IN THE
SUPREME COURT OF MISSOURI

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

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 REPLY BRIEF AND RESPONSE

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REPLY STATEMENT OF FACTS

For the Court's convenience in determining Point II on appeal, Appellant/Cross-Respondent has prepared the following to aid the Court in understanding the sentences imposed. Each odd-numbered charge has a concurrent armed criminal action counterpart, totaling life in prison. L.F. 262-70. Each pair is consecutive to each other. *Id.* When the armed criminal action sentence exceeds the primary charge sentence, the longer sentence is reflected in the fifth column ("Total Sentence").

Count	**Charge**	**Sentence**	**Running**	**Total Sentence**
1	Murder 1	LWOP	n/a	LWOP
2	ACA (M1)	Life	concurrent with 1	LWOP
3	Assault 1	Life	consecutive with 1 and 2	LWOP + Life
4	ACA (A1)	Life	concurrent with 3, consecutive with 1 and 2	LWOP + Life
5	Assault 1	Life	consecutive with 1-4	LWOP + 2 Life
6	ACA (A1)	Life	concurrent with 5, consecutive with 1-4	LWOP + 2 Life
7	Robbery 1	Life	consecutive to 1-6	LWOP + 3 Life

8	ACA (R1)	Life	concurrent with 7, consecutive to 1-6	LWOP + 3 Life
9 & 10	dismissed			
11	Robbery 1	Life	consecutive to 1-8	LWOP + 4 Life
12	ACA (R1)	Life	concurrent to 11 but consecutive to 1-8	LWOP + 4 Life
13	Robbery 1	Life	consecutive to 1-8, 11-12	LWOP + 5 Life
14	ACA (R1)	Life	concurrent with 13, consecutive to 1-8, 11-12	LWOP + 5 Life
15	Burglary 1	15 years	consecutive to 1-8, 11-14	LWOP + 5 Life + 15
16	ACA (B1)	Life	concurrent with 15, consecutive to 1-8, 11-14	LWOP + 6 Life
17	Kidnapping	15 years	consecutive to 1-8, 11-16	LWOP + 6 Life +
18	ACA (K1)	Life	concurrent to 17, consecutive to 1-8,	LWOP + 7 Life

			11-16	
19	Kidnapping	15 years	consecutive to 1-8, 11-18	LWOP + 7 Life +15
20	ACA	Life	concurrent with 19, consecutive to 1-8, 11-18	LWOP 8 Life
21	Kidnapping	15 years	consecutive with 1-8, 11-20	LWOP + 8 Life + 15
22	ACA	Life	concurrent with 21, consecutive with 1-8, 11-20	LWOP + 9 Life
23 & 24	dismissed			
25	Kidnapping	15 years	consecutive with 1-8, 11-22	LWOP + 9 Life +
28	ACA	Life	concurrent with 25, consecutive with 1-8, 11-22	LWOP + 10 Life

L.F. 262-70; Tr. 977-78, 996-1004.

REPLY ARGUMENT I (SUFFICIENCY OF THE EVIDENCE)

The State's response focuses on statements of defense counsel during opening statement that Nathan, not Coleman, was the person who shot the weapon that killed Gina Stallis. Tr. 342. In opening statement, Nathan's lawyer told the jury that Nathan committed twenty-six crimes in twenty minutes. Tr. 338. She promised that Nathan would testify he was the shooter. Tr. 342-345. Nathan did not testify at all, with no explanation. The State's witnesses testified that Coleman was the shooter. Tr. 371, 424, 425, 431, 486. The State argued that Coleman "was the shooter based upon three eye witnesses" and was incredulous of Nathan's counsel's unexplained admission that her client fired the fatal shot. Tr. 942, 963, 996. Now, the State asks the Court to view the case as if Nathan was the shooter, not Coleman, contrary to its argument on this disputed issue at trial. Resp. Sub. Br. 27. It asks the Court to hold Nathan to his lawyer's argument, unsupported by his promised testimony.

The State is required to present a consistent picture of what happened in a case when two defendants are accused of acting together. The State's fundamental interest in criminal prosecutions is "not that it shall win a case, but that justice shall be done." *Smith v. Groose*, 205 F.3d 1045, 1049 (8th Cir. 2000) (*citing Berger v. United States*, 295 U.S. 78, 88 (1935)). The State cannot claim one series of events or characterization of responsibility for one defendant, and then present a contrary picture for the next defendant to more easily obtain two convictions. "The use of theories that are factually contradictory to secure convictions against two or more defendants in prosecutions for

the same offenses arising out of the same event violates the principles of due process." *Bankhead v. State*, 182 S.W.3d 253, 258 (Mo. App. E.D. 2006) (*citing Groose*, 205 F.3d at 1052).

Now, the State is asking the Court to view the evidence in a light contrary to its own assertions at trial. This is contrary to the standard of review. "In determining the submissibility of the State's case we view the evidence in the light most favorable to the State, accept the State's probative evidence as true and draw therefrom the permissible inferences favorable to the State, and disregard defendant's contradictory evidence." *State v. Baldwin*, 358 S.W.2d 18, 22 (Mo. 1962). To persuade the Court to view the facts in a light contrary to its own theory of the case, the State points to case law from this Court that states generally that when a defendant makes a "voluntary judicial admission of fact," that serves as a "substitute for evidence and dispenses with proof of the actual fact." *State v. Olinger*, 396 S.W.2d 617, 621-622 (Mo. 1965); *State v. Roberts*, 948 S.W.2d 577, 588 (Mo. banc 1997).

In *Olinger* and *Roberts*, however, the State did not dispute the defendant's admission of fact at trial. Here, the State took issue with counsel's statements, and mocked defense counsel's argument that Nathan was the shooter, arguing it conflicted with three eye witnesses and could not be to Nathan's advantage. Tr. 942, 963, 996. In *Olinger* and *Roberts*, the defendant claimed a mental disease or defect and there were no disputed factual issues about the crimes themselves. Specifically, in *Olinger*, the defendant challenged certain instructions on appeal. 396 S.W.2d at 621. This Court noted that at his trial for burglary and stealing, he admitted committing the crime but

alleged he was insane. *Id.* "The transcript discloses that the defendant by statements amounting to judicial admissions sought to prevent the state from proving the facts relating to the commission of the offense and the defendant's criminal agency and sought to confine the issue solely to the mental responsibility of the defendant." *Id.* at 622. Similarly, in *Roberts*, the defendant gave notice of his intent to rely on a defense of mental disease or defect excluding responsibility. 948 S.W.2d at 587. The trial court erred by failing to give an instruction to the jury limiting how the jury was to use facts relating to the defendant's mental health. *Id.* This Court, reviewing for plain error, found that reversal was not mandated because there was no prejudice, since the *actus reus* of the crime was undisputed. *Id.*, at 588. Unsworn statements by counsel are not evidence, unless conceded by both parties. *Schnelle v. State*, 103 S.W.3d 165, 178 (Mo. App. W.D. 2003). The facts admitted by counsel in *Roberts* and *Olinger* were undisputed by both parties thus conceded for purposes of appeal. Here, that is not the case.

That leaves the Court with the general rule it has applied many times that statements by counsel are not evidence, and the Court assumes that the jury disregards any errant and unsupported statements by counsel in opening and closing argument. *State v. McFadden*, 369 S.W.3d 727, 742 (Mo. banc 2012) ("unsworn remarks of counsel in opening statements, during the course of trials or in arguments are not evidence of the facts asserted"); *State v. Hutchison*, 957 S.W.2d 757, 765 (Mo. banc 1997) (presuming that allegedly improper remarks by the State during opening statement were not considered as evidence by the jury).

Viewing Nathan as the shooter, contrary to its case at trial, the State asserts that there is ample evidence of deliberation based upon the fact several shots were fired. "The evidence of deliberation is especially strong for Lovadina's shooting." Resp. Sub. Br. 28-29. "The shooter shot Lovadina five times, with several shots to vital areas of her body." *Id.* The State argues, "[t]he evidence supported an inference of intentionally fired shots delivered at close range since Lovadina's blood was found on the front, and even inside the barrel, of the murder weapon." *Id.*

The State, in focusing its argument on Lovadina, overlooks that the issue on appeal is whether the shooter deliberated upon the death of Stallis. The State is correct that multiple shots fired at Lovadina would support an inference that the shooter targeted Lovadina intentionally, wounding her. Tr. 486. Missouri law on transferred intent states that the culpable mental state necessary for a homicide offense may be found to exist if the only difference between what "actually occurred and what was the object of the offender's state of mind is that a different person or persons were killed." Section 565.001.3. Missouri recognizes four such mental states: in order of relative culpability, acts may be committed purposely, knowingly, recklessly, or with criminal negligence. Section 562.021.

Nathan admitted that he was guilty of second-degree murder. Tr. 343. The evidence was that the gun was fired seven times. Tr. 381, 424, 283. Lovadina was hit five times. Tr. 386. Stallis was in a hallway some distance away, and fatally hit once. Tr. 490. Nathan was hit by a bullet. Tr. 656. Koenig was shot three times. Tr. 283. The evidence did not show which of the seven shots hit Stallis, though Koenig testified the

last several shots were pointed directly down at the floor at Lovadina. Tr. 486. The evidence did not show whether the bullet that killed Stallis hit her directly, or was one of the three unaccounted-for bullets that hit but passed through Lovadina, or Koenig, or Nathan himself. Tr. 386-387, 489.

Even if the evidence shows the shooter intentionally shot at Lovadina or Koenig, which is a culpable mental state that would "transfer" to Stallis if the jury found one of those shots was one that hit Stallis, there was no evidence of the shooter's deliberation upon Stallis's death, which is a separate element from the intentional mental state that would "transfer" under Section 565.003.1.

The flaw in the State's argument is that it conflates an intentional mental state with the separate element that the shooter coolly reflect upon the victim's death for some length of time. For example, it cites *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004) for its statement that deliberation may be inferred from "multiple wounds or repeated blows." Resp. Sub. Br 26. But Stallis suffered one gunshot wound. Tr. 490. The evidence did not show which of the seven bullets flying scattershot hit her, or whether any of the shots pointed at Lovadina (or Koenig) were ones that hit Stallis. 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 passed through his body. Tr. 489. The three bullets that grazed or went through Lovadina and Koenig may have been the bullet that hit Stallis. Or, as Nathan was also hit by a bullet, it could have been the case that the same bullet that hit him also hit and killed

Stallis. Or, it could be that Stallis and Koenig were hit multiple times by the same few bullets and the bullet that hit Stallis missed others and struck her.

The evidence only showed an intentional shooting with that culpable mental state transferring to the unintended victim, Stallis. Section 565.001.3. Contrary to the State's argument, this Court should hold that the element of deliberation cannot "transfer" in the same way. The act of deliberation is not a culpable mental state that can be imputed or transfer. Section 565.001.3. If that were the case, defendants would be responsible for the deliberation of their accomplices. In fact, this Court has long held that the element of deliberation is unique and separate from the intentional mental state required for second-degree murder, 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 transferred to an unintended victim without evidence that the defendant coolly reflected upon that person's death. Even if Nathan is deemed the shooter for purposes of this appeal, there is insufficient evidence of deliberation. And for the reasons stated in his opening brief, there is clearly insufficient evidence if the evidence is viewed in a light favorable to the State's argument at trial.

The trial court erred in denying Nathan's 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 respectfully requests this Court reverse his conviction and sentence on Count 1 as well as the associated count of armed criminal action.

REPLY ARGUMENT II (CRUEL AND UNUSUAL PUNISHMENT)

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 consecutive life terms for other related felonies. L.F. 262-70; Tr. 977-78, 996-1004.

(1) This Court cannot "effectively rewrite" Section 565.020 to reach the State's desired result. The State argues that this Court should remand for resentencing only on Count 1, murder in the first degree, and that the trial court's options should be life imprisonment, or life imprisonment without parole (LWOP). Resp. Sub. Br. 42-43.

To reach that result, the State asks this Court to "effectively rewrite the statute so that it is upheld to its fullest extent possible consistent with legislative intent." Resp. Sub. Br. 39-40. But Section 565.020 cannot be constitutionally applied to Nathan after *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and cannot be saved by excising language from, and then adding words to the statute in the way the State suggests.

Specifically, the State argues that this Court will resolve all doubts in favor of a statute's validity, and make "every reasonable intendment to sustain the constitutionality of the statute." Resp. Sub. Br. 37 (*citing Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007)). The State points to the idea of severability, argues that both possible penalties must be severed from Section 565.020, and argues that this Court must write and insert new language in Section 565.020 relating to penalty to reach the State's desired result. Resp. Sub. Br. 40-41. The State does not propose what exact language this Court should write, only that the two possible penalties for juveniles convicted of murder in the first

degree should be life or LWOP. Resp. Sub. Br. 41. The State's proposed result is based upon what the General Assembly "would have passed" had the restriction been in place at the time of drafting. Resp. Sub. Br. 39.

The State points to *Associated Indus. v. Director of Revenue*, 918 S.W.2d 780 (Mo. banc 1996) to support this idea. Resp. Sub. Br. 38. The State cites language in that opinion that, out of context, appears to countenance judicial "rewriting" of unconstitutional statutes. Resp. Sub. Br. 38; 918 S.W.2d at 784. However, it is helpful to understand the way in which this Court used the word "rewrite" when speaking of the severability statute, Section 1.140, and how it applied to a particular revenue statute that had been found to be unconstitutional as applied to certain entities. 918 S.W.2d at 784. Simply, the Court noted that when a statute is facially valid but unconstitutional as applied, it is sometimes necessary to "excise part of the text" if the remainder of the statute can be applied consistent with the intent of the legislature. *Id.* The Court did not, of course, envision itself actually composing words, the "rewrite" that would be required to reach the State's desired result in this case. *Id.*

While the Court could sever the entire penalty phase of Section 565.020, writing a new penalty clause to limit the penalties to life imprisonment or life without parole in the way the State suggests is beyond this Court's power. There is no way to excise text and reach the result the State wants. Notably, the penultimate line of *Associated Industries* states, "Because [the statute] cannot be constitutionally applied as written, and because

we have no power to rewrite the statute, we must strike it down in its entirety." 918 S.W.2d at 785.[1]

The State believes that LWOP should still be an option because "[t]he constitutional problem in *Miller* involved sentencing schemes that mandated [LWOP] sentences, not the sentence itself." Resp. Sub. Br. 36. But given the warnings in *Miller* that such sentences should be rare, there should be express statutory authority for such a sentence. *Miller* held that "appropriate occasions for sentencing juveniles to this harshest possible penalty [are] uncommon." 132 S.Ct. at 2369. Young people 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. The State concedes that *Miller* mandates that the sentencer "follow a certain process—considering an offender's youth and attendant characteristics." Resp. Sub. Br.

[1] Because the statute is plain if the penalty clause is severed (leaving, "Murder in the first degree is a class A felony . . . .") there is no need to consider the State's argument about legislative intent. Resp. Sub. Br. 38-42. "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) (*citing State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002)). A court "will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010).

36-37, 43 (*citing Miller*, at 2471). The revision the State suggests is not appropriate given *Miller*'s warnings, and is unworkable as a matter of statutory construction and separation of powers. *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996) ("The statutory doctrine of severability permits one offending provision of a law to be stricken and the remainder to survive. It has never allowed courts to insert words in a statute [that] were not placed there by the General Assembly.")

Further, the State does not attempt to distinguish cases stating that a criminal statute that has no constitutional penalty is simply void. Resp. Sub. Br. 36; *State v. Harper*, 510 S.W.2d 749 (Mo. App. K.C. 1974). While it is rare that a criminal statute has no penalty, that is what the Court is faced with here. Since Nathan conceded his guilt of second-degree felony murder, the best and simplest remedy for Nathan is to vacate his first-degree murder conviction on these grounds, and remand for resentencing for the Class A felony of second-degree murder, along with the other charged counts.

Alternatively, the State and Nathan agree that the Court has the option of excising the entire penalty clause of the statute, which leaves the General Assembly's designation of murder in the first degree as a class A felony. Resp. Sub. Br. 42. Contrary to the State's argument, this route is "faithful to legislative intent," (Resp. Sub. Br. 42) since the legislature had the option of designating the crime as an unclassified felony with two penalties. It chose, instead, to make it a class A felony. It is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *United States v. Johnson*, 703 F.3d 464, 468 (8th Cir. 2013) (*citing Williams v.*

Taylor, 529 U.S. 362, 404 (2000)). This interpretation "avoids surplusage" as well as being faithful to the intent of the General Assembly. *Id.*

(2) Nathan's jury sentencing waiver is not valid. When Nathan waived his right to a jury sentencing hearing after he was found guilty of first-degree murder, there was no discretion to sentence him to anything other than LWOP on Count 1. Tr. 977-978. Now, LWOP is no longer mandatory and may not even be available, and the trial court and defense counsel must comply with the direction in *Miller* that cautions against lengthy sentences that would eliminate Nathan's chance at release at some point in his life. The State agrees there must be a penalty phase, at which mitigating evidence can be offered and considered. Resp. Br. 44.

Given that there will be a penalty phase, the opportunity to revisit a jury determination of sentence makes sense, but the State points to *State v. Nunley*, 341 S.W.3d 611, 619 (Mo. banc 2011) to argue against it. Nunley pleaded guilty to first-degree murder and a judge sentenced him to death. *Id.* After his appeals were exhausted, intervening case law held that capital defendants have a constitutional right to a jury determination of the statutory factors supporting the death penalty. *Id.* At his guilty plea, however, Nunley waived that right, which existed in Missouri by statute at the time of his plea. *Id.* at 620. The record showed he waived a jury because he believed he might fare better with a judge. *Id.* Under these facts, this Court found the intervening case law did not entitle him to revisit that decision, since the right to a jury existed at the time of the plea, and his decision to waive it was fully informed and voluntary. *Id.*

None of those considerations are present here. Nathan waived his right to jury sentencing, but it was an empty right at that time, and there was no benefit to him or strategy behind his waiver. As the trial court pointed out to him, he had been found guilty of first-degree murder and the mandatory sentence was life without parole. Tr. 977-978. While Nunley was exercising strategy at the time he pleaded guilty, at the time Nathan waived jury sentencing it was likely more out of respect for the time of the Court, counsel, and jurors. Nathan could have insisted on a penalty phase despite the jury's verdict, but reasonably chose not to pursue that given his mandatory sentence on Count 1. Now that the law has changed dramatically and a penalty phase is essential as the State concedes, it is fair to give Nathan that opportunity.

(3) Nathan should be resentenced on all counts. Related to the jury waiver issue, the trial court should be given a second chance to revisit the entire package of sentences in this case. When LWOP was mandatory, Nathan was sentenced to that sentence plus sentences on 21 other counts that were themselves a functional sentence of life with no possibility of parole. Tr. 977-78, 996-1004. The 21 other counts had no practical effect at the time of sentencing, however, and the court considered *no* mitigating evidence before doling them out because such evidence could not be considered under the pre-*Miller* scheme.

Further, the primary case the State cites to demonstrate *Graham v. Florida*, 130 S.Ct. 2011 (2010) does not apply is not well-reasoned. *Walle v. State*, 99 So.3d 967 (Fla. App. 2012) is an intermediate appellate court case that reached a result contrary to *Floyd v. State*, 87 So.3d 45 (Fla. App. 2012) on this issue. *Floyd* held that an 80-year sentence,

while not called "life without parole," is functionally the same because it offers no opportunity for release during the defendant's life, which is precisely what *Graham* is about. *See* App. Sub. Br. 36. *Walle* reached the opposite result, based on such a narrow reading of *Graham* that *Graham* would be essentially inoperable if all courts followed its lead. *Walle* found that because the Graham defendant had a sentence designated a "life" sentence, *Graham* bans only non-homicide sentences that are specifically designed "life" sentences regardless of the practical consequences of equivalently long sentences of years. 99 So.3d at 970. Further, *Walle* erroneously found that since the defendant in *Graham* committed only one crime (armed burglary), that any case that follows must also involve only one crime and one LWOP punishment, and not multiple crimes with an equivalent term of years.[2] *Id.* Last, it stated there was nothing in the record to demonstrate a 65-year sentence, with no parole, would reach outside a teenager's natural life span. *Id.* The *Walle* court acknowledged the conflict with *Floyd*. 99 So.3d at 972.

The State summarily states that *Walle* is more persuasive than *Floyd* and this Court should follow it. Resp. Sub. Br. 53. But its reasoning misses the concern that lies behind *Graham*, which is on lengthy sentences that simply discard a teenager who commits serious crimes with no hope or opportunity at rehabilitation. There is nothing in *Graham* to suggest the Court was concerned with whether the life or life-equivalent sentences were for one crime, two crimes, or many related charges arising from the same

[2] Graham was actually convicted of both armed burglary and armed robbery. 130 S.Ct. at 2018.

incident. The idea that there must be only one charge, and a sentence must be called "life" is an absurd application; surely a 200-year sentence for twenty counts of robbery and armed criminal action would violate *Graham* just as surely as a lone 200-year sentence for one serious assault would violate *Graham*.

Also, there is nothing in *Graham* suggesting that life without parole is prohibited for only those convicted of relatively trivial or nonviolent crimes, or that there is some number of offenses after which a defendant is no longer redeemable. The State argues that Nathan forfeited his life by committing "multiple, serious" crimes (Resp. Br. 53), and while Nathan was charged with 26 counts out of an incident that lasted 20 minutes, Graham also committed a home invasion and robbery, and was charged with only two crimes in the State of Florida. The point, of course, is that the number of offenses a prosecutor charges for one criminal event is somewhat arbitrary; eleven of Nathan's crimes are for the offense of armed criminal action, which apparently has no equivalent in Florida, and he was charged separately for each count of robbery and kidnapping for each person in the house. A comparable crime in Florida might result in only two charges, but the effect of a LWOP sentence is no different and the considerations in *Graham* still apply. Regardless of how many charges apply, 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," thus the law treats children who commit even terrible crimes different than an adult. *Graham* , 130 S.Ct. at 2026. "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." *Id.* We still hold teenagers like Nathan responsible for their actions, but because of these fundamental differences, a juvenile's offense "is not as morally reprehensible as that of an adult. " *Id.* at 2026 (*quoting Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

The State also argues these non-homicide sentences do not push Nathan's earliest release date outside of his natural life expectancy.[3] It points to Section 558.019.4(2), which says, "[a]ny sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to be seventy-five years." Resp. Sub. Br. 15. According to the State, means that that Nathan's eligibility at parole will be calculated by the Department of Corrections as some percentage of 75 years.

Its calculations are not detailed in its brief, but the State's argument appears to overlook that Section 558.019.1 states in relevant part: "This statute shall not affect those provisions of section 565.020 [murder in the first degree] . . . . [or] section 571.015 [armed criminal action], which set minimum terms of sentences." So by its terms, Section 558.019 does not apply to the eleven consecutive counts of armed criminal

[3] Nathan was born on January 7, 1993. L.F. 242; Appendix at A1. A fifteen year old African-American male in 2008 had a life expectancy of 71.8 years. http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf (last accessed February 11, 2013).

action, for which Nathan received a life sentence on each count, totaling 330 years. The consecutive armed criminal action sentences are not reduced under the terms of Section 558.019.1. If paroleable "life" is deemed to be 30 years for purposes of calculating an early release date, and under Section 558.019.3, an offender must serve 15% of each armed criminal action count, Nathan may not be eligible for 49.5 years just on the armed criminal action counts. If the first three counts (totaling 90 years) are truncated to 75 years, there are seven consecutive life sentences for armed criminal action that follow. That adds 31.5 years to the 75 years the State believes Nathan will serve. While Missouri's parole eligibility system is somewhat esoteric, the doubt remains that Nathan would ever be eligible for parole, and this Court should remand to allow the sentencer to apply *Miller* and *Graham* to show mercy, and craft a sentence that will demonstrate a more obvious route to parole eligibility in Nathan's lifetime.

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. The Court may enter a sentence and judgment for the lesser-included offense of second-degree murder for Count 1. 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 1, 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.

REPLY ARGUMENT III (JUVENILE CERTIFICATION)

On the constitutionality of Section 211.071, the State argues that Nathan's challenge would impermissibly demand "full fact finding" at the certification level. Resp. Sub. Br. 58. The State points out there are currently no "substantive constitutional requirements as to the content of the statutory [certification] scheme a state may select." Resp. Sub. Br. 60 (*citing Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978)). The State further cites *Coney v. State*, 491 S.W.2d 501, 511 (Mo. 1973) for the premise that due process does not require findings of fact at the certification level. Resp. Sub. Br. 61.

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).

It violates due process for the quantum of evidence supporting certification to be of "no concern" to whether jurisdiction is waived, and yet the nature of the crime is the dominant criterion in whether to waive jurisdiction. Here, Nathan, as a certified juvenile, faced and ultimately received a sentence of life without parole along with numerous other sentences for related crimes totaling 10 consecutive life sentences. The juvenile officer alleged simply that Nathan shot Stallis. L.F. 85. At his trial in adult court, however, the State alleged 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 would ensure that where the most serious crimes are concerned, not every teenager is at the mercy of an adult criminal justice system where the penalties are extreme. Some determination of, essentially, "what happened" beyond mere assertions and a determination of the juvenile's level of culpability is not "full fact finding" that would equal an adjudication. Resp. Sub. Br. 58.

Where the penalties given to juveniles and certified juveniles differ so dramatically, it is not fair for the State's allegation to change so dramatically once the State is forced to meet its burden of proof. The juvenile division judge needed to know salient facts about the juvenile's level of relative culpability in order to make an informed decision about whether a juvenile is an appropriate subject for adult court. Contrary to *In re W.T.L.*, 656 A.2d 1123 (D.C. 1995) the eventual criminal trial is not a "corrective" for the presumption of guilt that amounts to nearly automatic certification for those accused of serious crimes where there is a possibility of dying in prison.

For these reasons, and for the reasons stated in his opening brief, Nathan requests this Court reverse the trial court's ruling.

REPLY ARGUMENT IV (VERDICT DIRECTOR)

The disputed issue in the case was whether Nathan deliberated upon "the matter" after Coleman began shooting. The State responds that Instruction 5, the verdict director

for first-degree murder, is perfectly clear. Resp. Sub. Br. 67. "The 'matter' referred to in the instruction is cool reflection on shooting at any of the three victims with the awareness that this would cause their death." Resp. Sub. Br. 67. That is a clear explanation of what "the matter" may be, but if that is the law, it should appear in the instruction itself. The fact is, "the matter" under the facts of this case is left to the imagination of the reader. L.F. 133.

Specifically, given the facts of the case, the jury would not necessarily know what "the matter" is that Nathan deliberated upon after the shooting began. While the matter may be clear in some cases, here it is ambiguous. The reason the ambiguity matters in this case is that unlike many cases, there are three individuals who were possible "targets" according to the State; there were several people hit by bullets, two alleged accomplices, and a robbery, burglary, and kidnapping. 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. For these reasons and those in his opening brief, Nathan asks for a new trial.

(Nathan stands on the arguments in his initial brief on Points V, VI, and VII.)

RESPONSE TO CROSS-APPELLANT'S POINTS

The trial court was correct in dismissing Counts 9, 10, 23, and 24.

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 as to 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 Whitlock (Counts 9, 10, 23 and 24). L.F. 247. Her name appears nowhere in the documents before the juvenile court, including the petition or the juvenile court order. L.F. 85-90. At minimum, the juvenile petition must allege sufficient facts to give the defendant fair notice of the charges and an opportunity to respond. L.F. 245. As 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). Certainly, the lack of any reference to Ms. Whitlock fits this criteria.

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.

Nathan also asks the Court to affirm the trial court's dismissal of Counts 9, 10, 23, and 24.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on this 13TH DAY OF FEBRUARY, 2013, 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 **6702** words excluding this certificate, the cover, and the signature block.

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