IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent/Cross-Appellant, v. LEDALE NATHAN, JR. Appellant/Cross-Respondent.	)	No. SC92979

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 18
THE HONORABLE ROBERT H. DIERKER, JR., JUDGE

APPELLANT/CROSS-RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

A petition was filed in the juvenile division of the family court of the Circuit Court of the City of St. Louis, Cause No. 0922-JU00755, alleging that Appellant, Ledale Nathan, Jr. committed murder in the first degree and other offenses at the age of sixteen.

After a hearing, the juvenile division issued an order on February 25, 2010 dismissing the petition to allow prosecution of Nathan under general law. On April 2, 2010, in the Circuit Court of the City of St. Louis, Cause No. 1022-CR01659, the State of Missouri filed a 26-count indictment charging that a man named Mario Coleman along with Nathan committed the crimes of murder in the first degree (Section 565.020), armed criminal action (Section 571.015), the class A felony of assault in the first degree (Section 565.050), the class A felony of robbery in the first degree (Section 569.020), the class B felony of burglary in the first degree (Section 569.160), and the class B felony of kidnapping (Section 565.110).

Nathan was convicted of the charged crimes after a trial by jury on April 11, 2011. On May 27, 2011, the court sentenced Nathan to life imprisonment without the possibility of parole for murder in the first degree. He was sentenced to ten consecutive terms of life imprisonment for robbery, assault, and armed criminal action, and concurrent terms of 15 years for burglary and kidnapping.

A timely-filed appeal was filed on June 6, 2011 in the Missouri Court of Appeals, Eastern District, requesting transfer to this Court. On November 20, 2012, the Court of Appeals transferred this case on the grounds that it involves a challenge to the

constitutionality of Missouri statutes, an issue reserved for the exclusive appellate jurisdiction of this Court. Mo. Const. Art. V, Sec. 3. Jurisdiction lies in this Court.

STATEMENT OF FACTS

On April 2, 2010, after Ledale Nathan, Jr. was certified to stand trial as an adult, the State of Missouri filed an indictment charging that he and an adult named Mario Coleman committed the crimes of murder in the first degree (Section 565.020), armed criminal action (Section 571.015), assault in the first degree (Section 565.050), robbery in the first degree (Section 569.020), burglary in the first degree (Section 569.160), and kidnapping (Section 565.110). L.F. 18-25; Appendix at A1-A9.

At trial held on April 4 through April 11, 2011, Nathan conceded his guilt of murder in the second degree (felony murder), along with certain other charged crimes. Tr. 338, 343, 933. Nathan argued he was not guilty of murder in the first degree and should be found guilty of a lesser-included offense on that count; at the time of trial the crime of murder in the first degree carried a mandatory sentence of life imprisonment without parole. Tr. 961-193.[1]

Nathan's lawyer told the jury during opening statement, "Ledale Nathan will tell you that he is guilty of murder in the second degree at the age of sixteen." Tr. 343. Counsel asked the jury to consider, "this is twenty minutes in Mr. Nathan's life when he's sixteen years old." *Id.*.[2]

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[1] *Miller v. Alabama*, 132 S. Ct. 2455 (2012), has since invalidated sentences of life imprisonment without the possibility of parole where they were mandatory.

[2] Counsel told the jury that Nathan would testify in this case. Tr. 344. She told the jury that Nathan was out with Mario Coleman collecting drug debts. Tr. 344.

The facts at trial were that on Sunday, October 4, 2009, Nicholas Koenig and Isabella Lovadina were at Koenig's grandmother's house at 902 Hickory in the City of St. Louis. Tr. 347, 468. As Lovadina, an off-duty police officer, was leaving the house, she put her duty weapon and other items in her car. Tr. 468, 356. Koenig and Lovadina lingered outside the house talking. Tr. 469. Suddenly, two men appeared. Tr. 359. Mario Coleman (wearing a black sweatshirt) and sixteen-year-old Nathan (wearing a red sweatshirt), had guns. Tr. 361, 371. Koenig gave them his wallet. Tr. 362. Coleman and Nathan gestured for them to go inside the house. Tr. 363. Once inside, Koenig and

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"[A]t sixteen, he was already a drug dealer . . . he had been a drug dealer since he was twelve." Tr. 344. "He will tell you that guns and drugs were as common in his house as clothes and food in yours, and he will tell you that when he left his home that evening with a twenty-two year old man and two adult women, no one asked him where he was going, no one checked to see whether or not he would be in by curfew." Tr. 344-345. Counsel also told the jury that contrary to what the State would allege, Nathan would testify he, not Mario Coleman, fired the shots at 902 Hickory, but did not intend to do so. Tr. 340. Despite this promise, Nathan, inexplicably, did not testify. The State maintained that Coleman, based on the testimony of all four witnesses, was the shooter and Nathan was across the room when Stallis was shot. Tr. 963. Accordingly, this brief will discuss the facts of the case in the light most favorable to the State's evidence, despite counsel's unexplained assertions in opening statement.

Lovadina were forced to kneel in the area inside the front door and put their foreheads to the floor. Tr. 366. Coleman was barking orders. Tr. 366. Nathan went to the second floor. Tr. 366.

Gina Stallis, her two children, her mother Rosemary Whitrock, and her grandmother Ida Rask were upstairs sleeping. Tr. 412. Whitrock woke up to find Stallis sobbing at the foot of her bed and Nathan pointing a gun. Tr. 412. Nathan ordered Stallis to pick up the large television that was in the room and carry it to the first floor. Tr. 370, 416. While Nathan was following Stallis downstairs, Whitrock crawled to her mother's room. Tr. 417. Nathan came back upstairs and took jewelry boxes. Tr. 420, 569, 571. Nathan ordered Rask and Whitrock to the first floor and gave the jewelry boxes to Coleman. Tr. 375, 478. Nathan put a gun to Rask's face and threatened to shoot her. Tr. 377.

Then, Coleman and Nathan discussed taking everyone down to the basement. Tr. 379. Stallis stood up as if she was about to go downstairs. Tr. 379. Lovadina, fearing for Stallis if she were to go into the basement, pushed and tried to disarm Coleman. Tr. 424, 482. She threw him against a door. Tr. 576. There was a burst of gunfire from Coleman's gun, and Koenig simultaneously grabbed Nathan. Tr. 381, 424, 483. Coleman's gun went, "pop, pop, pop, pop, pop, pop, pop" quickly seven times. Tr. 576.

Lovadina was shot five times, but she survived. Tr. 386. Koenig testified that Coleman was standing over Lovadina as the last shots were fired. Tr. 486. Koenig was shot three times in the throat and shoulder and also survived. Tr. 483, 485. Nathan was shot in the hand. Tr. 656. Stallis, who was standing some distance away in a hallway,

died after one bullet passed through her cheek into her torso, hitting several major organs. Tr. 490. Of the bullets that hit Lovadina, one grazed her, and the other four stayed in her body. Tr. 386-387. Of the bullets that hit Koenig, one was in his body at the time of trial, the two others went through him. Tr. 489. The evidence did not show whether the bullet that killed Stallis hit her directly or was one of the three that hit Lovadina, Koenig, or Nathan. Koenig testified the last several shots were pointed directly down at the floor towards Lovadina. Tr. 486.

Nathan and Coleman fled in a black car to Barnes Jewish Hospital on Kingshighway. Tr. 614. Nathan was admitted to the hospital, where his mother met him. Tr. 616. Lieutenant Courtland Ramey went to the hospital to investigate Nathan's wound after learning of the incident on Hickory. Tr. 656. Based on the descriptions of the perpetrators of that robbery and the timing of Nathan's injury, he "figured" Nathan was involved in the shooting on Hickory. Tr. 656. Nathan seemed nervous and gave inconsistent explanations about how he received the wound to his hand. Tr. 658-659, 663.

Another police officer, Jeffrey Long, was also dispatched to the hospital. Tr. 617. He talked to Nathan's mother and asked her to direct him to the people who had dropped Nathan at the hospital. Tr. 617. She walked with him to the waiting room. Tr. 617. From there, the officer could see three people, a man and two women, cross Kingshighway and approach a black Thunderbird. Tr. 619. They changed direction before reaching the car, and the officer followed them. Tr. 619.

He broadcast information indicating that certain other officers should call him on his cell phone. Tr. 621. He wanted to keep his pursuit off the police radio so that no police cars would approach the area with lights and sirens; he did not want the people to panic and run into nearby Forest Park. Tr. 621. When he was about 100 feet from the group, the man turned west into the park and the women went east. Tr. 622. The man, Coleman, threw jewelry taken from 902 Hickory Street on the ground. Tr. 624. Another officer searching the park with a flashlight found a small black .22 caliber handgun laying in the grass. Tr. 630, 637. It was missing its magazine; the lever that holds it in place was broken. Tr. 881. Accordingly, it could hold only one bullet, which is how the officers found it. Tr. 883. This gun, after examination, was found to have Mario Coleman's DNA on it, along with trace DNA from another individual. Tr. 842.

Police obtained a warrant and searched the black Thunderbird. Tr. 642. In it, an officer found a silver .25 caliber handgun between the passenger seat and the console. Tr. 643-644, 648. The gun was unloaded. Tr. 646. All seven shots at the Hickory residence were from this .25. Tr. 886. The police also found a black sweatshirt in the trunk with a cell phone in the pocket, belonging to one of the victims of the Hickory incident. Tr. 649-650. Nathan's DNA was on this weapon, along with a trace amount from another individual. Tr. 843. The barrel of the .25 had Lovadina's DNA on it. Tr. 844.

While Nathan was at the hospital receiving treatment for his gunshot wound, he received an x-ray. Tr. 608. He gave the x-ray technician a red sweatshirt and told her to throw it away. Tr. 608. She thought that was odd, so informed the police. Tr. 667. An

officer went to the x-ray room and found the red sweatshirt in a laundry hamper, and after examination, it was found to have Nathan's blood on it. Tr. 668, 849. Nathan's jeans and sneaker had Lovadina's blood on them. Tr. 848, 850. Nathan's blood was found in the house's entryway. Tr. 852.

Nathan was convicted of the charged crimes, including first-degree murder, on April 11, 2011. Tr. 201. On May 27, 2011, the court sentenced Nathan to life imprisonment without the possibility of parole for murder in the first degree. Tr. 266. He was sentenced to ten consecutive terms of life imprisonment for robbery, assault, and armed criminal action, and concurrent terms of 15 years for burglary and kidnapping. Tr. 266-270.

This timely-filed appeal followed. L.F. 271.

POINTS RELIED ON

I. The trial court erred in denying Nathan's motion for judgment of acquittal at the close of all evidence on Count I because the State failed to prove beyond a reasonable doubt that Nathan committed first-degree murder, defined as intentional murder committed after deliberation, in that, viewed in the light most favorable to the State, there was insufficient evidence from which a reasonable juror could find Nathan, with the purpose of promoting or furthering the death of Gina Stallis, deliberated or coolly reflected upon the death of Ms. Stallis. The trial court's ruling violated Nathan's rights to due process of law and to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.

State v. Thompson, 112 S.W.3d 57 (Mo. App. W.D. 2003)

State v. O'Brien, 857 S.W.2d 212 (Mo. banc 1993)

State v. Gray, 887 S.W.2d 369 (Mo. banc 1994)

Section 565.020

Mo. Const. Art. 1, Sec. 10

U.S. Const. Amends. V, XIV

II. The trial court erred in imposing sentence and judgment against Nathan, because Section 565.020 and Section 211.071 violate a child's constitutional rights to due process of law and protection against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, in that (1) a child's age must constitutionally be considered at sentencing, which mandatory sentences of life without the possibility of parole do not allow, and this Court must order a remedy under *Miller v. Alabama,* 132 S.Ct. 2455 (2012); (2) the remedy should be a judgment of conviction for the lesser-included offense of second-degree murder on Count I since under Section 565.020 there is no constitutional penalty for first-degree murder that is authorized, and such a remedy must also include resentencing on all counts totaling ten consecutive life sentences, and an opportunity for jury sentencing, and (3) further, sentences of life that do not provide for the possibility of parole are categorically unconstitutional for those under eighteen under the Eighth and Fourteenth Amendments, as well as under the Missouri Constitution, and categorically impermissible for those for whom there was no jury finding that he killed or intended to kill.

Miller v. Alabama, 132 S.Ct. 2455 (2012)

Graham v. Florida, 130 S.Ct. 2011 (2010)

Sections 565.020, RSMo. 2000 and 211.071, Supp. 2008

Mo. Const. Art. 1, Sec. 2, 10, 18(a)/U.S. Const. Amends. V, VI, VIII, XIV

III. The trial court erred in imposing sentence and judgment against Nathan, because Section 211.071 violates procedural and substantive due process rights and the right to jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the juvenile certification procedure in Missouri (1) presumes the allegations to be true without any inquiry into the facts of the alleged offense, resulting in arbitrary certification based upon mere allegations, dramatically increasing the range of punishment for which the child is exposed without the opportunity to be heard or any findings on the facts of the underlying offense, and (2) allows for certification, increasing the penalty for a crime beyond the prescribed statutory maximum for a juvenile, without submitting the statutory factors upon which certification is based to a jury.

Kent v. United States, 383 U.S. 541 (1966)

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

State v. Andrews, 329 S.W.3d 369 (Mo. banc 2010)

Section 565.020, RSMo. 2000

Section 211.071, Supp. 2008

Mo. Const. Art. 1, Sec. 10 and 18(a)

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

IV. The trial court plainly erred in submitting Instruction 5 to the jury, because this verdict director for the crime of first-degree murder misdirected the jury, failed to instruct the jury on the applicable law, relieved the State of its burden on a contested issue, and affected the verdict in violation of Nathan's right to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the definition of deliberation is (1) vague, confusing, internally inconsistent, and misleading under the facts of this case because it fails to specify what compromises "the matter," and (2) the failure to so specify under the facts of this case gave the jury a roving commission to decide for itself what constitutes "the matter" upon which Nathan coolly reflected.

MAI-CR 3d 314.02

State v. Scott, 278 S.W.3d 208 (Mo. App. W.D. 2009)

Mo. Const. Art. 1, Sec. 10 and 18(a)

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

V. The trial court erred in overruling post-trial motion for new trial alleging the state failed to disclose before trial, pursuant to Rule 25.03(A)(7), two municipal stealing convictions of witness Koenig because this discovery violation denied Nathan's rights to due process, a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the State did not disclose this information until after trial, and Koenig was the only witness to state that the shooter pointed the gun at Lovadina while she was on the ground, supporting an inference of intent, and such evidence would have been admissible to impeach Koenig's credibility, and where the evidence supporting Nathan's guilt of first degree murder was slim.

State v. Bynum, 299 S.W.3d 52 (Mo. App. E.D. 2009)

Rule 25.03

Mo. Const. Art. 1, Sec. 10 and 18(a)

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

VI. The trial court abused its discretion in refusing to disclose to the defense information presented to the court *in camera* about defense witness Koenig, because this denied Nathan's rights to due process, a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that while the information in the written summary is still under seal, undersigned counsel has viewed it and this information may be relevant to Koenig's credibility as a witness, and Koenig's credibility was important to the defense because Koenig was the only witness who testified the shooter intentionally pointed the gun at someone, which was relevant to the shooter's intent and deliberation.

State v. Newton, 925 S.W.2d 468 (Mo. App. E.D. 1996)

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

Mo. Const. Art. 1, Sec. 10 and 18(a)

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

VII. The trial court erred in denying Nathan's motion to dismiss charges that were not certified by the juvenile court, because this denied Nathan's rights to notice and due process, to a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that (1) Counts 11, 12, 21 and 22 alleging robbery and kidnapping against victim Stallis were not part of the juvenile court petition, (2) by proceeding to trial on these counts that were not certified, the trial court violated Section 211.071 and Nathan's right to notice and hearing on the issue of whether those offenses should have been dismissed in juvenile court and transferred to a court of general jurisdiction, and (3) the court of general jurisdiction had no jurisdiction over those counts.

Scott v. State, 691 S.W.2d 291 (Mo. App. W.D. 1985)

State ex rel. D.V. v. Cook, 495 S.W.2d 127 (Mo. App. K.C. 1973)

Section 211.071

Mo. Const. Art. 1, Sec. 10 and 18(a)

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

ARGUMENT

I. The trial court erred in denying Nathan's motion for judgment of acquittal at the close of all evidence on Count I because the State failed to prove beyond a reasonable doubt that Nathan committed first-degree murder, defined as intentional murder committed after deliberation, in that, viewed in the light most favorable to the State, there was insufficient evidence from which a reasonable juror could find Nathan, with the purpose of promoting or furthering the death of Gina Stallis, deliberated or coolly reflected upon the death of Ms. Stallis. The trial court's ruling violated Nathan's rights to due process of law and to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.

Preservation

At the close of the evidence, trial counsel made a motion for judgment of acquittal and argued that there was insufficient evidence to support the element of deliberation or cool reflection. Tr. 901-903; L.F. 106-110. The trial court denied the motion. Tr. 903. The issue was included in the timely-filed motion for judgment of acquittal notwithstanding the verdict, or in the alternative, for a new trial, though not required, and the issue is preserved for appellate review. Supp. L.F. 138; Rule 29.11(d); *State v. Washington*, 92 S.W.3d 205, 207 (Mo. App. W.D. 2002).

Standard of Review

A directed verdict of acquittal is authorized where there is insufficient evidence to support the verdict. *State v. Blue*, 811 S.W.2d 405, 409 (Mo. App. E.D. 1991).

Conviction upon evidence that is insufficient to establish guilt beyond a reasonable doubt violates the criminal defendant's constitutional right to due process of law. *Jackson v. Virginia*, 443 U.S. 307, 316-318 (1979). The state must prove beyond a reasonable doubt that the defendant committed each element of the offense charged. *Id.* If the state does not prove beyond a reasonable doubt that the defendant committed each element of the charged offense, the evidence is insufficient to support a conviction. *Id.*; *State v. Smith*, 33 S.W.3d 648, 652 (Mo. App. W.D. 2000).

Review of claims challenging the sufficiency of the evidence is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The reviewing court views the facts in a light most favorable to the verdict, disregarding all evidence and inferences contrary to the verdict. *Id.*

But in judging the sufficiency of the evidence, this Court will "not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences." *State v. Self*, 155 S.W.3d 756, 762 (Mo. banc 2005) (citation omitted); *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). "The inferences must be logical, reasonable and drawn from established fact." *State v. Dixon*, 70 S.W.3d 540, 544 (Mo. App. W.D. 2002).

The State's Argument

The State pointed to the following evidence when arguing there was evidence to support a first-degree murder conviction in the death of Gina Stallis:

- That Nathan was "making threats to kill people" during the robbery.

- That Nathan put a gun to Ida Rask's head and threatened to kill her during the robbery.

Tr. 901. Based on this evidence, the State argued, "he deliberated [because] . . . he thought someone could possibly die that night." Tr. 901. It was not alleged, and the jury did not find, that Nathan was the shooter. L.F. 133.

The Evidence is Insufficient

The State had the burden to prove three elements beyond a reasonable doubt: that Nathan (1) knowingly (2) caused the death of another person (3) after deliberation upon the matter. *State v. Hudson*, 154 S.W.3d 426, 429 (Mo. App. S.D. 2005). Section 565.002(3) defines the element of deliberation as cool reflection for any length of time no matter how brief. *Id.* at 429; Appendix at A39. The element of deliberation may be proven from the circumstances surrounding the crime. *Id.* Absent evidence of deliberation, an intentional killing is second-degree murder. *Id.*

Further, in a case of first-degree murder involving accomplice liability, the jury must find that the defendant himself cooly thought about the victim's death for some length of time. *State v. Thompson*, 112 S.W.3d 57, 62 (Mo. App. W.D. 2003) (*citing State v. Clemons*, 946 S.W.2d 206, 216 (Mo. banc 1997); *State v. O'Brien*, 857 S.W.2d 212, 217 (Mo. banc 1993)). "While the act of homicide may be imputed to an accomplice, the element of deliberation may not be imputed by association." *Clemons*, 946 S.W.2d at 216.

Proof that a defendant merely aided another with the purpose of facilitating an intentional killing is not enough to prove first-degree murder. *Thompson*, 112 S.W.3d at

62. "To make its case, the state must introduce evidence from which a reasonable juror could conclude beyond a reasonable doubt that the defendant (1) committed acts that aided his codefendant in killing the victims; (2) defendant's conscious purpose in committing the acts was that the victims be killed, *and* (3) defendant committed the acts after coolly deliberating on [the victim's death] for some amount of time, no matter how short." *Id.*

In *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994), this Court outlined three circumstances that are relevant to determine whether accomplice liability may be inferred for first degree murder. First, in *Gray*, the defendant or a co-defendant in the defendant's presence made a statement or exhibited conduct indicating an intent to kill prior to the murder; second, the defendant knew that a deadly weapon was to be used in the commission of a crime and that weapon was later used to kill the victim; and third, the defendant participated in the killing or continued with a criminal enterprise after it was apparent that the victim was to be killed. 887 S.W.2d at 376-77.

For sufficient evidence to support the conviction, thus, the State had to prove beyond a reasonable doubt that the shooter intended to cause the death of Lovadina, Koenig, or Stallis, and caused the death of Stallis, after deliberation upon the death. L.F. 133; *Thompson*, 112 S.W.3d at 62. The jury was given the option of finding either Coleman or Nathan was the shooter. L.F. 133. Then, further, the jury was instructed it must find that Nathan, "with the purpose of promoting or furthering" Stallis's death, aided or encouraged Coleman in causing the death of Stallis and did so after deliberation

upon "the matter," which was defined as "cool reflection upon the matter for any length of time no matter how brief." L.F. 133.

There was insufficient evidence that the shooter, alleged to be Coleman, deliberated upon causing the death of Gina Stallis. While both Coleman and Nathan had weapons and were making general threats to force people to give up their property, Stallis's death occurred suddenly after Lovadina jumped on the shooter and threw him against the wall attempting to disarm him. Tr. 424. The witnesses described the gun going off seven times quickly and hitting people randomly. Tr. 381, 424, 283. Lovadina was hit five times and Koenig was hit three times. Tr. 386, 483. Stallis, who was in a hallway some distance away, was fatally hit once. Tr. 490. Nathan was hit by a bullet, which demonstrates that the shooting was scattershot and random. Tr. 656. It is impossible to tell from the evidence which of the seven shots hit Stallis, though Koenig testified the last several shots were pointed directly at Lovadina. Tr. 486. The evidence did not show whether the bullet that killed Stallis hit her directly, or was one of the three bullets that passed through someone else before fatally striking her. Tr. 386, 489.

Even if the evidence showed an intent to shoot under circumstances practically certain to cause death, which under the law would "transfer" to Stallis even if she was killed unintentionally, there was no evidence or inference of the shooter's deliberation upon the death of Stallis. Section 565.003. The evidence only showed an intentional shooting with that culpable mental state transferring to the unintended victim, Stallis. The separate element of deliberation cannot "transfer" in the same way. This is demonstrated by the fact that in accomplice liability cases such as this one, the defendant must

personally deliberate upon or plan the victim's death. *State v. Wren*, 317 S.W.3d 111, 121 (Mo. App. E.D. 2010). If deliberation was simply a fungible culpable mental state that could be transferred to an unintended victim under Section 565.003.1, defendants would be responsible for the deliberation of their accomplices. In fact, the element of deliberation is unique, explaining why it cannot be imputed between codefendants. *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo. banc 1993). In the same way, deliberation cannot be imputed to an unintended victim.

Further, the law requires that Nathan, individually, have planned Stallis' death for some length of time. "A person is criminally responsible for the conduct of another when . . . before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid such other person in planning, committing or attempting to commit the offense." Section 562.041.1(2). In crimes other than first-degree murder, if the evidence is otherwise sufficient, "encouragement is enough." *State v. Sensabaugh*, 9 S.W.3d 677, 679 (Mo. App. E.D. 1999). But the rules are different for first-degree murder: to infer the deliberation of an accomplice under similar facts, it is necessary to show continued association with the criminal enterprise "after it is obvious that the victim would be killed." *Gray*, 887 S.W.2d at 376–77.

There were no facts presented or reasonable inference that Nathan, who was standing across the room and was shot in the hand, intended Stallis' death or offered any encouragement in the fraction of a second after Coleman suddenly began shooting. Tr. 656; *Gray*, 887 S.W.2d at 377.

At trial, the State pointed to evidence that Nathan made general threats during the robbery as well as a specific threat to Ida Rask. Tr. 377. But it is not reasonable, based on evidence of general threats during a robbery, to make the leap to the existence of "cool reflection" upon a person's death when the shooter made a sudden decision. It is true that it is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more evidentiary or "basic" facts. *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979). But the value of this inference, and its validity under the Due Process Clause, vary from case to case depending on the strength of the connection between the particular basic and elemental facts involved. *State v. Calvert*, 290 S.W.3d 189, 193 (Mo. App. W.D. 2009); *State v. Cox*, 752 S.W.2d 855, 857-58 (Mo. App. E.D. 1988). "[C]onjecture, suspicion, and surmise ... [are] not sufficient as the basis of a conviction." *State v. Carter*, 36 S.W.2d 917, 918 (Mo. 1931). Inferring "cool reflection" upon Stallis' death based upon threats Nathan made during a robbery is conjecture about his state of mind about Stallis's death, and is contrary to case law stating that Nathan needed to form the required state of mind after it was obvious that Coleman would shoot and kill Stallis. *Gray*, 887 S.W.2d at 376–77.

It is not possible to make that inference under the facts of this case. It is not possible to infer Nathan's "cool reflection" upon the death of Gina Stallis based upon the fact that she was suddenly shot and killed during a robbery, where the evidence was uncontroverted that the shooting was a spontaneous decision or reaction by Coleman. In *State v. Neal*, 14 S.W.3d 236 (Mo. App. W.D. 2000), for example, there was evidence

that the defendant started fight with the victim at a bar and, when the victim had pinned him to the ground, one of Neal's friends spontaneously struck the victim on the head with a pool cue. *Id.* at 238. Neal was charged and convicted as an accomplice to assault, and he argued on appeal that there was insufficient evidence to show that he aided his friend in assaulting the victim. *Id.* The Court noted that "presence at the scene of the crime, flight therefrom and association with others involved before, during and after commission of the crime are indicia of aiding and abetting." *Id.* at 240. However, the Court also found, "other courts who had found such evidence sufficient to support a conviction had relied upon significant evidence beyond these indicia of aiding and abetting." *Id.*

Here, Nathan would have had to consciously and calmly countenance Coleman's decision to shoot in the seconds it took for the gun to fire after Lovadina tried to disarm Coleman and the shots were fired. There was no evidence that happened. There are no underlying facts from which the jury could have reasonably inferred that Nathan deliberated upon Stallis' death because of the uniqueness of this case, which combines elements of transferred intent, accomplice liability, and evidence of a spontaneous decision to fire a gun during a robbery after one of the victims made a sudden move.

This is a case of second-degree murder, which Nathan admitted to, and no more. *Jackson*, 443 U.S. 307, 318 (1979). The trial court erred in denying Nathan' motion for judgment of acquittal at the close of all evidence because the State failed to prove first-degree murder beyond a reasonable doubt. Nathan was denied his rights to due process of law and to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Missouri Constitution. Nathan

respectfully requests this Court reverse his conviction and sentence on Count I as well as the associated count of armed criminal action.

II. The trial court erred in imposing sentence and judgment against Nathan, because Section 565.020 and Section 211.071 violate a child's constitutional rights to due process of law and protection against cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, in that (1) a child's age must constitutionally be considered at sentencing, which mandatory sentences of life without the possibility of parole do not allow, and this Court must order a remedy under *Miller v. Alabama,* 132 S.Ct. 2455 (2012); (2) the remedy should be a judgment of conviction for the lesser-included offense of second-degree murder on Count I since under Section 565.020 there is no constitutional penalty for first-degree murder that is authorized, and such a remedy must also include resentencing on all counts totaling ten consecutive life sentences, and an opportunity for jury sentencing, and (3) further, sentences of life that do not provide for the possibility of parole are categorically unconstitutional for those under eighteen under the Eighth and Fourteenth Amendments, as well as under the Missouri Constitution, and categorically impermissible for those for whom there was no jury finding that he killed or intended to kill.

Preservation

This assignment of error is preserved by Nathan's pretrial motions and by his motion for new trial. L.F. 60-74; Supp. L.F. 1-131; 134-135.

Standard of Review

Statutory interpretation is an issue of law and must be reviewed *de novo*, giving no deference to the trial court's determination. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998).

Discussion of Error

Pursuant to Sections 211.071 and 565.020, Nathan was sentenced to an automatic term of life imprisonment without the possibility of probation or parole for the crime of first-degree murder for the death of Gina Stallis, as well as ten consecutive life terms for other felonies. It was not alleged, and the jury did not find, that he was the shooter. L.F. 133.

A. Nathan's sentences are unconstitutional under *Graham* and *Miller*.

Before *Miller v. Alabama*, 132 S.Ct. 2455 (2012), juvenile offenders convicted of first-degree murder committed while under the age of eighteen were not entitled to adduce evidence in mitigation of punishment. *State v. Andrews*, 329 S.W.3d 369, 382 (Mo. banc 2010). Section 565.020 provides for only two possible punishments, neither of which can now be applied to a juvenile. *Id.*; Appendix at A39. *In Andrews*, Judges Wolff, Stith and Teitelman would have held that mandatory sentences of life without parole that do not allow the sentencing court to consider mitigating facts violate the Eighth Amendment since they "fail to ensure that [a] sentence is proportional to [the] crime." 329 S.W.3d at 388.

In *Miller*, the Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. *Id.* at 2463-2475. *Miller* held that juveniles who commit

homicide offenses must be sentenced in a way that is "individual," where mitigating evidence relating to their youth must be considered by the sentencing judge or jury. *Id*. at 2463-2469. "[A]ppropriate occasions for sentencing juveniles to this harshest possible penalty [are] uncommon." *Id.* at 2369.

Missouri's first-degree murder statute, apart from setting forth the elements of the offense, provides for only two possible penalties: death or life without parole. Section 565.020.2; Appendix at A39. It states, in relevant part, "Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor." *Id.* Since both of these alternative punishments are unconstitutional as applied to juvenile defendants under *Miller* and *Roper v. Simmons*, 543 U.S. 551 (2005), this statute is unconstitutional as applied to Nathan.

Because Nathan's first-degree murder conviction was secured under a statute that does not contain a constitutionally valid penalty for juvenile defendants, his first-degree murder conviction is void. "A criminal statute without a penalty is fundamentally nugatory." *State v. Harper*, 510 S.W.2d 749, 750 (Mo. App. W.D. 1974). This Court would have the authority to enter a judgment for the crime of second-degree murder. While the problem in this case is unusual, this Court has the power to enter a conviction for a lesser-included offense in certain cases "if the evidence was sufficient for the jury to find each of the elements and the jury was required to find those elements to enter the ill-fated conviction of the greater offense." *State v. O'Brien*, 857 S.W.2d 212, 220 (Mo. banc

1993). The lesser-included offense of second-degree murder is punishable as a class A felony from 10 to 30 years, or life, in prison. Section 558.011.1

In addition, because criminal defendants in Missouri have a statutory right to jury sentencing, Nathan should have the opportunity to present mitigating evidence before a jury upon remand. Section 557.036, Supp. 2003. Previously, Nathan waived jury sentencing, but that waiver is no longer valid because sentencing discretion was not possible at the time of trial. *Andrews*, 329 S.W.3d at 382. Now, under *Miller*, Nathan will face a range of punishment, and the sentencing authority will be required to consider an individualized sentence, taking "into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S.Ct. at 2469. Nathan's sentence must consider his age, evidence about his childhood, and other mitigating facts, similar to a case with an adult where the death penalty is an option. *Id.* at 2467. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Nathan's right to an individualized sentence within a range of punishment was not a known right at the time he waived jury sentencing.

Further, for many of the same reasons, Nathan must be resentenced on all counts upon which he was convicted, not just Count I. When sentence was imposed, the trial court sentenced Nathan to life without parole on Count I, and ten consecutive life sentences on other counts that were, by themselves, a functional sentence of life with no

possibility of parole. Tr. 977-78, 996-1004; Appendix at A1-A9.[3] Because Nathan faced an automatic life sentence with no parole on Count I, mitigating evidence that is now required under *Miller* could not be considered. Now that life without parole is no longer automatic, however, there would be a practical reason as well as a legal necessity to craft a different sentence.

The sentencing authority should have the opportunity to do that, and in fact must do so under *Miller*. The ten consecutive life sentences for non-homicide crimes that are consecutive to the life without parole sentence are contrary to *Graham v. Florida*, 130 S.Ct. 2011 (2010), as well as *Miller*'s command that lengthy sentences that stretch outside of a child's natural life expectancy are inappropriate in most cases. *Miller*, 132 S.Ct. at 2469 (stating, "appropriate occasions for sentencing juveniles to this harshest possible penalty [are] uncommon."); *Floyd v. State*, 87 So.3d 45, 47 (Fla. 1st DCA 2012) (reversing two consecutive forty-year sentences because they were the "functional equivalent of a life without parole sentence and will not provide [the defendant] with a

[3] Section 558.019.3 and 14 CSR 80-2.010 require a defendant to serve 85% of each of the "dangerous felonies" for which he was sentenced, which include assault in the first degree, kidnapping, and robbery in the first degree, as well as 15% of each armed criminal action sentence. A life sentence is calculated to be thirty years. Section 558.019.4(2). In addition to Counts I and II, there are ten consecutive life sentences in this case. These sentences for non-homicide crimes push Nathan's earliest possible release date well outside of his natural life expectancy.

meaningful or realistic opportunity to obtain release."). All of Nathan's sentences must be reconsidered in light of the change in the law as stated in *Miller*. If the other sentences are not also reconsidered, Nathan will still be serving life in prison without the possibility of release.

"[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, at 2466. Any mitigating qualities found in a youthful offender must be considered. *Id.* The California Supreme Court, in *People v. Caballero*, 282 P.3d 291 (Ca. 2012), considered whether a 110-year sentence for a juvenile convicted of three counts of attempted murder violated the Eighth Amendment under *Graham*. The court held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Id.* at 295.

The remedy, after *Miller*, is to remand for resentencing. This Court should reverse Nathan's first-degree murder conviction, as Section 565.020 is unconstitutional as applied to him. Where a criminal statute is unconstitutional as applied to a particular defendant, the conviction must be reversed. *See, e.g., State v. Molsbee*, 316 S.W.3d 549, 553-554 (Mo. App. W.D. 2010). The Court may enter a sentence and judgment for the lesser-included offense of second-degree murder for Count I. Then, after a hearing, the sentencing authority must impose a new sentence within the statutory range of punishment for a class A felony on Count I, along with resentencing on all other counts. These sentences should follow the direction of *Miller* that "appropriate occasions for

sentencing juveniles to this harshest possible penalty [are] uncommon." *Miller*, 132 S.Ct. at 2469.

B. The sentence of life without parole is disproportionate and categorically unconstitutional for those under eighteen as well as those juvenile defendants a jury did not find killed, or intended to kill.

The Court in *Miller* specifically did not consider the argument that the Eighth Amendment categorically bars life without parole for juveniles. *Miller*, 132 S.Ct. at 2469. Life without parole is uniquely harsh for a juvenile, who will serve both a greater number of years as well as a greater percentage of his life in prison than an adult. *Graham*, 130 S.Ct. at 2027; *Roper*, 543 U.S. at 572.

Courts, in determining whether a punishment is grossly disproportionate to the offense, must consider: (1) whether there is a national consensus against imposing the punishment for the offense; (2) the moral culpability of the offenders at issue in light of their crimes and characteristics; (3) the severity of the punishment; and (4) whether the punishment serves legitimate penological goals. *Graham*, 130 S.Ct. at 2022.

National Consensus. The best evidence of a national consensus with respect to the appropriateness of a particular punishment for a particular offense is the legislation enacted by the nation's legislatures. *Atkins v. Virginia*, 536 U.S. 304, 312, (2002). And yet, "[a]ctual sentencing practices are [also] an important part of [a court's] inquiry into consensus." *Graham*, 130 S.Ct. at 2023. In his dissent in *Andrews*, Judge Wolff stated:

> There are about 2,600 offenders currently serving life without parole for homicides committed while they were juveniles. Seven states and the District of

> Columbia prohibit life without parole for juveniles, four states allow life without parole but do not impose it, and 40 states and the federal system actively sentence juveniles to life without parole. Legislation does not seem to be indicative of a national consensus against life without parole for juveniles. The absence of legislation prohibiting a particular type of sentence, however, is not conclusive as to contemporary standards of decency. *See Graham*, 130 S.Ct. at 2022 (looking past legislation to actual sentencing practices); *Roper*, 543 U.S. at 572, 125 S.Ct. 1183 (looking past legislation to actual sentencing practices).

Andrews, 329 S.W.3d at 382-383.

In practice, actual sentences given can show evolving standards. *Id.* Notably, "the statistics are inconclusive because of the lack of discretion in many states' sentencing laws." *Id.* Before *Miller*, "[s]ixteen states have a mandatory juvenile sentencing statute (meaning that if a juvenile commits certain crimes, he or she must serve a mandatory sentence of life without parole), and 25 states have discretionary life without parole sentences (meaning that the sentence is authorized by statute but courts have discretion regarding if and when they sentence a juvenile to life without parole)." *Id.* So, "[b]ecause courts have been mandated by statute to impose life without parole in the majority of states where such a sentence is permitted, it is impossible to determine whether sentencing practices show that standards have evolved because, in practice, many courts have no discretion in this area of sentencing."

Moral Culpability. In *Graham*, 130 S.Ct. at 2026, the Supreme Court stated:

> " *Roper* . . . established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult." (Citations and internal quotation marks omitted.)

"The lessened culpability of a juvenile—when compared to the greater relative severity of the punishment—does not meet contemporary standards of decency." *Andrews*, 329 S.W.3d at 386 (Wolff, dissenting).

The Punishment. Life imprisonment without the possibility of parole is the second most severe penalty permitted by our law. In *Graham*, 130 S.Ct. at 2027–28, the Supreme Court stated:

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties

> without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.
>
> * * *
>
> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored.

(Citations omitted.)

Penological Goals. Four goals of penal sanctions have been recognized as legitimate: retribution, deterrence, incapacitation, and rehabilitation. *Graham,* at 2028. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.*

Society is entitled to impose severe sanctions on a juvenile offender "to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Id.* But "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison,* 481 U.S. at 149 (1987). So, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Roper,* 543 U.S. at 571.

Deterrence, on the other hand, is not served by imposing life without parole, as opposed to imposing life with parole, on a juvenile offender. "[T]he same characteristics

that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Id.* Because juveniles' lack of maturity and underdeveloped sense of responsibility often result in "impetuous and ill-considered actions and decisions," they are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 130 S.Ct. at 2028–29. To the extent that any punishment has a deterrent effect on a teenager, the punishment of life with the possibility of parole is itself a severe sanction, especially for a youth.

Regarding the penological goal of incapacitation, public safety can be ensured with life sentences and the parole system. As for rehabilitation, a sentence of life imprisonment without parole . . . cannot be justified by [it]." *Id.* at 2029–30. "The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id.* at 2030.

Further, after *Miller*, there should be a categorical ban on life without parole sentences for juvenile defendants who were alleged to be accomplices to first-degree murder when the conduct elements of the crime were committed by another. In *Graham*, which held that life without parole is unconstitutional when applied to those convicted of nonhomicide offenses, the Court's analysis relied on the principle that the ultimate punishment was not permissible for those juvenile offenders who did not "kill or intend to kill." 130 S.Ct. at 2027. It was not alleged, and the jury did not find, that Nathan was the shooter. L.F. 133. The jury had the option of finding either Coleman or Nathan committed the elements of the crime. L.F. 133. In *Miller*, two justices agreed with this

view that the Eighth Amendment categorically forbids life without parole unless the juvenile homicide defendant "killed" or "intended to kill the . . . victim." *Miller*, 132 S.Ct. at 2475-2477 (Breyer, J. concurring).

Nathan requests that this Court reverse the trial court's ruling and find Missouri's sentencing scheme for first-degree murder unconstitutional under *Graham* and *Miller* as applied to juveniles, and remand. Any sentences upon remand should be with the direction that sentences totaling life without a meaningful opportunity for release should be "uncommon . . . and [limited to] the rare juvenile offender whose crime reflect irreparable corruption." *Miller*, 132 S.Ct. at 2469.

III. The trial court erred in imposing sentence and judgment against Nathan, because Section 211.071 violates procedural and substantive due process rights and the right to jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the juvenile certification procedure in Missouri (1) presumes the allegations to be true without any inquiry into the facts of the alleged offense, resulting in arbitrary certification based upon mere allegations, dramatically increasing the range of punishment for which the child is exposed without the opportunity to be heard or any findings on the facts of the underlying offense, and (2) allows for certification, increasing the penalty for a crime beyond the prescribed statutory maximum for a juvenile, without submitting the statutory factors upon which certification is based to a jury.

Preservation

This assignment of error is preserved by Nathan' pretrial motions and by his motion for new trial. L.F. 60-74; Supp. L.F. 1-131; 134-135.

Standard of Review

Statutory interpretation is an issue of law and must be reviewed *de novo*, giving no deference to the trial court's determination. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998).

Discussion of Error

Pursuant to Sections 211.071 and 565.020 RSMo, Nathan was sentenced to an automatic term of life imprisonment without the possibility of probation or parole for

having committed first-degree murder, along with ten consecutive life sentences for related crimes. Nathan was subjected to these lengthy sentences pursuant to his adult certification. This certification procedure is unconstitutional.

To successfully raise a claim that the state has denied a person procedural due process, the claimant must establish the loss of a protectable property or liberty interest. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). Whether a constitutional violation has occurred depends in part on "what process the State provided, and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). The United States Supreme Court has held that the imposition of juvenile court jurisdiction provides a person with a protectable interest in a juvenile adjudication. *Kent v. United States*, 383 U.S. 541, 553–56 (1966). The Court held that a juvenile transfer proceeding is a "critically important" action in determining "vitally important statutory rights of the juvenile." *Id.* at 546. The "right to a judicial hearing is the classic protection provided by the Due Process Clause against arbitrary deprivations of life, liberty, or property." *Larson v. City of Fergus Falls*, 229 F.3d 692, 697 (8th Cir. 2000).

In Missouri, "the quantum of evidence pointing to the juvenile's guilt is of no concern to the determination to waive jurisdiction." *State v. Simpson*, 836 S.W.2d 75, 82 (Mo. App. S.D. 1992) (*citing State v. Tate*, 637 S.W.2d 67, 71 (Mo. App. E.D. 1982)). At the same time, however, "the serious nature of the crime is the dominant criterion among the ten factors" the juvenile court considers. *State v. Thomas*, 70 S.W.3d 496, 504 (Mo. App. E.D. 2002); Section 211.071; Appendix at A40.

It is inapposite and contrary to a juvenile's right to procedural due process for the juvenile court to not concern itself at all with the quantum of evidence pointing to the juvenile's guilt – presuming guilt - while at the same time using the "nature of the crime" as its dominant criterion. *Kent* demands "full investigation." 383 U.S. at 553 n. 5. "It prevents routine waiver in certain classes of alleged crimes." *Id.* It requires a judgment in each case based on "an inquiry . . . into the facts of the alleged offense." *Id.*

Of particular consequence in this case is that Nathan, as a certified juvenile, faced a mandatory sentence of life without the possibility of parole. He ultimately received a sentence of life without parole, plus ten consecutive life sentences, where he has no chance of being paroled for the rest of his life. The vital nature of the liberty interest at issue in this case, thus, calls for equally heightened procedural protections at the certification level that would ascertain Nathan's exact level of culpability. It is simply not enough for the juvenile court to guess what, exactly, Nathan did to deserve being relinquished to the adult system.

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldsridge*, 424 U.S. 319 (1976). Here, the juvenile officer's petition alleged:

> The juvenile, in violation of Sections 562.041 and 565.020.1, RSMo committed the offense of MURDER IN THE FIRST DEGREE, a class A felony, in that on or about 10/5/09, in the City of St. Louis, State of Missouri, the Juvenile after deliberation, knowingly caused the death of Gina Stallis by shooting her with a pistol.

L.F. 85. At his trial in adult court, however, the State's evidence painted a dramatically different picture. The State's evidence was that Mario Coleman fired the shot that killed Stallis as well as wounded two others, including Nathan himself. The trial court found "slender" evidence of deliberation to support first-degree murder. Tr. 903. The facts of the case differ dramatically from the juvenile officer's bare assertion that Nathan simply shot Gina Stallis with a pistol. L.F. 85. Some fact-finding at the certification level that attempted to ascertain Nathan's role in the crime was essential, especially in cases where, as here, the reality was that the State of Missouri's evidence was dramatically different from the facts that were asserted in juvenile court. The juvenile division judge needed to know salient facts about Nathan's level of relative culpability in order to make an informed decision where the child's exposure after certification is so great. Even under a scheme where no possibility of parole is no longer mandatory, a juvenile charged with serious crimes will face multiple life sentences that could be imposed consecutively, or even without the possibility of parole.

Further, there are also no findings of fact by a jury on the Section 211 factors that would satisfy the Sixth Amendment. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As noted by Judge Stith in her dissent in *Andrews*:

> In many cases, Missouri's juvenile system does allow for "an intimate, informal protective proceeding" to occur. But in the case of a 15–year–old male charged with first-degree murder for shooting a police officer—in the case of Antonio, in other words—the certification process undoubtedly is not such a process. It is the same adversarial process that will be used after

> the juvenile proceeding is dismissed and the child is prosecuted as an adult. In this case, and undoubtedly in most such cases where a juvenile is charged with a serious violent felony, the prosecutor wanted the juvenile to be punished for longer than six years. The state may do so, but *only* in a manner that preserves the right to a jury trial on the facts that can result in his punishment or would enhance his punishment.

Andrews, 329 S.W.3d at 391-392. The right to a jury is guaranteed to all adults in "serious" criminal cases by both the United States and Missouri constitutions. "It is a fundamental right, premised on the jury's traditional function of finding the essential facts necessary to impose a punishment." *Id.* (*citing Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968); *Blakely v. Washington*, 542 U.S. 296, 309 (2004); *State v. Baxter*, 204 S.W.3d 650, 652–53 (Mo. banc 2006)).

For this reason, the United States Supreme Court has held repeatedly that it "'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Andrews*, at 392 (*citing Apprendi*, 530 U.S. at 490). "Other than the fact of a prior conviction, 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.*

Applying these principles, *Apprendi* found that it violated the Sixth Amendment right to jury trial for a judge, rather than the jury, to make the factual findings that allowed the judge to sentence the defendant to a 12–year term, because without the trial

judge's finding, the defendant could have received no more than a 10–year term. 530 U.S. at 471, 476–97. The same reasoning applies in this context.

Nathan requests that this Court reverse the trial court's ruling and find Section 211.071 and Section 565.050 unconstitutional, either on the basis that it violates a juvenile's Sixth Amendment right to jury trial under *Apprendi*, or based upon its deficiencies under the Fifth Amendment, which grants criminal defendants, including certified juveniles, the right to due process of law.

IV. The trial court plainly erred in submitting Instruction 5 to the jury, because this verdict director for the crime of first-degree murder misdirected the jury, failed to instruct the jury on the applicable law, relieved the State of its burden on a contested issue, and affected the verdict in violation of Nathan's right to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the definition of deliberation is (1) vague, confusing, internally inconsistent, and misleading under the facts of this case because it fails to specify what compromises "the matter," and (2) the failure to so specify under the facts of this case gave the jury a roving commission to decide for itself what constitutes "the matter" upon which Nathan coolly reflected.

Preservation

Because trial counsel failed to object to the instruction on this basis, the error is arguably subject to plain error review. Rule 30.20.

Standard of Review

"Where the defense did not object to an instruction, we can review only for plain error." *State v. Reed*, 243 S.W.3d 538, 540 (Mo. App. E.D. 2008). "We grant relief under the plain error rule only if the trial court's error violated the appellant's substantial rights resulting in manifest injustice or a miscarriage of justice." *Id.* (*citing* Rule 30.20 and *State v. Sidebottom*, 753 S.W.2d 915, 920 (Mo. banc 1988)). Under plain error review, a party has to demonstrate the instruction:

> so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict. In determining whether the misdirection likely affected the jury's verdict, an appellate court will be more inclined to reverse in cases where the erroneous instruction did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime.

Id. However, "[e]ven if no objection is made, the failure to instruct upon a defense supported by the evidence is plain error affecting substantial rights." *State v. Westfall*, 75 S.W.3d 278, 281 (Mo. banc 2002).

Discussion of Error

A verdict-directing instruction must contain "each element of the offense charged" and must "require the jury to find every fact necessary to constitute the essential elements of the offense charged." *State v. Krause*, 682 S.W.2d 55, 56 (Mo. App. E.D. 1985).

In "reviewing claimed instructional error," the appellate court "view[s] the evidence most favorably to the instruction, disregard[s] contrary evidence, and revers[es]" when the [challenging] party "shows that the instruction misdirected, misled, or confused the jury, and there is a substantial indication of prejudice." *State v. Miner*, 363 S.W.3d 145, 148-149 (Mo. App. E.D. 2012). An instruction must "so misdirect ... the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *State v. Lemons*, 294 S.W.3d 65, 71 (Mo. App. S.D. 2009).

> The instruction at issue states that for the jury to find Nathan guilty of first-degree murder:
>
> . . . the defendant Ledale Nathan or Mario Coleman caused the death of Gina Stallis by shooting at Isabella Lovadina or Nicholas Koenig or Gina Stallis, and
>
> . . . that defendant Ledale Nathan or Mario Coleman knew or was aware that his conduct was causing or was practically certain to cause the death of Isabella Lovadina or Nicholas Koenig or Gina Stallis, and
>
> . . . that defendant Ledale Nathan or Mario Coleman did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,
>
> . . . . [and] with the purpose of promoting or furthering the death of Gina Stallis, the defendant Ledale Nathan aided or encouraged Mario Coleman in causing the death of Gina Stallis and did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief.

L.F. 133; Appendix at A38 (Instruction 5).

Under the facts of this case, the instruction is vague. It is confusing, internally inconsistent, and misleading. It fails to specify what compromises "the matter," and the failure to so specify under the facts of this case gives the jury the freedom to decide what constitutes "the matter" upon which Coleman and/or Nathan coolly reflected. L.F. 133.

An instruction results in a "roving commission" when "it assumes a disputed fact or posits an abstract legal question that allows the jury to roam freely through the evidence and choose any facts [that] suited its fancy or its perception of logic to impose

liability." *State v. Scott*, 278 S.W.3d 208, 214 (Mo. App. W.D. 2009) (quoting *Newell Rubbermaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164, 174 (Mo. App. E.D. 2007)). "To avoid a roving commission, the court must instruct the jurors regarding the specific conduct that renders the defendant liable." *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 594 (Mo. App. W.D. 2008).

MAI-CR 3d 314.02, and the verdict director in this case, do not explain or define to what "cool reflection upon the matter" refers. Does it, for example, mean cool reflection upon purposely or knowingly killing or causing to be killed the person who was actually killed? Or, is it cool reflection upon purposely or knowingly killing or causing to be killed the person who was intended to be killed? Is it simply cool reflection on killing in general? Or is it, as the jury likely believed under the facts of this case, simply cool reflection on the criminal enterprise as a whole?

Because it is not clear what comprises "the matter" that requires the "cool reflection" necessary for the element of deliberation, the verdict director gives each juror a roving commission to decide exactly what "the matter" is that requires cool reflection. *See State v. Mitchell*, 704 S.W.2d 280 (Mo. App. S.D. 1986). Some jurors may decide that the matter requiring cool reflection is purposely or knowingly killing or causing to be killed the person who was actually killed; others may decide "the matter" of cool reflection is purposely or knowingly killing or causing to be killed the person who was intended to be killed; still others may find it is sufficient for the defendant to coolly reflect on the criminal enterprise as a whole.

Under the facts of this case, the ambiguity in the instruction excused the jury from finding every fact necessary to constitute the essential elements of the offense charged. *Krause*, 682 S.W.2d at 56. It likely misled or confused the jury under these facts, where "the matter" is not so clear. In fact, "the matter" is the intentional murder of Gina Stallis. *Thompson*, 112 S.W.3d at 62. The reason the ambiguity matters in this case is that unlike many cases, there are a number of things going on factually. There are three individuals who were possible "targets" according to the State; there were several people hit by bullets, two accomplices, and a robbery, burglary, and kidnapping happening as well. The jury was likely misled, or each juror could have easily believed "the matter" meant different things under these complicated facts.

This defect in the verdict director, under the facts of this case, resulted in an unacceptable amount of ambiguity in this jury instruction, relieving the State from its burden the proof and likely affecting the verdict, Nathan asks for a new trial.

V. The trial court erred in overruling post-trial motion for new trial alleging the state failed to disclose before trial, pursuant to Rule 25.03(A)(7), two municipal stealing convictions of witness Koenig because this discovery violation denied Nathan's rights to due process, a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the State did not disclose this information until after trial, and Koenig was the only witness to state that the shooter pointed the gun at Lovadina while she was on the ground, supporting an inference of intent, and such evidence would have been admissible to impeach Koenig's credibility, and where the evidence supporting Nathan's guilt of first degree murder was slim.

Preservation

After trial, the defense discovered that the State had failed to comply with Rule 25.03(A)(7), which places an affirmative duty upon the State to provide to the defendant any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or at a trial. The defense included the issue in a timely-filed motion for new trial filed on May 4, 2011. Supp. L.F. 133. On May 4, 2011, counsel also filed a motion to compel the State to search government records to determine if any witnesses at the trial had criminal convictions that were not disclosed. L.F. 197. On May 13, 2011, the prosecutor informed the court that none of his witnesses had criminal convictions. L.F. 205. Counsel, on May 27, 2011, file a supplemental motion requesting a new trial based on the State's failure to disclose that Nicholas Koenig had two prior stealing convictions

from the City of Webster Groves. L.F. 206. The convictions involved stealing liquor from grocery stores. L.F. 206.

The trial court addressed the issue in written findings. L.F. 258. The matter is preserved for review.

Standard of Review

The determination of whether the State violated a rule of discovery is reviewable on appeal for an abuse of discretion. *State v. Bynum*, 299 S.W.3d 52, 62 (Mo. App. E.D. 2009) (*citing State v. Delancy*, 258 S.W.3d 110, 115 (Mo. App. E.D.2008); *State v. Royal*, 610 S.W.2d 946, 951 (Mo. banc 1981)). The remedy is also within the trial court's discretion. *Delancy*, 258 S.W.3d at 115. The trial court abuses its discretion when the fashioned remedy results in fundamental unfairness to the defendant. *Id.* Where the state has failed to respond promptly and fully to the defendant's disclosure request, the question is whether the failure has resulted in fundamental unfairness or prejudice to the defendant. *State v. Scott*, 647 S.W.2d 601, 606 (Mo. App. W.D. 1983).

Confrontation Clause violations are subject to the harmless error test found in *Chapman v. California*, 386 U.S. 18, 24 (1967). *State v. March*, 216 S.W.3d 664, 667 (Mo. banc 2007). That test requires that the error be harmless beyond a reasonable doubt, meaning that "there is no reasonable doubt that the error's admission failed to contribute to the jury's verdict." *Id.*

Discussion of Error

The Fifth and Fourteenth Amendments entitle criminal defendants to obtain material evidence relating to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83,

87 (1963). The discovery rules are designed to prevent surprise and deception. *State v. Wells*, 639 S.W.2d 563, 566 (Mo. banc 1982). The State must disclose all information about which it knows, or which it may learn "by reasonable inquiry." *State v. Varner*, 837 S.W. 44, 45 (Mo. App. E.D. 1992).

Rule 25.03(A) mandates that "any record of prior criminal convictions of person the state intends to call as witnesses" are to be disclosed by the State without court order. The broad rights of discovery afforded criminal defendants by our Rule 25 have constitutional underpinning rooted in due process." *State v. Wilkinson*, 606 S.W.2d 632, 636 (Mo. banc 1980); *see also Merriweather v. State*, 294 S.W.3d 52, 55 (Mo. banc 2009) ("The due process implications of a failure to disclose potentially exculpatory material render Merriweather's claim of a Rule 25.03 violation an issue of 'fundamental fairness.'"). Section 491.050 provides for the use of misdemeanor or felony convictions to impeach credibility in both civil and criminal trials.[4] The convictions must be for felonies or misdemeanors, but this principle does not extend to municipal ordinance

[4] The statute reads, "Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of *nolo contendere*, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

violations. *State v. Moore* 84 S.W.3d 564, 567 (Mo. App. S.D. 2002). However, "[i]t has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character." *Mitchell v. Kardesch,* 313 S.W.3d 667, 675 (Mo. banc 2010). "He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge." *Id.* "This includes admission of evidence of the witness's character for truthfulness and veracity." *Id.*

These prior convictions, contrary to the trial court's finding, were relevant to Koenig's character for truth and veracity. As a general rule, impeachment evidence 'should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity[.]' " *State v. Couch*, 256 S.W.3d 64, 68 (Mo. banc 2008) . The question is whether "admission of the extrinsic evidence would be more probative or more prejudicial." *Mitchell*, 313 S.W.3d at 682. A record of (repeatedly) stealing liquor from grocery stores has a high tendency to impeach a witness's character for truth and veracity. It is of a different nature than, for example, a ticket for an expired car registration. This evidence was relevant impeachment material.

Compliance with the discovery rules is not discretionary because "the rules of criminal discovery are not mere etiquette but the festoons of due process." *State v. Stapleton,* 539 S.W.2d 655, 659 (Mo. App. K.C. 1976). "The discovery rules seek to foster informed pleas, expedited trials, a minimum of surprise, and the opportunity for effective cross-examination," and the State's failure to comply with the applicable

discovery rules "serve[s] only to thwart these goals." *State v. Wells*, 639 S.W.2d 563, 566 (Mo. banc 1982).

The State's failure to disclose these convictions resulted in fundamental unfairness and was not harmless beyond a reasonable doubt. Koenig's testimony was not cumulative to the other witnesses on at least one key point: he was the only witness who testified the shooter intentionally pointed the gun at someone and his testimony was relevant to the shooter's intent and deliberation. Tr. 480. On the issue of the sufficiency of the evidence for murder in the first degree, the State pointed to this evidence as evidence of Mario Coleman's intent to kill, which was a necessary finding of fact to support Nathan's guilt of first-degree murder. L.F. 133.

Nathan's convictions must be reversed and remanded for a new trial.

VI. The trial court abused its discretion in refusing to disclose to the defense information presented to the court *in camera* about defense witness Koenig, because this denied Nathan's rights to due process, a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that while the information in the written summary is still under seal, undersigned counsel has viewed it and this information may be relevant to Koenig's credibility as a witness, and Koenig's credibility was important to the defense because Koenig was the only witness who testified the shooter intentionally pointed the gun at someone, which was relevant to the shooter's intent and deliberation.

Preservation

The prosecutor in this case deposited a written summary that he prepared of the evidence in question and asked the court to review the summary *in camera*. Tr. 3. The court reviewed the document to determine whether the evidence in question would be admissible. Tr. 3. Since the defense was not allowed to see the document, counsel objected generally and stated that she believed the evidence would be relevant to the impeachment of Koenig because it concerned drug use. Tr. 5, 542-551. In his motion for new trial, Appellant stated that the trial court erred in refusing to disclose this summary, and that "[t]he testimony of witness Koenig during the trial that he continued to use heroin "off and on" from the time of this incident until the time of trial raises concerns that either that witness, or another witness, was involved in criminal activity

that should have been disclosed to the defendant." L.F. 133-134; Tr.532-534 (testimony regarding Koenig's heroin abuse).

Standard of Review

Courts will review a claim that a trial court denied relevant discovery for an abuse of discretion. *State v. Jackson*, 353 S.W.3d 657, 659 (Mo. App. S.D. 2011). But when the trial court misapplies the law, the ruling is not due the same deference as is an exercise of discretion. *State v. Foust*, 920 S.W. 949, 955 (Mo. App. E.D. 1996).

When reviewing a claim that a defendant was denied meaningful discovery, this Court determines whether the trial court abused its discretion in such a way as to result in fundamental unfairness. *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004). In the context of a discovery dispute, "'[f]undamental unfairness occurs when the state's failure to disclose results in defendant's genuine surprise and the surprise prevents meaningful efforts to consider and prepare a strategy for addressing the evidence.'" *Id.* (quoting *State v. Tisius*, 92 S.W.3d 751, 762 (Mo. banc 2002)). A "'defendant is not entitled to information on the mere possibility that it might be helpful, but must make 'some plausible showing' how the information would have been material and favorable.'" *Id.* (*quoting State v. Goodwin*, 65 S.W.3d 17, 21 (Mo. App. S.D. 2001)).

Discussion of Error

The prosecutor in this case deposited a summary that he prepared describing a law enforcement contact that Nicholas Koenig had after the crime in this case. Tr. 1-12. The court reviewed the summary *in camera* and declared that the subject matter would be inadmissible to impeach Koenig. Tr. 10.

This was an abuse of discretion. "To protect privileged material *and* a defendant's need for evidence, the United States Supreme Court established that the 'trial court should conduct an *in camera* inspection of the evidence, and determine if it is relevant and material.'" *State v. Newton,* 925 S.W.2d 468, 471 (Mo. App. E.D.1996) (*citing United States v. Nixon*, 418 U.S. 683, 714–15 (1974)). A defendant's due process rights are not violated by an *in camera* review and a denial of disclosure if no relevant information is contained therein. *State v. Koenig*, 115 S.W.3d 408, 415 (Mo. App. S.D. 2003).

Relevant evidence tends to confirm or refute a fact in issue, or corroborate evidence that is relevant and pertains to the primary issue in the case. *State v. Freeman,* 212 S.W.3d 173, 176 (Mo. App. S.D.2007). Further, "[a] fundamental interest secured by the confrontation clause is a defendant's right of cross-examination." *State v. Moorehead*, 811 S.W.2d 425, 427 (Mo. App. E.D.1991). "This right of confrontation encompasses the right to cross-examine a witness to determine the accuracy of his/her testimony." *Id.* However, a defendant's right to cross-examine his accuser is not without limitation. *State v. DeClue,* 128 S.W.3d 864, 872 (Mo. App. S.D. 2001). "The opportunity for effective cross-examination does not necessarily include 'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* (quoting *State v. Guinn*, 58 S.W.3d 538, 547 (Mo. App. W.D. 2001)). "The right to confront is satisfied if defense counsel has wide latitude at trial to cross-examine witnesses; it does not include a right to pretrial disclosure of any and all information that might assist cross-examination." *Taylor,* 944 S.W.2d at 931. While a trial court has the

discretion to impose reasonable limits on cross-examination, preventing the accused from revealing bias, motive, or prejudice necessary for the jury's evaluation of an adverse witness' credibility is "limitation beyond reason." *Olden v. Kentucky*, 488 U.S. 227, 232 (1988). "The scope of a judge's discretion ends at the threshold of the rights secured by the Confrontation Clause of the Constitution." *Thomas*, 118 S.W.3d 686 at 690.

Confrontation Clause violations are subject to the harmless error test found in *Chapman v. California*, 386 U.S. 18, 24 (1967). *State v. March*, 216 S.W.3d 664, 667 (Mo. banc 2007). That test requires that the error be harmless beyond a reasonable doubt, meaning that "there is no reasonable doubt that the error's admission failed to contribute to the jury's verdict." *Id.*

Here, undersigned counsel has reviewed the document in question and believes it is essentially impossible to tell from the prosecutor's "summary" of the evidence if it is relevant or material. It is written in such a vague manner that it was essentially impossible for the trial court to have any idea whether it was material. Certainly, in light of the fact that Koenig admitted to being a street drug user but denied current drug use or drug use at the time of the crime, there is a high likelihood that further investigation of the subject matter in the sealed document would provide relevant impeachment material.

Counsel at trial stated she believed the evidence in question related to drug trafficking, and that information would be relevant to impeach Koenig, and would support the defense's contention that this was not a random crime, but rather an attempt to collect a drug debt from Koenig. Tr. 547-548. Without further inquiry and discovery on the matters that underlie the "summary" the ruling on the exclusion of this evidence

was unsupported by any substantial evidence and denied Nathan's rights to due process, a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This information was likely relevant to Koenig's credibility as a witness, and it impossible to tell for sure from the prosecutor's summary, which was written in a very imprecise and incomplete manner. Since the document was under seal and not shared with anyone other than the judge, there was no reason for the prosecutor to not be completely forthcoming on the matters in question. Further, because defense counsel below was not allowed to see the document, it was impossible for her to make this same request at the trial court level that undersigned counsel is making now.

Koenig's credibility was very important. His testimony was not cumulative: he was the only witness who testified the shooter intentionally pointed the gun at someone which was relevant to the shooter's intent and deliberation. Tr. 480. On the issue of the sufficiency of the evidence for murder in the first degree, the State pointed to this evidence as evidence of Mario Coleman's intent to kill, which was a necessary finding of fact to support Nathan's guilt of first degree murder. L.F. 133.

Nathan asks for this Court to remand for a hearing upon which there is more inquiry as to precisely what matters underlie the "summary" that was prepared by the State and put under seal in this case.

VII. The trial court erred in denying Nathan's motion to dismiss charges that were not certified by the juvenile court, because this denied Nathan's rights to notice and due process, to a fair trial, to confront and cross-examine witnesses, and present a defense, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that (1) Counts 11, 12, 21 and 22 alleging robbery and kidnapping against victim Stallis were not part of the juvenile court petition, (2) by proceeding to trial on these counts that were not certified, the trial court violated Section 211.071 and Nathan's right to notice and hearing on the issue of whether those offenses should have been dismissed in juvenile court and transferred to a court of general jurisdiction, and (3) the court of general jurisdiction had no jurisdiction over those counts.

Preservation

Nathan filed a pretrial motion to dismiss the charges that were not certified by the juvenile court. L.F. 91. There was argument on the record on this issue. Tr. 12-19. The issue was included in the motion for new trial. Supp. L.F. 135. The trial court granted that motion in part and denied it in part. L.F. 247. The trial court dismissed Counts 9, 10, 13, and 24 after the verdict relating to Rosemary Whitrock, because the juvenile court proceedings never charged or concerned any offenses as to her. L.F. 247. It left the remaining verdicts intact. *Id.*

Standard of Review

Appellate courts review matters of jurisdiction *de novo. Bounds v. O'Brien*, 134 S.W.3d 666, 670 (Mo. App. E.D. 2004).

Discussion of Error

A dismissal of a petition in juvenile court to allow a prosecution under the general law pursuant to § 211.071 (certification) is not a final order from which an appeal is allowed. *In re T.J.H.*, 479 S.W.2d 433, 434 (Mo. banc 1972). The exclusive method for review of a juvenile division's order is to file a motion to dismiss the indictment in the court of general jurisdiction." *Id.* Here, such a motion was filed, challenging the court's jurisdiction, and the court ruled upon it after the jury reached verdicts on all the charged counts. L.F. 244-247.

The petition, filed in the juvenile court, alleged Nathan shot and killed Gina Stallis, committed assault in the first degree against Isabella Lovadina and Nicholas Koenig, first degree burglary, robbery in the first degree of Ida Rask, attempted robbery of Lovadina and Koenig, and felonious restraint of Lovadina, Koenig, and Rask. L.F. 85-86. The petition alleged a firearm was used to commit the murder, assault, and robbery counts. L.F. 85-86.

Upon certification, the prosecutor may charge any offense fairly comprised in the facts alleged in the juvenile petition, even if a specific offense or statute is not referred to in the juvenile petition. *Scott v. State*, 691 S.W.2d 291, 294 (Mo. App. W.D. 1985). The Court was correct in finding it did not have jurisdiction over those offenses charging acts against Rosemary Whitrock (Counts 9, 10, 23 and 24). L.F. 247. Her name appears nowhere in the materials that were before the juvenile court, including the petition or the

juvenile court order. L.F. 85-90. The juvenile petition must allege sufficient facts to give the defendant fair notice of the charges and an opportunity to respond. L.F. 245. The trial court found, "If the facts alleged in the petition do not suffice to give notice of an offense, the petition is insufficient to permit . . . transfer to the circuit court. L.F. 245 (*citing T.S.G. v. Juvenile Officer*, 322 S.W.3d 145 (Mo. App. W.D. 2010); *State ex rel. D.V. v. Cook*, 495 S.W.2d 127 (Mo. App. K.C. 1973).

Despite its reasoning as to victim Whitrock, the court did not dismiss Counts 11, 12, 21 and 22 (robbery and kidnapping of Gina Stallis) through this same reasoning. The petition only alleged the defendant shot and killed Stallis. L.F. 85-86. There were no facts alleged suggesting she was robbed, however. There were also no facts or allegation that she was confined. This is not a question of the prosecutor permissibly charging a related crime to the one alleged in the juvenile court petition; for example, kidnapping in lieu of felonious restraint, which would be based on the same underlying facts. In contrast, here, the facts alleged in the petition simply do not support Counts 11, 12, 21 and 22.

The trial court erred in denying Nathan's motion to dismiss as to Counts 11 and 12, 21 and 22 alleging robbery, kidnapping, and related counts of armed criminal action against victim Stallis. The court of general jurisdiction had no jurisdiction over those counts because they were not fairly comprised within the juvenile court petition. L.F. 85-87. This Court should dismiss these counts, for which Nathan was sentenced to consecutive sentences totaling life plus fifteen years. L.F. 267, 269.

CONCLUSION

On Point I, Nathan asks the court to vacate his conviction, sentence, and judgment for murder in the first degree and enter a judgment of second-degree murder.

On Point II, Nathan asks the court to vacate his conviction and sentence of life without the possibility of parole and enter a judgment of second-degree murder, and remand for resentencing on all counts.

On Point III, Nathan asks the court to vacate his convictions and sentences.

On Points IV and V, Nathan asks for a new trial.

On Point VI, Nathan asks for a hearing on the matters underlying the sealed summary prepared by the prosecutor that concerns possible impeachment material regarding witness Koenig.

On Point VII, Nathan asks for the Court to dismiss Counts 11, 12, 21 and 22.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on this 21st day of December, 2012, a true and correct copy of this brief was served via the eFiling system to the office of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief complies with the limitations in Rule 84.06(b), includes the information required by Rule 55.03, was prepared with Microsoft Word for Windows, and uses Times New Roman 13 point font. The word-processing software indicates that this brief contains **15,333** words excluding this certificate, the cover, and the signature block. Finally, I hereby certify that the electronic copy of this brief has been scanned for viruses and found virus-free.

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