog, people would want the death penalty; Vincent enjoys killing; Todd was a totally innocent victim whose family has suffered; in childhood, Vincent was the aggressor against other children; Vincent had a supportive family and wasn't abused or retarded; everyone agreed to impose death; Vincent terrorized Pine Lawn; Vincent was Leslie's jury and judge; jurors shouldn't consider mercy; in the olden days, the families could have hunted Vincent down; for once, Vincent should be held accountable; jurors represent the community's wishes; if this isn't a death case, none are; everyone hopes to never experience the horror these families have; and jurors should hug and love Leslie and Todd because these arguments denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const., Amends.VI,VIII,XIV;Mo.Const.,Art.I,§10,18(a),21, in that Larner misstated the facts and law; commented on Vincent's failure to

testify and exercise of constitutional rights; injected irrelevant emotion; personalized to himself and the jury; vouched for witnesses' credibility; used epithets about Vincent; attacked defense counsel; speculated, told jurors to "send a message," turned mitigators into aggravators, violated *Payne v. Tennessee* and §565.030.4, and injected facts outside the record, rendering the verdicts unreliable.

Newlon v. Armontrout, 885 F.2d 1328(8thCir.1989);

Antwine v. Delo, 54 F.3d 1357(8thCir.1995);

State v. Storey, 901 S.W.2d 886(Mo.banc1995);

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

Mo.Const.,Art.I,§§10,18(a),21.

VII. The trial court erred in overruling Vincent's objections to Will Goldstein, Tara Franklin and Evelyn Carter's testimony, and Larner's arguments, that Vincent killed Todd Franklin because Todd testified in a prior proceeding against Vincent's friends Corey and Lorenzo because these rulings denied Vincent due process, a fair trial, freedom from cruel and unusual punishment and freedom from being tried for the same offense after prior acquittal,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const. Art.I,§§10,18(a),19,21, in that, in the first "Franklin" trial, jurors rejected the statutory aggravator that because Todd was a witness in a prior prosecution he was killed. That rejection constitutes an acquittal of that element of the offense and the State is therefore estopped from seeking a different ruling from another jury.

Ashe v. Swenson, 397 U.S. 436(1970);

Capano v. State, 889 A.2d 968(Del.Supr.2006);

Poland v. Arizona, 476 U.S.147(1986);

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

Mo.Const.,Art.I,§§10,18(a),19,21.

VIII. The trial court erred in overruling Vincent's objections and admitting copious evidence about the Franklin homicide because this denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21;§565.032.2(1), in that the evidence proved not just Vincent's "prior record of conviction for murder in the first degree," but sought death based on jurors' emotional response and was more prejudicial than probative.

State v. Sladek, 835 S.W.2d 308(Mo.banc1992);

State v. Josephs, 830 A.2d 1074(N.J.2002);

State v. Whitfield, 837 S.W.2d 503(Mo.banc1992);

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

Mo.Const.,Art.I,§§10,18(a),21.

IX. The trial court erred in denying Vincent's motion to quash the venire, letting the State continue to seek death, and sentencing Vincent to death, and this Court, exercising independent proportionality review under §565.035.2(3)RSMo, should find Vincent's death sentence unconstitutionally excessive, because it violates due process, a fair trial before a properly-selected jury, reliable sentencing, and freedom from cruel and unusual punishment and jurors' right to serve, irrespective of their fundamental beliefs and is inconsistent with evolving standards of decency,U.S.Const. Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§5,10,18(a),21, in that 37% of the venire was struck for cause for their unwillingness to consider death as a punishment. Evolving standards of decency in St. Louis County, demonstrated by the views of over one-third of those called, mandate Vincent's death sentence be set aside. Further, if this Court considers the State's repeated misconduct in this case; only 29 of 164, 17.9% of veniremembers were African-American, and if it complies with §565.035.6 and considers all similar cases in its proportionality review, it will find Vincent's sentence disproportionate.

Roper v. Simmons, 543 U.S. 511(2005);

State v. Storey, 901 S.W.2d 886(Mo.banc1995);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.035RSMo.

X. The trial court erred and plainly erred in overruling Vincent's objections and not *sua sponte* declaring a mistrial when the State argued in guilt phase opening and closing and presented evidence on Eva Addison's direct examination that she consistently identified Vincent as Leslie's killer because this denied Vincent due process, a fair trial, confrontation and freedom from cruel and unusual punishment,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that the State bolstered Eva's credibility by eliciting her trial accusations of Vincent and prior consistent accusations, made without confrontation, and then told jurors that Eva consistently identified Vincent as Leslie's killer. This gave the State an undue advantage, resulting in Vincent's conviction and death sentence.

State v. Seever, 733 S.W.2d 438(Mo.banc1987);

State v. Davis, 186 S.W.3d 367(Mo.App.,W.D.2005);

State v. Cole, 867 S.W.2d 685(Mo.App.,E.D.1993);

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

Mo.Const.,Art.I,§§10,18(a),19,21.

XI. The trial court erred in overruling Vincent's objections, plainly erred in not *sua sponte* declaring a mistrial, and admitting evidence and allowing guilt phase argument about "Al" having gone to court and recanted his accusations; Vincent wouldn't be prosecuted for "Todd" but would for something else; and Gary Lucas fled to Dallas because he feared for his life because these rulings denied Vincent due process, a fair trial, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10, 18(a),21 in that these references to other crimes were neither logically nor legally relevant since they had no legitimate tendency to establish Vincent's guilt of this offense but merely prejudiced jurors by suggesting Vincent threatened a witness before, thereby escaping prosecution and, if he did it once, he did it again; suggesting Vincent committed other crimes and would be prosecuted for some but not others, and suggesting Vincent used illicit drugs and readily violated the law.

State v. Johnson, 207 S.W.3d 24(Mo.banc2006);

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

State v. Davis, 211 S.W.3d 86(Mo.banc 2006);

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

Mo.Const.,Art.I,§§10,18(a),21.

XII. The trial court abused its discretion in overruling Vincent's objections to Larner's repeated leading questions of and letting State's witness, Eva Addison, parrot back his commentary because this denied Vincent due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII, XIV;Mo.Const.,Art.I,§§10,18(a),21, in that Larner's leading questions let him testify for Eva, the sole eyewitness, and, especially since Eva's testimony grew remarkably stronger with each telling, they bolstered Eva's credibility. Vincent was prejudiced because jurors likely considered Larner's story, told through his leading questions, and couldn't accurately judge Eva's credibility.

State v. Miller, 208 S.W.3d 284(Mo.App.,W.D.2006);

State v. Preston, 673 S.W.2d 1(Mo.banc 1984);

United States v. Dumpson, 70 F.3d 1268(5th Cir.1995);

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

Mo.Const.,Art.I,§§10,18(a),21.

XIII. The trial court abused its discretion and plainly erred in overruling Vincent's pre-trial motions and trial objections and not declaring a mistrial *sua sponte* to Stacy Stevenson's testimony about what he heard an unidentified man say; denying Vincent's motion for Eva Addison's school and medical records; letting Larner testify Eva's eyesight was "excellent;" and letting Larner bootstrap an identification of Vincent as the speaker/shooter through Eva's testimony, because these rulings denied Vincent due process, confrontation, cross-examination, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, in that, although no light source illuminated the scene and Eva was some distance away, Eva claimed she could recognize Vincent as the person who got out of the car, spoke to Leslie and shot her. The State used Stacy Stevenson's description of the statement he overheard to bolster Eva's identification despite his inability to identify the speaker. This testimony was highly prejudicial since, unless the statement could be independently identified as Vincent's, it was inadmissible hearsay and its admission made jurors find Eva's identification more credible. Further, although the distance and lack of illumination rendered Eva's identification questionable, counsel was denied means to challenge it with objective evidence about her credibility and ability accurately to observe.

United States v. Owens, 484 U.S. 554(1988);

State v. Edwards, 31 S.W.3d 73(Mo.App.,W.D.2000);

Scherrfius v. Orr, 442 S.W.2d 120(Mo.App.,Spfd.D.1969);

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

Mo.Const.,Art.I,§§10,18(a),21.

XIV. The trial court clearly and plainly erred and abused its discretion in overruling Vincent's objections, not declaring a mistrial *sua sponte*, letting the State read from Exhibit 148-E, a transcript, in guilt phase opening and admitting Exhibits 148 and 148-D, a tape purportedly the recording of a phone conversation between Eva and "Slim," with Vincent in the background, because these actions denied Vincent due process, confrontation and cross-examination, a fair, reliable sentencing trial, and freedom from cruel and unusual punishment,U.S.Const.,Amends.V,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21 in that (1) the State failed to lay a foundation for admitting the recording and transcript, by not establishing Eva could hear everything Vincent said, without Slim repeating it and thus didn't establish the recording's authenticity and correctness; no changes, additions or deletions were made; how the recording was preserved, or the speakers' proper identification and (2) the recording contained hearsay—the non-testifying Slim's out-of-court statements of what Vincent purportedly said.

State v. Wahby, 775 S.W.2d 147(Mo.banc1989);

State v. Fletcher, 948 S.W.2d 436(Mo.App.,W.D.1997);

State v. Black, 50 S.W.3d 778(Mo.banc2001);

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

Mo.Const.,Art.I,§§10,18(a),21.

XV. The trial court abused his discretion and plainly erred in striking for cause Veniremembers Boyd, Heet, Davis, Bunch, Rebholz, Hornak, Linville, Merz, Gray, Williamson, Ousley, Ayidiya, Hernton, Horst, Robinson, Rohrbacker, Bugarin, Tornetto, Bonastia and Schlake because these rulings violated the veniremembers' rights to participate in the judicial process and freedom from religious discrimination and Vincent's rights to jurors chosen without regard to religious beliefs, equal protection, due process, a fair trial, and freedom from cruel and unusualpunishment,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const,Art.I,§§5,10, 18(a),21; Universal Declaration of Human Rights,Art.26;§494.400 RSMo, in that these veniremembers' unwillingness to impose death was solely due to their religious beliefs.

Gray v. Mississippi, 481 U.S. 648(1987);

State v. Parker, 836 S.W.2d 930(Mo.banc1992);

Strong v. State, 263 S.W.3d 636(Mo.banc2008);

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

Mo.Const.,Art.I,§§5,10,18(a),21.

ARGUMENTS

I. The trial court plainly erred in convicting Vincent of first-degree murder and sentencing him to death since Veniremember 44, Jimmy Williams, was seated as a juror because those actions denied Vincent a fair, impartial jury, due process, a fair trial, freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VIII,XIV; Mo.Const.Art.I,§§10,18(a),21 in that, despite specific questioning from Judge Gaertner, Williams failed to disclose he was a veniremember for Vincent's assault and armed criminal action trial, which provided four of six statutory aggravators here.

Judge Gaertner asked the second panel of veniremembers, which included Jimmy L. Williams, whether anyone thought they recognized Vincent; nobody responded.(Vol.II,T7). He also asked if they had acquired any information about Vincent from any source; again, nobody responded.(Vol.II,T8). Mr. Larner told panelists that, in penalty phase, they would hear Vincent already had been convicted of first degree murder and, in a separate trial, convicted of two counts each of first degree assault and armed criminal action.(Vol.II,T21). Veniremembers were then questioned individually about their ability to consider both punishments. Mr. Williams responded, with "yes" "no" answers, that he could consider both punishments and, even after being told about Vincent's prior convictions, stated he would not automatically vote for death.(Vol.II,T100-06). Mr. Williams served on Vincent's jury.(LF619). The jury questionnaire for Case

No. 03CR-2642-02 reveals Veniremember 44, Jimmy L. Williams, was a service technician for Industrial Battery; his spouse, a marketing coordinator.(Supp.LF1).

Jimmy L. Williams, a service technician for Industrial Battery, whose spouse was a marketing coordinator,(Appendix at A-1,5), was Veniremember 6 in Case No. 04CR-002658, which became ED85858, *State v. Vincent McFadden*, 193 S.W.3d 305(Mo.App.,E.D.2006). Judge Ross told veniremembers there that Vincent was charged with three counts each of first degree assault and armed criminal action and one unlawful use of a weapon.(Supp. LF 20). Counsel repeatedly confirmed Vincent faced those charges.(Supp.LF70, 78-79). The State peremptorily struck Mr. Williams, an African-American, without objection.

Judge Gaertner did not know that Mr. Williams lied to secure a spot on this jury.[4] Thus, if he is to be charged with error, it must be plain error, because a manifest injustice or a miscarriage of justice will result if Vincent's conviction and sentence are allowed to stand. *Rule 30.20.* The real question facing this Court is whether empaneling Mr. Williams here created structural error.

The Sixth Amendment guarantees criminal defendants a fair trial, including a verdict by an impartial jury. *Smith v. Phillips*, 455 U.S. 209, 217(1982). The touchstone of that guarantee is protection against juror bias. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554(1984). A single juror's bias or

[4] This case pre-dates this Court's directive in *Johnson v. McCullough*, 306 S.W.3d 551(Mo.banc 2010).

prejudice may deny a fair jury trial.*Dyer v. Calderon*, 151 F.3d 970, 973(9th Cir. 1998). Voir dire protects the right to an impartial jury by exposing veniremembers' possible biases.*McDonough*, at 554. Not disclosing information the veniremember should have disclosed is prejudicial if it denies the defendant an impartial jury.*Id.* at 549. The question becomes whether the veniremember did not answer honestly a material question on voir dire and whether his honest answer would have provided a valid basis for a cause strike. *Id.* at 556. Implied bias, presumed as a matter of law, exists "where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury." *Fields v. Brown*, 503 F.3d 755, 770(9th Cir. 2007); *Garza v. Tilson*, 2009 WL 5206414(E.D.Cal.2009); *see, Morgan v. Illinois*, 504 U.S. 719, 727(1992).

The record establishes Williams' implied bias. His dishonesty in concealing from the lawyers and the court his prior knowledge of Vincent and his participation in the assault case voir dire is beyond question. His participation, as a biased juror, is not harmless but created structural error, requiring a new trial without a showing of actual prejudice.[5]*Garza*, at 4; *Arizona v. Fulminante*, 499 U.S. 279(1991).

[5] Were it necessary to establish prejudice, during voir dire in the assault trial, Williams heard Vincent was charged with three counts each of assault and armed criminal action.(Supp.LF 20,70,78-79). Since jurors in the homicide trial only heard about his convictions on **two** counts of each, Williams had knowledge of

Constitutional errors can be trial errors, which may be "quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148(2006), quoting *Fulminante*, 499 U.S. at 307-08, or structural defects, which cannot be analyzed for harmless error since they affect the very framework within which trial occurs.*Id.* at 309-10;*Neder v. United States*, 527 U.S. 1, 7-9(1999); *Strong v. State*, 263 S.W.3d 636, 647(Mo.banc2008). Those errors make the criminal trial "fundamentally unfair or an unreliable vehicle for determining guilt or innocence."*Id.* at 9. Harmless error analysis in such cases becomes a "speculative inquiry into what might have occurred in an alternate universe."*Gonzalez-Lopez*, at 150. Where, as here, despite clearly-worded questions, a juror fails to disclose material information leading inexorably to a cause challenge—indeed, a joint cause challenge—and thereby secures a place on the jury, structural error has occurred. Much like the presence of a biased judge, *see Tumey v. Ohio*, 273 U.S. 510(1927), a biased juror renders the criminal trial fundamentally unreliable.

This Court must reverse and remand for a new trial.

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other bad acts he may have considered or imparted that knowledge to other jurors as they deliberated in both phases.

II. The trial court erred in overruling Vincent's objections to and submitting Instruction 21, patterned after MAI-CR3d 314.40, rejecting Instruction B, and accepting the jury's verdict because those actions denied Vincent due process, a properly-instructed jury, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that, contrary to the MAI-CR3d and the Notes on Use, Instruction 21 submitted, in six separately-numbered paragraphs, Vincent's convictions for first-degree assault, first-degree murder, and armed criminal action. This prejudiced Vincent because, when jurors weighed aggravators and mitigators, they were encouraged to believe more aggravators were on "death's" side of the scales and death was the appropriate penalty.

Contrary to MAI-CR3d 314.40 and its Notes-on-Use, Instruction 21 instructed Vincent's jurors, in separately-numbered paragraphs, to find whether six statutory aggravators, Vincent's prior convictions, existed.(LF669-70). Then, Instruction 22 instructed jurors to determine whether mitigators outweighed aggravators.(LF671-72). Jurors found all six aggravators and recommended death.(LF704-05). Because their weighing likely was impacted by considering six priors separately and independently, contrary to the Notes-on-Use, Vincent was sentenced to death. Judge Gaertner's refusal to follow MAI-CR3d and its Notes-on-Use, and accepting the verdict violated Vincent's state and federal constitutional rights to due process, a properly-instructed jury and freedom from cruel and unusual punishment.

"Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form."*Rule 28.02(c).* "The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03."*Rule 28.02(f).* Not following the Notes-on-Use is reversible error if submitting the instruction was error and prejudice results. *State v. Taylor*, 134 S.W.3d 21, 25(Mo.banc 2004). Prejudicial effect is determined by considering facts and instructions together.*State v. Dismang*, 151 S.W.3d 155, 164(Mo.App.,W.D. 2004). The instruction's proponent must show no prejudice.*Snyder v. Chicago R.I. & P.R. Co.*, 521 S.W.2d 161, 164(Mo.App.,W.D.1973).

Larner offered Exhibits 100-104, certified copies of Vincent's convictions and sentences, which the court admitted over objection.(Vol.VIII,T461-65). At the instruction conference, counsel objected to Instruction 21 asserting that listing Vincent's priors in separate paragraphs violated MAI-CR.(Vol.VIII,T733). Larner responded, "The statute seems to say that each serious assaultive conviction should be in, lumped together into one statutory aggravating circumstance. However, the statute hasn't changed. The instruction seems to indicate a change."(Vol.VIII,T734). He requested, notwithstanding the Notes on Use, the instruction list the priors in separate paragraphs.(Vol.VIII,T735-36).

Overruling counsel's objection, Judge Gaertner agreed to give Instruction 21and rejected Instruction B, which, as one paragraph, required jurors list any "serious assaultive convictions" and facts jurors found showing their serious assaultive nature.(Vol.VIII,T742;LF679-80). He cautioned, "If you get it reversed, they're coming back. And God willing, they keep the guilt part, and I can just give life without and be done."(Vol.VIII,T742). Counsel preserved their objection in the new trial motion.(LF706-08).

Instruction 21 told jurors to consider whether "one or more of the following statutory aggravating circumstances exists….

1. Whether the defendant has a serious assaultive conviction in that he was convicted of Murder in the First Degree on September 7, 2007, in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin on July 3, 2002.
2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on September 7, 2007, in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin with a deadly weapon on July 3, 2002.
3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.

4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant with a deadly weapon on April 4, 2002.
5. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit court of St. Louis County, Missouri, because defendant shot at Jermaine Burns, on April 4, 2002.
6. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns with a deadly weapon on April 4, 2002….

(LF669-70).

MAI-CR3d 314.40 directs, "any one or more of the following 'statutory aggravating circumstances' that are supported by the evidence and requested by the state" be listed and numbered in separate paragraphs. It enumerates each possible statutory aggravator, and begins:

"1A. Whether the defendant had a prior record of conviction for murder in the first degree in that he was convicted of murder in the first degree on [*date*], in the [*name of court*] of [*name of county, district, etc.*] of [*name of state*].

1B. Whether the defendant had (a) (one or more) serious assaultive conviction(s) in that he was convicted of [*Insert name of serious assaultive crime*.] on [*date*], in

the [*name of court*] of [*name of county, district, etc.*] of [*name of state*] because defendant [*Identify brief facts to establish that crime was a serious assaultive conviction.*] (and [*Specify other serious assaultive convictions in the same manner.*])." It lists the remaining legislatively-authorized aggravators.

Statutory aggravators include when "(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions."§565.032.2. The Note-on-Use in effect during trial requires:

> 5. The court should determine before submitting paragraph 1B that there is sufficient evidence to warrant its submission. For discussion of offenses that might constitute a "serious assaultive conviction," see State v. Brooks, 960 S.W.2d 479, 496 (Mo.banc 1997); State v. Kinder, 942 S.W.2d 313, 332 (Mo.banc 1996); and State v. Brown, 902 S.W.2d 278, 293-94 (Mo.banc 1995).
>
> Because of the United States Supreme Court decision in Shephard v. United States, 544 U.S. 13 (2005), the facts of the serious assaultive conviction should be submitted to the jury.

The previous Note-on-Use required:

> When paragraph numbered 1B is submitted, the Court will first, outside the hearing of the jury, determine if the defendant has "one or more serious assaultive criminal convictions." If the Court finds the conviction to be a "serious assaultive criminal conviction," this paragraph may be used. *If the*

defendant has more than one such conviction, a separate numbered paragraph should be used for each conviction….

(emphasis added). The MAI-CR and applicable Note on Use thus clarify that **all** serious assaultive criminal convictions used as statutory aggravators must appear in **one** paragraph.

Not following an Approved Instruction constitutes reversible error, the prejudicial effect of which will be judicially determined by considering facts and instructions together.*State v. Taylor*, 134 S.W.3d 21, 25(Mo.banc2004); *State v. Dismang*, 151 S.W.3d 155, 164(Mo.App.,S.D.2004);Rule 28.02(f). Prejudice is the potential for misleading or confusing the jury.*Dismang* at 164.

Supreme Court Rules are construed using canons of statutory construction.*State ex rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.3d 470, 471-72 (Mo.banc2002); *State ex rel. Missouri Pacific RR Co. v. Koehr*, 853 S.W.2d 925, 926(Mo.banc1993). Reviewing courts must "ascertain the intent of the Court, giving the language used its plain and ordinary meaning."*Dynamic Computer Solutions, Inc. v. Midwest Marketing Ins. Agency, LLC*, 91 S.W.3d 708, 713 (Mo.App.,W.D.2002). If the intent in promulgating a Rule is clear and unambiguous, after "giving the language used its plain and ordinary meaning, [reviewing courts should] give effect to that intent and … not … engage in any construction of the rule."*Short v. Short*, 947 S.W.2d 67, 71(Mo.App.,S.D.1997).

When language of a statute, Rule, instruction or Notes on Use is changed, that change is intended to have some effect. It is not presumed a useless act.*State*

ex rel. Missouri State Board of Registration for Healing Arts v. Southworth, 704 S.W.2d 219, 225(Mo.banc1986); *Ristau v. DMAPZ, Inc.*, 130 S.W.3d 602, 606(Mo.App.,W.D.2004); *Hillyard v. Hutter Oil Co.*, 978 S.W.2d 75, 78(Mo.App.,S.D.1998).

Before Vincent's trial, the MAI-CR3d 314.40 Notes on Use required each conviction be listed in separately-numbered paragraphs. By eliminating that directive, the drafters clarified that such convictions may not appear in separate paragraphs but must appear within one. Judge Gaertner erred in ignoring his instincts and the Notes on Use, and rejecting Instruction B.(Vol.VIII,T742).

Instruction 21 directed jurors decide whether six separately-numbered statutory aggravators existed.(LF669-70). Instruction 22 then directed they weigh mitigators against aggravators, considering all evidence in aggravation, including statutory aggravators.(LF671-72). The verdict form directed they list all statutory aggravators found. They listed six.(LF705).

These instructions echoed Larner's closing. "[Y]ou have to find an aggravating circumstance beyond a reasonable doubt. Now, there's six serious assaultive convictions. Each one of those qualifies in and of itself."(Vol.IX,T769). "Now, the instructions of law tells you—there's all six of them. You vote for all six one at a time. You'll find all six."(Vol.IX,T770). "Any one of them opens Door 2. It's opened six times."(Vol.IX,T770)

By instructing jurors find six statutory aggravators and write separate findings for each, jurors were encouraged to count "six times" what should have

been one.(Vol.IX,T770). Especially since Instruction 22 listed no statutory mitigators, expanding the list of aggravators from one to six undoubtedly affected jurors' decision to impose death. Since they were specifically instructed to "determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment,"(LF671), increasing how many statutory aggravators they could consider placed a thumb on death's side of the scales.*Stringer v. Black*, 503 U.S. 222, 232(1992).

Even if jurors find statutory aggravators, death is not the only possible sentence.*State v. Whitfield*, 107 S.W.3d 253, 259(Mo.banc2003). Since jurors weighed statutory and non-statutory aggravators against mitigating evidence, five additional, improperly-submitted factors changed the balance.

The State cannot show no prejudice from jurors' consideration of six times as many aggravators as the MAI-CR allows. This Court should reverse and remand for a new penalty phase or reverse and order Vincent re-sentenced to life without parole.

III. The trial court abused his discretion and plainly erred in granting the State's cause strikes of Veniremembers Behrens, Stevens, and Brunetti because these rulings denied Vincent due process, a fair, impartial jury, and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that their responses revealed they could impose both punishments and apply the law. That Behrens could impose either punishment but couldn't sign a death verdict; Stevens could impose either punishment but wasn't 100% certain she could sign the verdict; and Brunetti could impose either punishment, wasn't sure she could sign but could announce the verdict, did not reveal their inability to follow the law. Further, since an inability to sign the verdict is not a statutory disqualification, it may not form the basis for a cause strike.

The trial court abused his discretion and plainly erred in granting the State's cause strikes of Veniremembers Behrens, Stevens, and Brunetti, who could impose either punishment but hesitated about signing a death verdict. Since their ability to follow the court's instructions was unimpaired, they were qualified to sit. Judge Gaertner's actions violated Vincent's state and federal constitutional rights to due process, a fair and impartial jury and freedom from cruel and unusual punishment.

Rulings on cause challenges will be upheld on appeal unless clearly against the evidence and a clear abuse of discretion.*State v. Christeson,* 50 S.W.3d 251, 264(Mo.banc2001). While the trial court is best-positioned to evaluate someone's

qualifications to serve, qualifications "are not determined by an answer to a single question, but by the entire examination."*Id.;State v. Johnson*, 22 S.W.3d 183, 188(Mo.banc2000). Defense counsel timely objected to the State's strike of Brunetti and included the claim in the new trial motion.(Vol.IV,T157-67;LF761-62). Since counsel did not object to the other strikes, plain error review is requested to remedy manifest injustice and miscarriage of justice.*Rule 30.20*.

Veniremembers may be struck for cause only if their views prevent or substantially impair their ability to abide by their oath and the court's instructions. *Wainwright v. Witt*, 469 U.S. 412, 242(1985); *Christeson*, at 264. Because capital juries have vast discretion to decide if death is the "proper penalty," general objections to the death penalty or conscientious and religious scruples against it are not disqualifications.*Witherspoon v. Illinois*, 391 U.S. 510, 519(1968); Mo.Const.,Art.I,§5. One "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror."*Witherspoon*, at 519.

This Court has held a veniremember's "equivocation about his ability to impose the death penalty in a capital case, especially when coupled with an unequivocal statement that he could not sign a verdict of death, provides a basis to exclude him from the jury."*Christeson*, at 264-65. The United States Supreme Court has not ruled that inability or hesitancy to sign a death verdict is alone sufficient for a cause strike.*Id.* at 265. Such inability or hesitancy does not mean

one's ability to follow the law is substantially impaired.*Alderman v. Austin*, 663 F.2d 558, 562-64 (5th Cir.1981); *O'Bryan v. Estelle*, 714 F.2d 365(5th Cir.1983).

"The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'"*Gray v. Mississippi*, 481 U.S. 648, 658 (1987), quoting *Witt*, at 423. Judge Gaertner condoned Larner's removal of Behrens, Stevens and Brunetti, individuals clearly qualified to serve.

If they reached "door three," Behrens "would probably go with the death sentence" but could be persuaded otherwise if there were remorse or he weren't persuaded of the defendant's guilt.(Vol.I,T241-43). He wouldn't require additional proof from the State to impose death and could impose either punishment.(Vol.I,T242-47,250-51). He was unwilling to sign the death verdict. (Vol.I,T248-51). Behrens never equivocated about his ability to impose either penalty.

Stevens could impose both punishments.(Vol.III,T111-12). She initially stated she could sign a death verdict if elected foreperson, but then stated she could not.(Vol.III,T116). She later stated she could sign and announce the verdict, but, since she didn't want to be the leader, didn't want to do either.(Vol.III,T118-120). "I suppose I could do it, but I wouldn't want to."(Vol.III,T120). She reiterated she could consider both punishments.(Vol.III,T121). Stevens never

equivocated that she could impose either penalty. Although hesitant to sign a death verdict, she would.

Brunetti could impose death, depending on how violent and heinous the crime and its surrounding circumstances.(Vol.IV,T159-60). She could "legitimately and realistically" consider both punishments.(Vol.IV,T160-61). She could not sign the death verdict as foreperson.(Vol.IV,T162-63). Brunetti could realistically consider imposing both punishments and her views would not impair her ability to follow the law.

Jurors' oaths and the instructions require an ability to consider imposing both punishments. If their views or beliefs preclude that consideration, a cause strike is appropriate. Behrens', Stevens' and Brunetti's inability or hesitancy to sign a death verdict neither precluded nor substantially impaired their ability to follow the law. Judge Gaertner clearly abused his discretion in granting these cause strikes since they were qualified. This Court must reverse and remand for a new trial.

IV. The trial court erred in finding Vincent's prior convictions were "serious assaultive," overruling Vincent's objections to Instruction 21, submitting that Instruction, rejecting Instruction B, and accepting the jury's death verdict based, in part, on findings of six statutory aggravators, purporting to be "serious assaultive convictions," because this denied Vincent due process, a properly-instructed jury, jury sentencing, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21, in that, although the Instruction purported to let the jury determine whether the convictions were "serious assaultive," it failed to submit the "serious assaultive" facts; Instruction B would have required they make factual findings of "serious assaultive" for any prior conviction and there was insufficient evidence upon which a "serious assaultive conviction" finding could rest for all six convictions.

The Fifth, Sixth and Fourteenth Amendments demand that any fact, other than prior conviction, increasing a crime's maximum penalty, be charged in the indictment, submitted to and found by the jury beyond a reasonable doubt.*Apprendi v. New Jersey*, 530 U.S. 466, 476, 484, 490(2000);*Ring v. Arizona*, 536 U.S. 584, 609(2002);*United States v. Booker*, 543 U.S. 220(2000). When the State seeks death based upon the statutory aggravator, "one or more serious assaultive criminal convictions,§565.032.2(1), jurors must find the prior conviction is "serious" and "assaultive." Instruction 21, based on MAI-CR3d 314.40, did not require jurors make those factual findings. By accepting their

verdict and sentencing Vincent to death, the court violated Vincent's state and federal constitutional rights to due process, jury sentencing, a properly-instructed jury and freedom from cruel and unusual punishment. Since the State failed to adduce evidence demonstrating each prior's "serious assaultive" nature, Vincent's death sentence violates due process under the state and federal constitutions.

MAI-CR3d 314.40 requires, if the State submits the "serious assaultive" conviction aggravator, the instruction read:

> 1B. Whether the defendant had (a) (one or more) serious assaultive conviction(s) in that he was convicted of *[Insert name of serious assaultive crime,]* on *[date]* in the *[name of court]* of *[name of county, district, etc.]* of *[name of state]* because defendant *[Identify brief facts to establish that crime was a serious assaultive conviction]* (and *[Specify other serious assaultive convictions in the same manner.]*).

The Note on Use requires, "Because of the United States Supreme Court decision in *Shepard v. United States*, 544 U.S. 13 (2005), the facts of the 'serious assaultive conviction' should be submitted to the jury."

MAIs are presumptively valid and must be given to the exclusion of other instructions.*State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006). Reversal is warranted if an instruction was erroneously submitted and prejudice resulted.*Id.*; *State v. Westfall*, 75 S.W.3d 278, 280(Mo.banc2002); *Rule 28.02(f)*. When a trial court's failure to give an instruction "in accordance with the accompanying Note on Use may have adversely influenced the jury … reversible error"

occurs.*Westfall*, at 284. The error is presumed prejudicial, and the State must "clearly establish" no prejudice resulted.*Id*.

In penalty phase, Larner offered, over objection, Exhibit 101,

> a certified copy of a judgment and sentence… This will prove that on February 4th, 2005, the defendant was convicted of assault in the first degree and he was sentenced to 15 years on that charge. And on Count II, the armed criminal action, he was convicted on the same date and he was sentenced to 30 years on that. And on the same date, which is February 4th, 2005, he was convicted of another assault first and was sentenced to 10 years on that. And on Count IV, another armed criminal action charge, he was sentenced on the same date and he was sentenced to 10 years on that.

(Vol.VIII,T463-64). In opening, Larner stated, aside from the Franklin case, "I'll just introduce the paperwork on that, the certified records. I'm not going to prove up anything on those. You will get the records on that. You can read it for yourself. They will be certified."(Vol.VII,T433).

Larner called Shonte Addison and asked about a Pine Lawn incident on April 4, 2002.(Vol.VIII,T624). Shonte testified Vincent approached Darryl Bryant and Jermaine Burns' van and told Darryl he would shoot him.(Vol.VIII,T625). Darryl and Jermaine left, heading north, and Vincent and his friend left, heading south.(Vol.VIII,T626). Shonte later found Darryl's van, its windows shot out.(Vol.VIII,T626-27). Darryl had been shot but Shonte did not see the shooting.(Vol.VIII,T627-28).

The State offered and the Court submitted Instruction 21:

In determining the punishment to be assessed against the defendant for the murder of Leslie Addison, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the defendant has a serious assaultive conviction in that he was convicted of Murder in the First Degree on September 7, 2007, in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin on July 3, 2002.
2. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on September 7, 2007, in the Circuit Court of St. Louis County, Missouri, because defendant killed Todd Franklin with a deadly weapon on July 3, 2002.
3. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant on April 4, 2002.
4. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Daryl Bryant with a deadly weapon on April 4, 2002.

5. Whether the defendant has a serious assaultive conviction in that he was convicted of Assault in the First Degree on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns, on April 4, 2002.
6. Whether the defendant has a serious assaultive conviction in that he was convicted of Armed Criminal Action on February 4, 2005, in the Circuit Court of St. Louis County, Missouri, because defendant shot at Jermaine Burns with a deadly weapon on April 4, 2002….

(LF669-70).

Defense counsel objected because Instruction 21 did not require jurors make the factual findings the convictions were "serious assaultive." (Vol.VIII,T737). Over objection that the question was for the jury, Judge Gaertner found them "serious assaultive."(Vol.VIII,T741-43). Although Instruction B required jurors list what facts made each conviction serious assaultive,(Vol.VIII,T741), Judge Gaertner rejected it.(Vol.VIII,T749-51).

Despite this Court's directive that jurors "'have as much information…as possible when [making] the sentencing decision,'"*State v. Parkus*, 753 S.W.2d 881, 887(Mo.banc1988); *quoting Gregg v. Georgia*, 428 U.S. 153, 203-04(1976), and the Sixth Amendment requirement of jury fact-findings,*see Ring*; *Apprendi*, Judge Gaertner deemed it sufficient to tell Vincent's jury, through Instruction 21 and Exhibit 101, that Vincent "shot at" two men on April 4, 2002. While that

might have told jurors Vincent's actions were "assaultive," it did not sufficiently allege they were "serious" or "serious assaultive." Larner's lone witness, Shonte Addison, did not establish that either since she testified Darryl was shot; recounted nothing about Jermaine's condition, and didn't witness the shooting.

This Court's opinion in *State v. Schlup*, 724 S.W.2d 236, 239-40(Mo.banc 1987) is instructive. The statute then required proof of a "substantial history of serious assaultive convictions." This Court stated:

> We believe that when the legislature used the words "*substantial* history of *serious* assaultive criminal convictions" (emphasis added), they contemplated there being presented to the jury something more than bare evidence of the conviction of the crime of "assault" or the bare conviction of some other crime which may include the element of assault. The jury is required to find a "substantial" history of "serious" assaultive criminal convictions. Assault can range from acts which constitute little more than conduct offensive to another to the most vile, sordid, repugnant and repulsive sexual assault upon the body of another. … Clearly some details and description of crimes must be shown for the jury to find that the convictions were for *serious* assaultive crimes.

Factual details of Schlup's convictions for sexually assaulting his cellmate were necessary to prove the offenses were serious assaultive. Here, particularly regarding Jermaine Burns, Larner adduced no evidence proving "serious assaultive" and the Instruction alleged no such facts.

Evidence is sufficient to support aggravators if "a reasonable juror could reasonably find from the evidence that the proposition advanced is true beyond a reasonable doubt,"*State v. Johns*, 34 S.W.3d 93, 115(Mo.banc2000);*State v. Simmons*, 955 S.W.2d 752, 768(Mo.banc1997). Vincent's jurors were asked to *presume*, from their titles, his convictions were serious assaultive. Calling something "serious assaultive" doesn't make it so.*See Schlup*, at 239-40. Vincent's jurors received no guidance for that factual determination. The Instruction let jurors presume the offenses were "serious assaultive."

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

V. The trial court erred in submitting Instructions 22 and 24 over objection; rejecting proposed Instruction D, which would have cured the errors in Instruction 22, and admitting over objection evidence of non-statutory aggravators, because those actions denied Vincent due process, a properly-instructed jury, appellate review, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21 in that Instructions 22 and 24 place the burden of proof on the defense; fail to require the State prove eligibility steps beyond a reasonable doubt; contravene §565.030 by requiring jurors unanimously find mitigators outweigh aggravators to impose life; let jurors consider constitutionally-impermissible evidence as aggravation; and insulate jurors' decision from appellate review by not requiring written findings on this step and jurors likely considered that evidence in sentencing Vincent to death.

Larner's penalty phase focused on the Franklin homicide(Vol.VIII,T466-87,497-503,505-30,533-36,538-51,553-61,565-71,572-75,Vol.IX,T772-74); allegations Vincent threatened witnesses,(Vol.VIII,T586-89,607-08,613-15,Vol.IX,T775-76,789,796); suggestions Vincent might kill other witnesses(Vol.VIII,T475); altercations between Vincent, Jessica and Leslie(Vol.VIII,T590-94,606,611-13), Vincent's prior convictions for third-degree assault, tampering, stealing, drug possession(Vol.VIII,T460-62,572-75,577-81); and victim-impact evidence about Todd and Leslie(Vol.VIII,T596-600,616-22,629-36,Vol.IX,T796,797). Larner argued, "If he had put family members on

that said they sexually molested him or that he was abused or beaten. I mean, that's the type of thing you can say, well, you know, he really had it rough. That's not an excuse to kill, but it would be mitigating in some way…."(Vol.IX,T771). Larner stated, "There's no remorse. He doesn't feel bad…."(Vol.IX,T789). He encouraged they consider Leslie was "good" and Vincent, "evil," (Vol.IX,T797) and consider "McFadden terrorized the community, the whole community. Who felt safe in Pine Lawn in 2002 and 2003 with a murderer loose? Who felt safe? You'll consider it for them, that whole community."(Vol.IX,T796).

Larner told jurors to consider that evidence, weighing it against mitigation, in determining punishment. But, they were never instructed **how** to consider it and were instructed the defense must prove mitigators outweighed aggravators. Letting Larner first introduce and then argue that, through Instructions 22 and 24, jurors should consider this non-statutory aggravating evidence, created error.

The instructions misstated the law, misleading and confusing the jury, prejudicing Vincent.*Martens v. White,* 195 S.W.3d 548, 557(Mo.App.,S.D.2006); *Hosto v. Union Electric Co*., 51 S.W.3d 133, 142(Mo.App.,E.D.2001). By submitting these instructions, rejecting Instruction D, and overruling Vincent's objections, Judge Gaertner violated Vincent's state and federal constitutional rights to due process, a properly-instructed jury, appellate review, reliable sentencing and freedom from cruel and unusual punishment.

Reversal is warranted if submitting an instruction was error and prejudice resulted.*State v. Johnson*, 207 S.W.3d 24, 46-47(Mo.banc2006). While MAI's are

presumed valid, *Id.*, if they conflict with the substantive law, they must not be given.*State v. Carson*, 941 S.W.2d 518, 520(Mo.banc1997);*Clark v. Missouri & Northern Arkansas RR Co.,Inc.*,157 S.W.3d 665, 671(Mo.App.,W.D.2004). When the trial court doesn't give an instruction that comports with MAI, Notes on Use or **substantive law**, presumptively-prejudicial reversible error occurs.*State v. Westfall*, 75 S.W.3d 278, 280(Mo.banc2002). The State must "clearly show" no prejudice.*Id.* at 284.

Over objection,(Vol.VIII,T748-49), the Court gave Instruction 22:

> If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No.21 exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.
>
> 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 circumstances submitted in Instruction No. 21, and evidence presented in support of mitigating circumstances submitted in this instruction.
>
> You shall consider any facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that

there are facts or circumstances in mitigation of punishment sufficient to outweigh the facts or circumstances 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.

(LF671-72). Instruction 24 states:

…If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Leslie Addison by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment….

(LF673).

Instructions 22 and 24, based on MAI-CR3d 314.44 and 314.48, conflict with *State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003), *Ring v. Arizona*, 536 U.S. 584(2002), *Apprendi v. New Jersey*, 530 U.S. 466(2000), *Kansas v. Marsh*, 548 U.S. 163(2006), *Payne v. Tennessee*, 501 U.S. 808(1991), *Mills v. Maryland*, 486 U.S. 367(1988), and §565.030.4.[6]

[6] This Court has rejected this claim.*State v. Zink*, 181 S.W.3d 66, 74(Mo.banc 2005);*State v. Anderson*, 306 S.W.3d 529, 539-40(Mo.banc2010). Vincent requests reconsideration.

Capital defendants are entitled, under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees, to have juries find, beyond a reasonable doubt, all facts upon which increased punishments are contingent.*Whitfield*, at 257;*Ring*, at 600; *Jones v. United States*, 526 U.S. 227, 243 n.6(1999). Facts increase maximum punishment when their absence renders higher sentences unavailable.*Ring*, at 600-01.

All but §565.030's final step are eligibility steps, requiring jury fact-findings.*Whitfield*, at 256, 261. *Whitfield* was based on *Ring* and *Apprendi*, which require all factual death-eligibility findings be made unanimously beyond a reasonable doubt.*Id.* at 257; *Ring*, at 602; *Apprendi*, at 494. Since those findings are the functional equivalent of an element of a greater offense,*Id.*at 494 n.19; *Ring*, at 609, the State bears the burden of proof.*In re Winship*, 397 U.S. 358; *Jackson v. Virginia*, 443 U.S. 307(1979).

Section 565.030.4 provides:

> the trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor … (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….

Larner offered Exhibits 100-104 to prove statutory aggravators (Vol.VIII,T460-65), and over objection,(Vol.VIII,T440-49,488,496,565,577,583), presented non-statutory aggravators. Seven witnesses testified about the Franklin homicide and its impact.(Vol.VIII,T466-86,496-571). Gary Lucas testified he fled to Dallas after Todd died because he feared death, returning only upon Vincent's incarceration.(Vol.VIII,T475). An officer testified when Todd was killed, Vincent was the subject of a "nationwide wanted" search for assaulting Bryant and Burns.(Vol.VIII,T534-36). Two officers testified that, when arrested, Vincent possessed 17 baggies of crack.(Vol.VIII,T572-81). Will Goldstein, Lorenzo Smith's lawyer, testified about Lorenzo's plea and Goldstein's belief Todd was truthful.(Vol.VIII,T487-95). Evelyn Carter testified about prior incidents involving Vincent, her beliefs about events, her recollections of Leslie and Leslie's funeral.(Vol.VIII,T583-600). Jessica Addison testified about prior incidents involving Vincent, her belief Vincent killed Todd, and Leslie's nature, hopes and dreams.(Vol.VIII,T611-22). Shonte Addison testified about Leslie's actions with family and friends, and the Bryant/Burns shootings.(Vol.VIII,T624-638).

Jurors were never instructed what, if any, burden of proof to apply to this evidence. Un-adjudicated bad acts evidence lacks the reliability of evidence of prior convictions, yet is enormously prejudicial.*State v. Debler*, 856 S.W.2d 641,

657(Mo.banc1993). Inherently emotional victim impact evidence[7] and argument is also highly prejudicial and sheds no "light on the character of the offense, the character of the offender, or the defendant's moral culpability."*Zamudio v. California*,129 S.Ct. 564, 565-67(2008). Jurors received no guidance on how to consider this evidence.*Id.* Without guidance, it is impossible to discover how jurors considered and weighed the evidence. Only through an instruction requiring they find the facts unanimously beyond a reasonable doubt, and list them on the verdict form, can some unreliability be cured.*Id.*[8]

Instruction 22's first paragraph violates *Ring, Apprendi, Whitfield, Marsh* and *Winship*. Although a death-eligibility step, it tells jurors to "determine" whether mitigators outweigh aggravators. It puts the burden of proof on the defense, not the State, violating due process.*State v. Roberts*, 615 S.W.2d 496, 497(Mo.App.,E.D.1981);*State v. Ford*, 491 S.W.2d 540, 542-43(Mo.1973). It fails to require a finding beyond a reasonable doubt.*Winship*. As the Court cautioned, "although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of

[7] While victim impact evidence about Leslie was arguably admissible, evidence about Todd was not.*Payne v. Tennessee*, 501 U.S. 808(1991); §565.030.4.

[8] Although this Court has retreated from *Debler*,*see, State v. Strong*,142 S.W.3d 702, 719-20(Mo.banc2004), its analysis in *Debler* accords with *Whitfield* and *Ring*. This Court should re-adopt *Debler's* rationale.

demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence."*Marsh*, at 178-79. Because jurors could also believe the first paragraph requires unanimous findings on mitigators before weighing them, the instruction also violates *Mills v. Maryland*, 486 U.S. 367, 384(1988);*Abu-Jamal v. Horn*, 520 F.3d 272, 300-04(3rd Cir.2008). Distinct from *Smith v. Spisak*,130 S.Ct. 676 (2010), where the instructions did not suggest jurors' findings about mitigators must be unanimous, Instruction 22 clearly did. It created "'a substantial possibility that reasonable jurors … may well have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.'"*Id.*, at 684, citing *Mills*, at 384.[9]

The second paragraph is even worse, telling jurors, in weighing mitigators against aggravators, they can consider anything presented in either phase, whether "found" by them or not. Despite that this death-eligibility step requires the State's proof be beyond a reasonable doubt,*Ring*, at 602; *Winship*, it neither specifies a

[9] The Instructions reflect the State's admonitions throughout jury selection that, unless jurors unanimously found mitigators did not outweigh aggravators, Vincent remained death-eligible.(Vol.I,T38,168,185,211,240,269,323,331,352;Vol.II,T16-17,74,125,145,156,169,184,207,224;Vol.III,T26,28,166,184,252,320,325,331,342, 404;Vol.IV,T20,24,258,262-63,272,339,342).

burden of proof nor places it on the State. It lets jurors weigh evidence they have never found—using **any** standard—as aggravation. Since Larner told jurors to consider aggravating that "Leslie was a good person. And you'll consider that he's an evil person,"(Vol.IX,T797), they should have made those findings beyond a reasonable doubt.

The instruction also let jurors consider aggravating evidence they constitutionally should not. Especially since Larner stated jurors could not consider mercy, and Vincent wasn't "too young," "too crazy," "too insane," or "retarded"(Vol.IX,T811-12), *Zant v. Stephens*, 462 U.S. 862(1983);*California v. Brown*, 479 U.S. 538(1987), the prejudice becomes clear. Moreover, because jurors weren't required to specify their decision's factual basis, it is insulated from review.

Instruction 24 is similarly problematic. Contrary to §565.030.4(3), which requires, if the jury "concludes" mitigators outweigh aggravators, a life without parole verdict, the Instruction and the MAI-CR3d require unanimity.*Mills*, at 384. Violating *Ring*, *Winship*, and *Marsh*, the Instruction places the burden on the defense, and increases that burden from a mere "conclusion"—which could mean one or any jurors so found—to unanimity.

As an alternative to Instruction 22, Vincent unsuccessfully offered Instruction D(LF684-88;Vol.VIII,T749-51), to comport with §565.030.4, *Ring*, *Apprendi*, *Winship*, *Mills* and *Marsh*.

Instruction D's first two clauses track Instruction 22. It continues:

> …you must then determine whether there are facts or circumstances in mitigation of punishment and, if so, whether the aggravating circumstances that you, unanimously and beyond a reasonable doubt have found to exist, outweigh the mitigating circumstances.
>
> The state bears the burden of proving beyond a reasonable doubt that the aggravating circumstances that you have unanimously found outweigh the mitigating circumstances.
>
> In deciding whether there are facts and circumstances in mitigation of punishment, you may consider all of the evidence presented in both the guilt and the punishment stages of trial. However, the only aggravating evidence that you may consider in determining whether the aggravating evidence outweighs the mitigating evidence is that aggravating evidence that you have unanimously and beyond a reasonable doubt found to exist.
>
> You shall consider all other facts or circumstances which you find from the evidence in mitigation of punishment. It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. In weighing the aggravating and mitigating evidence, each juror must decide, individually, what mitigating evidence exists. However, the only aggravating evidence that may weighed against the mitigating evidence is the aggravating evidence that all jurors unanimously find to exist beyond a reasonable doubt.

> If all the jurors do not agree that the state has proved beyond a reasonable doubt that the evidence in aggravation of punishment outweighs the evidence in mitigation 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.

(LF684-85).

Instruction D eliminates the requirement that jurors "unanimously" find mitigators outweigh aggravators for a life without parole verdict, places the burden of proof on the State, and disallows considering aggravators never found unanimously beyond a reasonable doubt.(LF684-88).

Vincent's jury was mis-instructed, rendering its verdicts unreliable. This Court should reverse and remand for a new penalty phase, or reverse, ordering Vincent re-sentenced to life without parole.§565.040.

VI. The trial court erred and plainly erred in overruling Vincent's objections and mistrial requests, and not granting a mistrial *sua sponte* based on the State's arguments in:

Voir Dire

That: They work for Bob McCulloch, for whom jurors may have voted, and represent the citizens of St. Louis County; in phase two's weighing step, the State bore no burden, and, if the jury unanimously found mitigators outweighed aggravators, a life without parole sentence would result but, if only one juror found aggravators outweighed mitigators, the jury would move toward death.

Guilt Phase

That: Vincent would kill more people; the jury heard of nobody else with a motive to kill Leslie; there was no evidence Vincent was anywhere but the scene of the crime; Vincent never said he didn't do it; even in evidence the jury hadn't heard, Eva's statements were consistent; the prosecutor believed Eva was an "incredibly great eyewitness;" the worst place to shoot a woman is in the face; since Leslie couldn't speak, the prosecutor would speak for her; defense counsel wanted a murder second verdict but the State only wanted murder first and Vincent would only be held accountable with a murder first conviction; and the jury's decision would be easy.

Penalty Phase

That: The jury should consider Vincent's prior convictions as separate statutory aggravators; the prosecutor didn't consider the defense's evidence mitigating; the jury should balance one aggravator against one mitigator; they should consider Vincent's sentence in the Franklin case; they should send a message and support the justice system with their verdict; their verdict is important because this case is different; Vincent showed no remorse; Vincent's family, good people, knew he was wanted and hid him; Vincent is evil and mean, not like he was as a baby; Vincent has enjoyed life, unlike Leslie and Todd; shooting a .44 produces a big kick; if Leslie were a dog, people would want the death penalty; Vincent enjoys killing; Todd was a totally innocent victim whose family has suffered; in childhood, Vincent was the aggressor against other children; Vincent had a supportive family and wasn't abused or retarded; everyone agreed to impose death; Vincent terrorized Pine Lawn; Vincent was Leslie's jury and judge; the jury shouldn't consider mercy; in the olden days, the families could have hunted Vincent down; for once, Vincent should be held accountable; the jury represents the community's wishes; if this isn't a death case, no case is; everyone hopes they never have to experience the horror these families have; and the jury should hug and love Leslie and Todd because these arguments denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const., Art.I,§10,18(a),21, in that Larner misstated the facts and law; commented on

Vincent's failure to testify and exercise of constitutional rights; injected irrelevant emotion; personalized to himself and the jury; vouched for witnesses' credibility; used epithets about Vincent; attacked defense counsel; speculated, told the jury to "send a message," turned mitigators into aggravators, violated *Payne v. Tennessee* and §565.030.4, and injected facts outside the record, rendering the verdicts unreliable.

ARGUMENT

Prosecutorial argument rendering juries' verdicts unreliable must be condemned.*State v. Storey*, 901 S.W.2d 886(Mo.banc1995);*State v. Rhodes*, 988 S.W.2d 521(Mo.banc1999). A fair trial is mandatory and prosecutors should do nothing to deny one or obtain wrongful convictions.*State v. Tiedt*, 206 S.W.2d 524, 526-27(Mo.banc1947);*Berger v. United States*, 295 U.S. 78, 88(1935);*Rule 4.3.8*. Larner ignored this Court's admonitions, and Judge Gaertner's warning, "…you have a tendency, when there's an objection, to come right back in and stick it. And what I'm going to tell you: If you do it again, I'm going to lay you out in front of the jury."(Vol.IX,T815-16).

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."*Donnelly v. DeChristoforo*, 416 U.S. 637(1974). Outrageous argument violates due process and the Eighth Amendment.*Newlon v. Armontrout*, 885 F.2d 1328, 1337(8thCir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364(8thCir.1995). Larner's misconduct violated Vincent's state and federal

constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. Judge Gaertner erred and plainly erred in overruling counsel's objections and mistrial requests, and not *sua sponte* declaring a mistrial.

For some arguments, counsel objected timely. "Trial court error, timely preserved, creates the presumption of prejudice."*Rhodes*, at 529; *Storey*, 901 at 901. Where counsel did not object, plain error review,*Rule 30.20*, is warranted because, if uncorrected, a manifest injustice or miscarriage of justice results.

Voir Dire

Voir dire is intended to expose juror bias so parties can intelligently exercise challenges, selecting a fair, impartial jury.*State v. Clark*, 981 S.W.2d 143, 146(Mo.banc1998); *Morgan v. Illinois*, 504 U.S. 719, 729(1992). Questions calculated to create prejudice are impermissible.*State v. Lacy*, 851 S.W.2d 623, 629(Mo.App.,E.D.1993).

Without objection,[10] Larner told every panel prosecutors "work for Bob McCullough…the elected prosecutor…Some of you may know him or heard of him or voted for him."(Vol.I,T.30;Vol.II,T.12;Vol.III,T.17,312-13;Vol.IV,T.12,332). He argued McCullough "was elected by the people of St. Louis County" and represents "the citizens of St. Louis County."*Id.* Larner

[10] Defense counsel initially objected to Larner's comments, including he represents the jurisdiction's victims,(Vol.I,T30), but never thereafter.

blatantly co-opted jurors' allegiance, destroying their neutrality. "[A]s long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct."*United States v. Johnson*, 892 F.2d 707, 713(8thCir.1989) (Lay,C.J., McMillian,J., concurring).

Larner misstated the law, telling every panel without objection that, if all jurors found mitigators outweighed aggravators, a life verdict would result, but if only one found aggravators outweighed mitigators, they continued toward death.(Vol.I,T38,168,185,211,240,269,323,331,351-52;Vol.II,T16-17,27,74,125,145,156,169,184,207,224; Vol.III,T26,28,166,184,252,320, 325,331,342;Vol.IV,T20,24,258, 262-63,272,338-39,342). He stated jurors didn't have to vote for the same aggravating evidence, except as to statutory aggravators(Vol.III,T27;Vol.IV,T24), and the weighing step had no burden of proof.(Vol.IV,T20,338). Larner's arguments contradicted *Ring v. Arizona*, 536 U.S. 584(2002);*Apprendi v.New Jersey*, 530 U.S. 466(2000);*State v. Whitfield*, 107 S.W.3d 253(Mo.banc2003), and *Mills v. Maryland*, 486 U.S. 367(1988).

Due Process and the Sixth Amendment's notice and jury trial rights require jurors find, beyond a reasonable doubt, all facts upon which increased punishments are contingent.*Whitfield*, at 257;*Ring*, at 600; *Jones v. United States*, 526 U.S. 227,243 n.6(1999). Missouri's weighing step requires "factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible."*Whitfield*, at 261. As an eligibility step, the State must prove those findings unanimously beyond a reasonable doubt.*Id.* Jurors must not be misled

into believing they may not consider mitigators unless found unanimously.*Mills*, at 384. Like in *Mills*, given Larner's repeated statements, reasonable jurors could have interpreted the instructions and verdict form to preclude considering mitigators unless found unanimously.*Id.* at 376;*Abu-Jamal v. Horn*, 520 F.3d 272, 300-04(3rdCir.2008); *Smith v. Spisak*, 130 S.Ct. 676, 684(2010).

Guilt Phase

Larner repeatedly referred to Vincent's failure to testify.*Griffin v. California*, 380 U.S. 609, 615(1965);*State v. Redman*, 916 S.W.2d 787, 792(Mo.banc 1996);*State v. Parkus*, 753 S.W.2d 881, 885(Mo.banc 1988). No negative inferences from a defendant's failure to testify may be drawn.*Mitchell v. United States*, 526 U.S. 314, 327(1999). Nevertheless, over objection, Larner asked, "Have you heard of anyone else that was mad at her other than the defendant?"(Vol.VII,T341-42); "There's been no, no, zero evidence that it was anyone other (snapped fingers) than that man. No evidence. None."(Vol.VII,T342). Over a mistrial request, "There's no evidence the defendant was anywhere else but right there at the crime scene."(Vol.VII,T342). And, "…he never says, I didn't do it."(Vol.VII,T389).

Larner argued facts outside the record.*Tucker v. Kemp*, 762 F.2d 1496, 1507(11thCir.1985);*Drake v. Kemp*, 762 F.2d 1449, 1458-59(11thCir.1985)(en banc);*Storey*, at 900-01. "Assertions of facts not proven amount to unsworn testimony by the prosecutor…A prosecutor arguing facts outside the record is highly prejudicial. His assertions of personal knowledge…are 'apt to carry much

weight against the accused when they should carry none' because the jury is aware of the prosecutor's duty to serve justice, not just win the case."*Id.* Larner vouched, "when the witnesses came forward that night, Eva made a taped statement. You don't get to hear—I told you in voir dire you wouldn't get to hear a lot of that stuff. It doesn't matter… no inconsistencies in her testimony."(Vol.VII,T345). Larner encouraged jurors believe him about evidence they never heard. He argued, over objection, with no supporting evidence, Vincent "didn't know about that or she'd be dead too. He would have killed Eva. He didn't know Eva saw it."(Vol.VII,T333). And, over objection, "He wasn't done killing. He hasn't killed Eva yet, the only eyewitness. Then is he done killing? No. He's got to get the guy that turned him in at the hotel, at the Travel Lodge."(Vol.VII,T334). Larner encouraged jurors believe this was the beginning of a killing spree and Vincent would kill again if not convicted and sentenced to death. References to hypothetical, future bad conduct let jurors convict and sentence Vincent for what he **might** do.*State v. Burnfin*, 771 S.W.2d 908, 911-12(Mo.App.,W.D.1989); *State v. Cuckovich*, 485 S.W.2d 16(Mo.banc1972).

With no evidentiary support, Larner became a witness, vouching for his key witness's credibility.*Storey*, at 900-02. "Now, look. A lot's been made about Eva's eyesight. She hit a glare on the screen, whatever, and couldn't tell 10:30 from – or 10:18 from 9:18 or 11, whatever it was. Sit in the chair. A little glare there."(Vol.VII,T335). And, "Now, we talked in voir dire about one eyewitness. This isn't just one eyewitness. You got one eyewitness who's an incredibly great

eyewitness who knew him, who happened to be there because of the threats."(Vol.VII,T338). Larner argued Eva's credibility,*Proffit v. State*, 183 P.3d 228(Wyo.2008); ability to see and recount events, yet never produced her medical or educational records for *in camera* inspection, *Pennsylvania v. Ritchie*, 480 U.S. 39, 56(1987), nor her affidavit attesting she lacked such problems, despite Judge Gaertner's assertion, "If the State had those records, I would mandate that they be turned over."(PTT,T51).

Larner encouraged jurors to convict Vincent based on emotion.*State v. Debler*, 856 S.W.2d 641, 656(Mo.banc1993);*Gardner v. Florida*, 430 U.S. 349, 358(1977); *Storey*, at 901. He argued, "What's the worst place to shoot a woman? The worst place you can think of to shoot a woman? Right in the middle of the face."(Vol.VII,T358). He called Vincent's acts vile.(Vol.VII,T358). In final closing, he pleaded, "…Leslie is not here to tell you. Here's what she would say if she was here… I'll speak for Leslie."(Vol.VII,T396).

Penalty Phase

Penalty phase closings undergo a "greater degree of scrutiny."*Caldwell v. Mississippi*, 472 U.S. 320, 329(1985);*California v. Ramos*, 463 U.S. 992, 998-99(1983). Larner's arguments encouraged an unreliable verdict.

By misstating the law, prosecutors risk misleading jurors.*State v. Jones*, 615 S.W.2d 416(Mo.1981);*Tucker*, at 1507;*Storey*, at 902. Larner told jurors to count all priors as separate statutory aggravators—"Each one of those qualifies in and of itself."(Vol.IX,T769); "You vote for all six one at a time."(Vol.IX,T770);

"Any one of them opens Door 2. It's opened six times."(Vol.IX,T770). Yet, the MAI-CR3d and Notes on Use require those convictions be listed as one aggravator.

Larner stated, "Leslie came from a good family, too, okay? The families cancel out. You're not going to vote for the death penalty because Leslie came from a good family or because he came from a good family."(Vol.IX,T771-72). He suggested jurors weigh one aggravator versus one mitigator. Yet, "The weighing process is a qualitative one not a quantitative one."*State v. Wilkins*, 736 S.W.2d 409, 416(Mo.banc1987).

Misstating facts and law, eliciting emotion, Larner argued Vincent has "been spitting on the floor of courtrooms for years: all of those cases because no one has held him accountable. And the reason you're going to hold him accountable is because innocent people have a right to live and murderers have no right to not pay for their crimes."(Vol.IX,T817).*Tucker*, at 1507; *Storey*, at 902. Larner argued Vincent's prior punishments were a mere slap on the wrist and life without parole was not punishment.

Larner argued Vincent's other death sentence(Vol.VIII,T454-55;Vol.VIII-IX,T722-74). This diminished jurors' sense of responsibility, rendering this sentence arbitrary, capricious and unreliable.*Caldwell v. Mississippi*, 472 U.S. 320(1985);*Johnson v. Mississippi*, 486 U.S. 578(1988).

Larner argued, "In the proper case, you [all swore you] would vote for the death penalty…And that's why you're sitting there or you wouldn't be if you

didn't tell me that."(Vol.IX,T795). He suggested, contrary to §565.030 and *Morgan*, at 726-27, jurors were chosen because they agreed to impose death. This skewed their decision toward death.

Resorting to epithets and encouraging jurors to weigh the value of Vincent's life against Leslie's, *Payne v. Tennessee*, 501 U.S. 808,823(1991), Larner exhorted jurors to kill Vincent.*State v. Hodges*, 586 S.W.2d 420(Mo.App.,E.D.1979). He argued, "This mean, evil person committed the murder"(Vol.IX,T781); "You'll also consider that Leslie was a good person. And you'll consider that he's an evil person."(Vol.IX,T796). He appealed to jurors' passions and prejudices.*Darden v. Wainwright*, 477 U.S. 168, 179(1986);*State v. Cauthern*, 967 S.W.2d 726, 737(Tenn.1998).

Larner encouraged jurors to consider Todd's family's pain; Todd, a "totally innocent victim" who never had the chance to live, and their verdict was for him.(Vol.IX,T790,796,797,822). The court overruled two of counsel's objections to improper argument.(Vol.IX,T796,823). Section 565.030.4 lets jurors consider "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others." *Accord, Payne.* Subject to the Eighth Amendment, Missouri's Legislature defined permissible victim impact evidence.§565.030.4. It did not include evidence about victims of other offenses. By arguing victim impact evidence about Todd, Larner violated §565.030.4, the Eighth Amendment, and *Payne*.

Larner misstated the law, violating due process and the Eighth Amendment, in arguing mercy is irrelevant to punishment.*Nelson v. Nagle*, 995 F.2d 1549(11th Cir.1993);*California v. Brown*, 479 U.S. 538(1987). "Ms. Kraft asks for mercy and forgiveness. Well, look around, ladies and gentlemen. We are not in a church. There are no stained glass windows. And I pray that Mr. McFadden can find peace and forgiveness with his creator, but that's not our job. That's not our job. Our job is to give justice. And justice deserves and demands the death penalty."(Vol.IX,T811).

Larner encouraged jurors speculate about potential harm, encouraged a punishment decision based on emotion, and compared the value of Vincent, Todd and Leslie's lives.*Hollaway v. State*, 6 P.3d 987, 994 (Nev.2000);*Payne*, at 823. "You'll also consider that Leslie was a good person. And you'll consider that he's an evil person. And you'll consider that she was unable to graduate from high school and how she was unable to go into the Army." (Vol.IX,T797). "You will consider that she never had an opportunity to be a mother and a wife and that she was 18 years old. You'll consider the fact that Todd was 20 years old. Same thing about Todd. He never had the chance to live."(Vol.IX,T797). Jurors may consider how a defendant's actions impacted the victim and her family.*Payne*, *supra*;§565.030.4. Considering evidence not statutorily-authorized violates due process and the Eighth Amendment.

Larner speculated, injected his opinion, and advised jurors convert mitigators into aggravators.*Zant v. Stephens*, 462 U.S. 862(1983);*Allen v.*

Woodford, 395 F.3d 979, 1017(9thCir.2005);*Poindexter v. Mitchell*, 454 F.3d 564, 586-87(6thCir. 2006); *Miller v. State*, 373 So.2d 882, 885(Fla.1979). "It's sad. It's truly sad that the family—and they're good people. I'm not saying they're not. They're nice folks. But, you know, it's sad that they—they don't have to accept what he did."(Vol.IX,T779-80). Over objection, "This mean, evil person committed the murder. Not those cute little baby pictures that you're going to see, okay? Remember that. That's just to play on your sympathies."(Vol.IX,T781). "He got a GED—stole it from Leslie."(Vol.IX,T784). "He came home with a black eye? The other guy had two black eyes."(Vol.IX,T791). Over objection, "He had a supporting family. No one in his family has been convicted of anything, yet—and everyone tried to help him, yet he still kills. That's aggravating."(Vol.IX,T794). "That's aggravating. That's aggravating. They'll call it mitigating. I call it aggravating. You decide what it is. Anyway, when you weigh all of this aggravating, and then you got this whatever mitigating she can come with and tell you—we'll listen."(Vol.IX,T794). Larner advised jurors impose death because, "He was never abused, sexually molested."(Vol.IX,T795). Over objection, "Now, sometimes we hear people are too young to get the death penalty. That doesn't fit here. He's 28. He's a grown man. Sometimes we hear people are too crazy, too insane, retarded…."(Vol.IX,T812).

Larner advised jurors consider facts outside the record, unsupported allegations, and his personal opinion, encouraging them to believe him, the State's

representative, giving him credibility where none was warranted.*Storey*, at 900-02;*Brooks v. Kemp*,762 F.2d 1383, 1403, 1408(11th Cir.1085).

> I didn't hear anything mitigating in the case… You know what would have been mitigating? If he had put family members on that said they sexually molested him or that he was abused or beaten. I mean, that's the type of thing you can say, well, you know, he really had it rough. That's not an excuse to kill, but it would be mitigating in some way and, … I didn't hear anything like that…All I heard was he came from a good family that tried to do the best they could for him. That's supposed to be mitigating? That's what I heard. It was bizarre. I was waiting for some mitigation. There wasn't any mitigation.

(Vol.IX,T771). "They'll call it mitigating. I call it aggravating."(Vol.IX,T794). Alluding to facts outside the record, "You see how important it is, your verdict? How important it is to give him what he deserves? What he's earned? It's so important. This case is just different. You know that. It's different."(Vol.IX,T776). He espoused personal opinion, "You know we all agreed we'd listen. We will. And when we get to that third door, we'll all consider both punishments, absolutely. I mean, no doubt. But we're going to vote for the death penalty because that's the appropriate sentence…."(Vol.IX,T795) and "You will do the right thing."(Vol.IX,T789). Over objection, without evidentiary support, "When you consider his family for mitigating, keep this in mind. They knew he was a fugitive from justice out in California. Everyone

knew it. There was a nationwide 'wanted' out. You don't think the police went to their houses looking for him?"(Vol.IX,T779). And, "You know the police were out looking for him, going to the family's house. That's why they sent him out to California to live with family. He didn't go out there for a family reunion and decide to stay. The guy problem (sic) never left the State in his life until then."(Vol.IX,T779-80). He speculated, "Let me show you this. You want to see about his family? Look at his middle name. His mother's name: Theresa Brown. Look who paid for the hotel. To whom it may concern: I, Lisa Brown, okay? They're helping him. His family's helping him. That's who paid for the Travel Lodge: Lisa Brown….Okay? We don't know…."(Vol.IX,T790). Without supporting evidence, "I don't know if anyone has ever shot a .44 caliber. When you shoot a gun like that, it kicks. It's a big kick. You got to aim again."(Vol.IX,T786). Without evidentiary support, "He came home with a black eye? The other guy had two black eyes.(Vol.IX,T791). And, "You'll also consider as aggravating that McFadden terrorized the community, the whole community. Who felt safe in Pine Lawn in 2002 and 2003 with a murderer loose? Who felt safe? You'll consider it for them, that whole community." (Vol.IX,T796). Over objection, alluding to non-record facts, "each one of you promised me. Each one of you told that, in the proper case, you would vote for the death penalty. Well, ladies and gentlemen, this is that case. This defendant, these facts, his criminal background: This is that case. **And if this ain't a death**

penalty case, then there ain't such a thing."(Vol.IX,T818) (emphasis added).*Storey*, at 900-03; *Newlon*, at 1340.

Larner relied on external sources of law, encouraging jurors apply vigilante justice and ignore Vincent's constitutional rights.*Id.*, *Debler*, at 656. "Now look. We live in a civilized society. And back in the old days, we would have allowed the Addison and the Franklin families to go hunt him down like he deserves and get retribution. We wouldn't have had this jury. But, that was in the old days. We're more civilized now. He had the right to counsel."(Vol.IX,T814). "And on that day that he killed Todd, on the following May, there was one juror in Pine Lawn. That juror was the foreperson. Had no instructions of law. There was no trial. There were no jury instructions. There was no evidence. There were no witnesses. And that foreperson and that juror decided that the death penalty was appropriate then and that Todd and Leslie should not get a fair trial. Because if there's one person in this courtroom that believes in the death penalty, it's that man right there."(Vol.IX,T810).

Larner encouraged jurors "send a message," for community values and wishes and ignore the facts and the law, denying Vincent individualized sentencing.*Comm. v. DeJesus*, 860 A.2d 102,116-119(Pa.2004); *Brewer v. Comm.*, 206 S.W.3d 343, 350-51(Ky.2006);*Weaver v. Bowersox*, 438 F.3d 832, 840-42(8thCir.2006). Over objection, "It demands that you vote for the death penalty. The integrity of the judge, the criminal justice system. Witnesses need to know that they can come forward and be safe."(Vol.IX,T775). And, "…you are not just

twelve individuals. You represent society. You represent what is good and decent about our community. It's as though the law gives you a little piece of a mirror…And we're going to show him, finally, what society thinks of him. That's what we're going to do. Because he's not going to be allowed to be slipping through the cracks any longer."(Vol.IX,T818). He argued jurors' duty, as the community's conscience, was to sentence Vincent to death.*Sinisterra v. United States*, 600 F.3d 900, 910-11(8th Cir.2010);*State v. Brown*, 651 A.2d 19, 56-57(N.J.1994).

Larner argued Vincent's failure to testify.*State v. Barnum*, 14 S.W.3d 587, 591(Mo.banc2000);§546.270. Over objection, "This is all aggravating. It's all lack of remorse. It's all aggravating."(Vol.IX,T778). And, "There's no remorse. He doesn't feel bad about any…why did he keep doing it?...why does he keep doing it if he feels so bad about shooting people?"(Vol.IX,T789).

Larner encouraged jurors to decide punishment on visceral emotion.*Debler*, at 856;*Clark v. Comm.*, 833 S.W.2d 793, 796-97(Ky.1991); *Payne*, *supra*. Over objection, "If it had been a dog, people would be clamoring for the death penalty, if you killed an animal like that…He shot her down like a dog. And you know what? To him, she is a dog. To him, she's a dog."(Vol.IX,T787). "Ladies and gentlemen, I leave you with Leslie and Todd. Hold them. Hug them. Tell them you love them. But most of all, don't let them down. This verdict is for Leslie and Todd."(Vol.IX,T822). Larner ignored *Rhodes*,*supra*:

> Ladies and gentlemen, everybody that has a sister or children knows and prays that they never had to look upon the horror that the Addison and Franklin families had had to endure. Because you now know how fleeting life, innocent life, can be, and how quickly innocent life can be taken away by someone with a cruel, evil intent that that man had. Think of the terror. Think of the terror that Leslie went through the last moments of her life on that street. The sheer terror with him putting the gun in her face and clicking it and laughing and her begging for her life, knowing that she was 18 years old and about to die for his pleasure. Think of the terror that Eva went through watching all of this, helplessly watching, from the bushes as this entire murder unfolds. Think of the terror, the horror of Todd's sister, Tara, and mother coming home from the store… Think of it. They come home. They see this body of their son in the driveway and the blood next door to where they live. Think of the terror and the horror of the mother and the sister of Todd Franklin.

(Vol.IX,T818-19,820). Argument personalizing to jurors is "grossly improper." *Storey*, at 901; *Rhodes*, at 528. Its prejudice

> is undeniable. Inflammatory arguments inflaming and arousing fear in jurors are especially prejudicial in death penalty cases.*State v. Tiedt*, 206 S.W.2d 524, 529(Mo.banc1947). "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, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393(1977). *Storey*, at 901.

Larner's misconduct rendered the verdicts unreliable, requiring reversal and remand for a new trial, or resentencing to life without parole.

VII. The trial court erred in overruling Vincent's objections to Will Goldstein, Tara Franklin and Evelyn Carter's testimony, and Larner's arguments, that Vincent killed Todd Franklin because Todd testified in a prior proceeding against Vincent's friends Corey and Lorenzo because these rulings denied Vincent due process, a fair trial, freedom from cruel and unusual punishment and freedom from being tried for the same offense after prior acquittal,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const. Art.I,§§10,18(a),19,21, in that, in the first "Franklin" trial, jurors rejected the statutory aggravator that because Todd was a witness in a prior prosecution he was killed. That rejection constitutes an acquittal of that element of the offense and the State is therefore estopped from seeking a different ruling from another jury.

Despite that the first "Franklin" homicide jury rejected the State's theory that Vincent killed Todd because he was a witness in a prior prosecution, the State used the same evidence to support this death sentence. Because that first jury's decision is an acquittal—a merits ruling—on that element, and the parties and issues are the same, the State was collaterally estopped from again presenting this evidence and forcing Vincent to defend against it. Judge Gaertner's rulings violated Vincent's state and federal constitutional rights to due process, a fair trial, freedom from cruel and unusual punishment, and being re-tried for the same offense.

In the first "Franklin" trial, the State charged Vincent killed Todd because he was a witness in a prior prosecution. Jurors were instructed to decide unanimously beyond a reasonable doubt "whether Todd Franklin was a witness in a past prosecution of Lorenzo Smith and Corey Smith for the robbery and assault of Todd Franklin and was killed as a result of his status as a witness."[11] They rejected that aggravator. Collateral estoppel precludes the State from re-submitting the issue.

Collateral estoppel is part of the state and federal constitutional guarantee against double jeopardy.*Ashe v. Swenson*, 397 U.S. 436, 445(1970);*Benton v. Maryland*, 395 U.S. 784, 794(1969). "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."*Ashe* at 443. The "first trial [cannot be treated] as no more than a dry run for the second prosecution."*Id.* at 447.

In *Ashe*, the State originally prosecuted Petitioner for the armed robbery of one of six poker players. After acquittal, the State prosecuted Petitioner for the armed robbery of another player. Since the "single rationally conceivable issue in dispute before the jury" was whether Petitioner was a robber, by acquitting him,

[11] Vincent requests this Court judicially notice its records. This issue was litigated in *State v. McFadden*, SC88959, pending before this Court. The instruction and verdict appear at (LF366,375).

the first jury found he was not and the State could not retry that issue.*Id.*at 445. It could not force Petitioner to "run the gantlet" again.*Id.* at 445-46.

In *State v. Nunley*,923 S.W.2d 911(Mo.banc1996), this Court addressed whether a post-conviction court's finding on a second Rule 24.035 motion was collaterally estopped, since, when an issue of ultimate fact has been determined by a valid judgment, the same parties may not relitigate it.*Id.* at 922. Collateral estoppel applies when: (1) the issue is identical to the issue decided in the prior proceeding; (2) there was a judgment on the merits in that proceeding; (3) the party against whom collateral estoppel is asserted is the same or has privity with a party in that proceeding, and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in that proceeding.*Id.*

Jurors in the first "Franklin" trial rejected the statutory aggravator that Todd was killed because he was a witness in a prior prosecution. Here, the State did not re-submit the aggravator, but violated *Ashe*, by, over repeated objection, permeating penalty phase with argument and testimony that Vincent killed Todd because Todd was a witness against Vincent's friends, Corey and Lorenzo.

Pre-penalty phase, counsel moved to preclude the State from adducing evidence and arguing this killing was related to them.(Vol.VIII,T444-45). Judge Gaertner believed the evidence was relevant and admissible.(Vol.VIII,T445). Counsel objected and preserved the issue for review.(Vol.VIII,T447;LF765-66).

Larner's penalty phase opening focused on Vincent's priors, including the Bryant and Burns assaults and the Franklin homicide.(Vol.VII,T424-36). After

the assaults, Vincent was "wanted for that shooting because Shonte goes to the police and tells the police what she knows. Along with the victims of that case, you know, Daryl and Jermaine."(Vol.VII,T428). Larner argued Vincent killed Todd because Todd fingered Vincent's friends.(Vol.VII,T435).

Before penalty phase, defense counsel posed a continuing objection to William Goldstein's testimony, arguing any suggestion that Vincent killed Todd because he was a witness in the prior prosecution was collaterally estopped since the first jury rejected that statutory aggravator.(Vol.VIII,T443-47). Judge Gaertner overruled the objection, holding collateral estoppel did not apply since the evidence went to motive, not an aggravator.(Vol.VIII,T446-47). That ruling was erroneous. Collateral estoppel means **issue**, not **claim**, preclusion.

Goldstein represented Lorenzo in the robbery prosecution in which Todd was the victim.(Vol.VIII,T447,487-90). Goldstein was present when Todd was deposed, implicating Lorenzo and Corey.(Vol.VIII,T490). Lorenzo pled guilty thereafter.(Vol.VIII,T491-92). Upon hearing Todd's deposition, Goldstein thought Lorenzo should plead.(Vol.VIII,T492).

Evelyn Carter, Leslie's first cousin, testified she knew Todd, Lorenzo and Corey.(Vol.VIII,T585). After Todd died, Vincent called her, saying Todd "was soft and … snitched. He was going into some details about the whole situation with Todd and Lorenzo. He kept talking about what happened with them and about them being in jail and all that…."(Vol.VIII,T588). Larner asked, "…is that

what he told you why he did it?"(Vol.VIII,T588). Evelyn responded, "…that's my assumption, yeah, that's why he did it."(Vol.VIII,T588).

In closing, Larner argued the justice system was under fire—witnesses weren't safe with Vincent alive, thus jurors must sentence him to death.(Vol.IX,T775). He argued Vincent threatened to kill Eva because she witnessed Leslie's death.(Vol.IX,T775).

> You know, Todd Franklin would not have been killed if he had not been a witness against Corey and Lorenzo. Todd Franklin decided not to take the law in his hands. He decided to go through the criminal justice system and prosecute these two guys who robbed and shot at him… Talk about the integrity of the criminal justice system. There is no integrity in the criminal justice system with a guy like this killing witnesses and killing people that come forward.

(Vol.IX,T776).

Trial courts' decisions to admit evidence will be reversed if they abuse discretion and prejudice results.*State v. Davis*, 226 S.W.3d 167, 169 (Mo.App.,W.D.2007). While evidentiary rulings require deference, if trial courts misapply the law, review is *de novo*.*Ryan v. Ford*, 16 S.W.3d 644, 648(Mo.App.,W.D.2000). Judge Gaertner misapplied the law, believing collateral estoppel did not apply.

The first jury's failure to find the statutory aggravator that Todd was killed because he was a witness constitutes an acquittal of that aggravator.*State v.*

Whitfield, 107 S.W.3d 253(Mo.banc2003); *Apprendi v. New Jersey*, 530 U.S. 466(2000); *Ring v. Arizona*, 536 U.S. 584(2002); *accord, Capano v. State*, 889 A.2d 968(Del. Supr.2006)(failure to find a statutory aggravator unanimously beyond a reasonable doubt is an acquittal of that aggravator); *State v. Silhan*, 275 S.E.2d 450, 480-83(N.C. 1981)(decision aggravator doesn't apply analogous to acquittal).

The Sixth Amendment requires 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."*Jones v. United States*, 526 U.S. 227, 243 n.6(1999). The Court re-emphasized:

> The dispositive question, we said, "is one not of form, but of effect." 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. A defendant may not be "expose[d] … to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone…."

Ring, 536 U.S. at 602(citations omitted). Because statutory aggravators are "'the functional equivalent of an element of a greater offense,' … the Sixth Amendment requires that they be found by a jury."*Id.* at 609;*Apprendi*, at 494 n.19. This Court has acknowledged that, in capital cases, jurors must find eligibility factors unanimously beyond a reasonable doubt.*Whitfield*, at 256. If those facts are not

found unanimously beyond a reasonable doubt, the defendant is acquitted of that element of the offense.

Judge Gaertner acknowledged the first jury did not find unanimously beyond a reasonable doubt that Vincent killed Todd because he was a witness against Corey and Lorenzo.(Vol.VIII,T446-47). That was a merits ruling in the prior proceeding.*Nunley*, at 922. The parties in both proceedings are identical.*Id.* The State had a full and fair opportunity to litigate the issue in the prior proceeding—it offered the aggravator and presented supporting evidence.*Id.* Judge Gaertner erroneously believed because there, the factual question was a statutory aggravator and here, was motive, collateral estoppel was inapplicable. (Vol.VIII,T446-47).

Larner suggested Vincent should be sentenced to death because, by killing witnesses like Todd, he undermined the justice system. Through testimony and argument, he asserted Vincent killed Todd for testifying against his friends.(Vol.VIII,T487-95,502,585-88). Although not packaged here as an aggravator, Larner presented the identical factual issue.

The first jury's rejection of the statutory aggravator is a merits ruling, an acquittal of that aggravator. Because penalty phase "resembles a trial on the issue of guilt or innocence … [and] *explicitly requires* the jury to determine whether prosecution has 'proved its case,'"*Bullington v. Missouri*, 451 U.S. 430, 444(1981), Larner should have been precluded from using that aggravator here as an aggravator or as motive since it forced Vincent to "run the gantlet" again. *Id.* at

443;quoting,*Green v. United States*, 355 U.S. 184, 190(1957). *Whitfield*, *Ring* and *Apprendi* compel this result, and a re-thinking of *Poland v. Arizona*, 476 U.S. 147(1986).

In *Poland*, the trial judge sat as the sentencer in penalty phase and heard evidence on two statutory aggravators—pecuniary gain and depravity.*Id.* at 149. He found the latter but not the former since he believed the Legislature intended the former apply only to contract killings.*Id.* Weighing aggravators and mitigators, he imposed death.*Id.* On appeal, Petitioners argued the evidence didn't support depravity.*Id.* The appellate court agreed but also found the trial judge mistakenly interpreted the Legislature's intent about the first aggravator. *Id.* It held that, on retrial, the State could re-submit it. *Id.*

On re-trial, Petitioners were convicted and, at sentencing, the State presented evidence supporting the depravity and pecuniary gain aggravators and alleged a new aggravator. Finding all three, the judge imposed death.*Id.* at 150. Petitioners argued, under *Bullington*, the appellate court's original decision that the evidence didn't support the depravity aggravator was an acquittal of the death penalty and Double Jeopardy barred its imposition.*Id.* at 151. The appellate court disagreed, stating that holding was not a death penalty acquittal. It had held the death penalty could not be based solely on the depravity aggravator since there was insufficient evidence to support it.*Id.* It again found insufficient evidence to support the depravity aggravator, but, finding sufficient evidence of the other two,

concluded death was appropriate. *Id.* The Court granted certiorari to consider whether re-imposing death violated Double Jeopardy.*Id.*

The issue was whether the sentencer or the appellate court decided the State had not proved its case for death and thus acquitted Petitioners.*Id.* at 154. The Court held that the trial judge had not acquitted Petitioners since he imposed death. Although the appellate court found the depravity aggravator unsupported by the evidence, it did not acquit of death, specifically advising that, upon re-trial, the State could submit the pecuniary gain aggravator since the trial judge misunderstood the applicable law.*Id.* at 154-55. Petitioners argued the appellate court acquitted them of death since it found insufficient evidence on the sole statutory aggravator and this acquittal was final for Double Jeopardy purposes.*Id.* at 155.

The Court rejected

> …the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate*. We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating

circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

Id. at 155-56. Further, "while it might be possible to treat each aggravating circumstance as a separate 'offense,' of which a defendant is either convicted or acquitted, this Court has taken a different approach."*Id*. at 160. The central issue was whether death was the appropriate punishment.*Id.*

Poland pre-dates *Ring, Apprendi* and *Whitfield*. Those cases compel the analysis and result in *Campano*. *Whitfield* teaches jurors must "determine all facts on which the legislature has predicated imposition of the death penalty."*Whitfield*, at 258. *Ring* and *Apprendi*, which underpin *Whitfield*, explicitly require jurors make those factual findings unanimously beyond a reasonable doubt.*Apprendi*, at 490;*Ring*, at 602.

When the State chooses to charge a statutory aggravator, an element of the offense, it must be proved to jurors unanimously beyond a reasonable doubt. If they do not so find, the State should be precluded from asking a second jury to ignore that prior acquittal and convict based on evidence the first jury rejected. "To permit a second trial after an acquittal … would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant…."*Poland*, at 156; *United States v. Scott*, 437 U.S. 82, 91(1978).

This Court should reverse and remand for a new trial.

VIII. The trial court erred in overruling Vincent's objections and admitting evidence about the Franklin homicide because this denied Vincent due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21; §565.032.2(1), in that the evidence proved not just that Vincent had a "prior record of conviction for murder in the first degree," but sought death based on the jury's emotional response and was more prejudicial than probative.

Of the State's thirteen penalty phase witnesses, eight—scene witnesses, Lorenzo's lawyer, Todd's sister, police officers, evidence analysts, and the medical examiner—testified solely about the Franklin homicide. Two testified about finding drugs on Vincent when he was arrested. Of the remaining three who actually discussed this case, Shonte Addison testified equally about Leslie and the Bryant and Burns shooting.

The numbers tell the tale. Todd Franklin **was** the State's penalty phase. Larner analogized the cases, arguing Vincent killed Todd because he was a witness against Vincent's friends and arguing that, for both, Vincent called Evelyn Carter to tell her what he had done.(Vol.VII,T435). Larner turned this penalty phase into a mini-trial of that case, throwing in the Bryant and Burns assaults for good measure.

While the State is entitled and obligated to present sufficient evidence for jurors to find statutory aggravators beyond a reasonable doubt, by opening the floodgates to evidence about the Franklin homicide and the other statutory

aggravators, the State went far beyond what the Legislature authorized through §565.032.2(1). Larner injected emotion into the penalty phase decision, rendering it fundamentally unreliable. This violated Vincent's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

Trial courts' decisions to admit evidence are reviewed for abuse of discretion.*State v. Johns*, 34 S.W.3d 93, 112(Mo.banc2000); *State v. Smith*, 136 S.W.3d 546, 550(Mo.App.,W.D.2004). Discretion is abused "when it is clearly against the logic of the circumstances then before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Id.* Judge Gaertner abused his discretion in letting Larner introduce this tsunami of evidence, violating the statute, this Court's decisions, and creating prejudice. Counsel's continuing objection to the testimony preserved the error. Prejudice is presumed, which the State must show was harmless.*State v. Anderson*, 76 S.W.3d 275, 278(Mo.banc2002).

Larner began penalty phase with Gary Lucas, a worker next door to the Franklins on July 3, 2002.(Vol.VIII,T466-67). Lucas heard "firecrackers" and then saw Todd running; Vincent and a light-skinned man behind him.(Vol.VIII,T467). The men talked to the owner, then the light-skinned man shot Todd.(Vol.VIII,T467-68). Vincent took the gun, kicked Todd, said he wasn't dead, and shot him three times.(Vol.VIII,T469). The two men and Lucas ran.

(Vol.VIII,T469-70). Upon family advice he might be killed,[12] Lucas fled to Dallas, returning upon hearing Vincent was incarcerated.(Vol.VIII,T475).

William Goldstein, Lorenzo's lawyer on the robbery for which Todd was the complaining witness, testified Todd implicated Lorenzo and Corey.(Vol.VIII,T490-94). After hearing Todd's deposition testimony, Goldstein advised Lorenzo to plead guilty.(Vol.VIII,T492).

Todd's sister, Tara, and their Mother returned home from shopping shortly after the shooting.(Vol.VIII,T496-500). Tara stated Todd only testified against Lorenzo and Corey, and that was the only crime for which Todd was the victim.(Vol.VIII,T502-03).

Detective Sieck photographed the scene.(Vol.VIII,T505). He described photographs showing Todd's injuries.(Vol.VIII,T507-19). Judge Gaertner admitted the photographs, over objection.(Vol.VIII,T507-18). Sieck diagrammed the scene and photographed a cigar eight feet from the body, at the driveway's edge.(Vol.VIII,T520-23). From the cigar, Heather Burke lifted a print matching Vincent.(Vol.VIII,T538-51). Sieck's scene videotape recapitulated the photos.(Vol.VIII,T525-26).

Detective Stone investigated Vincent as a suspect in the shooting. (Vol.VIII,T523). That night, at the Pine Lawn Police Department, he saw

[12] Counsel did not object to this hearsay and other crimes evidence. *See*,Point X.

Vincent's "wanted" poster for the Bryant and Burns shootings.(Vol.VIII,T534). It thereafter became a "nationwide wanted."(Vol.VIII,T535).

Dr. Nanjuri, who performed Todd's autopsy, observed five gunshot wounds.(Vol.VIII,T553-59). Nanjuri believed Todd was alive for all shots, with all contributing to his death.(Vol.VIII,T561). William George testified over objection that he examined five .44 caliber bullets, which could have come from the same ammunition box, and were fired from a revolver.(Vol.VIII,T567-71).

Evelyn Carter spoke to Vincent the day after Todd died.(Vol.VIII,T585-86). Because Vincent commented Todd was soft and a snitch, she assumed he shot Todd since Todd told police about Lorenzo and Corey.(Vol.VIII,T588). Larner closed, arguing, "You'll consider the fact that Todd was 20 years old…He never had the chance to live. He took that away from him. You'll also consider that he kicked Todd. That he kicked him before he shot him: Nigger ain't dead yet. You'll consider that."(Vol.IX,T797). "Think of it. They came home. They see this body of their son in the driveway and the blood next door to where they live. Think of the terror and the horror of the mother and the sister of Todd Franklin."(Vol.IX,T820).

While jurors must weigh aggravators against mitigators and some facts about prior offenses may be helpful, "the penalty phase is not a mini-trial of these prior offenses."*State v. Whitfield*, 837 S.W.2d 503, 512(Mo.banc1992); *Johns*, at 113. The New Jersey Supreme Court reversed a penalty phase after the State elicited that the defendant and a prior murder victim worked together in a large

drug-distribution network, linking, through similar facts, the offenses, and graphically detailing the other victim's wounds.*State v. Josephs*, 830 A.2d 1074(N.J.2002).

The *Josephs* Court noted its "abiding effort to guard against jury prejudice in the penalty phase of a capital case," since "other-crimes evidence is of special concern because of its capacity to prejudice the capital-sentencing deliberations."*Id.* at 1117. That potential for prejudice is "particularly high" if the prior offense is similar.*Id.* Prior murder convictions ordinarily are proved by introducing the judgment of conviction, although the New Jersey statute lets the State offer evidence of the victim's identity and age, how he was killed and his relationship with the defendant.*Id.* The statutory limitation is intended "to avoid turning the sentencing proceeding into a second trial of the previous case and at the same time to provide the jury with some information about the prior conviction."*Id*. at 1118, *citing State v. Erazo*, 594 A.2d 232 (N.J.1991). To avoid inflaming jurors' passions and prejudices, medical evidence about the prior victims and their "manner of death" should be described in "general terms."*Josephs*, at 1118. Instead of witnesses graphically describing and highlighting wounds in photographs and diagrams, the State should provide "no more detail than that death resulted from two gunshot wounds to the head."*Id*. at 1120. This could serve the statutory purpose and avoid the risk "the prejudicial effect of a graphic and detailed account of the victim's death might exceed its probative value."

Although that statute authorized admitting evidence about prior murder convictions, it did not "circumscribe the trial court's inherent ability to limit the prejudicial effect of admissible evidence."*Id.* at 1121. The trial court should control prejudice "as gatekeeper of the evidence presented to the jury."*Id.*

Judge Gaertner did little to control evidence and argument about the Franklin homicide. Instead, jurors heard not merely that Vincent shot Todd but kicked him, calling him a "nigger;" witnesses believed they could be next; Lorenzo's lawyer believed Todd, who claimed Lorenzo robbed him; and, like Leslie, Todd was a witness against one of Vincent's friends and, like Leslie, Vincent killed him. Thus, Vincent's jury heard Vincent had another first degree murder conviction, its graphic details, what purportedly provoked it, and that this was the tip of the iceberg. If this penalty phase were intended to exact punishment for the Franklin homicide, **some** of that evidence might have been appropriate. But, since its purpose is to determine the appropriate sentence for **this** homicide, it was improper. *Id.* at 1118.

"Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented **subject to the rules of evidence at criminal trials**."§565.030.4(emphasis added). To be admissible, evidence must be logically and legally relevant.*State v. Anderson*, 76 S.W.3d 275,276 (Mo.banc2002)*;State v. Sladek*, 835 S.W.2d 308, 314(Mo.banc 1992)(Thomas, J., concurring). Evidence is logically relevant if it tends to make

the existence of a material fact more or less probable.*Id.*; *State v. Smith*, 32 S.W.3d 532, 546(Mo.banc2000). It is legally relevant if its probative value doesn't outweigh its costs. *Id.* Costs include unfair prejudice, confusion of issues, misleading the jury, undue delay, waste of time and the cumulative nature of the evidence.*Id.*;*Sladek*, at 314. If costs outweigh benefits, the evidence must be excluded.*Anderson*, at 276.

Some evidence about the Franklin homicide was logically relevant. Vincent's "prior record of conviction for murder in the first degree" was alleged as a statutory aggravator. The State introduced the conviction(Vol.VIII,T465; Ex100), and called witnesses who elaborated on its underlying facts. This evidence made the prior conviction's existence more probable.

The wealth of evidence was not, however, legally relevant. Its unfair prejudice was enormous. Because of the parallels Larner drew between the two cases, this jury likely considered it, punishing Vincent for that homicide, rather than merely deciding what punishment should be imposed for this offense.*Josephs*, at 1118. Larner used this evidence to whip up jurors' emotions, arguing these two homicides showed a pattern keeping St. Louis citizens in fear and at risk unless they imposed death.*Sinisterra v. United States*, 600 F.3d 900(8thCir.2010). Most of the evidence wasn't legally relevant; it was inadmissible.

Admissibility in penalty phase is further limited by legislative mandate. "Statutory aggravating circumstances for a murder in the first degree offense shall

be limited to the following: (1) The offense was committed by a person with a prior record of conviction for murder in the first degree, **or** the offense was committed by a person who has one or more serious assaultive criminal convictions."§565.032.2(emphasis added). Whether a conviction is "serious assaultive" is a fact question for jurors.*Shepard v. United States*, 544 U.S. 13(2005);*accord*, MAI-CR3d 314.40. The existence of a prior conviction is neither a fact question nor subject to the requirement of jury fact-findings.*Shepard*, at 26 n.5;*Apprendi v. New Jersey*, 530 U.S. 466(2000). Were the Franklin homicide a "serious assaultive conviction," jurors would have to find its serious assaultive nature. Since it was a first degree murder conviction, presenting the record of conviction satisfied the State's burden. Everything else created prejudice.*Josephs,supra.*

Because the State used facts and an extraordinary number of details about the Franklin case to prejudice Vincent and obtain a death sentence, this Court should reverse and remand for a new penalty phase or reverse and order Vincent re-sentenced to life without parole.

IX. The trial court erred in denying Vincent's motion to quash the venire, letting the State continue to seek death, and sentencing Vincent to death, and this Court, exercising independent proportionality review under §565.035.2(3)RSMo, should find Vincent's death sentence unconstitutionally excessive, because it violates due process, a fair trial before a properly-selected jury, reliable sentencing, and freedom from cruel and unusual punishment and jurors' right to serve, irrespective of their fundamental beliefs and is inconsistent with evolving standards of decency, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§5,10,18(a),21, in that 37% of the venire was struck for cause for their unwillingness to consider death as a punishment. Evolving standards of decency in St. Louis County, demonstrated by the views of over one-third of those called, mandate Vincent's death sentence be set aside. Further, if this Court considers the State's repeated misconduct in this case; only 29 of 164, 17.9% of veniremembers were African-American, and if it complies with §565.035.6 and considers all similar cases in its proportionality review, it will find Vincent's sentence disproportionate.

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, *Furman v. Georgia*, 408 U.S. 238, 239(1972), provides "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This right "flows from the basic '"precept of justice that punishment for crime should be graduated and proportioned to [the]

offense.'"""*Roper v. Simmons*, 543 U.S. 551, 560(2005);*Atkins v. Virginia*, 536 U.S. 304, 311(2002);*Weems v. United States*, 217 U.S. 349, 367(1910).

Evolving Standards of Decency

How society judges the appropriateness of a particular sentence develops over time. That over one-third of those called for service here could not consider the death penalty reveals that, in St. Louis County, it constitutes cruel and unusual punishment. Judge Gaertner should have ensured Vincent not be sentenced to death. This Court must now reduce his sentence to life without parole, under its independent duty to review whether a death sentence is excessive or was imposed because of passion, prejudice or any other arbitrary factor.§565.035. Failing to act violates Vincent's state and federal constitutional rights to due process, a fair trial with a properly-selected jury, reliable sentencing and freedom from cruel and unusual punishment, and jurors' right to serve, regardless of religious beliefs.

Of 164 veniremembers voir dired, the State struck 61 for cause because they could not impose death.(Vol.I,T52,180,287,313,346,361,400;Vol.II,T30,40, 43,47,52,55,107,112,114,118137,140,144,150,156,192,194,197,254;Vol.III,T82,1 08,128,135,152,178,198,204,208,219,221,274,335,363,375,293,400,413,416,427, 440;Vol.IV,T58,79,81,91,120245,255,295,297,357,391,414,419). After the State announced peremptory strikes, defense counsel moved to quash the panel because, of 170 veniremembers called and 164 questioned, only 29—17%--were African-American, a statistically-significant difference from the 21.3% in St. Louis County's population.(Vol.V,T238-40). The court denied that motion.

(Vol.V,T240). Counsel moved to preclude the State from seeking death since 61 of 164 veniremembers questioned—37%, were struck for cause because they could not consider death.(Vol.V,T241). Counsel argued that figure demonstrated, in St. Louis County, evolving standards of decency render the death penalty unconstitutional.(Vol.V,T241). The court denied that motion.(Vol.V,T242).

> The ban on cruel and unusual punishments,
>
> like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework, we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

Simmons, at 560-61, citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)(plurality opinion). Addressing whether executing juveniles violated the Eighth Amendment, the Court considered the world community's practices, and other "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions…."*Simmons*, at 561-62. The inquiry does not end there, since "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."*Id.* at 563. The beginning point was the

"objective indicia of consensus." The final point was the Court's independent judgment.*Id.* at 564.

In finding a national consensus against executing juveniles, the Court relied on state legislatures' decisions to abolish it; the rate at which abolition occurred, and the consistency of change.*Id.* at 564-67. It also noted the "stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."*Id.* at 575.

The international community has registered its opposition to the death penalty through legislation, official resolutions, covenants and agreements. Universal Declaration of Human Rights,Art.5; International Covenant on Civil and Political Rights,Art.6,§1; Dorean Koenig, "A Death Penalty Primer: Reviewing International Human Rights,"4 ILSA J.Int'l & Comp.L. 513, 523 n.58(1998), citing "Council of Europe Demands Worldwide Ban on Death Penalty,"Agence-France Presse, October 11, 1997. The United Kingdom's experience abolishing the death penalty "bears particular relevance here in light of the historic ties between our countries and… the Eighth Amendment's own origins."*Simmons*, at 577. That international opinion, which considers fundamental our common rights, "underscores the centrality of those same rights within our own heritage of freedom."*Id.* at 578.

The direction of change in national and international consensus helps gauge whether evolving standards of decency preclude imposing the death penalty. Similarly persuasive is the direction of change within the relevant community—St.

Louis County. In *State v. McFadden*, 216 S.W.3d 673(Mo.banc 2007), over 50% of veniremembers were struck for cause because they could not impose death.[13] That a substantial percentage of St. Louis County citizens, otherwise qualified to serve, have repeatedly refused to impose death demonstrates evolving standards of decency within the County and a rejection of that penalty.

Only 17% of Veniremembers Were African-American

In 2007, 21.8% of St. Louis County's population was African-American.[14] The 170 member venire panel contained only 29 African-Americans, (Vol.V,T238), only 17.9% of those called, a statistically-significant variation. Especially given the St. Louis County Prosecutor's Office's pattern of peremptorily striking African-Americans, violating *Batson v. Kentucky*, 476 U.S. 79(1986), *see State v. McFadden*, 191 S.W.3d 648(Mo.banc2006); *State v. McFadden*, 216 S.W.3d 673(Mo.banc2007); *State v. Hopkins*, 140 S.W.3d 143(Mo.App.,E.D.2004), this under-representation becomes ever-more troubling and constitutionally-significant.[15]

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[13] Vincent requests that this Court take judicial notice of Case No. SC87753 and Appellant's opening brief(pp.102-05).

[14] http://quickfacts.census.gov/qfd/states/29/29189.html (last visited 3/15/12).

[15] Criminal defendants are entitled to impartial juries drawn from a fair cross-section of the community.*Taylor v. Louisiana*, 419 U.S. 522, 526-31(1975). A Sixth Amendment fair cross-section claim is established if the group excluded is a

The State's Repeated Misconduct

The prosecutor repeatedly ignored the law and the court's directives. Despite Judge Gaertner's warning, "If you do it again, I'm going to lay you out in front of the jury,"(Vol.IX,T815-16), Larner pushed the envelope. In guilt phase, he reminded jurors Vincent hadn't denied involvement in the killing. (Vol.VII,T389).*Griffin v. California*, 380 U.S. 609, 615(1965); *Mitchell v. United States*, 526 U.S. 314, 327(1999). In penalty phase, he again commented on Vincent's failure to testify: "This is all aggravating. It's all lack of remorse. It's all aggravating." "There's no remorse…."(Vol.IX,T778,789). In penalty phase, he stated jurors could not consider mercy in deciding punishment.(Vol.IX,T811). *Nelson v. Nagle*, 995 F.2d 1549(11th Cir.1993);*California v. Brown*, 479 U.S. 538(1987). He compared this case to others, outside the record,(Vol.IX,T818), making himself an unsworn witness.*State v. Storey*, 901 S.W.2d 886, 900-

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distinctive part of the community; its representation on venires is not fair and reasonable in relation to its representation in the community; and the underrepresentation is due to systematic exclusion during jury selection.*Duren v. Missouri*, 439 U.S. 357, 364(1979). A less than 10% discrepancy usually is not alone sufficient to demonstrate unfair or unreasonable under-representation.*United States v. Ashley*, 54 F.3d 311, 314(7th Cir.1995). Here, African-Americans are excluded through limiting those called, and *Batson* violations.

02(Mo.banc1995). He directed the jury to external sources of law, *id.*, encouraging vigilante justice:

> We live in a civilized society. And back in the old days, we would have allowed the Addison and the Franklin families to go hunt him down like he deserves and get retribution. We wouldn't have had this jury. But, that was in the old days. We're more civilized now. He had the right to counsel.

(Vol.IX,T814). He ignored this Court's mandate, telling jurors to think about their families:

> Think of the terror. Think of the terror that Leslie went through the last moments of her life on that street. The sheer terror with him putting the gun in her face and clicking it and laughing and her begging for her life, knowing that she was 18 years old and about to die for his pleasure. Think of the terror that Eva went through watching all of this, helplessly watching, from the bushes as this entire murder unfolds. Think of the terror, the horror of Todd's sister, Tara, and mother coming home from the store… Think of it. They come home. They see this body of their son in the driveway and the blood next door to where they live. Think of the terror and the horror of the mother and the sister of Todd Franklin.

(Vol.IX,T818-20).

Comparative Proportionality Review

A review of similar cases,§565.035RSMo, also demonstrates Vincent's death sentence is disproportionate. James Schnick received life without parole

after killing seven people, including his children.*State v. Schnick*, 819 S.W.2d 330, 331-32(Mo.banc1991) (reversed and, upon remand, life without parole plea). In *State v. Beishline*, 926 S.W.2d 501, 505(Mo.App.,W.D. 1996), after the State introduced evidence of other murder victims, jurors convicted Beishline of one count of murder but sentenced him to life without parole. In *State v. Blankenship*, 830 S.W.2d 1(Mo.banc1992), the jury convicted Blankenship of five counts of second degree murder, robbery, receiving stolen property and unlawful use of a weapon, for robbing a supermarket, forcing the victims to lie on their stomachs and shooting them. In *State v. Gilyard*, 257 S.W.3d 654(Mo.App.,W.D.2008), Gilyard was convicted of six counts of first degree murder but sentenced to life without parole in a serial murder case where women victims were found bearing Gilyard's DNA.

Vincent's sentence is disproportionate when compared to similar cases, and because it resulted from passion, prejudice and arbitrary factors. This Court should reduce Vincent's death sentence to life without parole.

X. The trial court erred and plainly erred in overruling Vincent's objections and not *sua sponte* declaring a mistrial when the State argued in guilt phase opening and closing and presented evidence on direct examination of Eva Addison that she consistently identified Vincent as Leslie's killer because this denied Vincent due process, a fair trial, confrontation and freedom from cruel and unusual punishment,U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),19,21, in that the State bolstered Eva's credibility by eliciting her trial accusations of Vincent and prior consistent accusations, made without confrontation, and then told jurors that Eva consistently identified Vincent as Leslie's killer. This gave the State an undue advantage, resulting in Vincent's conviction and death sentence.

Throughout trial, Larner argued Eva Addison consistently identified Vincent as having shot her sister. His closing re-emphasized her story had "no inconsistencies"(Vol.VII,T346-47); she was "a hundred percent sure" Vincent killed Leslie.(Vol.VII,T404). This argument and evidence denied Vincent's state and federal constitutional rights to due process, a fair trial, confrontation, and freedom from cruel and unusual punishment.

In reviewing improperly-admitted evidence, reversal is appropriate if the error was so prejudicial it denied a fair trial.*State v. Cole*, 867 S.W.2d 685, 686(Mo.App.,E.D.1993);*State v. McMillin*, 783 S.W.2d 82, 98(Mo.banc1990). Error is only deemed harmless if harmless beyond a reasonable doubt.*State v.*

Miller, 650 S.W.2d 619, 621(Mo.banc1983);*Chapman v. California*, 386 U.S. 18, 24(1967).

Larner improperly bolstered Eva's trial testimony. This prejudiced Vincent because, as the sole witness to the shooting, Eva's credibility was critical. Letting jurors hear her statements multiple times encouraged them to give her more credence than she otherwise deserved. Defense counsel objected timely to the evidence, and preserved the objection in the new trial motion.(LF727-28).

"When a witness testifies from the stand, the use of duplicating and corroborative extrajudicial statements is substantially restricted."*State v. Seever*, 733 S.W.2d 438, 441(Mo.banc1987);*State v. Christeson*, 50 S.W.3d 251,267(Mo.banc2001). A party may not read a witness's consistent testimony, either before or after he testifies, since the party that presents "the same testimony in multiple forms may obtain an undue advantage."*Seever*, at 441. Prior consistent statements can be used to rehabilitate witnesses impeached with prior inconsistent statements.*Cole*, at 686. Prior consistent statements are properly used "to the extent necessary to counter the subject on which the witness was impeached."*Id.* Here, Eva's prior consistent statements were inadmissible hearsay, merely offered to bolster and corroborate her trial testimony. Since Eva was not impeached, her prior consistent statements were inadmissible.*State v. Davis*, 186 S.W.3d 367, 375(Mo.App.,W.D.2005).

In guilt phase opening, Larner recounted what Eva would state she saw. He stated, "And this is what Eva told the police: that she fell to the ground and he

shot her again on the ground. Told the police immediately. Immediately that night. Does an oral statement, taped statement, written statement: that he stood over her and shot her again."(Vol.VI,T27). Larner reiterated that, shortly after the shooting, Eva told police Vincent shot Leslie(Vol.VI,T28,50); gave a written statement later that night at the Pine Lawn Police Station; at the St. Louis County Police Department, gave written and audio statements(Vol.VI,T28-29), and one month later, identified the car's driver.(Vol.VI,T50). Larner vouched, "she's done the best that she could to say what she could at the time, under the emotion that she was under."(Vol.VI,T29). Her "eyes are excellent. She doesn't wear glasses."(Vol.VI,T34). Counsel objected to bolstering with statements "that are not in evidence and may not be in evidence.(Vol.VI,T50-51). The court sustained the objection, telling Larner, "Just proceed.(Vol.VI,T51).

Larner's first guilt phase witness was Eva, who testified Vincent had arrived that night, hit her, and stated she and her sisters couldn't "come to Pine Lawn."(Vol.VI,T62-64). The men left and, when Eva's sisters and friend arrived, she recounted the conversation and all departed, except Eva and Leslie. (Vol.VI,T66). Two cars, one with Vincent as passenger, arrived, and Vincent told the women to leave Pine Lawn.(Vol.VI,T67). Leslie responded they had done nothing to him; he pointed a gun at her, pulled the trigger, and the gun "clicked."(Vol.VI,T67-68). Vincent stated one of them would have to die that night and Leslie would see her dead brother.(Vol.VI,T68-69). The men left and

Leslie began walking toward the Skate King.(Vol.VI,T69-70). Eva recounted hiding behind bushes and seeing Vincent shoot Leslie.(Vol.VI,T72-73).

Larner elicited that Eva went to the Pine Lawn and St. Louis County Police stations that night, making written, taped and oral statements.(Vol.VI,T74-75). Although Eva never indicated she needed to refresh her recollection, Larner asked to show Eva her taped statement.(Vol.VI,T76). Upon objection and despite the court's suggestion to ask whether she needed it, Larner did not do so.(Vol.VI,T76-77). After Larner repeated his questions about what she saw that night,(Vol.VI,T87-88); he asked she identify Exhibit 165, the recording of her statement to police.(Vol.VI,T89-90). Over objection as bolstering, the court admitted it.(Vol.VI,T91-92). Larner asked Eva if she had listened to the tape recently and if it contained her voice and Detectives Neske's and Walls'.(Vol.VI,T92-93). Larner asked Eva to identify Exhibit 164, two written statements from that night, in which she again identified Vincent as Leslie's shooter.(Vol.VI,T102-03). Over another "bolstering" objection, the court admitted the exhibit.(Vol.VI,T103). Later, the court noted having "given a lot of leeway to allow you to get into the written statement and the general gist of what she says she's been consistent with it…."(Vol.VI,T212). The court disallowed Larner's request to publish Eva's entire prior consistent statement.(Vol.VI,T212-13).

Larner then elicited that, in Detective Neske's re-interview, Eva again identified B.T. as the driver.(Vol.VI,T93-94).

On cross-examination, Ms. Turlington elicited that Eva never told Maggie, Theresa Jones or Demetrius Upchurch about the initial confrontation that night with Vincent.(Vol.VI,T139-42). She also elicited that, although Eva testified Leslie intended to meet her mother at the Skate King, she earlier testified their mother had already left the Skate King when Leslie headed out.(Vol.VI,T145-47).

In closing, Larner argued,

> We talked about her deposition, we talked about her taped statement to the police, we talked about her oral statement, we talked about her two written statements. We talked about them all. You know that they occurred. You know that she came forward immediately. In fact, Eva talked about the statements she made, to Ed McGee, twice. There are about seven statements that she made. And anything that was inconsistent in those statements could have been brought out. And, if there was a bunch of inconsistencies, they would have been brought out. Do you understand that? There weren't any inconsistences (sic) in her story, from day one, **although you don't get to see all the statements for yourself**. That's how it works. The defense pointed out whatever inconsistencies they could find. You know what they found? Was your mother at the skating rink that night or was your mother not at the skating rink that night. What other inconsistency was there? None. Nothing. Because she said the same thing, from day one. The car she said. Everything she said. From hour one. From hour one.

(Vol.VII,T346-47)(emphasis added). Finally, Larner asserted, "If she wasn't sure, she'd say she wasn't sure. She's a hundred percent sure."(Vol.VII,T404).

Eva was the corner-stone of Larner's guilt-phase case. As the sole eye-witness, her testimony and jurors' assessment of her credibility were critical. Yet, Larner was not content with presenting her trial testimony and letting jurors judge her credibility. Instead, he bolstered her credibility by repeatedly eliciting every consistent statement she made fingering Vincent. He even referred to statements the jury never heard.

Larner created error, gaining an "undue advantage," by eliciting these multiple statements on direct and arguing them in opening and closing. The issue is whether prejudice resulted.

Had Larner been precluded from bolstering Eva's credibility, jurors would have heard a strikingly different case. They would have judged Eva's identification, made from an alley between Blakemore and Kienlen, hiding behind bushes blocking her from view.(Vol.VI,T148,78-80;Ex62). Eva claimed she saw and identified Vincent as Leslie's shooter.(Vol.VI,T82-86). Yet, Stacy Stevenson testified he couldn't tell what was in the road until an SUV drove up and illuminated Leslie's body, which was 75 feet up Kienlen from the corner of Kienlen and Naylor.(Vol.VI,T180,197). Kienlen had no streetlights to illuminate the scene.(Vol.VI,T187). And, despite some illumination at the corner, which he could see from his apartment, and despite seeing Leslie walk away and the man walk after her, Stacy couldn't identify Vincent as the person who accosted and

then shot Leslie.(Vol.VI,T178-79,182,192). Officer Hunnius, who photographed the scene, recalled it was very dark (Vol.VI,T230) and the streetlight in the area, which illuminated the area directly around it, was "up the hill on Naylor."(Vol.VI,T230).

Had the jury only heard Eva's trial testimony identifying Vincent as the shooter, juxtaposed against the substantial evidence rendering her identification less worthy of belief, less credible, rather than the litany of her repeated identifications, the result may have been different. The State cannot show the error harmless beyond a reasonable doubt.

Because the State repeatedly, impermissibly bolstered its main witness's credibility, this Court should reverse and remand for a new trial.

XI. The trial court erred in overruling Vincent's objections, plainly erred in not *sua sponte* declaring a mistrial, and admitting evidence and allowing guilt phase argument about "Al" having gone to court and recanted his accusations; Vincent wouldn't be prosecuted for "Todd" but would for something else; and Gary Lucas fled to Dallas because he feared for his life because these rulings denied Vincent due process, a fair trial, and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII,XIV; Mo.Const.,Art.I,§§10, 18(a),21 in that these references to other crimes were neither logically nor legally relevant since they had no legitimate tendency to establish Vincent's guilt of this offense but merely prejudiced the jury by suggesting Vincent threatened a witness before, thereby escaping prosecution and, if he did it once, he did it here also; suggesting Vincent committed other crimes and would be prosecuted for some but not others, and suggesting Vincent used illicit drugs and thus was readily capable of violating the law.

Although Vincent was charged with Leslie Addison's homicide, Larner introduced evidence of other crimes in a concerted attempt to convict Vincent, not for this crime but for other alleged misconduct. This denied Vincent's state and federal constitutional rights to due process, a fair trial and freedom from cruel and unusual punishment.

Trial courts' decisions to admit evidence are reviewed for abuse of discretion.*State v. Smith*, 136 S.W.3d 546, 550(Mo.App.,W.D.2004). That occurs when the decision is clearly against the logic of the circumstances and "so

unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration."*Id.* If counsel does not timely object and preserve that objection, review is for plain error.*Rule 30.20*. Since counsel did not object each time Larner adduced this evidence, plain error review is requested.

Evidence of other crimes is generally inadmissible.*State v. Johnson*, 207 S.W.3d 24, 42(Mo.banc2006). It may be admissible if logically and legally relevant.*State v. Davis*, 211 S.W.3d 86, 88(Mo.banc2006). Evidence is logically relevant if it legitimately tends to establish the defendant's guilt of the crime charged, establishing identity, motive, intent, absence of mistake or accident, or common scheme or plan.*State v. Bernard*, 849 S.W.2d 10, 13(Mo.banc1993). It is legally relevant if its probative value outweighs its prejudicial effect.*State v. McCoy*, 175 S.W.3d 161, 163(Mo.App.,E.D.2005). The "admission of evidence of other crimes [must] be subjected to rigid scrutiny," or it may raise a false presumption of guilt.*Davis*, at 88.

In guilt phase opening, Larner read from the transcript of a taped telephone conversation between Eva Addison and "Slim," one to which Vincent purportedly was a third party—standing near Slim in the jail as Slim spoke to Eva. Larner recounted Vincent told Eva he wanted to see her when he got out of jail and, when Slim stated Eva didn't want to see Vincent, Vincent said, "Tell her she don't gotta see me. Tell her—tell her to sign the papers where I can get out of this place. And tell her all she gotta do is go to court and say it wasn't me."(Vol.VI,T40). Larner vouched, "That's J.R. saying that on the tape."(Vol.VI,T40). Then, Slim

stated, "He said, or just go to court and say it wasn't him."(Vol.VI,T40). And, Vincent said, "Like Al did."(Vol.VI,T40). Slim concurred, "Like Al did."(Vol.VI,T40).

During Eva's direct-examination, when Larner moved to admit Exhibit 148-D, counsel objected to the reference to Al.(Vol.VI,T108-10). Larner responded it was ambiguous because "We don't know if it's this case or some other case that he's referring to. I think it's relevant, in that he's referring to some other person that went to court and said that someone didn't do something."(Vol.VI,T110-11). Judge Gaertner overruled the objection. (Vol.VI,T111).

Despite Larner's assertions that the reference to Al was ambiguous, which, he claimed, made the reference relevant, Larner's message to jurors was clear—by coercing him, Vincent persuaded Al not to testify. This was what Larner told jurors about Leslie—Vincent coerces or kills witnesses.

Larner built this picture, starting with the references to Al, and, in guilt phase closing, arguing over objection, "He hasn't killed Eva yet, the only eyewitness. Then is he done killing? No. He's got to get the guy who turned him in at the hotel, at the Travel Lodge."(Vol.VII,T334-35). Larner used the reference to Al to show—those who cooperate and don't testify against Vincent live; but those who don't cooperate, die. In penalty phase Larner added that, instead of Lucas telling police what he allegedly saw happen to Todd, he fled to Dallas, fearing for his life until Vincent was incarcerated.(Vol.VIII,T475).

Larner used the unconnected, unsubstantiated, unclear reference to "Al" to paint this portrait. Larner's admission—the reference was "ambiguous"—makes questionable even its logical relevance. Even if true, its prejudice was enormous, encouraging jurors to speculate, if Vincent did it once, he likely did it again. Prejudice substantially outweighed any probative value it might have had. Thus, its legal relevance was nonexistent, and its admission denied Vincent a fair trial.*State v. Mozee*, 112 S.W.3d 102, 109(Mo.App.,W.D.2003);*State v. Edwards*, 31 S.W.3d 73, 77(Mo.App.,W.D.2000).

Larner argued in initial closing, Vincent told Slim, "They ain't going to court on me on Todd. Slim says: They ain't going to court on him for Todd, but they gonna go to court on him for something else, though."(Vol.VII,T353). Since the jury had heard in voir dire about Todd's death and knew Vincent was convicted of that,(*see* Vol.III,T369-70), the other crimes references were clear.

Larner also raised the spectre of crimes for which Vincent would be prosecuted and those for which he would not. Since, in penalty phase, Larner argued Vincent has "been spitting on the floor of courtrooms for years in all of those cases because no one has held him accountable,"(Vol.IX,T817), the prejudice in both phases was enormous. In guilt phase, Larner encouraged conviction even for crimes with which Vincent was not charged. In penalty phase, he wanted them to sentence Vincent to death because he scared witnesses and, he asserted, hadn't paid sufficiently for other actions.

Because Larner injected evidence of other crimes into both phases, this Court should reverse and remand for a new trial.

XII. The trial court abused its discretion in overruling Vincent's objections to Larner's repeated leading questions of and letting State's witness, Eva Addison, parrot back his commentary because this denied Vincent due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const.,Amends.VI,VIII, XIV;Mo.Const.,Art.I,§§10,18(a),21, in that Larner's leading questions let him testify for Eva, the sole eyewitness, and, especially since Eva's testimony grew remarkably stronger with each telling, they bolstered Eva's credibility. Vincent was prejudiced because jurors likely considered Larner's story, told through his leading questions, and couldn't accurately judge Eva's credibility.

Jurors must determine the facts under the law and judge witnesses' credibility.*Sparks v. Platte-Clay Electric Co-Op., Inc.*, 861 S.W.2d 604, 608(Mo.App.,W.D.1993);*State v. Chism*, 252 S.W.3d 178, 182-83 (Mo.App.,W.D.2008). When the witness's testimony is elicited through leading questions, instead of judging the witness's credibility, jurors are asked to determine credibility through the filter of the lawyer's questions, which contain and suggest the answers.

Larner told jurors in guilt phase closing, "this case basically hangs on the testimony of Eva Addison."(Vol.VII,T359). Larner's direct examination of Eva, the sole eye-witness, was a protracted series of leading questions, leading her through a drastically-improved statement of events. Overruling Vincent's

repeated objections, allowing Eva's "testimony," and denying Vincent's new trial motion (LF729-30), denied Vincent's state and federal constitutional rights to due process, confrontation, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

Trial courts have wide latitude to allow leading questions.*State v. Miller*, 208 S.W.3d 284, 289(Mo.App.,W.D.2006). Their decisions will be overturned for abuse of discretion and resulting prejudice.*Id.*;*State v. Thomson*, 705 S.W.2d 38, 40(Mo.App.,E.D.1985).

Leading questions suggest the answer the questioner desires.*Miller*, at 289; *State v. Allison*, 845 S.W.2d 642, 648(Mo.App.,W.D.1992). Generally impermissible, *Miller*, 208 S.W.3d at 289;*Engleking v. Kansas City, Ft. Scott & Memphis R.R.Co.*, 187 Mo. 158, 86 S.W. 89, 90(1905), they are occasionally permitted if the witness is shy, timid or unwilling; hostile; has difficulties understanding English; for formal or preliminary matters; or the answer has already been produced and it is merely repeated.*Miller*, at 289;*State v. George*, 214 Mo. 262, 113 S.W.1116, 1118(1908);*State v. Preston*, 673 S.W.2d 1, 5(Mo.banc1984);*Hesse v. Wagner*, 475 S.W.2d 55, 62(Mo.1971);*Vodicka v. Sette*, 223 S.W.578, 581 (Mo.1920);*Boulos v. Kansas City Pub. Serv. Co.*, 359 Mo. 763, 223 S.W.2d 446, 451-52(1949). Leading questions, except in those circumstances, let the questioner testify.*United States v. Dumpson*, 70 F.3d 1268, *2(5thCir.1995).

Larner began direct by asking Eva, over objection, "Did he say that you—and did he tell you and your sisters to get out of Pine Lawn?"(Vol.VI,T64). He

immediately repeated, "Did you already say that he told you and your sisters to—ho's to get out of Pine Lawn?"(Vol.VI,T64). Thereafter, "Did you hear her say, 'Please don't shoot me?'"(Vol.VI,T73). And then, "And did you see him point the gun at her?"(Vol.VI,T73). Over objection, "Now when he—now when he first—when he was at the place where he shot her, and he squeezed the trigger, did you tell the police that night that it didn't go off and he started laughing?" (Vol.VI,T75). "Did he give any type of gesture or laugh or any saying like that?"(Vol.VI,T77). Over objection and instructions to rephrase, Larner continued, "When you were over at 31 Blakemore, when J.R. got out, did he do anything other than just sit in the car? B.T. … "He didn't say anything?" … So you didn't hear him say anything that evening. …."(Vol.VI,T94-95). "Were you upset when you wrote it?" … "Did you do the best you could?"(Vol.VI,T104).

Counsel objected to Larner continuing to talk, despite objections, without awaiting rulings.(Vol.VI,T112). The court chided, "we're going to have to put a ruling on. Also, I understand that this witness is a rough witness, if I can say that, and not be accused of anything. It's just hard. So I understand. I've given you leeway with regard to your questions, but please just try to not lead the witness. And if there's a real problem, I can understand it. But I'm saying, if you do it every single time, it's – just try to get it out with open-ended questions."(Vol.VI,T112-13). Larner continued, over objection, "After the murder of your sister, were you staying over at his mother's house for a while?" … "Is

that the reason you were staying there?" … "Did you actually feel safer there than your own home?"(Vol.VI,T116).

Larner played Exhibit 148D, the taped phone conversation between Slim and Eva; then stated, over objection, "You were telling him that you saw him. Isn't that right?" … And looking at you, he was going to see Leslie. Is that what you were saying? … You were confronting a murderer. Is that what you were doing?"(Vol.VI,T122). Then, over objection, "Did he tell you to go in to court and say that it wasn't him?"(Vol.VI,T127). The court admonished, "just try to do non-leading nature of the questions."(Vol.VI,T127). Larner continued, over objection, "When he's talking about, on that tape, the motherfuckers this and the motherfuckers that, who is he referring to?" … "Is he referring to his friends?"(Vol.VI,T129-30). "And is that where you were staying also because you felt safer there ... after he killed your sister?"(Vol.VI,T138).

Larner's wholesale leading of Eva let him testify and encouraged jurors to judge his credibility, not hers. Instead of asking Eva to tell jurors what happened, **Larner** told them what happened, adding facts—facts heightening prejudice toward and fear of Vincent. For example, although Eva recounted seeing Vincent point a gun at and shoot Leslie,(Vol.VI,T72-73), **Larner** added, when at first the gun didn't fire, Vincent laughed.(Vol.VI,T76-77). Eva never testified that

occurred.[16] **Larner's** testimony created a picture of a cold, heartless killer who enjoyed it. And, in guilt phase closing, he argued Vincent's laughter proved deliberation.(Vol.VII,T357).

Larner built on that picture in penalty phase, arguing Vincent deserved to die because he "likes to kill. Enjoys it."(Vol.IX,T788). In closing, he continued, "You'll also consider as aggravating that McFadden terrorized the community, the whole community. Who felt safe in Pine Lawn in 2002 and 2003 with a murderer loose? Who felt safe?"(Vol.IX,T796).

While other evidence may have been sufficient to sustain Vincent's convictions, Larner's incessant use of leading questions undoubtedly affected the fairness and integrity of both phases and the reliability of the jury's verdicts. Larner became his own witness, creating evidence and arguing from that creation. Larner testified and argued Vincent inspired fear in the community. Larner's leading questions likely prejudiced jurors in both phases. This Court should reverse and remand for a new trial, a new penalty phase, or re-sentence Vincent to life without parole.

[16] Eva never mentioned Vincent laughed.(*State v. McFadden*, 216 S.W.3d 673(Mo.banc2007);SC87753—T1033-34);(Vol.VI,T73-74).

XIII. The trial court abused its discretion and plainly erred in overruling Vincent's pre-trial motions and trial objections and failing to declare a mistrial *sua sponte* to Stacy Stevenson's testimony about what he heard an unidentified man say; denying Vincent's motion for Eva Addison's school and medical records; letting Larner testify that Eva's eyesight was "excellent;" and letting Larner bootstrap an identification of Vincent as the speaker/shooter through Eva's testimony, because these rulings denied Vincent due process, confrontation, cross-examination, a fair trial, reliable sentencing and freedom from cruel and unusual punishment,U.S.Const., Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, although no light source illuminated the scene and Eva was some distance away, Eva claimed she could recognize Vincent as the person who got out of the car, said something to Leslie and shot her. The State used Stacy Stevenson's description of the statement he overheard to bolster Eva's identification despite Stacy's inability to identify the speaker. This testimony was highly prejudicial since, unless the statement could be independently identified as Vincent's it was inadmissible hearsay and its admission made the jury find Eva's identification more credible. Further, although the distance and lack of illumination between Eva and Leslie rendered Eva's identification questionable, counsel was denied means to challenge it with objective evidence about her credibility and ability accurately to observe.

Stacy Stevenson said an unidentified man[17] told a woman walking down Kienlen that he told her and her sister to "get the fuck from down here and stay the fuck from down here,"(Vol.VI,T179). This rendered more credible Eva's testimony that, on a street lacking illumination, she saw Vincent kill Leslie. Without linking to Stacy Eva's testimony, that she knew the man was **Vincent**; **Vincent** said something to her sister but she didn't know what, and she heard **Vincent** say "shut the fuck up," Stacy's testimony was inadmissible hearsay.

By linking these two witnesses, Larner impermissibly bolstered Eva's credibility and labeled an unknown speaker Vincent. This bootstrapping should not relieve Larner of his burden to prove Stacy's testimony was admissible. Further, because Vincent was denied the opportunity to challenge Eva's ability to see, hear and recount, and Larner vouched her eyesight was perfect, Eva's testimony about what she allegedly saw in Pine Lawn's near-blackness went virtually unchallenged. The testimony, argument and the court's prohibition violated Vincent's state and federal constitutional rights to due process, confrontation, cross-examination, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

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[17] Larner used Stacy's testimony to support Eva's identification of Vincent as Leslie's killer. Although Stacy saw Leslie and the man who approached her at the corner,(Vol.VI,T178-79), and Larner elicited **at this trial** the corner was somewhat illuminated(Vol.VI,237), Stacy couldn't identify the man as Vincent.

Stacy Stevenson, who lived in a first-floor Kienlen apartment, looked out his window that night and saw two women arguing on Naylor; then one of them walking down the hill toward Kienlen, while the other went the other way.(Vol.VI,T178,184-85). Over objection, he stated, 30 seconds later, he heard a man arguing with a woman, "Fucking bitch, come here. Where are you fittin' to go? I thought I told you and your sister to get the fuck from down here and stay the fuck from down here."(Vol.VI,T179). They walked around the corner, up Kienlen, which he couldn't see; he heard a scream and shots.(Vol.VI,T179,188).

When Stacy went outside, he saw something in the street but, as it was so dark, couldn't identify it until car lights illuminated the scene.(Vol.VI,T180,187). Eva returned shortly thereafter.(Vol.VI,T183). Jeff Hunnius, the crime scene investigator, had to illuminate the scene for photographs because it was so dark.(Vol.VI,T230). At the time, Hunnius acknowledged, no street lights were around the body, which was almost 76 feet from the Naylor/Kienlen intersection and between 150-200 feet from the bushes where Eva hid.(Vol.VI,T235, 237). A dawn-to-dusk light was about half-way up Naylor's hill, illuminating directly around it.(Vol.VI,T230-31). Lights on the Pine Lawn School would have illuminated a person at the intersection.(Vol.VI,T237). Despite that purported illumination, Stacy couldn't identify who approached, argued with, and shot Leslie.(Vol.VI,T182).

On May 15, 2003 around 11 p.m., Eva was at Maggie Jones' house when Vincent and B.T. drove up.(Vol.VI,T61-63). Vincent got out, hit Eva, kissed their

son, told Eva she and her sisters "can't come to Pine Lawn;" "You ho's can't come back to Pine Lawn," and "The ho's were supposed to have told something on him."(Vol.VI,T62,64).[18]

Leslie, another sister and a friend arrived, and they all, except Leslie, left after Eva recounted earlier events.(Vol.VI,T66). Vincent and B.T. returned in one of two cars, with "Smoke" in the other.(Vol.VI,T66-67). Vincent said "I told you all ho's to leave, to get out of Pine Lawn," and Leslie replied they had done nothing to him.(Vol.VI,T67). Vincent told Leslie to shut up, pointed a gun and pulled the trigger, but it didn't fire.(Vol.VI,T67-68). Over objection, Eva stated Smoke told Vincent he was "trippin;'" to leave them alone, and Vincent said, "One of these ho's has got to die tonight."(Vol.VI,T68).[19] Vincent asked Leslie if she loved her dead brother and told her she would see him tonight.(Vol.VI,T69). The men left.(Vol.VI,T69).

Eva and Leslie went inside and Vincent returned, afoot, but, hearing police, he ran toward the alley.(Vol.VI,T69-70).[20] Leslie announced, over Eva's objection, she would walk to the Skate King to use the pay phone.(Vol.VI,T70-71). Leslie walked down the street and Eva ran down the alley, and asked Leslie

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[18] Eva's testimony in *State v. McFadden*, 216 S.W.3d 673(Mo.banc2007); SC87753(Addison I) did not contain this statement.*See*,(T1017-26).

[19] Eva's testimony in Addison I also lacks this statement.(T1017-31).

[20] This allegation also does not appear in Addison I.(T1017-31).

to return because Eva saw Vincent and B.T.'s car coming off Dardenella. (Vol.VI,T71).[21]

Eva stated she saw Vincent leave the car, run toward and argue with Leslie, tell her "shut the fuck up," point the gun at and shoot Leslie.(Vol.VI,T71-72).[22] Eva ran back to the Jones' house. When she returned, Leslie was already in the ambulance.(Vol.VI,T74).

Counsel objected to Stacy's account of the unidentified man's statements in the street, as hearsay.(Vol.VI,T14,178-79). Larner responded, "Statement of the defendant…"(Vol.VI,T179). Judge Gaertner overruled the objection (Vol.VI,T179), which counsel preserved.(LF717-18).

Larner inaccurately asserted Stacy heard Vincent. Stacy heard an unidentified man, and Larner could only link it to Vincent through Eva. She testified here, differently than the first trial, that, while it was extremely dark and she was a substantial distance from Leslie and the shooter, she could hear Vincent. (Vol.VI,T180,187,230,235,237). The shooting occurred almost 76 feet beyond the Naylor/Kienlen intersection and 150-200 feet from the shrubbery behind which Eva hid.(Vol.VI,T235,237). Given the distance, lack of illumination and changes in Eva's testimony, her identification of Vincent is shaky at best. Letting Larner

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[21] This allegation also does not appear in Addison I.

[22] In Addison I, Eva stated she could "hardly hear them" but knew her sister screamed and Vincent said something.(T1034-35).

present, through Stacy, the statement of an unidentified man as Vincent's impermissibly bolstered Eva's identification.

Larner bootstrapped Eva's identification to the statements Stacy heard to convince jurors a positive, reliable identification existed. Stacy recounted hearsay that should have been excluded. By refusing to order Larner to produce Eva's school and medical records for, at minimum, an *in camera* inspection, and content with Larner's assertion, "I have no school records or medical records of Eva,"(PT44-54), the court precluded Vincent from discovering factors that may have impacted Eva's ability to make an accurate identification.(LF734-35). This, combined with Larner's vouching that Eva's eyesight was perfect,(Vol.VI,T71-72; Vol.VII,335-36), rendered the jury's guilt phase verdict unreliable.

Trial courts have broad discretion to admit or exclude evidence.*State v. Forrest*, 183 S.W.3d 218, 223(Mo.banc2006);*State v. Madorie*, 156 S.W.3d 351, 355(Mo.banc2005). Their rulings will be reversed for an abuse of discretion. *Forrest*, at 223. That occurs if the ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable it shocks the sense of justice and indicates a lack of careful consideration.*State v. Taylor*, 134 S.W.3d 21, 26(Mo.banc2004). No abuse of discretion exists "if reasonable persons can differ as to the propriety of the trial court's action."*Id.*

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.*State v. Revelle*, 957 S.W.2d 428, 431(Mo.App.,S.D.1997);*State v. Shurn*, 866 S.W.2d 447, 457(Mo.banc1993). Hearsay is generally inadmissible,*Id.* at

457-58, to protect the defendant's confrontation rights.*Bear Stops v. United States*, 338 F.3d 777, 781(8thCir.2003). Confrontation and due process are satisfied if the evidence falls within a generally-accepted exception to the hearsay rule; is supported by facts supporting its trustworthiness, or the declarant testifies at trial and can be cross-examined.*Id.* at 782;*United States v. Owens*, 484 U.S. 554, 557(1988).[23] What Stacy heard was hearsay. Larner used it to establish that Vincent threatened and shot Leslie.

If a declarant's identity is unknown, his statement can only be admitted if, **first**, it fits within an exception to the hearsay rule.*State v. Edwards*, 31 S.W.3d 73, 79-80(Mo.App.,W.D.2000); *State v. Moss*, 627 S.W.2d 667, 669 (Mo.App.,W.D.1982). Larner insisted the statement was admissible because it was Vincent's(Vol.VI,T179). This argument circumvents the identity question.

An unknown declarant's identity can be shown by circumstantial evidence. *Edwards*, at 80. It cannot be established by attempting to corroborate another identification that rests on an equally-shaky foundation—an identification made despite minimal illumination, from a substantial distance and behind shrubbery; an identification "improved" over time.

As in *Scherrfius v.Orr*, 442 S.W.2d 120, 127(Mo.App.,Spfd.D.1969), this hearsay

[23] Since the statement is not testimonial, *Crawford v. Washington*, 541 U.S. 36 (2004) is inapplicable.

> constituted an attempt to corroborate … and, being hearsay, its admission may not conceivably be justified on any theory of discretion … [it] constituted an attempt to bolster, corroborate, … and, since it was based upon the credibility of (an unknown) witness not present and concerned a most vital matter, it was prejudicial.

Since Leslie's shooter's identity was the issue, Larner should have been precluding from bolstering Eva's identification by ascribing to Vincent statements of someone Stacy could neither identify nor describe. Just saying it was Vincent doesn't make it so.

Although Judge Gaertner let Larner bolster Eva's identification of Vincent with Stacy's testimony, he denied Vincent the correlative opportunity to challenge or rebut it. Vincent requested disclosure of Eva's school and medical records, to discover any mental, physical or emotional disability that might affect her ability to observe and accurately recount what she saw and heard.(LF241-42). At the March 24, 2008 pre-trial hearing, the court did not grant the motion, did not order Larner to produce the records for an *in camera* inspection, despite *State v. Newton*, 963 S.W.2d 295(Mo.App.,E.D.1997), and let Larner's assertions that **he** didn't have the records end the inquiry.(PT44-54;LF22).*State v. Phillips*, 940 S.W.2d 512, 516-18(Mo.banc1997);*United States v. Safavian*, 233 F.R.D. 12, 17(D.D.C.2005). When Eva testified, Larner vouched for her eyesight, as "excellent."(Vol.VI,T71-72).

In closing, without supporting evidence, Larner continued,

> A lot's been made about Eva's eyesight. She hit a glare on the screen, whatever, and couldn't tell 10:30 from –or 10:18 from 9:18 or 11, whatever it was. Sit in the chair, a little glare there. You know the woman's got good eyesight. You know how you know? Look at this. Look at this. She could read from where she was sitting in that box. She could read—can you read it? 8629 Jennings Station Road. She says, 8629 Jennings Station Road. She's sitting here. I got glasses on, okay? And you're about the same distance away. Take a look at that. What do you think? Good eyesight? Woman's got good eyesight.

(Vol.VII,T335-36)

The court abused its discretion,*State v. Davis*, 186 S.W.3d 367, 371 (Mo.App.,W.D.2005), and plainly erred,*Rule 30.20*, in not granting Vincent's records request; not reviewing Eva's records *in camera* to determine if they contained relevant information; and not declaring a mistrial when Larner vouched for Eva's eyesight, telling jurors to believe her identification.[24]

Although patients' medical and psychiatric records are privileged, *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 62(Mo.banc1999), that privilege is not absolute. Due process guarantees the right to rebut the State's case.

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[24] Counsel neither objected to Larner's comments nor requested *in camera* review. Since this issue is incompletely preserved, Vincent requests plain error review. *Rule 30.20*.

Gardner v. Florida, 430 U.S. 349,362(1977). The Sixth Amendment guarantees the opportunity for effective cross-examination.*United States v. Warfield*, 97 F.3d 1014,1024 (8th Cir.1996); *United States v. Love*, 329 F.3d 981,984(8th Cir.2003). Confrontation Clause violations occur "when a defendant demonstrates that a reasonable jury might have received a significantly different impression of a witness's credibility had counsel been permitted to pursue the proposed line of cross-examination."*Id.*;*Harrington v. Iowa*, 109 F.3d 1275, 1277 (8thCir.1997). Defendants have "the right to attempt to challenge [a witness's] credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify." *Love*, at 984; *United States v. Jimenez*, 256 F.3d 330, 343 (5th Cir.2001). They must be allowed to challenge the witness's ability accurately to perceive and recount events.

Privileges protect confidentiality but aren't expansively construed because they stymie the search for truth.*United States v. Nixon*, 418 U.S. 683, 709-10(1974). Since defendants are entitled to production of evidence, confrontation, compulsory process and due process, "It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced…."*Id.* at 711-12. When privilege is asserted based only on a generalized confidentiality interest, "it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."*Id.* at 713. To protect against public disclosure of privileged information,

trial courts must review the material *in camera* to determine relevance and materiality.*Id.* at 714; *Newton*, at 471. Because Eva's ability to observe and accurately recount what she saw and heard was crucial, Judge Gaertner should have reviewed her records *in camera*.

Judge Gaertner let Larner bolster Eva's credibility and then denied Vincent the means to challenge and rebut her identification. Since Eva was the State's sole eyewitness, had that opportunity been afforded, the result may have been markedly different. This Court should reverse and remand for a new trial.

XIV. The trial court clearly and plainly erred and abused its discretion in overruling Vincent's objections, not declaring a mistrial *sua sponte*, letting the State read from Exhibit 148-E, a transcript, in guilt phase opening and admitting Exhibits 148 and 148-D, the tape purportedly the recording of a phone conversation between Eva and "Slim," with Vincent in the background, because these actions denied Vincent due process, confrontation and cross-examination, a fair, reliable sentencing trial, and freedom from cruel and unusual punishment,U.S.Const.,Amends.V,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21 in that (1) the State failed to lay a foundation for admitting the recording and transcript, by not establishing Eva could hear everything Vincent said, without Slim repeating it and thus didn't establish the recording's authenticity and correctness; no changes, additions or deletions were made; how the recording was preserved, or the speakers' proper identification and (2) the recording contained hearsay—the non-testifying Slim's out-of-court statements of what Vincent purportedly said.

The State asserted in guilt phase, through "Slim," Vincent threatened Eva so she wouldn't testify that Vincent shot Leslie. Larner read from the transcript of a jailhouse phone call in opening; asked Eva about the conversation, and played the tape for the jury. On the call were Eva and Slim, with Vincent in the background. When Vincent said something, Slim tried to repeat it to Eva; when Eva responded, Slim repeated, and so on.(Exh.148,148-D,E). Since Larner argued from this conversation that, because Vincent threatened Eva, he must have killed

Leslie, its admission was critical. Overruling counsel's objections, not *sua sponte* declaring a mistrial, and admitting Exhibits 148, 148D,E, denied Vincent's state and federal constitutional rights to due process, confrontation, cross-examination, reliable sentencing and freedom from cruel and unusual punishment.

Immediately before opening, counsel objected to the State using the hearsay-laden tape.(Vol.VI,T14-17). Larner asserted he had redacted references to other crimes and Judge Gaertner overruled counsel's objections.(Vol.VI,T17-18).

In opening, Larner described events and then read from Exhibit 148-E, the transcript, commenting while reading.(Vol.VI,T35-40). Larner later asked if, on May 27th, while at Vincent's mother's home, Eva received a call from Vincent and "Slim."(Vol.VI,T106). Eva identified three voices—hers, Vincent's, Slim's,[25] and said the tape fairly and accurately reflected their conversation.(Vol.VI,T106-07). The court admitted the tape over continuing objection.(Vol.VI,T107). Larner played it and provided transcripts.(Vol.VI,T118-21).

Larner asked Eva what she meant when, on the tape, she said, "I seen it."(Vol.VI,T122). Eva responded, "I seen J.R. kill my sister."(Vol.VI,T122). Larner confirmed, "You were confronting a murderer. Is that what you were

[25] As the call reveals, Eva did not know Slim. At the Franklin I trial, she could not identify his voice.(*State v. McFadden*, 191 S.W.3d 648(Mo.banc2006);SC86857; T586-87). By Franklin II, which is pending before this Court, Eva could identify it(SC88959;T1874), and, at this trial, easily identified it.(Vol.VI,T106-07).

doing?"(Vol.VI,T122). Eva responded, "Right."(Vol.VI,T122). Larner continued to ask, despite hearsay, speculation, and leading question objections, what Eva believed Vincent's purported responses meant.(Vol.VI,T122-35). Vincent preserved his objections.(LF730-31).

Trial courts have broad discretion to determine admissibility of evidence, which discretion will not be disturbed on appeal, unless clearly abused.*State v. Wahby*, 775 S.W.2d 147, 153(Mo.banc1989). That occurs when the ruling clearly offends the logic of the circumstances or is arbitrary and unreasonable.*State v. Hall*, 982 S.W.2d 675, 680(Mo.banc1998).

A proper foundation for admitting a sound recording includes showing: (1) the recording device could take testimony; (2) the device's operator was competent; (3) the recording's authenticity and correctness; (4) changes, additions or deletions haven't been made; (5) how the recording was preserved; (6) the testimony was elicited voluntarily, without inducement and (7) identifying the speakers.*Wahby*, 775 S.W.2d at 153;*State v. Spica*, 389 S.W.2d 35, 44(Mo.1965).

Virtually every foundational requirement is missing. The recording operator's competence is generally established through his testimony and experience.*Wahby*, at 153-54; *State v. Fletcher*, 948 S.W.2d 436,440 (Mo.App.,W.D.1997). Larner never presented testimony about the recorder's identity or competence. On the tape—Exh.148, and at the first trial, Eva couldn't identify Slim, the other person on the call, and only at subsequent trials could she identify his voice. The State presented no testimony the person who made the

recording listened while it was being made and checked to ensure its accuracy.*Id.* at 440. The defense had no opportunity to attack the recorder's credibility.*Id.*

Most importantly, the State never established the recording's authenticity and correctness, nor showed that changes, additions, or deletions were not made. Eva testified the recording was fair and accurate.(Vol.VI,T107). But, Eva wasn't competent to render that conclusion.*See, State v. Long*, 336 S.W.2d 378, 379-80(Mo.1960). Aside from the recorder, only Slim could, because only he heard both Eva and Vincent. Eva spoke to Slim, who relayed what she said to Vincent, and vice-versa. At times, Eva might have heard Vincent in the background loudly enough to discern his statements, but she relied primarily on Slim's interpretation. The recording demonstrates Eva did not hear the entire conversation clearly enough to vouch that the recording or transcript was accurate. Because Eva could not vouch for its accuracy and completeness, the State did not prove, with "reasonable assurance," the exhibit was not tampered with.*State v. Jones*, 877 S.W.2d 156, 157(Mo.App.,E.D.1994).

Without Slim's testimony, the tape should not have been admitted. A hearsay statement is any out-of-court statement used to prove the truth of the matter asserted and depending on its veracity for its value.*Smulls v. State*, 71 S.W.3d 138, 148(Mo.banc2002). Everything Slim stated Vincent told him was intended to prove Vincent killed Leslie and threatened Eva so she wouldn't testify against him. Slim's statements about what Vincent told him were hearsay.

Reversal is required when prejudice from improperly admitting evidence is outcome-determinative.*State v. Black*, 50 S.W.3d 778, 786(Mo.banc 2001). The erroneously-admitted evidence must have so influenced jurors that, when considered with and balanced against all properly-admitted evidence, a reasonable probability exists, but for the erroneously-admitted evidence, the result would have been different.*Id.*

Exhibits 148,148 D&E were highly prejudicial. They contained Vincent's purported threats to Eva, telling her to say he hadn't shot Leslie and agree she wouldn't testify against him(Exh.148E at 3-4,8,10,20,32-33) and Eva's statements she heard Vincent told many people about killing Leslie and then laughed.(Exh.148E at 26). Larner read lengthy parts of the transcript in opening, before the exhibits were even in evidence, and then, after playing the tape during Eva's testimony, asked line-by-line what each answer meant. Larner used this evidence to argue for conviction(Vol.VII,T337,348-53) and death (Vol.IX,T775). Larner told jurors to consider the tape "like a confession."(Vol.VII,T347-48).

Because the judgment and sentence rest upon this erroneously-admitted evidence, this Court should reverse and remand for a new trial.

XV. The trial court abused his discretion and plainly erred in striking for cause Veniremembers Boyd, Heet, Davis, Bunch, Rebholz, Hornak, Linville, Merz, Gray, Williamson, Ousley, Ayidiya, Hernton, Horst, Robinson, Rohrbacker, Bugarin, Tornetto, Bonastia and Schlake because these rulings violated the veniremembers' rights to participate in the judicial process and freedom from religious discrimination and Vincent's rights to a jury chosen without regard to religious beliefs, equal protection, due process, a fair trial, and freedom from cruel and unusual punishment,U.S.Const., Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§5,10,18(a),21Universal Declaration of Human Rights,Art.26;§494.400 RSMo, in that these veniremembers' unwillingness to impose death was solely due to their religious beliefs.

Larner moved to strike for cause twenty veniremembers because their religious beliefs precluded them from imposing death. By granting those motions, Judge Gaertner denied veniremembers' state and federal constitutional rights to participate in the judicial process and freedom from religious discrimination and Vincent's state and federal constitutional rights to jurors chosen without regard to religious beliefs, equal protection, due process, a fair trial, and freedom from cruel and unusual punishment.

Rulings on cause challenges are upheld on appeal unless clearly against the evidence and an abuse of discretion.*State v. Christeson*, 50 S.W.3d 251, 264(Mo.banc2001). The trial court usually is best able to evaluate someone's qualifications to serve, especially when that evaluation involves considering

demeanor, hesitancy in responding and other matters the appellate court cannot observe.*Id.* When strikes are a question of law, however, little deference is warranted. Since counsel did not object to these strikes, plain error review is requested.*Rule 30.20.*

Veniremembers "may not be excluded simply because of general objections to the death penalty or conscientious or religious scruples against it."*State v. Roberts*, 948 S.W.2d 577, 597(Mo.banc1997);*Gray v. Mississippi*, 481 U.S. 648, 657(1987). Moreover, "No person shall, on account of his religious persuasion or belief … be disqualified from testifying or serving as a juror…." Mo.Const.Art.I,§5. Further, "A citizen of the county…for which the jury may be impaneled shall not be excluded from selection for possible grand or petit jury service on account of … religion…."§494.400;*The Universal Declaration of Human Rights,*Art.26. The First Amendment's Free Exercise Clause, applicable to the States through the Fourteenth Amendment, a right deeply rooted in tradition, *Washington v. Glucksberg*,521 U.S. 702,720-21(1997), prohibits state action establishing or preventing the free exercise of religion.*Cantwell v. Connecticut*, 310 U.S. 296(1940).

Discussing peremptories, Judge Price concluded, "[t]he elevated protection required…of the rights of individuals to serve as jurors may extend beyond racial discrimination to religious…discrimination as well, either under the United States or the Missouri Constitutions."*State v. Parker*, 836 S.W.2d 930,942 (Mo.banc1992). Since Missouri's Constitution specifically prohibits disqualifying

anyone from service based on religious beliefs, "whether *Batson*, *Powers*, *Edmonson* or *McCollum* directly prohibit the use of peremptory strikes based upon religion or sex, they certainly suggest such a result when coupled with Missouri's Constitution."*Id.* at 942.

"As *Gray* and *Witherspoon* make clear, barring a religious juror from service, even a juror who has expressed ambivalence regarding the death penalty, is constitutionally impermissible."*Strong v. State*, 263 S.W.3d 636,657 (Mo.banc2008)(Wolff, J.,dissenting). Barring such jurors means the defendant is tried by jurors unconstitutionally-seated, which denies his substantive due process right to a fair, impartial jury,*Id.* at 658-59, and denies veniremembers' state and federal constitutional right to serve, free of religious discrimination.*Id.* at 659. "The Missouri Constitution [through Article I, §5] may require greater protection of the right of an individual to serve on a petit jury than does the United States Constitution."*Id.*

Veniremembers Boyd, Heet, Davis, Bunch, Rebholz, Hornak, Linville, Merz, Gray, Williamson, Ousley, Ayidiya, Hernton, Horst, Robinson, Rohrbacker, Burgarin, Tornetto, Bonastia and Schlake expressed religious opposition to the death penalty. Their religious beliefs precluded them from imposing death. (Vol.I,T52,187-89,287-88,327,400-02;Vol.II,T.30-33,40-42,43-44,54-56,107-11,114-17,134-38;Vol.III,T.141-43,208-219,221-23,363,416-17,440-43;Vol.IV,T.245-50). Larner struck them for cause, for that reason, without objection.*Id.*

Veniremembers' constitutional right to freedom from religious discrimination and Vincent's constitutional rights to substantive due process and a fair, impartial jury are not subordinate to the State's interest in seating only those who unequivocally assert they can consider both punishments. This Court must reverse and remand for a new trial.

Conclusion

This Court should reverse and remand for a new trial, a new penalty phase, or vacate Vincent's death sentence and order him re-sentenced to life without parole.

Respectfully submitted,

/s/ Janet M. Thompson
Janet M. Thompson
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, MO 65203
(573)882-9855 ext. 421(telephone)
(573)884-4921 (fax)
Janet.Thompson@mspd.mo.gov

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the attached appellant's brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 30,940 words, excluding the cover, signature block, this certification, and the appendix, as determined by Microsoft Word 2007 software; and that, on this 23rd day of April, 2012, this notification was sent through the Missouri Supreme Court e-filing system, to Shaun Mackelprang, P.O. Box 899, Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

/s/ Janet M. Thompson
Janet M. Thompson