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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

The jurisdictional statement from appellant's opening brief is incorporated by this reference.

STATEMENT OF FACTS

The Statement of Facts set forth in the opening brief is incorporated by reference.

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.

State v. Mayes, 63 S.W.3d 615 (Mo.banc 2001);

State v. Johnson, 284 S.W.3d 561 (Mo.banc 2009);

Johnson v. McCullough, 306 S.W.3d 551 (Mo.banc 2010);

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, 18 S.W.3d 366(Mo.banc2000);

State v. McFadden, SC88959, __S.W.3d __ (Mo.banc 5/29/2012);

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

§565.030RSMo;

MAI-CR3d 314.40;

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);

State v. Rhodes, 988 S.W.2d 521(Mo.banc 1999);

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.

State v. Simmons, 955 S.W.2d 752 (Mo.banc1997);

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

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

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

Mo.Const.,Art.I,§§10,18(a),19,21.

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.

State v. Gilyard, 257 S.W.3d 654(Mo.App.,W.D.2008);

State v. Beishline, 926 S.W.2d 501 (Mo.App.,W.D.1996);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.035RSMo.

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.

The State does not contest that the Jimmy L. Williams who served on Vincent's jury here was also a veniremember and sat through the entire voir dire in Vincent's assault and armed criminal action trial, a trial giving rise to four of the State's six statutory aggravators in this case.[1] The State argues that, despite Judge Gaertner's questions to veniremembers about whether they knew any of the witnesses, the lawyers, and Vincent(Vol.II,T7); despite Judge Gaertner's warning that veniremembers were to "decide this case based upon the instructions that I

[1] In footnote 4, the State suggests Vincent was convicted and sentenced on three counts each of assault and armed criminal action. He was convicted of two counts. (Supp.L.F.103). Jimmy Williams thus knew of charges brought against Vincent of which other jurors did not hear. This heightens the prejudice from Williams' non-disclosure and subsequent service.

will give you and the evidence that is presented to you in this courtroom alone,"(Vol.II,T8); despite the State's presentation throughout trial of evidence and argument about the assaults; and despite that, for the two times in his life that Jimmy Williams was on a venire panel, "Vincent McFadden" was the defendant, Jimmy Williams did not "fail to disclose" that prior service. Neither the facts nor the law support that position.

Prospective jurors must have an "open mind, free from bias and prejudice." *State v. Mayes*, 63 S.W.3d 615, 624(Mo.banc 2001), citing *State v. Wheat*, 775 S.W.2d 155, 158(Mo.banc 1989). They "have a duty to answer all questions fully, fairly, and truthfully during voir dire."*Mayes*, 63 S.W.3d at 624. If they fail to respond to an applicable question, counsel lacks "information needed to exercise a peremptory challenge or challenge for cause."*Id.* at 625; *State v. Martin*, 755 S.W.2d 337, 339(Mo.App.,E.D. 1988).

Non-disclosure during voir dire occurs when the veniremember "reasonably can 'comprehend the information solicited by the question asked.'" *State v. Johnson*, 284 S.W.3d 561, 569(Mo.banc 2009); citing *Mayes*, 63 S.W.3d at 625. "A response is reasonable based on the language and context, and the question's clarity is subject to *de novo* review."*Johnson*, 284 S.W.3d at 569. If non-disclosure has occurred, it must be determined whether it was intentional or unintentional. *Id.* It is intentional if the veniremember "actually remembers the experience or … it was of such significance that his purported forgetfulness is unreasonable."*Id.; Mayes*, 63 S.W.3d at 625. Bias and prejudice are presumed if

material information is intentionally withheld.*Id.* Non-disclosure is unintentional if the experience was insignificant or remote, if the veniremember misunderstood the question, or if the information was "disconnected."*Johnson*, 284 S.W.3d at 569-70. If prejudice results from unintentional non-disclosure, a new trial is warranted. *Id.* at 570.

The State asserts "Appellant has failed to establish nondisclosure by Juror Williams."(Resp.Br. at 20). The State misapplies the law. Nondisclosure clearly occurred. Judge Gaertner's questions to the venirepanel could not be misunderstood.*Johnson*, 284 S.W.3d at 569. He asked if they knew Vincent and told them they could be guided only by facts presented in his court. Surely Jimmy Williams could "reasonably comprehend the information solicited by the question asked."*Id.*

As this Court held in *Mayes* and *Johnson*, **intentional** non-disclosure occurs when the veniremember actually remembers the experience **or** the experience was so significant that his purported forgetfulness is unreasonable. *Johnson*, 284 S.W.3d at 569. Although we do not have supporting documentation that Jimmy Williams "actually remembered" having been on the prior venire panel, that lack does not preclude relief. The question is whether Williams' experience was so significant that any purported forgetfulness, or at least any forgetfulness the State asserts exists, is unreasonable.

Williams wrote in his questionnaire here that he had had jury service about three years earlier.(Supp.L.F.1). He heard in the first voir dire that the defendant,

Vincent McFadden, was charged with assault and armed criminal action. Williams heard here that Vincent McFadden was the defendant; he was charged with murder and, about three years ago, was convicted of assault and armed criminal action. (Vol.II,T21).

For the two times in his life that Williams had jury service, the defendant was Vincent McFadden. Both times, at issue was whether Vincent committed assault and armed criminal action. Since both trials were relatively close in time; since the issue was whether Williams remembered the same defendant, and since, in both voir dires, the lawyers discussed allegations of assaults by Vincent in Pine Lawn, Missouri, it is unreasonable to believe Mr. Williams "forgot" his prior significant experience. Jimmy Williams committed intentional non-disclosure, for which prejudice must be presumed. *Johnson*, 284 S.W.3d at 569.

This Court found the *Johnson* trial court did not abuse its discretion in rejecting a claim of intentional non-disclosure and finding no prejudice if the non-disclosure were unintentional. The *Johnson* facts are significantly different than here. There, Juror Broome failed to disclose she knew a State's witness, Det. Scognamiglio, through having worked with his wife. The trial court found that, since the precise question asked was whether veniremembers were close friends with "county police officers" and Juror Broome only knew him as a police officer, and didn't consider him a close friend, she had not even committed non-disclosure. *Id.* at 569. The trial court further found it was at most unintentional non-disclosure. *Id.* The trial court found credible Juror Broome's assertions that

the mention of the Detective's name in the midst of a list of 12 officers did not register with her as someone she knew. *Id.* The court also found no credible evidence that Broome had any close friendships with officers, other than those she disclosed during voir dire. *Id.* The trial court also found no prejudice from what may have been unintentional non-disclosure. *Id.*

Here, by stark contrast, Judge Gaertner's question was crystal clear—do any veniremembers recognize or know Vincent McFadden, the defendant? (Vol.II,T7). He warned that they could only consider the evidence they heard in his courtroom (Vol.II,T8), and then Mr. Larner told them Vincent McFadden was convicted in 2005 of first degree assault and armed criminal action. (Vol.II,T21).

This Court also rejected the defense's claim of intentional non-disclosure in *Mayes, supra.* There, the juror did not respond affirmatively when the judge asked if "you or any of your loved ones or close relatives have ever been the victim of a crime" although she answered 'yes' on the questionnaire when asked, "Have you or any relatives been a victim of a crime?" *Mayes*, 63 S.W.3d at 624. This Court found that the defense's failure to offer an affidavit or testimony from the juror claim-barring since the questions were phrased differently, thus, both answers may have been accurate, or, she simply could have marked incorrectly the box on the questionnaire. *Id.* at 626. This Court contrasted *State v. Martin*, 755 S.W.2d 337 (Mo.App., E.D. 1988) and *State v. Endres*, 698 S.W.2d 591 (Mo.App.,E.D. 1985) where the questions went to a significant fact—the murder of a close relative—and the veniremember failed to respond.

The State suggests that relief is precluded here because no evidence, through affidavit or testimony, has been presented. (Resp.Br. at 20). In *Mayes*, such evidence was required to show what the veniremember believed was a "close relative" or to show that she had or had not made a clerical error in checking a box on the questionnaire. Here, by contrast, the evidence required to establish the failure to disclose is all part of the record. Jimmy Williams was on both venirepanels and, about three years after his first experience, was asked if he recognized Vincent McFadden, the defendant in the first trial. No other information is necessary to establish the claim.

Finally, the State suggests appellant cites *Johnson v. McCullough*, 306 S.W.3d 551 (Mo.banc 2010) for the proposition that this Court can grant plain error relief of this claim. (Resp.Br. at 21n.5). Appellant actually acknowledged that there, this Court mandated attorneys "use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial."*Id.* at 559. The real question is whether this Court should address the claim now, or wait, expend countless hours and dollars of state resources in a post-conviction action, to reach the same conclusion.

This Court must reverse and remand for a new trial.

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.

In *State v. McFadden*, SC88959, __S.W.3d __ (Mo.banc, 5/29/2012), slip op. at 16-17, this Court rejected the claim that the trial court there had erred in overruling Vincent's objections to and submitting the Instruction based on MAI-CR3d 314.40, and accepting the jury's verdict based on the Instruction's non-compliance with the applicable Note on Use. The State considers that opinion to answer the questions this claim presents.(Resp.Br. at 25). It does not.

That opinion failed to acknowledge that the Note on Use applicable at the time of Vincent's trial had changed. It removed the mandate that "If the defendant has more than one such conviction, a separate numbered paragraph should be used for each conviction." In *McFadden*, SC88959, this Court relied on *State v. Taylor*, 18 S.W.3d 366 (Mo.banc 2000) and *State v. Clemmons*, 753 S.W.2d 901 (Mo.banc

1988), to support that the trial court did not err in submitting the Instruction. *Taylor* and *Clemmons* are not helpful. When they were decided, the existing Note on Use specifically authorized using "separate numbered paragraphs" for each serious assaultive conviction. *Taylor* and *Clemmons* are neither instructive nor controlling.

This Court found that relief was not warranted since "Only one statutory aggravating circumstance must be found for the jury to recommend the imposition of the death penalty."*McFadden*, slip op. at 17. The State argues, "since only one statutory aggravtor (sic) need be found to permit the jury to consider the death penalty, and the jury found five. *Id.* In this case, the jury found six."(Resp.Br. at 25). Both the prior opinion and the State ignore the nature of Missouri's capital sentencing proceedings.

Although jurors may continue to consider whether to impose death only if they find unanimously and beyond a reasonable doubt one statutory aggravator, their job is not then complete. §565.030 RSMo. They must continue to deliberate, by weighing aggravating and mitigating circumstances and thereafter deciding whether, under all of the circumstances, to impose death or life without parole. *See., e.g., State v. Whitfield*, 107 S.W.3d 253, 261(Mo.banc 2003).

At those later steps, a jury's findings of **four** rather than **one** statutory aggravator may make a difference. That is precisely why the State fought so hard in the prior proceeding to have Vincent's prior convictions listed in four separate paragraphs, despite a Note on Use mandating otherwise. Submitting an improper

instruction that lets jurors consider statutory aggravators in this fashion places a thumb on death's side of the scales.*Stringer v. Black*, 503 U.S. 222 (1992).

The State did not prove no prejudice from jurors' consideration of six times as many aggravators as the MAI-CR allows. *Snyder v. Chicago R.I. & P.R. Co.*, 521 S.W.2d 161, 164 (Mo.App., W.D. 1973). This Court should reverse and remand for a new penalty phase, or reverse and order Vincent re-sentenced to life without parole.

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.

Larner's argument "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process."*Donnelly v. DeChristoforo*, 416 U.S. 637(1974). Like the arguments the Eighth Circuit and this Court have condemned, *Newlon v. Armontrout*, 885 F.2d 1328, 1337(8thCir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364(8thCir.1995); *State v. Storey*, 901 S.W.2d 886(Mo.banc 1995); *State v. Rhodes*, 988 S.W.2d 521(Mo.banc 1999), Larner's arguments violated Vincent's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

Larner's improper arguments were not isolated, brief or non-repetitive. *State v. O'Haver*, 33 S.W.3d 555, 562 (Mo.App., W.D. 2000). They were a tsunami, swamping jurors with emotion and encouraging them to sentence Vincent to death based on improper, unconstitutional factors. Judge Gaertner erred and plainly erred in overruling counsel's objections and mistrial requests, and not *sua sponte* declaring a mistrial.

Voir Dire

The State argues Larner did not misstate the law by telling each panel that, if all jurors found mitigators outweighed aggravators, a life verdict would result but, if only one juror found aggravators outweighed mitigators, they would continue toward death.(Resp. Br. at 36-37). The State relies, for this premise, on *McFadden*, SC88959, slip op. at 24. Larner's argument directly violates §565.030 RSMo and the Due Process Clause, neither of which require the trier of fact's life verdict be unanimous.

Larner also 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). Jurors must not be misled into believing they may not consider mitigators unless found unanimously.*Mills*, at 384. Like in *Mills*, Larner's repeated statements encouraged reasonable jurors to interpret 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

A defendant's exercise of his constitutional right to remain silent is sacrosanct. No negative inferences from his exercise of that right may be drawn. *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); *Mitchell v. United States*, 526 U.S. 314, 327(1999). Larner repeatedly referred to Vincent's decision, including telling jurors that, during the conversation between

Slim and Eva, "…he never says, I didn't do it."(Vol.VII,T389). The State ignores Larner's pointed reference to Vincent's exercise of his constitutional right. (Resp.Br. at 37-38).

Penalty Phase

Penalty phase closings must undergo a "greater degree of scrutiny" than those in guilt phase.*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.

Larner argued Vincent's other death sentence, telling jurors he had been convicted of first degree murder and reminding them the only punishments available were life without and death.(Vol.VIII,T454-55;Vol.VIII-IX,T722-74). This diminished jurors' sense of responsibility, rendering Vincent's sentence arbitrary, capricious and unreliable.*Caldwell v. Mississippi*, 472 U.S. 320(1985);*Johnson v. Mississippi*, 486 U.S. 578(1988). The State argues all is well since the trial court instructed jurors to disregard.(Resp.Br. at 48). As Judge Somerville asked, "how do you unring a bell?"*State v. Rayner*, 549 S.W.2d 128, 133 (Mo.App.,K.C.D. 1977). An experienced prosecutor's argument encouraging jurors to consider Vincent's other sentence must be condemned.

The State argues it "is not error for a prosecutor to characterize a defendant and his criminal conduct as long as the evidence supports such a characterization" and that characterizing Leslie as a good person "was also supported by the evidence admitted during the penalty phase."(Resp.Br. at 49). This misses the

point. Jurors may not be encouraged to weigh the value of the victim's life against the defendant's in determining which punishment to impose.*Payne v. Tennessee*, 501 U.S. 808, 823 (1991);*Hollaway v. State*, 6 P.3d 987, 994(Nev.2000). Yet, Larner argued, "This mean, evil person committed the murder," (Vol.IX,T781), and "You'll also consider that Leslie was a good person. And you'll consider that he's an evil person.(Vol.IX,T796-797).

The State argues, since a "prosecutor is allowed to argue that the defendant does not deserve mercy under the facts of a particular case,"(Resp.Br. at 50), Larner's argument was permissible. Even assuming that premise is correct, Larner did not argue Vincent did not **deserve** mercy. Instead, he argued mercy was irrelevant to jurors' punishment decision because "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**."(Vol.IX,T811)(emphasis added). Larner's argument violated due process and the Eighth Amendment.*Nelson v. Nagle*, 995 F.2d 1549(11thCir.1993);*California v. Brown*, 479 U.S. 538(1987).

Larner repeatedly converted 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). The State seems to acknowledge such arguments are improper, but believes since "the prosecutor did not attempt to attach an

aggravating label to a factor that should militate in favor of a lesser punishment, such as mental illness,"(Resp.Br. at 51),[2] no reversible error occurred.

Since the instructions and §565.032RSMo specifically allow jurors to consider non-statutory, not just statutory mitigating circumstances, the State's argument is nonsensical. *Zant*'s rationale is not limited to statutory mitigators. Larner specifically told jurors to consider aggravating both statutory and non-statutory mitigators, including that Vincent hadn't been sexually abused, had a supportive family, wasn't a juvenile, wasn't "too crazy, too insane, retarded…." (Vol.IV,T794,795,812). Larner specifically told jurors, "That's aggravating. They'll call it mitigating. I call it aggravating."(Vol.IX,T794).

The State asserts, "Even if the argument strayed beyond permissible bounds, the jury was nevertheless properly instructed on aggravating and mitigating circumstances, and it is presumed to follow those instructions."(Resp.Br. at 51). This assertion misapprehends the law because, while the Instructions direct jurors 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), they give no guidance about what evidence goes on which side of the scales. Nowhere do the

[2] In *McFadden*, SC88959, Larner argued Vincent's lack of mental illness was aggravating.(T2389).

Instructions list non-statutory aggravators and non-statutory mitigators. The Instructions provide no safety net from Larner's constitutionally-infirm arguments.

The State asserts, contrary to *Newlon*, 885 F.2d at 1340, and *Storey*, 901 S.W.2d at 900-01, that Larner's argument "if this ain't a death penalty case, then there ain't such a thing," (Vol.IX,T818), was "a permissible expression of opinion that the death penalty is warranted based on the evidence presented in the case." (Resp.Br. at 54). The State ignores the similarity of Larner's argument to *Storey* and *Newlon*. By telling jurors this was **the** death case, Larner, like the prosecutor in *Storey*, suggested his prior experiences proved death was warranted here. His argument was grossly improper because it asserted facts outside the record—other cases.*Storey*, 901 S.W.2d at 900-01. By arguing facts outside the record, a prosecutor's assertions of personal knowledge "are apt to carry much weight against the accused when they should carry none" because jurors are aware of "the prosecutor's duty to serve justice, not just win the case."*Storey*, 901 S.W.2d at 901;*Berger v. United States*, 295 U.S. 78, 88(1935). Larner's personal "expression of opinion that the death penalty is warranted,"(Resp.Br. at 54), is impermissible since it "essentially turns the prosecutor into an unsworn witness not subject to cross-examination."*Storey*, 901 S.W.2d at 901. Since jurors believe he has a duty to serve justice, "the error is compounded."*Id.*; *Berger*, 295 U.S. at 88.

The State argues Larner's argument, "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), was not improper because it helped "the jury understand and appreciate evidence that is likely to cause an emotional response."(Resp.Br. at 54-55);*McFadden*, SC89959. "Likely to cause an emotional response" was Larner's argument, which reminded jurors of vigilante justice, of lynchings. Larner's argument was like that condemned in *Storey*, where the prosecutor argued, had the victim's brother happened upon the crime in progress, he would have been justified in killing Mr. Storey. *Storey*, 901 S.W.2d at 902. This Court found that argument impermissible because it was calculated to inflame the jury; equating the jury's function with self-defense, and inducing the jury to apply emotion, not reason, to the sentencing process.*Id.* "Inflammatory arguments are always improper if they do not in any way help the jury to make a reasoned and deliberate decision to impose the death penalty."*Rhodes*, 988 S.W.2d at 528;*State v. Taylor*, 944 S.W.2d 925, 937 (Mo.banc 1997).

The State argues Larner did not improperly personalize to the jurors because "the argument that Appellant complains of did not suggest that Appellant's future dangerousness would intrude upon the safety of the jury." (Resp.Br. at 56-57). That argument misapprehends *Storey* and *Rhodes*. In neither did the State suggest jurors were in peril from the defendant. The arguments were emotional pleas for jurors to place themselves in the victim's shoes.*Storey*, 901 S.W.2d at 901;*Rhodes*, 988 S.W.2d at 529. The arguments were intended to

engender fear and emotion, and mandated reversal because "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*, 901 S.W.2d 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.

The State relies upon this Court's decision in *McFadden*, SC88959, which reaffirmed "that the failure to find a particular aggravating circumstance does not constitute an acquittal, and that the submission of an aggravator rejected in a previous trial does not violate double jeopardy."(Resp.Br. at 58). That opinion rests upon *State v. Simmons*, 955 S.W.2d 752(Mo.banc 1997). That reliance renders the analysis flawed.

Simmons was handed down in 1997. This Court later decided *State v. Whitfield*, 107 S.W.3d 253(Mo.banc 2003), which relied on *Ring v. Arizona*, 536 U.S. 584(2002) and *Apprendi v. New Jersey*, 530 U.S. 466(2000), to hold that all

but the final step of §565.030 RSMo are eligibility steps and thus, all factual findings must be made by a jury, unanimously and beyond a reasonable doubt.

Whitfield, *Ring* and *Apprendi* drastically changed how jurors' findings on eligibility factors must be viewed. They compel a different result than that reached in *Poland v. Arizona*, 476 U.S. 147(1986). Jurors' findings on eligibility factors are not merely "'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."*Simmons*, 955 S.W.2d at 759, citing *Poland*, 476 U.S. at 155-56. They are the functional equivalent of elements of the offense. Those findings of fact entitle parties to the constitutional protections collateral estoppel provides.*See, Capano v. State*, 889 A.2d 968 (Del.Supr.2006);*State v. Silhan*, 275 S.E.2d 450, 480-83(N.C.1981);

In the first "Franklin" trial, 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," but did not so find. This Court's opinion in *McFadden* SC88959 ignores the practical considerations underlying such a verdict. The sole mechanism juries in capital cases have to "convict" of a particular statutory aggravator is the directive that the foreperson write down, thus memorializing, every statutory aggravator jurors find unanimously beyond a reasonable doubt. The foreperson's **failure** to memorialize a statutory aggravator is an acquittal, just as memorializing a statutory aggravator is finding it.

When the State charges a statutory aggravator, an element of the offense, it must be proved unanimously beyond a reasonable doubt. Without that finding, the State may not ask a second jury to ignore that prior acquittal and convict based on evidence the first jury rejects. "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.

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.

If a death sentence is imposed, this Court must determine "(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 or section 565.032 and any other circumstance found; (3) whether the sentence of

death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant."§565.035.3RSMo. The State asserts this Point violates Rule 84.04(d) by "grouping together multiple contentions not related to a single issue."(Resp. Br. at 65,n.11). Since this claim requests relief because the death sentence was imposed due to passion, prejudice and other arbitrary factors, and is disproportionate compared to other similar cases, it does not violate Rule 84.04.

The State argues cases like *State v. Blankenship*, 830 S.W.2d 1(Mo.banc 1992), *State v. Gilyard*, 257 S.W.3d 654(Mo.App.,W.D.2008) and *State v. Beishline*, 926 S.W.2d 501(Mo.App.,W.D.1996) should not be considered in performing proportionality review. (Resp.Br. at 71-72). This Court maintains trial judge reports, for "all cases in which the sentence of death or life imprisonment without probation or parole was imposed after May 26, 1977…."§565.035RSMo. Those records reveal Beishline's jury rejected death and sentenced him to life without parole; Blankenship also faced death and, with another, killed five people execution-style, yet was sentenced to life without parole, and Gilyard faced death for killing and sexually assaulting at least six women but received a life without parole sentence.

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.

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,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the attached appellant's reply brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,816 words, excluding the cover, signature block, and this certification, as determined by Microsoft Word 2007 software; and that, on this 5th day of July, 2012, this notification was sent through the Missouri Supreme Court e-filing system, to Daniel McPherson, P.O. Box 899, Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

/s/ Janet M. Thompson
Janet M. Thompson

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the attached appellant's reply brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains ____ (25% of 31,000 is 7,750) words, excluding the cover, signature block, this certification, and the appendix, as determined by Microsoft Word 2007 software; and that, on this 5th day of July, 2012, this notification was sent through the Missouri Supreme Court e-filing system, to Daniel N. McPherson, P.O. Box 899, Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

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