THE MISSOURI SUPREME COURT

STATE OF MISSOURI

Respondent

vs.

LANCE C. SHOCKLEY

Appellant

No. SC 90286

Appeal from the Circuit Court of Carter County
Hon. David Evans, Circuit Judge

REPLY BRIEF

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I.

The Circuit Court erred in finding that the transcript is complete and accurate and in certifying the transcript as sufficient for appellate review of Mr. Shockley's capital murder conviction and death sentence, because that finding is against the weight of the evidence and the evidence is insufficient to establish the reliability of the transcript as a matter of law, and the certification would limit Mr. Shockley to incomplete and unreliable appellate review in violation of his right to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to meaningful appellate review under Mo. Rev. Stat. § 565.035, in that (1) the evidence established that the trial court reporter was impaired at the time of trial and afterward and was unable to prepare a transcript despite being afforded many months to do so; (2) the portion of the transcript prepared by the court reporter is known to have omitted specific recorded proceedings despite the court reporter's post-trial testimony that she had examined that portion of the transcript and found it complete; (3) the remote Office of State Courts Administrator typists who completed the bulk of the transcript encountered ongoing difficulty interpreting the sound files and other materials from which their transcription was done; (4) all trial counsel agreed that a mid-trial challenge to the competence of the jury foreman and material associated issues were discussed by the trial court and counsel in an auxiliary courtroom and both

defense attorneys indicated their belief that the proceeding was conducted on the record, but the proceeding is not included in the transcript; and (5) the cumulative bases for doubting the completeness and accuracy of the transcript, together with the heightened need for reliability in determining the appropriateness of executing a particular defendant, make reliance on the present transcript unconscionable.

"[T]he qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). The transcript in any appeal "must contain all the necessary material to make a determination of the issues raised," or else "the appellate court is unable to determine if the trial court erred." *Arnold v. State,* 789 S.W.2d 525, 526 (Mo.App.E.D. 1990) (citing *Garrett v. State,* 486 S.W.2d 272, 274 (Mo. 1972)). Through no fault of Mr. Shockley, and as demonstrated by the record before this Court, is impossible to conclude with reason that the transcript is complete and accurate. Mr. Shockley's conviction and sentence of death should be reversed because that transcript cannot provide a reliable basis for "determin[ing] if the trial court erred."

The Court should reject the state's contention that the Court should proceed with plenary appellate review despite any shortcoming of the transcript because of Mr. Shockley's inability to prove definitively that particular matters are not present or not accurately recorded in the transcript. Resp.'s Br. at 24-32. The 2,243-page transcript filed in this appeal more than a year after Mr. Shockley's

trial had ended had to be prepared by the typing pool staff at the Office of State Courts Administrator because the court reporter who attended the trial proved incapable of completing it. Supp. Tr. Dec. 22, 2010 at 4-10. The transcript was prepared from the court reporter's digitized voice recordings and ambient courtroom noise recordings, id. at 4-10, 13-14, the OSCA typists repeatedly encountered difficulty comprehending those recordings and the transcript they prepared is studded with notations of inaudibility, id. at 15-18, it is now established that the transcript omitted at least two proceedings that were conducted on the record and outside the trial courtroom, Supp. Tr. Feb. 10, 2011, nothing in the record affords this Court a reasonable basis for concluding that every omission from the original transcript has been identified, and the statements of defense counsel—supported in part by the statement of trial counsel for the state—must raise concern that a particular as yet unreported proceeding held in a separate courtroom with regard to a material issue in this appeal was in fact conducted on the record. Supp. Tr. Dec. 22, 2010 at 35-47.

The state acknowledges that "[a]ppellants are entitled to a full and complete transcript for the appellate court's review." Resp.'s Br. at 29. But it argues that this Court must proceed to adjudicate Mr. Shockley's appeal because he has "failed to identify any inaccuracies or omissions" that have not been cured by the preparation of a supplemental transcript or "to show that he was prejudiced" by shortcomings of the record. Id. at 29-30. If Mr. Shockley is put to death (or, for that matter, locked away for the rest of his life) because he is unable to prove

exactly what did happen on a record that (a) through no fault of the defendant was not prepared and could not be reviewed until *almost a year after the trial had ended,* (b) could only be completed by remote typists who encountered significant difficulties in their attempts to transcribe problem-riddled voice and ambient noise recordings, and (c) was by *every* account incomplete and inaccurate in the very volume that (i) would have contained the particular proceeding that defense counsel believed to have been conducted on the record but that still is absent from the transcript and (ii) the court reporter *swore she had read and found complete,* the State of Missouri will have knocked the notion that a civilized society requires *heightened* reliability in capital cases on its ear.

The state notes that "the matters that were omitted from the original transcript were brief and [not] crucial to this appeal." Resp.'s Br. at 30. That refers only to the *acknowledged* omissions and, more importantly, misses the point. The point is that circumstances now a matter of record make it profoundly unreasonable to rely upon the present transcript as a complete record of trial court proceedings. The court reporter took an oath and testified—at a post-trial hearing that had as its sole purpose determining whether the transcript was accurate and complete—that her recordings had been complete and accurate and that she had made a priority of reviewing Volume IV of the transcript and found the volume complete. Supp. Tr. Dec. 22, 2010 at 9, 18-19. There is no question now that it was not. The court reporter's testimony surely cannot be considered reliable with

respect to the accuracy and completeness of the transcript. Surely that is a crucial consideration in the context of this case.

Further, the known omission of two brief proceedings conducted outside the main courtroom cannot reasonably be considered the end of the inquiry. The difficulties encountered by the typists of the Office of State Courts Administrator who finally were ordered to prepare the transcript that the true court reporter could not prepare were continuous and are documented, perhaps incompletely, in the record on appeal. App. to Appellant's Br. at A12-A39. The court reporter recalled in her testimony that she had created a plethora of digital files: "But my system, you know, there's so many different files, there, it's hard to put it all together . . . for somebody that isn't computer savvy to a certain degree." Supp. Tr. Dec. 22, 2010 at 17-18. The files reflecting the first and second "anteroom" proceedings, which were identified and transcribed for the first time after the Circuit Court's post-trial inquiry, plainly escaped the notice of the transcription pool. The first of those two proceedings remained outside the ken of the court reporter herself when she testified at that hearing despite her review of her own records and Volume IV of the trial transcript. Id. at 21-27. Although she remembered the second proceeding during her testimony, she had failed to detect its omission from the transcript. Id. at 9, 19, 21, 27. This Court has no adequate basis for confidence that the warren of computer files has been completely vetted still.

The state contends that this Court should pay no mind to shortcomings in the transcription process because Mr. Shockley "has not pointed to anything omitted from the trial transcript that was not corrected through the circuit court's filing of the supplemental transcript." Resp.'s Br. at 30. That is not accurate. Mr. Shockley has pointed to the in-court recollections of two defense trial attorneys who agreed that at least one proceeding had been conducted on the record and outside the main courtroom. Appellant's Br. at 47-49 (citing Supp. Tr. Dec. 22, 2010 at 36-37, 39, 40-45). No such proceeding was included in the orginal transcript. The matters at issue in the proceeding described by defense counsel, *as recalled by the prosecuting attorney,* were how the parties and the trial court would handle the defense demand for removal of the jury foreman and the threatened refusal of Mr. Shockley's lead counsel to participate in further proceedings if the foreman remained on the jury. Appellant's Br. at 48-49 (citing Supp. Tr. Dec. 22, 2010 at 45-47). One of Mr. Shockley's attorneys stated his belief a record had been made in the small courtroom but—at the time of his recollection, some 21 months after the trial had ended—could not recall the details of that colloquy. Appellant's Br. at 47-48 (citing Supp. Tr. Dec. 22, 2010 at 40). Counsel stated: "[T]he judge said we were going in the small courtroom . . . And, I mean, I think it was to make a record." Appellant's Br. at 47-48 (citing Supp. Tr. Dec. 22, 2010 at 43).[1]

[1] The prosecuting attorney recalled a conversation between the trial court and

Mr. Shockley acknowledges that the record may not afford definitive proof of particular substantive matters omitted from the transcript. In the premises of this case, that burden should not be assigned to him. Mr. Shockley never stood a decent chance of being able to prove what was omitted from or inaccurately recorded in his trial transcript. His trial ended on March 28, 2009. Legal File at 1727, 1774-75. The singular and bizarre transcription process that ensued kept him and his appellate counsel from seeing a transcript—or beginning to know just how it was being prepared—until May 3, 2010, more than a year later. When the transcript came, it was 2,243 pages long. The legal file was almost as voluminous. It stands to reason that a substantial amount of additional time would pass before the review and analysis of the record could be completed by Mr. Shockley, his trial attorneys—who had assumed responsibilities in a succession of other cases—and his appellate counsel.[2] The unique circumstances that impaired Mr. Shockley's ability to assess the trial transcript in this case were not of his making.

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counsel in the small courtroom lasting "four [or] five minutes" but did not feel that the colloquy had been conducted on the record. App.'s Br. at 48-49 (citing Supp. Tr. Dec. 22, 2010 at 47-48).

[2] Appellate counsel represents to the Court that he inherited 39 full boxes of documents from the capital unit attorneys of the Office of the State Public Defender who had represented Mr. Shockley for several years until being compelled to withdraw shortly before trial.

The uncontrollable change of circumstances that make it reasonable to require the litigant in a routine case to satisfy a particular burden of proof or persuasion may render that burden utterly inappropriate in an anomalous case. *See McQueen v. Swenson,* 498 F.2d 207, 220 (8th Cir. 1974).

It matters that this has happened in a capital case. "[D]eath is a different kind of punishment from any other which may be imposed in this country." *Beck v. Alabama,* 447 U.S. 625, 637 (1980). That "qualitative" difference is a matter of constitutional magnitude, demanding a heightened threshold of reliability in capital cases. *Lockett,* 438 U.S. at 604; *Deck,* 68 S.W.3d at 430. In any criminal appeal, the defendant "is entitled to . . . review based upon a full, fair and complete transcript." *State v. Fults,* 719 S.W.2d 46, 48 (Mo. 1986). In this capital appeal, whatever the record may not prove definitively about particular errors or omissions in the record, the method of transcription was hinky and aberrant to put it kindly; the original finished product was not finished at all; and—particularly given the absence of information regarding how the trial court was able to identify a second "anteroom" proceeding that never had been transcribed and never was mentioned during the court's evidentiary hearing, or regarding the scope or manner or staffing of that out-of-court inquiry—only wishful thinking could support a conclusion that the transcript in its current form is accurate and complete.

The state concludes that Mr. Shockley has "provide[d] no compelling reason" for this Court to doubt the completeness or accuracy of the trial transcript.

Resp.'s Br. at 32. Poppycock. The method of transcription in this capital case was extraordinary and the transcript that Mr. Shockley has been able to provide for appellate review is utterly undeserving of confidence. Affirmance on the basis of such a record cannot be squared with the constitutional pre-condition of heightened procedural and substantive reliability when the state seeks to take the life of one of its citizens.

II.

The Circuit Court erred in failing to provide the jury with a remedial instruction or declare a mistrial *sua sponte* when counsel for the state commented on Mr. Shockley's failure to testify, because counsel's remark violated the defendant's right to refrain from testifying as provided in U.S. Const. amend. V and XIV and Mo. Const. Art. I, § 19, and the absence of remedial action by the court resulted in prejudice to Mr. Shockley, in that the statement (1) suggested to the jury that Mr. Shockley could explain the purported presence of his grandmother's automobile near the site and at the time of Sgt. Graham's murder, (2) insinuated that counsel for the state had knowledge of that explanation and that it inculpated the defendant, (3) imposed a penalty upon the defendant for exercising his constitutional right, and (4) resulted in prejudice by encouraging the jury to find that Mr. Shockley was concealing guilty knowledge and making it more likely that a guilty verdict would ensue.

The keystone of the state's case against Mr. Shockley was the purported presence of an automobile that he had borrowed from his grandmother near the scene of Sgt. Graham's murder. During trial one of the prosecuting attorneys effectively assured the jury that Mr. Shockley could provide them with an explanation of why the car was parked in that location. Tr. at 1914. The state's insistence that its trial counsel could have been referring to someone other than Mr. Shockley—to the defendant's grandmother, to be precise—is ill-conceived

and regrettable. Its suggestion that the remark could not have been intended to highlight Mr. Shockley's silence defies logic: no other rational explanation can be assigned to the prosecutor's conduct. And its contention that this issue is not worthy of plain error review depends upon this Court's willingness to ignore the fact that this was a close case at best for the prosecution and that the challenged prosecutorial comment can fairly be characterized as a surgical incursion on a fundamental individual right that was designed and likely to help sell the state's most important notion to the jury.

The state argues that the prosecuting attorney's gratuitous statement to the jury in this case could only have been an indirect reference to Mr. Shockley's right to refrain from testifying. Resp.'s Br. at 33-34, 37-38. Mr. Shockley contends that the prosecutor's remark was a direct comment on his prospective reliance on the right of an accused to refrain from giving testimony. Appellant's Br. at 78-80. It is well established that reversal may be required whether a prosecutorial comment on a defendant's silence is "direct" or "indirect." *State v. Neff,* 978 S.W.2d 341, 344 (Mo. 1998). "An indirect reference is one reasonably apt to direct the jury's attention to the defendant's failure to testify. *Id.; see also Arnold,* 628 S.W.2d at 669 (defining "indirect reference" as one that "highlighted" the defendant's silence). And an indirect comment on a defendant's silence is especially egregious if it amounts to a "'pointed reference'" to that silence or "demonstrates a 'calculated intent' to magnify a defendant's decision not to testify." *State v. Hamilton,* 847 S.W.2d 198, 200-01 (Mo.App.E.D. 1993)

(quoting *State v. Johnson,* 811 S.W.2d 411, 416 (Mo.App.E.D. 1991), and *State v. Robinson,* 641 S.W.2d 423, 426 (Mo. 1982)). Reversal is required in this case whether the Court concludes that the comment was direct or indirect.

This Court's analysis of the prosecutorial comment on a defendant's failure to testify in another case supports Mr. Shockley's contention that the comment was direct:

> That it was in effect a pointed reference to the fact that defendant had not testified is too plain for controversy, and that it was so intended and necessarily so understood by the jury does not admit of doubt. The evidence showed clearly and without dispute that there were but three persons present or who witnessed the holdup, the two girls who testified and the defendant who did not. The attorney said that there were three present, "and these two girls were the only ones that testified." The reference to the defendant's failure to testify could not have been more obvious had he been called by name and the fact baldly stated that he had not taken the witness stand and denied the testimony of the girls.

State v. Shuls, 44 S.W.2d 94, 97 (Mo. 1931); *see also State v. Robinson,* 184 S.W.2d 1017, 1018-19 (Mo. 1945) (concluding that reference to absence of testimony contradicting state's evidence when nobody but defendant could have provided testimony was "exactly the same as" *Shuls*). The state has made no effort to distinguish *Shuls* from the present case and has not criticized its treatment

of the issue. Resp.'s Br. at 33-39. Instead it insists that the present statement can only have been an indirect comment on Mr. Shockley's silence. Id. at 36-38.

The prosecutor's statement is indefensible and cause for reversal even if it was an indirect comment on Mr. Shockley's ultimate silence. There is no rational explanation for the comment at issue other than that it was a "pointed reference" to Mr. Shockley's purported ability to explain why his grandmother's automobile would be parked near the scene of Sgt. Graham's murder near the time of the shooting. That the remark evidences "a 'calculated intent' to magnify [the] defendant's decision not to testify" is manifest as well.

Nor is the state's suggestion that its trial counsel could have been referring to the ability of Mr. Shockley's grandmother to explain the presence of her automobile near the murder scene a rational explanation. Resp.'s Br. at 33, 36-38. Melia Mae Shockley was the prosecution's own witness. Tr. at 1800. She testified that she gave Mr. Shockley the keys to her automobile shortly after noon on March 20, 2005, and that he returned the automobile to her home between 4:15 and 4:20 that afternoon. Tr. at 1807-10. Mrs. Shockley said that she spent the entire afternoon in her home. Id. at 1809. She stated that she had never seen Sgt. Graham and had not been acquainted with him. Id. at 1803.

Nothing in Mrs. Shockley's testimony or in the evidence generally offers even faint support for the notion that she could have explained why the automobile in question was parked near Sgt. Graham's house on the day that he was killed. Mrs. Shockley already had testified that she loaned the automobile to her grandson

for several hours that day; not a shred of evidence could support any notion that she knew more. It is an insult to common sense to suggest that the prosecutor was referring to her when he assured jurors that "someone" could explain why that car was near the murder scene. That the state has made that preposterous suggestion in this Court evinces a desperate awareness of exactly what one of its trial attorneys did, and a good grasp of the prejudice that inevitably attended his conduct.

The state emphasizes the "fleeting and isolated nature" of the prosecuting attorney's remark. The number of words uttered in an improper reference to the silence of an accused at trial does not determine whether reversal is necessary. "[A] direct reference to the failure of the defendant to testify will almost invariably require reversal of the conviction." *State v. Lawhorn,* 762 S.W.2d 820, 826 (Mo. 1988). "Even an indirect reference to the defendant's reliance on this constitutional right is improper if the prosecutor's remark reflects "a calculated intent" to highlight a defendant's silence "so as to call it to the jury's attention." *Id,* at 826-27; *State v. Wood,* 7198 S.W.2d 756, 761 (Mo. 1986). "[T]he ultimate test . . . is whether the jury's attention was called to the fact that the accused did not testify." *State v. Shields,* 391 S.W.2d 909, 912 (Mo. 1965). The prosecuting attorney's statement to the jury had precisely that intent. It would be folly to contend that it did not have that effect.

The state argues, as Mr. Shockley acknowledged in his initial brief, that this claim of error was not preserved in the trial court. Resp.'s Br. at 38-39. When the

issue of prosecutorial comment on the defendant's reliance upon his right to refrain from testifying has not been preserved, review still may be had under the plain error rule. Mo. R. Crim. P. 30.20. To be entitled to relief under that rule, "the appellant must show that the error affected his rights so substantially that a miscarriage of justice or manifest injustice will occur if the error is left uncorrected." *State v. Parker,* 856 S.W.2d 331, 332-33 (Mo. 1993). Whether manifest injustice is threatened depends upon the facts and circumstances of the case. *State v. Zindel,* 918 S.W.2d 239, 241 (Mo. 1996).

Despite the state's effort to trivialize the impact of its trial attorney's remark and shrink the mandate of Rule 30.20, plain error review of this issue is singularly appropriate. The plain error rule is "the ultimate repository of an appellate court's power to correct injustice." *State v. Jordan,* 627 S.W.2d 290, 293 (Mo. 1982). Its importance to Missouri's criminal law jurisprudence is such that, where manifest injustice otherwise would occur, the plain error rule trumps another rule's express provision that appellate review cannot be had absent timely objection in the trial court. *See State v. Wurtzberger,* 40 S.W.3d 893, 897-98 (Mo. 2001). The issue here arises from prosecutorial violation of a bedrock individual right: "The privilege against self-incrimination 'registers an important advance in the development of liberty—one of the great landmarks in man's struggle to make himself civilized." *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 55 (1964). The evidence in this case was close, *see* Appellant's Br. at 63-70, jurors' trust and confidence in prosecuting attorneys is high, *see State v.*

Storey, 901 S.W.2d 886, 900-01 (Mo. 1995), and the risk that improper prosecutorial remarks had a direct impact on the jury's verdict cannot be overstated.

Plain error review is called for in that circumstance. Upon review, Mr. Shockley's sentence should be vacated and his conviction reversed.

III.

The Circuit Court erred in refusing to declare a mistrial after the prosecuting attorney and Sgt. Heath combined to inform jurors of Mr. Shockley's purported history of violence because Sgt. Heath's statement violated Mr. Shockley's rights to a fair trial and due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, and to be tried for the offense with which he was charged under Mo. Const. Art. I, §§ 17-18, in that the purpose and effect of the statement was to impugn Mr. Shockley's character and to make jurors more prone to find him guilty of the offenses charged in this case because of a propensity to engage in violent criminal behavior.

A criminal defendant in Missouri enjoys the right to be tried only for the offense for which he has been indicted. *State v. Sladek,* 835 S.W.2d 308, 311 (Mo. 1992). That right is the source of the propensity evidence rule, which requires the exclusion of evidence of other bad acts of the defendant unless the evidence "has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial." *State v. Reese,* 274 S.W.2d 304, 307 (Mo. 1954); *see also State v. Ellison,* 239 S.W.3d 603, 607-08 (Mo. 2007) (holding that "[e]vidence of prior uncharged misconduct is inadmissible for the sole purpose of showing the propensity of the defendant to commit such acts"); *Sladek,* 835 S.W.2d at 314 (Thomas, J., concurring) (explaining that the "general rule can be described as excluding 'bad guy evidence'"). The premeditated violation of Mr. Shockley's right to a trial free of propensity evidence provided the jurors' only

exposure to evidence of his purported "violent history." Tr. at 1922-23. Despite the trial court's remedial instruction, the statement force-fed to jurors by the prosecutor and Sgt. Heath increased the likelihood that they would overcome the incongruity of an individual with no history of violence being charged with the commission of a deliberate and gruesome murder. That misconduct violated Mr. Shockley's right to be tried for the crime charged against him. It violated the propensity evidence rule. The prejudice inherent in Sgt. Heath's statement should have resulted in the declaration of a mistrial.

The state's principal response is that the evidence actually was admissible—*i.e.,* in a prosecution for the brutal murder of a police officer in which there was zero legitimate evidence of violence in the defendant's background, the state is free to tell the jury that the defendant has such a violent history that an officer going to his home to interview him must be accompanied by a SWAT team on account of that history. Resp.'s Br. at 50. The rationale of that argument is that defense counsel had cross-examined prosecution witnesses about the surrounding of Mr. Shockley's house by police officers: "[T]he State was entitled to explain to the jury why those officers were there." *Id.*

In fact the prosecuting attorney had told the jury about the surrounding of Mr. Shockley's home in his opening statement. Counsel informed jurors that police investigating the murder scene earlier that day had found Sgt. Graham's notes reflecting a current investigation of Mr. Shockley: "And so the police

obviously that night want to talk to Lance Shockley about this because that's the very last thing Sgt. Graham was basically working on." Tr. at 1020. And:

> The officers didn't know what kind of situation they were having, they already had one of their own killed, and they were going out here in the middle of the woods, so they had some fellows from the Sikeston Department of Public Safety kind of be backup. They were out there in the woods concealed to give Jeff Heath some protection. Jeff doesn't even know this.

Id. at 1022. The prosecutor also told jurors that one of the backup officers had fired a round accidentally as the interview of Mr. Shockley was ending. Id.

It is true that defense counsel referred to the firing of a shot on the Shockley property that night during his cross-examination of more than one prosecution witness. But there had been no mention of Mr. Shockley's purported "violent history" during the prosecutor's opening statement, and of course there was none by defense counsel in any cross-examination of a prosecution witness. The idea that the state was entitled to "explain to the jury why those officers were there" has no basis in anything said by defense counsel and ignores the force of the Missouri Constitution and the propensity evidence rule.

The state also suggests that the scripted dialog between its trial counsel and Sgt. Heath was proper because it "counter[ed] the inference . . . that the gunshot fired at Appellant's home may not have been accidental." Resp.'s Br. at 50. No explanation is offered of how a defendant's otherwise unproven "violent history"

might relate to whether the shot fired by a policeman in the direction of his home was intentional or accidental. There could be no such explanation. Sgt. Heath could have given the jury conclusive proof that Mr. Shockley was the lovechild of Lizzie Borden and Jack the Ripper and still it would not have helped the prosecution prove what the sniper had on his mind when his rifle was shot.

Nor is the state correct in its argument that the Circuit Court's remedial instruction neutralized the harm in this case. Resp.'s Br. at 51. Telling the jury to disregard an authoritative statement that purported to answer the essential riddle of the prosecution—what kind of a person could commit such a savage and callous crime—was no sure cure for the pointed characterization of the defendant. The prosecuting attorney and a Highway Patrol officer had told jurors that the Mr. Shockley had a history so violent that police officers could not go to his home to interview him without a SWAT team surrounding the premises to protect them. The murder of Sgt. Graham was cold-hearted and brutal. There was no legitimate evidence suggesting that Mr. Shockley had a background consistent with the commission of that crime. This Court should recognize what the prosecution was doing when it invited Sgt. Heath to bridge that evidentiary gap with an outrageous cheat. And the Court should conclude that harm inherent in this particular prosecutorial excess was unlikely to be cured by an instruction to disregard it.

Mr. Shockley acknowledges that the declaration of a mistrial is a drastic remedy that should be applied only in extraordinary circumstances. *State v. Camper,* 391 S.W.2d 926, 927-28 (Mo. 1965). But that is precisely the relief that

must be granted "when the incident is so grievous that the prejudicial effect can be removed no other way." *Id.* A trial court abuses its discretion as a matter of law by refusing to declare a mistrial in such a situation. *Id.* In particular, when "evidence" once placed improperly before the jury has such a high potential for prejudice that it is unreasonable to expect a curative instruction to eliminate it from the minds and deliberations of jurors, the ensuing judgment of conviction cannot stand. *See State v. Benson,* 142 S.W.2d 52, 54-55 (Mo. 1940) (holding that "[w]here incompetent evidence is admitted of a character highly prejudicial to the rights of the defendant, the error is generally not cured by a withdrawal instruction").

V.

The Circuit Court erred in submitting penalty phase Instruction 14 to the jury and in failing to instruct the jury that the prosecution bore the burden of proving beyond a reasonable doubt that aggravating circumstances had a weight equal to or greater than mitigating circumstances, because the omission of clear instruction to that effect relieved the prosecution of its constitutional and statutory burden of proof, gave the jury a roving commission to find an element of capital murder without holding the state to that burden, and violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, in that (1) a finding of aggravating factors carrying at least as much weight as mitigating factors is a prerequisite for imposition of a death sentence under Mo. Rev. Stat. § 565.030.4, (2) determining the relative weight of aggravating and mitigating circumstances under § 565.030.4 is a fact-finding process, (3) due process precludes conviction of any crime, including capital murder, unless the prosecution has proved every factual element of the crime beyond a reasonable doubt and § 565.030.4 complies with that requirement, and (4) penalty phase Instruction 14 and the instructions as a whole failed to apprise the jury that the prosecution bore that burden of proof with respect to the weighing of aggravating and mitigating circumstances and in fact suggested that the defendant bore that burden.

Mr. Shockley contends that penalty phase Instruction 14 failed to tell jurors that the prosecution bore the burden of proving the relative weight of aggravating and mitigating factors—that aggravating factor evidence carried at least as much weight as mitigating factor weight—beyond a reasonable doubt. Appellant's Br. at 96-106. The state's principal response is this: "If the legislature wanted to place the burden on the State of proving that aggravating circumstances outweigh mitigating circumstances, then it would have written the statute to explicitly provide for that." Resp.'s Br. at 76. Well, not exactly.

If the legislature did *not* want to place the burden of proving the relative weight of aggravating circumstances on the state—especially once it became aware that this Court had identified the weighing of aggravating and mitigating circumstances in a capital case as a fact-finding process in *State v. Whitfield,* 107 S.W.3d 253, 261 (Mo. 2003)—it would not have written and maintained a statute that made a capital defendant eligible for sentence of death only if the aggravating circumstances evidence was found to have a particular relative weight—*i.e.,* at least equal to that of the mitigating circumstances evidence.

This Court held in *Whitfield* that the weighing of aggravating and mitigating circumstances in order to determine the sufficiency of aggravating circumstance evidence is a fact-finding process. 107 S.W.3d at 261; *see also State v. McLaughlin,* 265 S.W.3d 257, 262 (Mo. 2008) (characterizing the § 565.030.4 weighing determination as a "specific factual finding" and the outcome of that

process as a "fact," equivalent to the determination of aggravating factors).[3] The United States Supreme Court recognized in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 476; *see also State v. Taylor,* 238 S.W.3d 145, 148 (Mo. 2007) (recognizing that "the state must prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant] was charged") (quoting *State v. Erwin,* 848 S.W.2d 476, 481 (Mo. 1993)). *Ring,* decided two years after *Apprendi,* held that the "aggravating factors" required to make a defendant eligible for the death penalty were "the functional equivalent of an element of a greater offense" and must be proved beyond a reasonable doubt to the satisfaction of a jury. 536 U.S. at 608-09 (2002). In light of those opinions, a Missouri prosecutor seeking a sentence of death must bear the burden of establishing the relative weight of aggravating circumstances beyond a reasonable doubt.

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[3] It is entirely possible that between one and 11 of Mr. Shockley's jurors found the evidence of mitigating factors to *outweigh* the evidence of aggravating factors. All that the jury was required to report to the trial court was that its members had no unanimously found mitigating factors to outweigh aggravating factors. Legal File at 1723.

The state contends that "[i]t would be absurd to place on the State . . . the burden of proving that the defendant is ineligible for the death penalty because the mitigating circumstances outweigh the aggravating circumstances." Resp.'s Br. at 76. Of course Mr. Shockley did not argue that § 565.030.4 imposes *that* burden on the prosecution. His argument is that (1) any fact that must be found in order for a defendant to be eligible for an enhanced punishment that otherwise could not be imposed is an element of the enhanced crime, (2) the prosecution seeking such an enhanced punishment bears the burden of proving every element beyond a reasonable doubt, (3) the defendant in a Missouri capital case cannot be punished by death absent proof that the aggravating circumstances in his case weigh at least as much as the mitigating circumstances, and (4) the prosecution bears the burden of establishing that relative weight element beyond a reasonable doubt. What would be absurd is requiring a capital defendant to disprove a fact that is a precondition to the punishment sought by the prosecution.

The state argues that *Kansas v. Marsh,* 548 U.S. 163 (2006), and *State v. Taylor,* 134 S.W.3d 21 (Mo. 2004), repudiate Mr. Shockley's position. Resp.'s Br. at 75. In *Marsh,* as in *Walton v. Arizona,* 497 U.S. 639 (1990), overruled on other grounds, *Ring v. Arizona,* 536 U.S. 584 (2002), and in *Ring* itself, the Supreme Court identified the element of capital murder that was in question as "the existence of aggravating circumstances." 548 U.S. at 170-72; 497 U.S. at 650. *Marsh* observed that both the Kansas and Arizona statutes "place[] the burden of proving the existence of aggravating circumstances on the State, and

both . . . require the defendant to proffer mitigating evidence." 548 U.S. at 172.). The Supreme Court found it important that under the Kansas statute "the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence." 548 U.S. at 178-79.

The United States Supreme Court's interpretation of a Kansas statute hardly determines the intent and application of a Missouri statute. This Court should recognize that the relevant statutory element under § 565.030.4 is not merely the existence of an aggravating factor but *the existence of an aggravating factor having the weight specified by the legislature.* This Court's interpretation of a Missouri statute is the governing construction. *See Memorial Hospital v. County,* 415 U.S. 250, 256 (1973) (stating that "[i]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State"), quoted in *Sours v. State,* 603 S.W.2d 592, 600-01 (Mo. 1980).

In *Taylor* the appellant had contended, *inter alia,* that the penalty phase instructions had failed to inform the jury that the state bore the burden of proof with respect to the relative weight of aggravating and mitigating circumstance evidence. 134 S.W.3d at 30. This Court dismissed that aspect of the appellant's argument: "Appellant offers no case on point or statutory requirement that the prosecutor has the burden to demonstrate that the mitigating circumstances must be insufficient to outweigh aggravating circumstance." *Id.* That does not dispose of Mr. Shockley's argument.

VII.

The Circuit Court erred in sentencing Mr. Shockley to death after the jury had weighed aggravating and mitigating factors and failed to reach unanimous agreement with respect to punishment, because the imposition of that enhanced sentence, and the provision of § 565.030.4 that purported to authorize the imposition of a death sentence by the trial court when the jury was unable to agree upon punishment, violated Mr. Shockley's rights to due process under U.S. Const. amend. XIV and Mo. Const. Art. I, § 10, a jury trial under U.S. Const. amend. VI and XIV and Mo. Const. Art. I, § 22(a), and freedom from cruel and unusual punishment under U.S. Const. amend. VIII and XIV and Mo. Const. Art. I, § 21, in that (1) a finding of aggravating factors carrying at least as much weight as mitigating factors is a prerequisite for imposition of a death sentence under Mo. Rev. Stat. § 565.030.4, (2) determining the relative weight of aggravating and mitigating circumstances under § 565.030.4 is a fact-finding process, (3) due process precludes conviction of any crime, including capital murder, unless the prosecution has proved every factual element of the crime beyond a reasonable doubt to the satisfaction of a jury, and (4) the death sentence imposed in this case necessarily depended upon—and § 565.030.4 in fact required—the substitution of affirmative fact-finding by the trial court with respect to the element of aggravating factor weight.

Section 565.030.4 precludes the imposition of a death sentence absent a finding of aggravating circumstances that weigh at least as much as mitigating circumstances. This Court made it clear in Whitfield that the relative weight of aggravating circumstances and mitigating circumstances in a capital case is a question of fact. 107 S.W.3d at 259-261. When Mr. Shockley's jurors were unable to reach a punishment verdict, § 565.030.4 required the trial court to follow the exact procedure that the jury had followed in order to make a sentencing decision. That necessarily meant that the trial court's own determination of the relative weight element of capital murder became the factual basis for its imposition of a death sentence. This Court should vacate the sentence because it violated the constitutional principles articulated in *Ring* and *Apprendi,* as well as correlative principles under the Missouri Constitution.

The state argues that the necessary intercession of judicial fact-finding to wrap up this jury trial can pass constitutional muster because the jury made the necessary factual findings before processing its determinations into a punishment verdict. Resp.'s Br. at 86, 88-89. That is the conclusion that this Court reached in *State v. McLaughlin,* 265 S.W.3d 257 (Mo. 2008). Mr. Shockley contended in his initial brief and still maintains that McLaughlin was decided in error and should be reconsidered. Appellant's Br. at 113-18.

The state contends that the jurors "ma[de] the factual findings that a jury is required to make" before concluding that they would be unable to pull the trigger on what Mr. Shockley's punishment should be, and thus that "the court could

consider those same facts and circumstances and determine whether the death sentence was appropriate." Resp.'s Br. at 89. That is, the trial court could adhere to the explicit statutory mandate to "follow the same procedure" that the jury was told to follow and on that basis determine whether Mr. Shockley was to be sentenced to death. Mo. Rev. Stat. § 565.030.4. But *Whitfield* recognized that the jury's determination of the relative weight of aggravating and mitigating circumstances is a fact-finding process. 107 S.W.3d 259-61. And § 565.030.4 thus requires the trial court to make a factual determination of the relative weight of aggravating and mitigating circumstances as a predicate for the selection and imposition of punishment.

One problem with the state's position—and with the *McLaughlin* constitutional analysis—is that the jury was not instructed that the state bore the burden of proving the relative weight of aggravating circumstances evidence and mitigating circumstances evidence. The state's argument that jurors made the factual findings that *Apprendi* and *Ring* require is incorrect. *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 476. *Ring* held that the "aggravating factors" required to make a defendant eligible for the death penalty were "the functional equivalent of an element of a greater offense" and must be proved beyond a reasonable doubt to the satisfaction of a jury. 536 U.S. at 608-09.

The second reason that the state and *McLaughlin* are in error is that under § 565.030.4 the findings of a jury that has become deadlocked with respect to punishment are supplanted by those of the trial judge, at least in cases in which a death sentence is imposed. *Ring* held that a death sentence arrived at through judicial fact-finding violates the defendant's rights under the Sixth and Eighth Amendments. 536 U.S. at 608-09. Mr. Shockley's death sentence was not arrived at through fact-finding by a jury. It was reached through fact-finding by a judge. The sentence should be vacated for that reason.

CONCLUSION

The Court should vacate the sentence of death imposed upon Mr. Shockley, reverse the judgment of conviction, and remand the case to the Circuit Court for a new trial or resentencing for the reasons set forth in Mr. Shockley's initial brief and this reply brief. On the basis of its proportionality review under Mo. Rev. Stat. § 565.035, as contended in Mr. Shockley's initial brief, the Court should vacate the sentence of death and resentence Mr. Shockley to imprisonment for life.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief contains the information required by Mo.R.Civ.P. 55.03 and complies with the limitations contained in Mo. R. Civ. P. 84.06(b). The brief contains 7,625 words, excluding those words not counted pursuant to Mo. R. Civ. P. 84.06(b), as determined by the software application Microsoft Word for Macintosh version 2111.

The brief has been filed through the Court's electronic filing system on October 24, 2011, to be served by that system upon counsel of record in the case.

/s/ Michael A. Gross
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