**IN THE**
**MISSOURI SUPREME COURT**

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| **STATE OF MISSOURI,** | ) | |
| | ) | |
| **Respondent,** | ) | |
| | ) | |
| **vs.** | ) | **No. SC85419** |
| | ) | |
| **RICHARD STRONG,** | ) | |
| | ) | |
| **Appellant.** | ) | |

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**APPEAL TO THE MISSOURI SUPREME COURT**
**FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI**
**TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION SIX**
**THE HONORABLE GARY M. GAERTNER, JR., JUDGE**

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# APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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# INDEX

## *AUTHORITIES*

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**



**RULES:**

**INSTRUCTIONS**



**OTHER:**

## JURISDICTIONAL STATEMENT

Richard Strong was jury-tried and convicted in St. Louis County Circuit Court of two counts of first degree murder.§565.020RSMo. Following penalty phase closing arguments, in which the State displayed a montage of blown-up photographs on a projection screen, the trial court sentenced Richard to death, in accordance with the jury's verdicts. Because death was imposed, this Court has exclusive appellate jurisdiction.Mo.Const.,Art.V,§3(as amended 1982).

## STATEMENT OF FACTS

On October 23, 2000, at 3:30 p.m., Michelle Rosner, the St. Ann police department dispatcher, received a 911 call and, since the caller was already gone, she dispatched officers and then played back the tape.(T1000-01).[1] Rosner heard a scream on the tape.(T1001-03). She attempted to call the number until the officers arrived on the scene, about two minutes later.(Tr1005).

Henry Kick was the second officer to arrive at 9835 Treadway, Apartment 3, and Lt. Adams arrived seconds later.(T1077,1080,1123). Kick and Officer Carbray went to the front door, while Adams went to the back.(T1081). Kick knocked and called out but nobody answered.(T1082). Kick could see into the living room, where nothing seemed amiss and he saw no movement.(T1082-04). Kick told Carbray to stay-put while he consulted with Adams.(T1084). Kick asked if he should kick the door in and Adams told him to stay there while he went around front.(T1084-05). Kick again looked through the window, and saw

[1] References to the record on appeal are: Two large transcript volumes: (T__); Small transcript volume prepared by Eleanor Quinn: (QuinnT__); Transcript volume prepared by Dena Abdullah: (AbdullahT__); Transcripts prepared by Shannon McCreary: (9/24/02T__) and (9/25/02T__); legal file: (LF__); Exhibits: (Ex__).

nothing amiss in the kitchen and attached hallway.(T1086). Kick remained alone at the back door.(T1086).

When Adams, he went to the back door, knocked, announced his presence, and asked permission to enter.(T1160). Receiving no response, he asked the dispatcher to continue calling the apartment.(T1161). When Kick came to the back door and told him he also had gotten no response, he went to the front, leaving Kick at the back.(T1161).

When Adams went to the front, Chief Hawkins arrived.(T1086,1163,1237). Adams told Hawkins that, if he didn't get a response quickly, he would enter forcibly.(T1163). While Adams continued to knock on the front door, Hawkins went to the back door.(T1087,1163,1238). Finally, as Adams knocked, he saw Richard head toward the back door.(T1163). Adams radioed the other officers and ran around the building to the back door.(T1088,1165,1239).

When Richard opened the back door, Kick recognized him from the neighborhood but didn't know his name.(T1089). Richard looked "surprised" to see Kick.(T1090). Kick knew the apartment's resident, Eva Washington, by name, and asked Richard what was going on and how his wife and kids were.(T1077,1090). Richard responded they were all right; sleeping.(T1090). As they spoke, Richard stood at the door, closing it, with his hand near the knob.(T1090). He closed the door, Kick said, with his right hand.(T1090). Hawkins saw Richard reach inside the door toward the knob and pull it shut. (T1241-42).

Hawkins asked Richard what was going on but heard no response.(T1421). Adams approached, asked if everyone was ok and Richard said "fine."(T1168). When Adams asked where Eva was, Richard said she had gone to work.(T1168,1244). Kick observed that Richard had just said something different and, when asked the children's whereabouts, Richard said they were inside.(T1170). Kick asked if they could check on them and Richard stated he had locked himself out and had no key.(T1170-71,1245). Richard then knocked on the door and called for someone to let him in.(T1093,1243).

Richard was sweating profusely.(T1091). He seemed shocked and was trying to cooperate.(T1092). The officers could see his heart thumping rapidly under his shirt.(T1091-92). They saw a sweaty-looking t-shirt under the polo shirt and dark stains on his jeans' knees.(T1092). Adams asked if Richard had a key, took Richard's left hand and asked about what looked like blood.(T1245). Richard said that he had cut himself earlier and hadn't cleaned up.(T1171,1246). Adams told him to step away from the door and kicked it in.(T1096,1172,1246). Richard ran.(T1096-97,1246).

As Richard ran, he said, "just shoot me, just shoot me."(T1098,1135-36,1174,1247). When he stopped initially, he told the officers to shoot him and was described as "kind of nonchalant."(T1100). When finally stopped and cuffed, and while being taken to the police car, he stated, "I killed them."(T1141).

While officers took Richard to the police car,(T1106), Adams returned to the apartment.(T1179). In the back bedroom he found Eva Washington and her

two-year-old daughter, Zandrea Thomas.(T1181). Both had massive, multiple stab and slash knife wounds.(T1181-82). On the bed, Adams found a butcher knife and a three-month-old baby.(T1184).

Adams called for an ambulance.(T1213,1254). The medical examiner arrived and examined the bodies.(T1255,1303). Detectives took a video and photographs and seized clothing, paint samples, blood samples and the knife. (T1017-37). A detective attended both autopsies, photographing the bodies and collecting evidence.(T1068-73).

Dr. Turgeon, the Deputy Medical Examiner, performed both autopsies.(T1316). Eva received 21 stab and five slash wounds and Zandrea had nine stab and 12 slash wounds.(T1317,1370). Of Eva's, several were potentially lethal, capable of causing immediate loss of consciousness and death within a few minutes.(T1338-39,1356,1360-61,1363-65). Her cause of death was multiple stab wounds to the neck and chest.(T1369). Several of Zandrea's wounds were lethal, causing immediate loss of consciousness and death shortly thereafter. (T1374,1377,1380-81,1384,1386). Zandrea's cause of death was multiple stab wounds to the neck, back and abdomen.(T1391). Any of their wounds could have caused loss of consciousness.(T1400). It was impossible to say which injury was inflicted first.(T1402).

At a hearing on July 26, 2002, defense counsel moved to subpoena Eva Washington's psychiatric records since, in a statement to police, Richard had stated Eva killed Zandrea and he then killed Eva.(AbdallahT20-21;LF121-24).

The court ordered that St. Louis County Psychiatric Center and Metropolitan St. Louis Psychiatric Center records be released to the defense.(AbdallahT24;LF354-56). Epworth Children and Family Services, acknowledging that Eva had resided there, a facility providing "residential services for teenagers, including various types of counseling and therapy for these individuals"(LF449), moved to quash the subpoena, stating the information was confidential.(QuinnT181;LF451). The court reviewed the records *in camera* and determined they were irrelevant and immaterial.(LF459). It ordered Eva's records sealed.(LF461).

The prosecutor told the jury, over objection, during jury selection, "I'm not going to bore you with the whole process that's involved where I would make a determination that, as in most cases, we don't seek death, we don't ask for a death sentence in most first degree cases. But in some cases we go through a procedure and a process."(T60). He rephrased, upon objection.(T61). Later, also over objection, he stated, "But there are sometimes certain facts that may be so overwhelming and overbearing that they impact a person's ability to be fair and impartial."(T110). He further stated, over objection, that certain facts might impact one's ability to be fair and impartial, but "we only do that in very rare instances."(T110). The court instructed him to rephrase.(T111).

When referring to penalties for first degree murder cases, he asked, over objection, "Understanding, of course, that it is the decision of the jury, the jury's unanimous decision as to what the appropriate punishment is, but you would be able to follow that law and impose the one that you think is appropriate for that

particular situation?"(T165-66). The court told him to clarify his statement.(T166-67).

The prosecutor moved to strike peremptorily Sylvia Stevenson and Luke Bobo, African-Americans.(T908). The defense made *Batson* challenges.(T908). The state responded that Stevenson seemed unhappy about the sequestration; had a brother in prison; was weak on the death penalty and he wanted jurors with small children.(T910). The defense responded that similarly-situated white jurors were not struck and the record did not support the state's assertions.(T913-14). The court found the excuses not pretextual and noted Stevenson's "physical disdain" regarding sequestration.(T917). It also relied on McCulloch's reputation, stating "I am aware of Mr. McCulloch's credibility and based upon his reputation, demeanor, and the Court's experience with Mr. McCulloch, I find that Mr. McCulloch has not pretextually stricken Miss Stevenson".(T918).

The state responded that Bobo has small children but is an assistant seminary dean and he wanted no religious people on the panel.(T919). He also noted Mr. Bobo's cousin was in prison for murder.(T919). The court immediately found those reasons race-neutral.(T920). Mr. Dede responded that another juror, Martin McCabe, was a similarly-situated white person.(T921). The court found logical relevance between the state's religion-based reason for the strike and this case because the state was seeking death.(T923). It found no pretext because of McCulloch's credibility and its "past experiences with him and his reputation"(T923).

Before opening statements, the prosecutor stated his intent to use forty photographs, including 22 scene and autopsy photographs.(T952-54). The defense objected to them as inflammatory, duplicative, irrelevant, prejudicial and gruesome.(T956-62). He objected that the video was duplicative.(T963).

The state's opening focused on what the officers found at the apartment.(T982-88). Then, after the first three brief witnesses, every witness described, over objection, photographs or the video of the scene and bodies.(T1017-35,1069-73,1109-16,1180-87,1221,1255-60,1316-90). During the direct of Hawkins, the defense asked the photographs the state had displayed on a projector screen be removed.(T1260). The court denied the request, and they remained on display.(T1260).

In final closing, the state argued, over objection, "And you know one thing you didn't hear in that argument at all? Any assumptions…. It's just as important what you didn't hear in that defense argument, and you didn't hear anything about what was going on in that room."(T1471-74).

The state argued the jury's obligation to find deliberation. He stated, "The deliberation is not cool, it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief."(T1474).

He argued over objection and mistrial request, "What happened was Richard Strong took that knife and viciously and brutally assaulted those two people, and murdered them and butchered them and cut them up. And you know what? I will not make a single apology to anybody for putting those pictures up

there. I won't do that. I won't do that because he did it."(T1479-80). He continued, "as many of those pictures as possible contain as many wounds and injuries suffered by them as possible for that very reason, so we don't have four hundred of these pictures up there, or however many we have. They were kept to a minimum."(T1481). He continued, "that's not put up there and it's not shown to you to shock you. I know it did shock you. It's not shown up there to generate sympathy for the victims in this case. Although, I know it does. And we're not going to decide the case on the shock value."(T1482). Finally, he argued, over objection, "I wish this was, and it isn't, it's not an episode of CSI. If it was, and I wish it was, I wish it was because then---."(T1482).

The jury returned verdicts of first degree murder.(T1486-87;LF539-40).

Before penalty phase, the defense objected to references to a consent order (T1503); Eva's statements about a prior assault(T1510,1517,1526); Lutricia Braggs' testimony(T1513,1526) and a memorial brochure about Zandrea(T1521). The court let the defense objections be continuing and denied its mistrial request. (T1528). The state re-offered Exhibits 1-59.(T1535).

The state called Kimberly Strong, Richard's ex-wife.(T1536-37). In May, 1996, Kimberly and Richard were separated and she was 4½ months pregnant with their second child.(T1537-38). She went to Richard's house and, because he didn't want their son to leave, they had a confrontation.(T1538). Richard began hitting Kimberly and pushed and hit her again, causing her to almost lose consciousness and rupture an eardrum.(T1539-40). When they first separated,

Kimberly obtained an order of protection because, while not fearing for her son's safety, she feared for hers.(T1541,1551). Richard threatened to do "an O.J."(T1551). They entered into a consent judgment and the court issued a full order of protection until August 26, 1996.(T1553-56).

Kimberly testified Richard loved all children—his own, Zandrea, neighbors and relatives—and they loved him.(T1543-49). Richard worked hard to pay child support but spent time with children.(T1547). She never believed children were at risk with Richard and still takes them to see him.(T1545).

Lutricia Braggs, one of Richard's co-workers, testified they became close, dating several times.(T1557-60). In February, 1996, she wanted end the relationship, and, after dining that night, she told Richard.(T1560-61). He became upset and grabbed the wheel, steering her car into on-coming traffic.(T1561). She tried to regain control and he hit and cursed her, knocking her unconscious.(T1562-65).

Officer Patrick responded to a 911 call from Eva's apartment on November 11, 1999.(T1570-71). He saw two black men, one Richard, getting into separate cars.(T1571-72). Patrick entered Eva's apartment while another officer remained with the men.(T1572). Eva was crying, shaken, visibly upset and borderline hysterical.(T1572-73). She had a knot on her forehead, her left eye appeared bruised and she stated, "he hit me, he hit me in the eye and in the mouth and choked until I passed out."(T1573). Eva identified "him" as Richard.(T1576). Richard stated Eva hit him first and Patrick noticed Richard had a small cut on his

nose and another under his earlobe.(T1577,1578). Over objection, the state introduced Exhibit 64, the family court file about Eva and Richard's consent judgment and order of protection.(T1579).

Michelle Brady, Zandrea's cousin, knew Eva and met Richard right before Eva became pregnant with Alicia, Richard's younger child.(T1580-81). Michelle saw Eva three to four times each week as Eva babysat for her or other neighbors. (T1582-83). Eva was a friendly, giving, sweet and loving mother.(T1583). Over objection, she stated that she knew Richard enough to not like him and that Richard threatened Eva in September or October, 1999.(T1584).

Over objection, she testified that in September, 1999, she and her mother went to Eva's house because she had a flat tire.(T1588-89). Eva told them to wait because Richard had a spare, but he later refused to let them use it.(T1589-90). Michelle asked Eva to give them a ride home and, while Richard refused, Eva consented and Richard, Zandrea and Eva drove them home.(T1590-92). Richard and Eva began arguing, Richard calling her a whore and saying he would get a chance to kill her.(T1592-93). They continued arguing as they left.(T1593).

Michelle recounted a phone call with Eva between September and November, 1999. Richard entered the room, cursed Eva and said Michelle wasn't good for her.(T1598-1600). Richard and Eva yelled at each other, and Michelle suggested Eva leave Richard.(T1600-01). Michelle overheard Richard say he "was going to get a chance to kill her and her baby."(T1601). Eva told Michelle

she had to go, but, as she didn't hang up, Michelle overheard Richard cursing for 15-20 minutes, although he didn't threaten her again.(T1602).

In the early morning of November 11, 1999, Michelle went to Eva's house after Eva called.(T1594). Eva's forehead was injured, her left eye was shut and welts were around her neck.(T1594). She was shaken, scared and upset.(T1595).

For the defense, co-workers testified that Richard was a responsible employee, easy to get along with, easy-going, genial, polite, professional and never mad.(T1614-23). Richard's barber, who had known him for at least 15 years, recalled him bringing children, including Zandrea, to his haircuts.(T1625-26). Richard was always friendly and treated the children well and equally.(T1626-29). A friend of Richard, Eva and the children saw Richard interact with children and said they loved each other.(T1646-49).

William Bradford, a jail Unit Supervisor, stated Richard had adjusted to confinement and posed no threat.(T1638-40).

Richard's family testified that Richard loved all children around him, whether biologically his or not.(T1630-32,1635-37, 1650-53,1654-57,1657-62,1663-66,1684-87,1696-1705). They noted Richard and Zandrea's strong bond and love .(T1657,1700-01). Richard's mother recalled he was great with kids "because he was just like a big baby himself," always sitting at the children's table at family holidays and playing games with them.(T1702).

The state stated it would project photographs in a power-point presentation in closing.(T1721). Dede objected, arguing their gruesome nature would be

highlighted by enlargement.(T1721). In closing, McCulloch flashed photographs of Eva, Zandrea, Richard and the knife on the projector screen, and argued "why I think death is the appropriate punishment… why I think that should be the sentence."(T1723). He continued, "remember what I said earlier, the instructions are as important for what they don't say as what they do say."(T1727).

He continued, "If, in your opinion, your view, your conscience what's true and just in this case at that point is the imposition of a death sentence on Richard Strong, then you consider evidence in mitigation, and determine if that mitigation outweighs that evidence in aggravation."(T1728). He argued, over objection and a mistrial request, "We have to go beyond a reasonable doubt to those special, rare, particularly egregious situations in which the death penalty is warranted, in which a death penalty is demanded, in which justice can only be even partially served."(T1730). Finally, this case "affected everybody that came into this courtroom, and who knows how many people beyond what you saw this case has done."(T1735).

The jury returned death verdicts(LF573-75;T1761). The court sentenced Richard to death.(LF598-600;5/9/03T53). This appeal follows.

## POINTS RELIED ON

## I. GRUESOME PHOTOS IN PENALTY PHASE

**The trial court erred in admitting in penalty phase Exhibits 10-17,19-34,47-48, photographs of Eva Washington and Zandria Thomas at the scene and during the autopsies, and letting the prosecutor present photographs as part of a power-point presentation during his penalty phase closing argument because this denied Richard due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I§§10,18(a),21 in that the probative value of the exhibits was vastly outweighed by their prejudicial effect as they were largely irrelevant, used solely to engender passion and prejudice and their duplicative nature compounded the prejudice from each individual view. Richard's death sentences directly resulted from their display, rendering penalty phase fundamentally unfair.**

*Spears v. Mullin*, 343 F.3d 1215 (10th Cir.2003);

*Thompson v. Oklahoma*, 487 U.S. 815 (1988);

*State v. Robinson*, 328 S.W.2d 667 (Mo.1959);

*State v. Clawson*, 270 S.E.2d 659 (W.Va.1980);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a)21.*

## II. DELIBERATION: IS IT REQUIRED?

**The trial court erred and plainly erred in overruling the motion for judgment of acquittal at the close of all of the evidence; not declaring a mistrial, *sua sponte,* when the prosecutor stated that deliberation did not have to be reflected upon; accepting the jury's verdicts of guilty of first degree murder and sentencing Richard to death; submitting Instructions 5 and 6, and not dismissing the first degree murder charges because this denied Richard due process, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I,§§10,18(a),21 in that §565.020RSMo requires, for conviction, that the defendant have deliberated, which §565.002RSMo defines as "cool reflection for any length of time no matter how brief." The evidence adduced showed *intent* but not *deliberation*, since there was no evidence of "cool reflection," but only a frenzied series of blows resulting in the deaths. By allowing submission of the charges and then conviction, the court eliminated the distinction between first and second degree murder and relieved the state of the burden of proof on that element of the offense since the definition contains mutually inconsistent elements. Those elements create a statute that is so vague as to leave the jurors free to decide, without any legally-fixed standards, what constitutes deliberation. The prosecutor's argument highlighted the inconsistency, allowing conviction despite no evidence of "cool reflection," thus creating arbitrary and capricious sentencing.**

*State v. Brown*, 836 S.W.2d 530 (Tenn.1992);

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

*State v. Thompson*, 65 P.3d 420 (Ariz.2003);

*Clarke v. State*, 218 Tenn. 259, 402 S.W.2d 863 (1966);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21;*

*§§565.00.020.*

## III. NON-STATUTORY AGGRAVATORS SUBJECT TO RING ANALYSIS

**The trial court erred and plainly erred in overruling Richard's objections and not *sua sponte* striking or disallowing evidence of non-statutory aggravating circumstances, specifically prior assaults on Eva Washington, Kimberly Strong and Lutricia Braggs, in penalty phase; letting the jury consider that evidence in reaching its penalty phase verdicts without instructing that they must find those facts unanimously and beyond a reasonable doubt; overruling defense objections to the penalty phase instructions and accepting the jury's verdicts and sentencing Richard to death because these rulings violated Richard's rights to due process, a fundamentally fair jury trial before a properly-instructed jury, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I, §§10,18(a),21 in that the jury was instructed to "decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant," a finding of fact the jury must make beyond a reasonable doubt yet the instruction let the jury decide what burden of proof it would apply and on whom to place that burden.**

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

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

*State v. Debler*, 856 S.W.2d 641 (Mo.banc1993);

*U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I, §§10,18(2),21.*

## IV. JURY SELECTION DISCRIMINATORY

**The trial court clearly and plainly erred in denying the defense motion to disallow the state's peremptory challenges of Venirepersons #39—Luke Bobo, and #5—Sylvia Stevenson, African-Americans, and letting the state utilize only six of nine peremptories because these rulings denied the venirepersons and Richard equal protection and the right that religion not be the basis for a strike and denied Richard freedom from cruel and unusual punishment under U.S.Const.,Amends.8,14;Mo.Const.,Art.I,§§2,5,21 in that defense counsel made a prima facie case of discrimination and the state's excuses were pretextual. Its excuses for striking Stevenson—that she was unhappy about sequestration, was not strong on the death penalty, had no small children and had mentioned church—were unsupported by the record or similarly-situated white venirepersons were not struck. The state's excuses for striking Bobo—that he was a religious person because he was an assistant dean of Coventry Seminary, was not strong on the death penalty and had a relative in prison—were unsupported by the record or similarly-situated white venirepersons were not struck, and made his religious affiliation the basis for striking him.**

*Batson v. Kentucky*, 476 U.S. 79 (1986);

*State v. Butler*, 731 S.W.2d 265 (Mo.App.,W.D.1987);

*Thorson v. State*, 721 So.2d 590 (Miss.1998);

*U.S.Const.,Amends.8,14;Mo.Const.,Art.I,§§2,5,21*.

## V. EVA'S RECORDS: DISCLOSURE

**The trial court abused its discretion in sealing Eva Washington's subpoenaed psychiatric records because this ruling denied Richard due process, compulsory process, confrontation, right to present a defense, a fair trial, and freedom from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I,§§10,18(a),21, in that, although portrayed at trial as a victim, Eva's psychiatric records may well have disclosed an evidentiary basis for presenting, as a defense, that Eva violently attacked Richard or Zandrea and Richard's attack was precipitated by hers. Since allegations, supported by physical evidence, of Eva's violence toward Richard, were made in November, 1999, and Richard told officers after this offense that Eva had attacked Zandrea, causing him to confront Eva, this also would have undercut a non-statutory aggravator.**

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

*State v. Newton*, 963 S.W.2d 295 (Mo.App.,E.D.1997);

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

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21*.

## VI. STATUTORY AGGRAVATOR INVALID

**The trial court erred in submitting, over objection, Instructions 16 and 21, patterned after MAI-Cr3d313.40, and accepting the jury's penalty phase verdicts on both counts because these actions denied Richard's rights to due process, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I,§§10, 18(a),21 in that the state charged that the killings were outrageously and wantonly vile, horrible and inhuman because "the defendant committed repeated and excessive acts of physical abuse upon [the victim] and the killing was therefore unreasonably brutal." Because the Legislature premised the statutory aggravator upon findings of "abuse," it clearly intended that it only apply to cases involving the victim's conscious suffering. If it is not so limited in effect, the statutory language is vague and overbroad, gives the jury standardless discretion and Richard's death sentences are thus invalid. If limited to those cases involving conscious suffering, insufficient evidence exists to support the aggravator since no evidence shows either victim was conscious after the first blow.**

*Proffitt v. Florida*, 428 U.S. 242 (1976);

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

*State v. Smith*, 756 S.W.2d 493 (Mo.banc1988);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21.*

## VII. GRUESOME PHOTOS AND VIDEO RENDERED GUILT PHASE UNRELIABLE

**The trial court abused its discretion in admitting, over objection, and then repeatedly showing in guilt phase Exhibits 4-17,19-34,4245,47-48,52-54—photographs of Eva, Zandrea and the scene—and Exhibit 35—the videotape—because those rulings denied Richard due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I, §§10,18(a),21 in that the exhibits were cumulative and duplicative, and their cumulative effect was magnified because the state used them with all but three of his guilt phase witnesses. Their prejudicial impact far outweighed any probative value, individually or together, they might otherwise have had. Because they were shown multiple times and they showed multiple views of the same things—none of which were even at issue—they encouraged the jury to disregard the facts and to convict Richard based on raw emotion.**

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

*State v. Stevenson*, 852 S.W.2d 858 (Mo.App.,S.D.1993);

*People v. Blue*, 724 N.E.2d 920 (Ill.2000);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21*.

## VIII. WITNESS GIVES OPINION OF GUILT

**The trial court erred and abused its discretion in overruling Richard's objection to Officer Kick's testimony that Richard was "nonchalant" after running from the apartment because this ruling denied Richard due process, a fair jury trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I,§§10, 18(a),21 in that Kick's testimony was improper lay testimony, that co-opted the jury's decision-making authority, since Richard's outer appearance was as susceptible of an innocent interpretation as a culpable interpretation and suggested that, if guilty, Richard felt no remorse. Especially since the state's theory was that Richard "coolly reflected," this interpretation was damning. Because of this susceptibility of interpretation, its probative value is vastly outweighed by its prejudicial effect.**

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

*People v. Peterson*, 698 N.Y.S.2d 777 (NYAD 3rd Dept.1999);

*Doyle v. Ohio*, 426 U.S. 610 (1976);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21.*

## IX. VICTIM'S PRIOR STATEMENTS IMPROPERLY ADMITTED

**The trial court erred and abused its discretion in admitting, over continuing objection, Eva Washington's statements to Officer Patrick that Richard assaulted her in November, 1999, because this denied Richard rights to due process, confrontation, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I,§§10, 18(a),19,21 in that her statements were hearsay, admitted to establish that Richard assaulted Eva before and were inadmissible under any exception to the hearsay rule. Richard was prejudiced because the state used this evidence to obtain a death sentence and argued his prior conduct was why he could not be sentenced to life imprisonment but must instead be sentenced to death.**

*State v. Bell*, 950 S.W.2d 482 (Mo.banc1997);

*State v. Post*, 901 S.W.2d 231 (Mo.App.,E.D.1995);

*State v. Revelle*, 957 S.W.2d 428 (Mo.App.,S.D.1997);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),19,21.*

## X. PROSECUTOR'S ARGUMENT GROSSLY IMPROPER

**The trial court erred and plainly erred in overruling defense counsel's objections, not striking the venire panel, and not declaring a mistrial *sua sponte* to the prosecutor's arguments in**

**VOIR DIRE**

**1. "…in most cases, we don't seek death, we don't ask for a death sentence in most first degree cases";**

**2. "But there are sometimes certain facts that may be so overwhelming and overbearing that they impact a person's ability to be fair and impartial. We only do that in very rare instances, but…";**

**GUILT PHASE**

**3. "It's just as important what you didn't hear in that defense argument, and you didn't hear anything about what was going on in that room. Now, is it possible—you saw the injuries. You heard the doctor testify. Is it possible—and the doctor told you—";**

**4. "The deliberation is not cool, it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief";**

**5. "And you know what? I will not make a single apology to anybody for putting those pictures up there. I won't do that. I won't do that because he did it."**

**6. "You recall the evidence that went up there, and as many of those pictures as possible contain as many wounds and injuries suffered by them as possible**

**for that very reason, so we don't have four hundred of these pictures up there, or however many we have. They were kept to a minimum."**

**7. "I wish this was, and it isn't, it's not an episode of CIS. If it was, and I wish it was, I wish it was because then—".**

**PENALTY PHASE**

**8. "I'll have an opportunity to argue why I think death is the appropriate punishment in this case, why I think you should sentence Richard Strong to death based upon the evidence and the information that you received in this case. Why I think that should be the sentence imposed upon him for murder in the first degree of both Eva Washington and Zandrea Thomas.";**

**9. "If I have proven that beyond a reasonable doubt to your satisfaction as a jury..."**

**10. "And remember what I said earlier, the instructions are as important for what they don't say as what they do say. At that point it doesn't say must decide whether there are facts and circumstances in statutory aggravation. It says at that point in aggravation of punishment, taken as a whole, which warrants the imposition of death."**

**11. "If, in your opinion, your view, your conscience what's true and just in this case at that point is the imposition of a death sentence on Richard Strong, then you consider evidence in mitigation, and determine if that mitigation outweighs that evidence in aggravation."**

**12. "And they're not the only victims in this case. Consider all of the evidence, all of the evidence that you saw in this case, and you will see just how much this tragedy affects people. It affected everybody that came into this courtroom, and who knows how many people beyond what you saw this case has done.";**

**13. "You can't describe the pain and suffering that so many other people have to experience because of the conduct of Richard Strong…Michelle Brady, when she tried to read about her friend, she could hardly get the words out, after two and a half years could barely read about the life of her good friend."**

**14. "You saw the effect and the impact that it had on his ex-wife, on Kim Strong…You saw the impact, and you know the impact and the pain and the suffering that it has caused to his mother, and that it has caused to his children, and that it has caused to his brothers, and that is has caused to his sisters and their children."**

**15. "But should we allow Richard Strong to escape justice because we can't provide complete justice?...he would escape justice, he would escape paying the price that he ought to be paying for what he did in this case, if he is sentenced to life without parole."**

**because these arguments denied Richard due process, a fair trial and freedom from cruel and unusual punishment, U.S.Const.,Amends5,6,8,14; Mo.Const.,Art.I,§§10, 18(a),21;§565.030.4 in that the prosecutor argued facts**

**outside the record(1,2,6,7), misstated the law(4,9,10,11,16), misstated the facts(12), personalized the case, making himself a 13th juror(5,8), and argued improper victim impact evidence(13,14,15), prejudicing Richard and rendering the verdicts unreliable.**

*Berger v. United States*, 295 U.S. 78 (1935);

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

*Tucker v. Kemp*, 762 F.2d 1496 (11thCir.1985);

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21*.

## XI. RICHARD'S SENTENCES MUST BE REDUCED

**This Court, in exercising its independent duty, under §565.035, to review all death sentences, must set aside Richard's death sentences because they were imposed under the influence of passion and prejudice and the evidence does not support the existence of one statutory aggravator, which violates Richard's rights to due process and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,8,14;Mo.Const.,Art.I,§§10,21 in that the state obtained these death sentences by flooding the jury's consciousness with gory, cumulative images in penalty phase and encouraging them to decide the case, not on the facts but on their emotions and one of its statutory aggravators—that the murders were outrageously or wantonly vile, horrible or inhuman, involving depravity of mind, was defined as repeated and excessive acts of physical abuse. Since the state did not prove beyond a reasonable doubt that Eva and Zandrea were conscious after the first blow, it could not prove conscious suffering. Either the aggravator was unsupported by the evidence or it is unconstitutionally vague and overbroad since the various limiting constructions offered to save it allow findings based on conscious suffering and lack thereof.**

*Furman v. Georgia*, 408 U.S. 238 (1972);

*Stringer v. State*, 500 So.2d 928 (Miss.1986);

*State v. Clawson*, 270 S.E.2d 659 (W.Va.1980);

*U.S.Const.,Amends.5,8,14;Mo.Const.,Art.I,§§10,21.*

## XII. AGGRAVATORS NOT PLED

**The trial court plainly erred in not sua sponte quashing the information in lieu of indictment for failure to comply with *Jones v. United States* and *Apprendi v. New Jersey* and exceeded its authority in sentencing Richard to death because these actions denied Richard due process, a jury trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I,§§10,18(a),21 in that, in neither the indictment nor the information did the state charge any statutory aggravator, a fact necessary to qualify the offense as one capitally-eligible in Missouri. Since the charging document included none of those factors, Richard was not charged with the capitally-eligible offense of first degree murder and his death sentences cannot stand.**

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

*Jones v. United States*, 526 U.S. 227 (1999);

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

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

*U.S.Const.,Amends.5,6,8,14;*

*Mo.Const.,Art.I,§§10,18(a),21.*

## ARGUMENT

### I. GRUESOME PHOTOS IN PENALTY PHASE

**The trial court erred in admitting in penalty phase Exhibits 10-17,19-34,47-48, photographs of Eva Washington and Zandria Thomas at the scene and during the autopsies, and letting the prosecutor present photographs as part of a power-point presentation during his penalty phase closing argument because this denied Richard due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I§§10,18(a),21 in that the probative value of the exhibits was vastly outweighed by their prejudicial effect as they were largely irrelevant, used solely to engender passion and prejudice and their duplicative nature compounded the prejudice from each individual view. Richard's death sentences directly resulted from their display, rendering penalty phase fundamentally unfair.**

Because the death penalty is qualitatively different from any term of imprisonment, a "corresponding difference [exists] in the need for reliability in the determination that death is the appropriate punishment in a specific case."*Woodson v. North Carolina*, 428 U.S. 280, 305(1976). Death cannot be imposed under procedures that create a substantial risk of arbitrary or capricious sentencing.*Furman v. Georgia*, 408 U.S. 238(1972). Richard's jury imposed death because they were bombarded in penalty phase by a multitude of gruesome large color images displayed on a projector screen during Prosecutor McCulloch's

closing. They inflamed the jury's passions and prejudices, causing them to sentence Richard to death not based on the facts and law but on raw emotions. Letting McCulloch shanghai penalty phase and convert it into a kaleidoscope of color and emotion denied Richard's state and federal constitutional rights to due process, reliable sentencing, a fair trial and freedom from cruel and unusual punishment.

At the outset of penalty phase, McCulloch re-offered Exhibits 1-59, except Exhibit 3.(T1535). These included scene photographs(Exhibits 4-11,42-45,49-54) and photographs of Eva Washington and Zandrea Thomas, at the scene and during the autopsies(Exhibits 16,17,19,28-34,47-48). Dede objected to these exhibits in guilt phase(T953-68). Immediately before penalty phase, the court acknowledged, "it will be a continuing objection to all the prior objections that Mr. Dede has made, [since] he does not want to highlight his objections to the jury on some of these very critical points."(T1528).

> While preparing for penalty phase closing, McCulloch stated:
>
> Judge, my intention, during the closing argument, is to use the exhibits in the case. But I'm not going to—I've taken the exhibits, the photographs, and—primarily the photographs and scanned them into the computer.
>
> They're all the exact exhibits, identical to what was admitted into evidence. They are the evidence. And put them into a power-point format, and will go through those exhibits at various times during the closing argument.

(T1720-21). Dede objected, "due to the gruesome nature of the photographs, that enlarging them highlights and prejudices the jury, and makes them unduly inflammatory."(T1721). The court overruled the objection, stating the exhibits were "part and parcel" of penalty phase.(T1721).

In closing, McCulloch argued that Richard

> deprived them of the ability to get up in the morning and experience life…He deprived her of all of that, he deprived Zandrea of that. He deprived Eva of the joy of the human experience of raising not just Zandrea, but her other daughter, Alicia. He deprived them of that. He took that away from them. And he took it away from them in such a brutal, vicious, inhuman way that he has forfeited his right to walk among us.

(T1734). In his final closing, he argued:

> And there are those among us, Richard Strong, who forfeit their right to life by their conduct. Consider all of the evidence in this case, all of what he did, all of the harm and the suffering that he has caused to Eva, of course, to Zandrea, of course, but the other people that he's caused that harm and suffering to…Let's not forget what brought us here. Let's not forget what Richard Strong did, of course, put all of us in this courtroom here. Let's not forget the 21 stab wounds and eight slash wounds inflicted upon Eva Washington. Let's not forget the torture, the depravity of mind, the cruel, vile, inhuman treatment that he inflicted upon Eva Washington.

> Let's not forget Zandrea. Let's not forget what he did to Zandrea Thomas. Let's not forget the cruel and vile and inhuman treatment, and the torture that he inflicted upon Zandrea Thomas.

(T1756-57). During that argument, someone said, "Richard, tell the truth, please God, tell the truth."(T1758).

While McCulloch made his impassioned plea for death, as promised, he displayed photographs on a projector screen of Eva, Zandrea, Richard and the knife.(Exhibits 10-17,19-34,36,47-48,60-62; Power-Point CD—"Strong"). As William C. Lhotka of the St. Louis Post-Dispatch recorded, "Just before jurors started deliberating Thursday on Richard Strong's punishment for murder, prosecutor Robert P. McCulloch flashed a montage of photographs—some gruesome—on a screen in court. So powerful were the images that members of the victims' families fled the St. Louis County courtroom. A relative of Strong's cried out, prompting a visit by a bailiff. Jurors stared intently at the pictures…." Lhotka, William C., "Killer of Woman, Girl Should Die, Jury Says," *St. Louis Post-Dispatch*, March 7,2003,pageB3.

This case raises the issue the Supreme Court left unresolved in *Thompson v. Oklahoma*, 487 U.S. 815(1988)—whether inflammatory and prejudicial photographs of the victim's body, introduced during guilt phase and reincorporated into penalty phase, violate the accused's constitutional right to reliable sentencing.*See also Mann v. Oklahoma*, 488 U.S. 876(1988)(Marshall, J., dissenting from denial of certiorari);*Tucker v. Kemp*, 480 U.S.

911(1987)(Brennan, J., dissenting from denial of certiorari). As Justice Marshall stated, because introducing "ghastly photographs" of the victims presents "substantial and recurring issues of constitutional dimension," review is warranted.

The trial court has broad discretion to determine whether potentially inflammatory photographs and videotapes are admissible. *State v. Knese*, 985 S.W.2d 759, 768(Mo.banc1999);*State v. McMillin*, 783 S.W.2d 82, 100(Mo.banc1990). Even gruesome or graphic photographs may be admissible if they show the nature and location of wounds, the body's condition or prove an element of the state's case. *Knese*, 985 S.W.2d at 768;*State v. Mease*, 842 S.W.2d 98, 108(Mo.banc1992). If photographs of a victim's body are solely to arouse the jury's emotions and prejudice the defendant, *State v. Wood*, 596 S.W.2d 394 (Mo.banc1980), or their needlessly-inflammatory nature outweighs their probative value, they should be excluded. *State v. Robinson*, 328 S.W.2d 667(Mo.1959). "The fundamental rationale barring the introduction of gruesome photographs is that their impact on the jury is such that it will become so incensed and inflamed at the horrible conditions depicted that it will not be able to objectively decide the issue of the defendant's guilt." *State v. Clawson*, 270 S.E.2d 659, 674(W.Va.1980).

These rules are grounded in concepts of logical and legal relevance. Evidence is logically relevant if it tends to make a material fact's existence more or less probable. *State v. Anderson*, 76 S.W.3d 275, 276(Mo.banc2002);*State v.*

*Smith*, 32 S.W.3d 532, 546(Mo.banc2000). But, even if *logically* relevant, for admissibility, it must also be *legally* relevant. Legal relevance weighs the evidence's probative value against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasted time and cumulativeness. *Anderson*, 76 S.W.3d at 276; *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc1992)(Thomas,J.,concurring). If evidence is improperly admitted, the reviewing court must determine if prejudice resulted, such that a fair trial was denied. *Anderson*, 76 S.W.3d at 277. When the error is preserved, it is presumed prejudicial and the state must show harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18(1967); *State v. Rhodes*, 988 S.W.2d 521, 529 (Mo.banc1999).

When the error occurs in penalty phase,[2] its constitutional dimension is amplified, raising whether the evidence so unfairly infects sentencing as to "render the jury's imposition of the death penalty a denial of due process" and violate the Eighth Amendment. *Romano v. Oklahoma*, 512 U.S. 1, 12(1994); *Bruton v. United States*, 391 U.S. 123, 131 n.6(1968)("An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of [sentencing]."). The 10th Circuit recently addressed this question and affirmed the grant of habeas relief, finding admitting gruesome photographs in penalty phase

[2]This Court has never directly addressed the constitutional error from admitting gruesome photographs in penalty phase.

created that kind of constitutional error. *Spears v. Mullin*, 343 F.3d 1215(10th Cir.2003).

In *Spears*, the state incorporated its first-phase evidence and then presented six photographs of the victim's body from the crime scene.*Id.*at 1224. It asserted they were relevant to show the victim had suffered serious physical abuse before dying.*Id*.at 1226. The 10th Circuit agreed with the district court that the photographs depicting the many injuries—large gashes, stabs, exposed intestines, swollen face and black eye—rendered penalty phase fundamentally unfair.*Id*.at 1228. It noted the heinous, atrocious and cruel aggravator in Oklahoma focuses on the victim's conscious suffering and, because the evidence did not establish the victim was conscious when those injuries were inflicted, the photographs were unduly prejudicial.*Id.* It held, "the gruesome photographs potentially misled the jury, as they necessarily had a strong impact on the jurors' minds."*Id.*

The Court found that, even if "minimally relevant" to the heinous, atrocious and cruel aggravator, the photographs' prejudicial effect outweighed their probative value.*Id.* The state waited to spring the photographs in penalty phase, deliberately waiting to present them "solely for their shock value."*Id.* The Court recognized the photographs were the state's primary evidence in aggravation.*Id.* The Court concluded the effect of this improper evidence was great, given the strength of the mitigation evidence and the "not particularly strong" evidence supporting the other statutory aggravator.*Id.*

Recently, in *Reese v. State*, 33 S.W.3d 238(Tex.Crim.App.2000), the Texas Court decided whether admitting an 8x10 color photograph of the victim and her unborn child in penalty phase created reversible error. The Court noted the photograph arguably showed the results and foreseeable consequences of the defendant's actions and was therefore relevant to the special issues in penalty phase.*Id*.at 240. That finding did not end the Court's inquiry, since relevant evidence is properly excluded if its probative value is substantially outweighed by the danger of unfair prejudice.*Id*. Factors to be considered are whether the ultimate issue is seriously contested by the opponent; the state had other, convincing evidence to establish the ultimate issue on which the evidence was relevant; the probative value of the evidence was not particularly compelling and the evidence was such that an instruction to disregard would likely not have been efficacious.*Id.* at 241. As to photographs, the reviewing court should consider their number and size; whether black and white or color; the detail shown; whether the body is naked, clothed or has been altered post-offence to enhance its gruesomeness.*Id.*

The *Reese* Court held that the photograph at issue—the sole photograph admitted in penalty phase—was improperly admitted, despite its relevance to show the results and foreseeable consequences of the defendant's actions and his violent, vicious nature.*Id.*at 241-42. The photograph could "impress the jury in some irrational yet indelible way," showing much more than the facts relevant to

penalty phase, suggesting "that the jury's decision be made on an emotional basis and not on the basis of the other relevant evidence introduced at trial."*Id.*at 242.

The Court in *Stringer v. State*, 500 So.2d 928(Miss.1986) also addressed whether admitting photographs in penalty phase created reversible error. The defendant was being tried for the second of two homicides, yet the state introduced photographs not only of the victim of that homicide but also the victim of another homicide. The Court found reversible error not merely because the state used the photographs to get a "second bite at the apple" in seeking the death penalty for the first homicide but because

> …the prosecution could not be content with merely introducing the photographs of Nell McWilliams into evidence, but displayed them to the jury during closing argument as part of its "slide show." We deplore this practice. As the West Virginia court noted in *Clawson*, the effect is to take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury.

*Id*.at 935. The Court further noted,

> It is the jury's duty to weigh the permissible aggravating circumstances against any mitigating factors to determine whether the defendant deserves to suffer the death penalty. Just as a lack of evidence taints this process, so does the admission of irrelevant or inflammatory evidence. Color slides of the body of another victim, projected on a screen during closing argument,

are an unnecessary dramatic effect that can only be intended to inflame and prejudice the jury.

*Id.* This tactic so prejudiced the jury that it denied the defendant a fair sentencing phase.*Id.*

Against the constitutional backdrop the Court laid in *Woodson, supra,* stressing the qualitative difference in the death penalty and the critical need that sentencing be reliable, not the result of the state's emotional assault, the courts' analyses in *Spears, Reese* and *Stringer* provide some measure of guidance on this issue.

If this Court solely considered whether the photographs helped to prove a fact at issue—the statutory aggravator that the murder "involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find the defendant committed repeated and excessive acts of physical abuse…."(LF549,555)—the inquiry undoubtedly would end. But, that is not the sole issue. We must consider how many photographs were used; their size; color; detail; whether they showed changes from what was found at the scene, and when they were used.*Reese,* 33 S.W.3d at 241. We must also consider whether the issue was seriously contested; other evidence was available to prove that fact and an instruction to disregard would have been efficacious.*Id.* Further, we must consider whether the state used the photographs just as evidence or as a tool to inflame the jury's emotions.*Stringer*, 500 So.2d at 935.

For McCulloch's final penalty phase closing, he used power-point and, on a projector screen, displayed blown-up,[3] color versions of over 25 photographs. They depicted Eva and Zandrea before the events in question; Eva and Zandrea at the scene and during the autopsies; the butcher knife and Richard's mugshot, superimposed on the other images.(Exh10-17,19-34,36,47-48). The jury was bombarded with a host of graphic, color images.

That Eva and Zandrea were repeatedly stabbed and slashed was not questioned, let alone "seriously contested" at trial. The state also had other mechanisms—the medical examiner and the police officers, to remind the jury of their wounds. Further, given the timing and nature of McCulloch's presentation, it is highly unlikely that any admonition to the jury to disregard or not let emotions affect their decision would have any effect. "The vice of the pictures is in their tendency to inflame and to arouse the passions. This vice cannot be erased, however many statutory aggravating circumstances the jury finds." *State v. Leisure*, 749 S.W.2d 366, 385(Mo.banc1988). As Judge Somerville once asked, "how do you unring a bell?" *State v. Shepard*, 654 S.W.2d 97, 101(Mo.App.,W.D.1983).

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[3] The Florida Supreme Court reversed and remanded for a new trial in *Ruiz v. State*, 743 So.2d 1,8(Fla.1999), because in penalty phase the state introduced a blow-up of the victim's upper body. It introduced a standard-sized photograph in guilt phase and provided no credible explanation about the need for the blow-up.

The state used its dramatic power-point to inflame the jury's passions, to decide Richard's fate solely on their gut reaction to graphic photographs. Especially in penalty phase, when the "qualitative difference of death from all other punishments," *California v. Ramos*, 463 U.S. 992, 998(1983), should underpin every action, such a presentation cannot be condoned.

> It is the duty of the State to present relevant and material facts to the jury to stimulate their mental processes so that they might thereby arrive at the guilt or innocence of the accused. But to introduce evidence only for the purpose of arousing the passions and prejudices of the jury, in such a manner as to cause them to abandon any serious consideration of the facts of the case and give expression only to their emotions, is clearly outside the scope of such duty and a violation of an accused's right to a fair trial.

*Kiefer v. State*, 239 Ind. 103, 153 N.E.2d 899, 905(1958); *Clawson*, 270 S.E.2d at 612-13. Presenting these photographs in penalty phase closing denied Richard due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. Richard's death sentences are the resulting prejudice. This Court should reverse and remand for a new penalty phase or order him re-sentenced to life without probation or parole.

## II. DELIBERATION: IS IT REQUIRED?

**The trial court erred and plainly erred in overruling the motion for judgment of acquittal at the close of all of the evidence; not declaring a mistrial, *sua sponte,* when the prosecutor stated that deliberation did not have to be reflected upon; accepting the jury's verdicts of guilty of first degree murder and sentencing Richard to death; submitting Instructions 5 and 6, and not dismissing the first degree murder charges because this denied Richard due process, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I,§§10,18(a),21 in that §565.020RSMo requires, for conviction, that the defendant have deliberated, which §565.002RSMo defines as "cool reflection for any length of time no matter how brief." The evidence adduced showed *intent* but not *deliberation*, since there was no evidence of "cool reflection," but only a frenzied series of blows resulting in the deaths. By allowing submission of the charges and then conviction, the court eliminated the distinction between first and second degree murder and relieved the state of the burden of proof on that element of the offense since the definition contains mutually inconsistent elements. Those elements create a statute that is so vague as to leave the jurors free to decide, without any legally-fixed standards, what constitutes deliberation. The prosecutor's argument highlighted the inconsistency, allowing conviction despite no evidence of "cool reflection," thus creating arbitrary and capricious sentencing.**

When a homicide occurs in Missouri, without more, it is presumed to be second degree murder. *State v. Gassert*, 65 Mo. 352(Mo.1877); *Love v. State*, 670 S.W.2d 499, 505(Mo.1984); *State v. Little*, 601 S.W.2d 642(Mo.App.,E.D.1980). To elevate the homicide charge to first degree murder, the state must also prove the murder was done deliberately.§§565.020-.030 RSMo. "Deliberation [is] the distinctive quality which separates murder in the first degree from murder in the second degree…." *State v. Garrett*, 207 S.W. 784(Mo.1918).

Despite the requirement of proof of deliberation, deliberation has been legislatively-defined and judicially-applied to render meaningless any rational distinction between first and second degree murder. Especially in a case such as this, where all evidence points to a frenzied, unthinking killing, the court's actions in submitting Instructions 5 and 6, the first-degree verdict-directors; accepting the jury's verdicts; not dismissing the first degree murder charges; and not declaring a mistrial *sua sponte* when the prosecutor stated that the jury did not have to find cool reflection denied Richard's state and federal constitutional rights to due process, a fundamentally fair trial and freedom from cruel and unusual punishment.

Section 565.020 provides that "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." Section 565.002 defines deliberation as "cool reflection for any length of time no matter how brief." Despite the seeming clarity

of this definition, however, the definition and how it has been interpreted have blurred the line between first and second degree murder

This Court has stated that, when a defendant "with the purpose of causing serious physical injury" causes a death, that is second degree murder. "Both second degree murder and first degree murder require that the act be intentionally done. Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." *State v. O'Brien*, 857 S.W.2d 212, 218(Mo.banc1993); *State v. Black*, 50 S.W.3d 778, 797(Mo.banc2001)(Wolff, J., dissenting). Yet, this Court, through opinions and Approved Instructions, has repeatedly found deliberation by focusing on the temporal component, rather than the mental process inherent in the word's definition. *See, e.g., Id.* at 788; *State v. Tisius*, 92 S.W.3d 751, 764(Mo.banc2002); *State v. Clemmons*, 753 S.W.2d 901, 906(Mo.banc1988); *State v. Ervin*, 979 S.W.2d 149, 159(Mo.banc1998); *State v. Feltrop*, 803 S.W.2d 1, 11(Mo.banc1991); *State v. Ingram*, 607 S.W.2d 438, 443 (Mo.1980); *see also State v. Samuels*, 965 S.W.2d 913, 922(Mo.App.,W.D.1998) ("The deliberation necessary to support a conviction of murder in the first degree need only be momentary; it is only necessary that the Appellant considered taking the victim's life in a deliberate state of mind." *Id.*at 922). This focus misdirects the jury, blurring the distinction between first and second degree murder. Since for the statute to be constitutional, the definition of premeditation must provide a meaningful distinction between first and second degree murder, the legislative and

judicial definitions violate due process. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03(1966).

Because a defendant's mental state is often difficult to prove by direct evidence, the state often resorts to proof by circumstantial evidence. *See, e.g.*, *Black*, *supra* at 788-89. But, as noted, *supra*, the circumstantial evidence upon which convictions often rest is not necessarily proof of the essence of deliberation—cool reflection. That aspect of deliberation is often ignored or mistakenly combined with a discussion of intent and premeditation.

In *State v. Brown*, 836 S.W.2d 530, 540(Tenn.1992), the Tennessee Supreme Court noted, "The obvious point to be drawn from this discussion is that even if intent (or 'purpose to kill') and premeditation ('design') may be formed in an instant, deliberation requires some period of reflection, during which the mind is 'free from the influence of excitement, or passion.'" *Citing, Clarke v. State*, 218 Tenn. 259, 402 S.W.2d 863, 868(1966). Analyzing the law's development, the court noted that courts often use "premeditation" and "deliberation" to refer to the same concept. *Brown*, *supra* at 540. It recognized that recent opinions "overemphasize the speed with which premeditation may be formed" converting

> the proposition that no *specific* amount of time between the formation of the design to kill and its execution is required to prove first-degree murder, into one that requires virtually no time lapse at all, overlooking the fact that while intent (and perhaps even premeditation) may indeed arise instantaneously, the very nature of deliberation (and perhaps even

> premeditation) may indeed arise instantaneously, the very nature of deliberation requires time to reflect, a lack of impulse, and, as the older cases had held at least since 1837, a "cool purpose."

*Id*. at 540, *citing Dale v. State*, 18 Tenn.(10 Yer.) 551, 552(1837).

The Court further noted that the confusion of premeditation and deliberation was not unique to Tennessee but was documented, and participated in by the commentators. More recent versions of those learned treatises, however, note the distinction between the concepts. Wharton's Criminal Law states:

> Although an intent to kill, without more, may support a prosecution for common law murder, such a murder ordinarily constitutes murder in the first degree only if the intent to kill is accompanied by premeditation and deliberation. "Premeditation" is the process simply of thinking about a proposed killing before engaging in the homicidal conduct; and "deliberation" is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when apprehended. "Deliberation" is present if the thinking, i.e., the "premeditation," is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit a "careful weighing" of the proposed decision.

C.Torcia, *Wharton's Criminal Law,* §142(15th ed.1994); *Brown*, 836 S.W.2d at 540-41. Similarly, 2W.LaFave and A. Scott, *Criminal Law,*§7.7(1986), states,

"perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection…." "It is not enough that the defendant is shown to have had time to premeditate and deliberate. One must actually premeditate and deliberate, as well as actually intend to kill, to be guilty of…first degree murder." *Id.*

Courts have further blurred the distinction between first and second degree murder by relying upon "repeated blows" as circumstantial evidence of premeditation. *Brown*, 836 S.W.2d at 541. This usage is not unique to Tennessee, since Missouri courts also find multiple blows prove deliberation. *See e.g.*, *Tisius*, 92 S.W.3d at 764; *Samuels*, 965 S.W.2d at 922. Nonetheless, "Logically, of course, the fact that repeated blows (or shots) were inflicted on the victim is not sufficient, by itself, to establish first-degree murder. Repeated blows can be delivered in the heat of passion, with no design or reflection. Only if such blows are inflicted as the result of premeditation and deliberation can they be said to prove first-degree murder." *Brown*, 836 S.W.2d at 542; LaFave&Scott,§7.7("The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant in this regard, as such a killing is just as likely (or perhaps more likely) to have been on impulse").

The Arizona Supreme Court recently re-visited the meaning of premeditation[4] to determine whether reducing proof of premeditation to mere passage of enough time to permit reflection renders the statute vague and unenforceable, and eliminates the difference between first and second-degree murder. *State v. Thompson*, 65 P.3d 420, 424(Ariz.2003). The Court found the verdict-directors and the state's argument that it did not have to prove actual reflection, but only that enough time had elapsed to allow reflection erroneous, but concluded the errors were harmless since the evidence of the defendant's "reflection" was overwhelming. *Id.*at 429. The Court stated, however, "if the only difference between first and second degree murder is the mere passage of time, and that length of time can be 'as instantaneous as successive thoughts of the mind' then there is no meaningful distinction between first and second degree murder. Such an interpretation would relieve the state of its burden to prove actual reflection" and would, therefore, violate due process." *Id*.at 427. The Court concluded the Legislature intended premeditation "and the reflection that it requires, to mean more than the mere passage of time." *Id*. The Court stated, "We

[4] Premeditation exists if "the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection. Proof of actual reflection is not required, but an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion."A.R.S.§13-1101(1)

also discourage the use of the phrase 'as instantaneous as successive thoughts of the mind.' We continue to be concerned that juries could be misled by instructions that needlessly emphasize the rapidity with which reflection may occur." *Id*.at 428.

As the Tennessee Supreme Court stated, "this discussion leads us inevitably to the conclusion that [Richard's] conviction for first-degree murder in this case cannot be sustained." *Brown,* 836 S.W.2d at 543. Due process requires proof of every element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314-15(1979); *In re Winship*, 397 U.S. 358(1970). Here, the evidence of deliberation was insufficient; the verdict directors misled the jury by allowing conviction despite no evidence of cool reflection, and the prosecutor stated the jury need not find, for conviction, that Richard coolly reflected.

As to the first of these claims, review is limited to whether sufficient evidence was adduced from which a reasonable juror could find guilt beyond a reasonable doubt. *Black*, 50 S.W.3d at 788; *State v. Dulany*, 781 S.W.2d 52,55 (Mo.banc1989). This Court views the evidence, and all reasonable inferences, in the light most favorable to the verdict. *Black*, 50 S.W.3d at 788; *Clemmons*, 753 S.W.2d at 904.

What evidence did the state adduce in guilt phase? It adduced that the police department received a 911 call and dispatched officers to the scene.(T996-98,1000-02). Officers knocked and saw nothing inside the apartment until Richard headed toward the back door.(T1082-89,1093-96,1160-66,1237-40).

Richard first said that Eva and the children were asleep and then that Eva had gone to work.(T1090,1168,1244). Richard ran when the officers kicked the door open. (T1096,1172, 1204,1246). Through almost every witness, it adduced that Eva and Zandrea died from multiple stab and slash wounds.(T1017-57,1067-73,1109-16,1181-88,1252-60,1316-91). As Richard ran, he told officers, "Just shoot me" and later stated he killed them.(T1098,1135-36,1141,1174,1247).

This evidence is sufficient to sustain a conviction for second degree murder but insufficient to establish that additional element—deliberation—to elevate the charge to first degree murder. It established there was **time** for deliberation. But time alone does not establish "cool reflection."*Brown*, 836 S.W.2d at 540-41; *Thompson*, 65 P.3d at 427; *Wharton*,§142; LaFave&Scott,§7.7; *Black*, 50 S.W.3d at 797(Wolff, J, dissenting). It also established there were multiple blows. But, multiple blows do not alone establish cool reflection. *Brown*, 836 S.W.2d at 543-44; *Midgett v. State*, 729 S.W.2d 410(Ark.1987); LaFave&Scott,§7.7. Indeed, multiple blows are "just as likely (or perhaps more likely) to have been on impulse." *Id.* Finally, while the state may argue that giving different stories about his family and then running away establishes deliberation, that too is insufficient to prove deliberation since "conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation, as it only goes to show the defendant's state of mind at the time and not before or during the killing." LaFave& Scott,§7.7.

The verdict-directors also misled the jurors because they so confused the concept of deliberation that the jury found Richard guilty of first degree murder despite no evidence on an element. In each of the two first degree murder verdict-directors, the jury was instructed, to convict of first degree murder, it must find, "Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief."(LF519-20). The defense objected to both instructions, arguing neither had evidentiary support.(T1426;LF586).

Whether a jury is properly instructed is a question of law. *Rice v. Bol*, 116 S.W.3d 599(Mo.App.,W.D.2003); *Hosto v. Union Elec. Co*., 51 S.W.3d 133, 142 (Mo.App.,E.D.2001). To reverse because of instructional error, the instruction must have misdirected, misled or confused the jury, resulting in prejudice to he who challenges the instruction. *Williams v. Fin. Plaza, Inc.*, 23 S.W.3d 656, 658 (Mo.App.,W.D.2000). To determine whether a jury was misdirected, misled or confused, it must be determined whether "an average juror would correctly understand the applicable rule of law" that the instruction attempts to convey. *Lashmet v. McQueary*, 954 S.W.2d 546, 550(Mo.App.,S.D.1997). Prejudice exists if the error materially affected the case's merits and outcome. *Hill v. Hyde*, 14 S.W.3d 294, 296(Mo.App.,W.D.2000).

A jury instruction creates a "roving commission" if it fails to advise the jury what acts or omissions by the defendant create his liability. *Lashmet*, 954 S.W.2d at 550; *Paisley v. K.C. Pub. Serv. Co.*, 351 Mo. 468, 173 S.W.2d 33, 38

(1943). An instruction may also create a roving commission when it is "too general." *Id*.at 38.

The first degree verdict directors here misled the jury and, because they were so general as to not advise the jury what constituted deliberation, they created a roving commission, letting the jury give its own, unguided interpretation to that element. That they were based on the Approved Instructions does not eliminate the problem.

As Justice Cardozo once observed, the distinction between first and second degree murder based upon the existence or non-existence of deliberation, especially when defined as it is here, is too vague and obscure for any jury to understand. B.Cardozo, *Law and Literature and Other Essays*, 99-100(1931). The Arizona Supreme Court recognized that the statutory definition "may not explain it in an easily understandable way and, indeed, might mislead the jury." *Thompson*, 65 P.3d at 428. It continued "to be concerned that juries could be misled by instructions that needlessly emphasize the rapidity with which reflection may occur." *Id.* In postulating an instruction to alleviate this concern, the court noted that the instruction "merely clarifies that the state may not use the passage of time as a proxy for premeditation. The state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time *is* premeditation." *Id.*

The instructions guiding Richard's jury did precisely what Justice Cardozo and the Arizona Supreme Court warned against—they combine two concepts that

would appear to be mutually exclusive—cool reflection and instantaneous occurrence. Since deliberation requires some period of reflection during which the mind is free from excitement or passion, *Brown*, 836 S.W.2d at 540; *Clarke*, 402 S.W.2d at 868, and some time to permit careful weighing of the proposed decision, *Wharton's Criminal Law,*§142, the instructions misled the jury, letting them convict Richard of first degree murder absent any evidence of "cool reflection upon the matter." Indeed, all the jury considered was "for any length of time no matter how brief."

The prosecutor also misled the jury by arguing in closing, "The deliberation is not cool, it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief."(T1474). As the Arizona court warned, he did not argue that the passage of time *suggested* deliberation. He argued that the passage of time *was* deliberation. This argument misstated the law and denied due process. *State v. Storey*, 901 S.W.2d 886, 901(Mo.banc1995); *Tucker v. Kemp*, 762 F.2d 1496, 1507(11$^{th}$Cir.1985); *Drake v. Kemp*, 762 F.2d 1449, 1458-59(11$^{th}$Cir.1985)(en banc). Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637(1974). Here, because the prosecutor preyed upon the lack of evidence of "cool reflection upon the matter" and upon a jury instruction exacerbating the jury's misunderstanding, Richard was convicted of first degree murder with no evidence of one of the elements of the offense—deliberation.

This Court must reverse Richard's convictions for **first** degree murder, reduce them to **second** degree and remand for re-sentencing. Additionally, it must declare §565.020 unconstitutionally vague.

## III. NON-STATUTORY AGGRAVATORS SUBJECT TO "RING"

**The trial court erred and plainly erred in overruling Richard's objections and not *sua sponte* striking or disallowing evidence of non-statutory aggravating circumstances, specifically prior assaults on Eva Washington, Kimberly Strong and Lutricia Braggs, in penalty phase; letting the jury consider that evidence in reaching its penalty phase verdicts without instructing that they must find those facts unanimously and beyond a reasonable doubt; overruling defense objections to the penalty phase instructions and accepting the jury's verdicts and sentencing Richard to death because these rulings violated Richard's rights to due process, a fundamentally fair jury trial before a properly-instructed jury, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I,§§10,18(a),21 in that the jury was instructed to "decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant," a finding of fact the jury must make beyond a reasonable doubt yet the instruction let the jury decide what burden of proof it would apply and on whom to place that burden.**

Defendants in capital cases are entitled to have a jury find beyond a reasonable doubt all of the facts upon which an increase in punishment is contingent. *State v. Whitfield*, 107 S.W.3d 253, 257(Mo.banc2003). If those findings are not made, the defendant's state and federal constitutional rights to due

process, a jury trial and freedom from cruel and unusual punishment are violated. That occurred here when the trial court admitted, over objection, evidence of Richard's prior assaultive behavior against Eva Washington, Kimberly Strong and Lutricia Bragg; instructed the jury, over objection, to consider that evidence in deciding whether, "taken as a whole, [it] warrant[s] the imposition of a sentence of death," and sentenced Richard to death.

In penalty phase, Kimberly Strong, Richard's ex-wife, testified[5] that, when pregnant with their second child, she had a confrontation with Richard about custody of their son.(T1537-38). He began hitting her and later pushed and hit her again, causing her almost to lose consciousness and rupture an eardrum.(T1539-40).

Lutricia Braggs, Richard's ex-co-worker, testified[6] they were close at work and, when another man became a problem, Richard acted jealous and told him to leave her alone.(T1557-59). He also told others she was "off-limits."(T1559). When she decided to end their relationship, he grabbed the car's steering wheel,

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[5] Counsel Dede lodged continuing objections to this testimony before penalty phase.(T1499-1507). To the extent this challenge is not preserved, Richard requests plain error review. *Rule 30.20*.

[6] Dede lodged continuing objections to Lutricia Braggs' testimony before penalty phase.(T1513-14). To the extent this challenge is imperfectly preserved, Richard requests plain error review. *Rule 30.20*.

steering them into on-coming traffic.(T1560-61). She tried to regain control of the car and remembered him hitting her face several times, while cursing.(T1562). She re-awakened, bloody and in pain, after the car stopped.(T1563).

Officer Daniel Patrick testified that on November 11, 1999, he responded to a 911 call from Eva Washington, in which she alleged Richard hit her face and then choked her until she lost consciousness.(T1570-73). Michelle Brady testified[7] she heard Richard curse Eva and threaten to kill her in September, 1999. (T1584,1593-94). She said that she visited Eva on November 11, 1999 and saw Eva's injured forehead, swollen left eye, welts around her neck and bruises on her arms.(T1594-96).

At the penalty phase instruction conference, defense counsel objected to Instructions 17 and 22 (T1714,1716), based on MAI-Cr3d 313.41A, which stated[8]:

> As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 16 exists, then you must decide whether there are facts and

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[7] Dede lodged continuing objections to the testimony about prior assaults on Eva. (T1508-12,1516-18). To the extent that this claim of error is imperfectly preserved, Richard requests plain error review. *Rule 30.20*.

[8] Since the instructions are identical, except for the references to Counts I or II and the number of the prior instruction, only the text of Instruction 17 is set forth. No waiver is intended as to Instruction 22.

circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented in both the guilty and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 16. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(LF550,556).

In his penalty phase closing, the prosecutor focused on Richard's prior altercations with Kimberly, Eva, and Lutricia. He told the jury that, once it found a statutory aggravator:

At that point it doesn't say must decide whether there are facts and circumstances in statutory aggravation. It says at that point in aggravation of punishment, taken as a whole, which warrants the imposition of death.

And in deciding this question, you consider all of the evidence presented in both phases of the case.

That's absolutely everything that you heard and saw in this particular case.

That includes the evidence about what Richard Strong did to women he supposedly loved. What Richard Strong did to the woman who was carrying his child, whether that woman was Kim Strong or whether that woman was Eva Washington, in November of 1999.

That is all evidence in aggravation in this case, and that's evidence, once you determine the statutory aggravators exist based upon the evidence in this case beyond a reasonable doubt, then whether all of the facts included, all of the evidence in this case, including everything you heard in the second phase and everything you heard in the first phase and everything you saw in both phases, warrants the imposition of death.

If, in your opinion, your view, your conscience what's true and just in this case at that point is the imposition of a death sentence on Richard Strong, then you consider evidence in mitigation, and determine if that mitigation outweighs that evidence in aggravation….

Those are factors that you should consider in determining...whether that outweighs the beating into unconsciousness of Lutricia Braggs in the car; whether that outweighs the pounding and choking of Eva Washington, in November of '99; whether that outweighs the torture and depravity

exhibited in this case by the repeated and excessive acts of physical abuse inflicted upon the victims in this case.

(T1727-29). In his final closing, McCulloch argued the jury should:

consider all of the evidence in this case, all of what he did, all of the harm and the suffering that he has caused to Eva, of course, but the other people that he's caused that harm and suffering to.

You know what he did to his first wife, the O.J. he's going to commit. I won't go through all of this again, but he pounded her, he beat her while she was pregnant.

What he did with Lutricia Braggs, you know, in the car. That while they're in the car and she wants to break off the relationship, he pounded her, beat her into unconsciousness.

(T1756).

"The right to trial by jury reflects… 'a profound judgment about the way in which law should be enforced and justice administered.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), *quoting Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *accord*, *Ring v. Arizona*, 536 U.S. 584, 609(2002). The framers of our Constitution installed the jury as the ultimate check against "oppression by the government." *Duncan*, 391 U.S. at 155. Deeming an independent judiciary alone an insufficient safeguard, the framers insisted upon juries to further protect the citizenry against arbitrary governmental action. *Id*.

When the framers were drafting our Constitution, juries already had assumed the power to determine guilt and punishment. *Ring*, 536 U.S. at 599. "[T]he jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established." *Id*. (quotations omitted). "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243, n.6(1999); *accord, Ring*, 536 U.S. at 600. A fact increases the maximum sentence when its absence renders the higher sentence unavailable. *Id.* at 600-01. Justice Scalia explained:

> [T] fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that **all facts essential to the imposition of the level of punishment that the defendant receives**—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—**must be found by the jury beyond a reasonable doubt.**

*Id*. at 610 (Scalia, J.,concurring)(emphasis added).

So, what are all facts essential to imposing death in Missouri? The instructions and this Court's opinion in *Whitfield, supra*, answer that question with unmistakable clarity.

To impose death, the jury must first find that "one or more statutory aggravating circumstance[s] exist[s]." (LF549,555);*MAI-Cr3d 313.40*. The *Ring*

Court found that the jury must find this essential fact and, without it, the defendant **must** be sentenced to life without parole.(LF549,555);§565.030.4(1); *Whitfield*, 107 S.W.3d at 258-59.

The second step also requires the jury make factual findings—whether the historical facts, "facts and circumstances in aggravation…taken as a whole, warrant the imposition of death." (LF550,556);*MAI-Cr3d313.41A.* This Court has specifically held:

> Step 2 requires the trier of fact (whether jury or judge) to find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty…In order to fulfill its duty, the trier of fact is required to make a case-by-case determination based on all the aggravating facts the trier of facts finds are present in the case. This is necessarily a determination to be made on the facts of each case. Accordingly, under *Ring*, it is not permissible for a judge to make this factual determination. The *jury* is required to determine whether the statutory and other aggravators shown by the evidence warrants the imposition of death.

*Id.*at 259.

A defendant's constitutional guarantees to due process and a jury trial are not satisfied, however, just with a jury's factual finding. Rather, as the *Ring* Court held, and this Court affirmed in *Whitfield*, it must be "found by a jury beyond a

reasonable doubt." *Id.* at 257; *citing Ring*, 536 U.S. at 602; *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

As to Step Two, this means that when the prosecutor and the instructions tell the jury to "decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant," (LF550,556), to consider "all evidence in aggravation in this case" (T1727), those facts and circumstances must be found beyond a reasonable doubt. The state must prove and the jury must find all of the evidence that the jury considers—including so-called non-statutory aggravators—beyond a reasonable doubt for it to be placed in the balance on Step Two.

This concept is not new. This Court, in *State v. Debler*, 856 S.W.2d 641 (Mo.banc1993), spoke on it a decade ago. There, this Court addressed whether admitting extensive evidence of Debler's prior drug dealing, for which he had not been convicted, was plainly erroneous. *Id.*at 657. This Court held, because Debler had never been convicted of any offense involving that conduct, the evidence was "significantly less reliable than evidence related to prior convictions." *Id.* To the average juror, such evidence was practically indistinguishable from evidence of prior convictions. *Id.* It held, therefore, that:

> [E]xtensive evidence of unconvicted drug dealing is highly prejudicial. If instructed on the drug dealing, the jury, before considering this circumstance, must unanimously find beyond a reasonable doubt that Debler was involved in a conspiracy to distribute drugs with Fisk—thereby

> curing some of the unreliability of this evidence. *MAI-Cr3d313.41*. Without such an instruction, it is possible that some jurors took this evidence into account while applying a lesser standard of proof. Such consideration would clearly violate the statutory standards governing the death penalty.

*Id.*at 657.

Under *Ring, Whitfield* and *Debler*, step two involves process in which the jury must find the facts. If the facts that the State wishes the jury to weigh against mitigation evidence include facts constituting unconvicted criminal activity, the jury must find them beyond a reasonable doubt. If this were not the case, *Ring* and *Whitfield* would be stood on their heads. After all, those cases require that the step be found by a jury and beyond a reasonable doubt. That requirement would be a hollow shell if the evidence that is weighed and balanced is not subject to the same requirements—proof to a jury and proof beyond a reasonable doubt.

Richard's jury was told to decide "whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant." (LF550-56). McCulloch then presented evidence and argued in closing as reasons to kill Richard that he assaulted Kimberly, Eva and Lutricia. Yet, no jury has ever found beyond a reasonable doubt that Richard committed these actions, despite that "to the average juror… unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions…." *Debler*, 856 S.W.2d at 657. To

allow Richard's death sentences to rest upon this evidence, without such a finding, denies due process, a jury trial and freedom from cruel and unusual punishment.

This Court must vacate Richard's death sentences and order him re-sentenced to life without probation or parole.

## IV. JURY SELECTION DISCRIMINATORY

**The trial court clearly and plainly erred in denying the defense motion to disallow the state's peremptory challenges of Venirepersons #39—Luke Bobo, and #5—Sylvia Stevenson, African-Americans, and letting the state utilize only six of nine peremptories because these rulings denied the venirepersons and Richard equal protection and the right that religion not be the basis for a strike and denied Richard freedom from cruel and unusual punishment under U.S.Const.,Amends.8,14;Mo.Const.,Art.I, §§2,5,21 in that defense counsel made a prima facie case of discrimination and the state's excuses were pretextual. Its excuses for striking Stevenson—that she was unhappy about sequestration, was not strong on the death penalty, had no small children and had mentioned church—were unsupported by the record or similarly-situated white venirepersons were not struck. The state's excuses for striking Bobo—that he was a religious person because he was an assistant dean of Coventry Seminary, was not strong on the death penalty and had a relative in prison—were unsupported by the record or similarly-situated white venirepersons were not struck, and made his religious affiliation the basis for striking him.**

Racial discrimination in jury selection has a long and ugly history and barriers have precluded its elimination. In the 1960's, the burden of showing discrimination was so high that a defendant could not prove it even where no African-Americans were allowed to serve. *Swain v. Alabama*, 380 U.S. 202

(1965). In *Swain*, the Court ruled that, to prevail, a defendant must show "the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." *Id*.at 227. Two decades later, the Court overruled *Swain*, because the burden of showing purposeful discrimination over the long-term was a "crippling burden of proof." *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986). Such a burden left prosecutors' peremptory challenges largely immune from constitutional scrutiny. *Id.* The Court rejected that standard as "inconsistent with the standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id*.at 93.

Following *Batson*, the Court stated, trial courts were required to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. If a party believes a peremptory strike is exercised in a racially-discriminatory[9] fashion, the stage is set for a *Batson* challenge. In the first step, before the venire is excused and the jury sworn, the party makes a prima facie case of discrimination by objecting to the peremptory strike as being exercised against an African-American. *Id.* at 95; *State v. Parker*, 836 S.W.2d 930, 939 (Mo.banc1992); *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo.banc2002). At the second step, the burden shifts to the strike's proponent to give a race-neutral

[9] This process also applies to gender or ethnic-based discrimination. *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

explanation. *Parker*, 836 S.W.2d at 939. At that step, the explanation need not be persuasive, but must be race-neutral. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). The race-neutral explanation must be clear, reasonably specific and case-related. *Batson*, 476 U.S. at 98,n.20. Unless a discriminatory intent is inherent in the explanation, it will be deemed race-neutral. *Hernandez v. New York*, 500 U.S. 352, 360 (1993). For the third step, the opponent must show that the proponent's explanation is pretextual. *Parker*, 836 S.W.2d at 939. A pretext can be shown by one or more similarly-situated white jurors who were not struck, *Id*.at 940; little or no logical relevance between the explanation and the case, *Id*.; no record support for the explanation, *State v. Butler*, 731 S.W.2d 265 (Mo.App.,W.D.1987); if the strike is based on the juror's "demeanor," that aspect of the juror's demeanor was not raised when it occurred, *State v. Metts*, 829 S.W.2d 585 (Mo.App.,E.D.1992), or the explanation is "implausible or fantastic" or "silly." *Purkett*, 514 U.S. at 768.

The trial court clearly erred in denying Richard's motions to disallow the state's peremptory strikes of two African-American veniremembers—Stevenson and Bobo. These actions denied Richard and the veniremembers equal protection under the state and federal Constitutions.

**Juror #5—Sylvia Stevenson**

McCulloch exercised a peremptory strike against Ms. Stevenson, an African-American. (LF497;T908). Dede objected, stating the strike violated *Batson*. (T908). The court responded that, of six African-Americans on the panel, the state had struck only three. (T909). It further noted that, since McCulloch used

only six peremptories, three Caucasians were eliminated from the panel. (T909). The court then asked McCulloch to "provide your explanation for the *race-neutral* reason." (T910)(emphasis added). McCulloch asserted he moved to strike Stevenson because she was "particularly unhappy" about sequestration, her brother was imprisoned, she was "particularly weak on the death sentence," didn't have small children and mentioned church and religion. (T910-11).

The court found the excuse race-neutral, affirming that her brother was incarcerated, she belonged to a church, was aggravated about sequestration and had no minor children. (T911-12). "[F]rom her answers and her physical motions she did not appear to be extremely strong for the death penalty." (T912).

In response, Dede noted that various white veniremembers, including Kimberly Keachie (who served,LF495), Donald Moreland, and Priscilla Schmidt (who also served, LF495), had no minor children. (T914). Dede disagreed Stevenson was not strong on the death penalty since her answers revealed her willingness to impose either penalty. (T913). Dede noted she agreed to impose death and answered that question before it was even complete. (T913).

McCulloch responded that Keachie (a man) was young and, as a Rockwood School district teacher, works with children. (T915-16). As to Schmidt, he argued she previously served and had no hesitation in agreeing to impose death. (T916).

The court found McCulloch's excuses not pretextual. (T917). He held the white jurors were not similarly-situated and Stevenson displayed "physical disdain" about sequestration. (T918). He found logical relevance between the

state's desire for jurors with minor children and this case. (T918). Finally, he stated, "I am aware of Mr. McCulloch's credibility and based upon his reputation, demeanor, and the Court's experience with Mr. McCulloch, I find that Mr. McCulloch has not pretextually stricken Miss Stevenson." (T918).

The court's findings were clearly erroneous because the state did not strike similarly-situated white venirepersons and his other excuses were unsupported by the record. Further, the court's rationale for upholding McCulloch's excuses—that he knew from past experience that McCulloch did not exercise strikes in a racially-discriminatory fashion, harkens back to *Swain*, not the current standard of review—*Batson*.

What does the record reveal about Stevenson? She is African-American and has no minor children. (T908;LF497). She stated if the facts supported imposing death, she could impose it, but if they did not, she would not. (T57). McCulloch successfully objected when Dede asked if she favored one penalty but she responded she could consider both punishments equally. (T58). Her brother was in Algoa for stealing but nothing about that situation would influence her or cause her to be anti-state. (T753-55). She knew very little about her brother's situation (T754-55). Finally, she knew someone who is a "member[] of our church…but that's all I know about it…I know him from church." (T823).

McCulloch's first excuse, that he struck Stevenson because she had no minor children, is pretextual because McCulloch failed to strike white venirepersons who also had no minor children. As Dede noted, Keachie and

Schmidt, who ultimately served, had no minor children. (T914). Millard Vance also has no minor children. (LF496). Even if having minor children is logically relevant to this case, *Marlowe*, 89 S.W.3d at 469, three white venirepersons who served shared with Stevenson the characteristic that McCulloch asserted disqualified her. This Court has stated, "the existence of similarly situated white jurors who were not struck," while not dispositive, is a "factor so relevant in determining pretext that it is 'crucial.'" *Id.* Given Keachie, Schmidt and Vance's service, the state's excuse is problematic.

McCulloch's excuse that Stevenson's brother was imprisoned is similarly unavailing, since Kelly Sullivan's relative was killed the year before by her husband, and Kimberly Keachie's friend was imprisoned for manslaughter. (T756-57,862-63). Sullivan and Keachie served (LF495), despite the existence of a fact the state decided disqualified Stevenson.

McCulloch's second excuse, that Stevenson was annoyed about sequestration, was pretextual because he made no record when they allegedly noticed her body language or facial expressions. Until McCulloch moved to strike her, the record contains no mention of her supposedly blatant disgust. Pretext can be shown where strikes are based on demeanor and that aspect of the veniremember's demeanor is not raised when it occurred. *Metts*, *supra*. By waiting until much later, the issue cannot be explored with the juror and a full record made for appeal. Allowing such *post hoc* excuses promotes pretextual strikes.

McCulloch's excuse that Stevenson was weak on the death penalty is refuted by the record and is pretextual. *Butler, supra*. Stevenson stated she could impose either penalty, depending upon the facts. (T57-58). Dede noted she was not hesitant about voicing her ability to impose either punishment and answered almost before the question was complete. (T913).

McCulloch's excuse that Stevenson is religious and she must be weak on the death penalty is pretextual. As the Court stated in *Thorson v. State*, 721 So.2d 590, 595 (Miss.1998),

> The critical question [McCulloch] should have asked [Stevenson] was whether or not she felt that she could sit in judgment of her fellow man regardless of the position of [her church.] If this question had evinced that she could not, then [McCulloch] would have had a valid reason for striking her. Thus, while we will permit a party to strike a potential juror for her actual beliefs, even if that belief springs from her religion, we will not allow challenges based solely on a potential jurors' religious affiliation. An individual's affiliation with the religious group of his or her choice shall not be a badge of second class citizenship in [Missouri.]

Stevenson knew someone who was a "member of our church." (T823). Stating her membership in a church did not signal her opposition to the death penalty. After all, our current United States Attorney General is a member of a church. Stevenson is African-American and McCulloch was grasping at straws to preclude

her service. The state violated equal protection by predicating its excuse upon her religious affiliation.

The court's actions reveal that, despite lip-service to *Batson*, it actually sought guidance from *Swain*. Before hearing reasons, it demonstrated its finding wasn't based on the state's actions here since it asked McCulloch to explain his "race-neutral" strikes. (T910). Then, finding McCulloch's excuses not pretextual, it stated, "furthermore, I am aware of Mr. McCulloch's credibility and based upon his reputation, demeanor, and the Court's experience with Mr. McCulloch, I find that Mr. McCulloch has not pretextually stricken Miss Stevenson." (T918).

The court's finding wasn't based merely on McCulloch's excuses here but on his "systematic use of peremptory challenges against Negroes over a period of time." *Swain*, 380 U.S. at 227. The *Batson* Court specifically rejected that approach because it presented a crippling burden of proof to those seeking to break racism's impact on jury selection. This Court must adhere to *Batson* and reject this attempted return to *Swain*.

**Juror #39—Luke Bobo**.

McCulloch also peremptorily struck Luke Bobo, an African-American. (T908;LF503). Dede challenged the strike under *Batson*. (T919). McCulloch replied that, although Bobo has small children (LF503), he was an assistant dean of Covenant Seminary and he didn't want "religious people, very religious, and I would have to assume because he's the dean of a seminary that he is a very religious person. I don't think he would make a particularly good death penalty

juror in this case, but – or in any case for that matter." (T919). McCulloch also stated Bobo's imprisoned cousin was a factor outweighing him having minor children. (T919-20). The court found these reasons race-neutral, and found most important that Bobo was the assistant seminary dean. (T920-21).

Dede responded that Venireperson #33, Martin McCabe, a retired teacher from St. Louis Priory School, a parochial school, was a similarly-situated white person not struck. (T921). McCulloch and the court responded that there was a great difference between a teacher at a parochial school and an assistant seminary dean. (T921-22). The court found logical relevance between striking someone with a religious background and a death penalty case since "it's clear to the Court that individuals in often religious avocations are more apt to—it's a very relevant issue between those two and the effect that it would have upon an individual sitting in a case involving the death penalty." (T923).

So, what did Bobo reveal? He told McCulloch that he believed life without parole and death were appropriate punishments in first degree murder cases. (T245-46). He could impose either punishment upon instruction. (T246). He recounted that several years earlier in Kansas City, a second cousin was shot at. (T713-14). He did not recall if anyone was charged, he had no role in the case, and it would not affect his ability to be fair and impartial. (T714). He recalled another second cousin from Kansas City, convicted of murder several years earlier. (T759-60). This would not affect his ability to be fair and impartial or affect his decision "because I'm so far removed from both occasions."(T760).

Further although his cousin's mother believed he was set-up, Bobo "know[s] so little about the case that I can't make a fair judgment."(T761).

McCulloch's excuses for striking Bobo are pretexts for race-based strikes and are overtly based on his religious affiliation. They violate equal protection and Mo.Const.,Art.I,§5.

The state's excuses are pretextual since similarly-situated white venirepersons were not peremptorily struck. The excuse that "there is a criminal background involved with Mr. Bobo," (T920) can be just as easily said about a myriad of white jurors, including Kelly Sullivan, who served. (LF495). Sullivan, a white juror, recounted that her mother-in-law's cousin was killed last year by her husband. (T862). Sullivan knew the defendant had confessed and wanted his confession suppressed. (T862). That McCulloch struck Bobo peremptorily, while leaving similarly-situated white jurors, like Ms. Sullivan, "is a factor so relevant in determining pretext that it is 'crucial.'" *Marlowe*, 89 S.W.3d at 469.

McCulloch's second excuse was that Bobo was a religious person. As Dede pointed out, other similarly-situated white jurors were not struck. Martin McCabe had taught at St. Louis Priory, a parochial school. (T921). McCulloch responded that there was a difference between an assistant seminary dean and "teaching a high school student math; I don't know what Mr. McCabe taught."

(T922). The court did not find McCabe similarly-situated for that reason. (T922).[10]

This finding ignores St. Louis Priory School's history. Begun by the Benedictine Order, it "seeks to impart a thorough grounding in the knowledge and practice of the Roman Catholic faith. As a monastery school, Priory places special emphasis on prayer and service to others." http://www.1.priory.org/mission.html . It is therefore just as likely that McCabe would have the same bent of mind as that which McCulloch speculated was Bobo's.[11] Moreover, McCulloch's speculation that Bobo was opposed to the death penalty because he was employed by a seminary ignores his responses. He clearly stated no opposition to imposing death. (T245-46).

Finally, both McCulloch and the court relied upon Bobo's religious affiliation as the excuse for striking him. The court found this factor logically relevant to a strike since religious people are less likely to impose death. (T923).

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[10] The court also rationalized the state's strike by finding that Bobo and McCabe were not similarly-situated because McCabe had no relatives with criminal entanglements. (T922-23). No challenge was made on that basis.

[11] Just as in *Thorson*, 721 So.2d at 595, McCulloch speculated about Bobo's beliefs and extrapolated from his job as Assistant Dean that he would be unable to impose death. This is sheer speculation, ignores Bobo's record responses and makes those with religious affiliations "second class citizens."

Striking Bobo because of his religious affiliation violates equal protection just as does striking him because he is African-American. *See United States v. Stafford*, 136 F.3d 1109 (7th Cir.1998); *State v. Fuller* 812 A.2d 389 (N.J.Super.Ct.App.Div. 2002); *State v. Purcell*, 18 P.3d 113 (Ariz.App.2001); *Thorson*, *supra*..

This excuse also violates Article I,§5, which provides, "no person shall, on account of his religious persuasion or belief … be disqualified from … serving as a juror…." McCulloch argued that Bobo's religious affiliation rendered him unfit for service, "in this case…or in any case for that matter." (T919). This is precisely what the Missouri Constitution forbids.

This Court must reverse and remand for a new, fair trial before a jury selected without regard to race or religious affiliation. Only then can Richard's and the venirepersons' rights to equal protection and freedom from cruel and unusual punishment be protected.

## V. EVA'S RECORDS: DISCLOSURE

**The trial court abused its discretion in sealing Eva Washington's subpoenaed psychiatric records because this ruling denied Richard due process, compulsory process, confrontation, right to present a defense, a fair trial, and freedom from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I,§§10,18(a),21, in that, although portrayed at trial as a victim, Eva's psychiatric records may well have disclosed an evidentiary basis for presenting, as a defense, that Eva violently attacked Richard or Zandrea and Richard's attack was precipitated by hers. Since allegations, supported by physical evidence, of Eva's violence toward Richard, were made in November, 1999, and Richard told officers after this offense that Eva had attacked Zandrea, causing him to confront Eva, this also would have undercut a non-statutory aggravator.**

The state charged Richard with brutally killing Eva and Zandrea. One of the statutory aggravators was that Richard had committed two homicides at the same time. (LF549,555). Yet, all evidence, even from his ex-wife and Eva's brother, showed his great love for Zandrea and hers for him. (T1542-50,1551,1609-10,1625-29,1632,1635-37,1646-49,1650-53,1654-57,1658-62,1663-65). The offense did not make sense. Perhaps it did not because Richard did not kill Zandrea. The jury did not have the opportunity to consider this theory or that the November, 1999 assault, used as a non-statutory aggravator, was actually instigated by Eva because the trial court precluded counsel from exploring Eva's

psychiatric records. Those records may well have provided the evidentiary basis for presenting this theory to the jury. The court's action denied Richard state and federal constitutional due process, compulsory process, confrontation, the right to present a defense, a fair trial, and freedom from cruel and unusual punishment.

Dede moved pre-trial for disclosure of Eva's medical and psychiatric records, having reason to believe her psychiatric history would affect her credibility and competency. (LF121-24). As Dede noted, if her history included *inter alia* "outbursts of violence," and the jury was not permitted to know this, confidence in the verdict will be undermined. (LF123).

At a July, 2002 motion hearing, Dede noted the state had disclosed that the Medical Examiner's Office had contacted the custodian of records at Epworth House and Children's Center and the Metropolitan Psychiatric Center. (AbdallahT20-21). Dede stated that because of the possibility that Eva had killed Zandrea, Eva's psychiatric condition could be relevant to his defense. (AbdallahT21). The court agreed and ordered the defense have access to her records. (AbdallahT24). He thereafter ordered disclosure by St. Louis County Psychiatric Center, Metropolitan St. Louis Psychiatric Center and St. John's Mercy Medical Center. (LF354-56).

DFS later moved to set aside those orders and quash the subpoena. (LF366-74). The court denied the motions and stated he would review supporting documents *in camera*. (LF375). Epworth Children and Family Services also moved to set aside and quash, acknowledging Eva residence there from January,

1992 until February, 1995 but asserting confidentiality. (LF449-54). On February 19, 2003, the court ordered those records sealed. (LF461).

Although a patient's medical and psychiatric records are privileged, *Rodriguez v. Suzuki Motor Corp*., 996 S.W.2d 47, 62 (Mo.banc1999), that privilege is not absolute. Privileges protect confidentiality but are not expansively construed because they stymie the search for truth. *United States v. Nixon*, 418 U.S. 683, 709-10 (1974); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State ex rel. Fusselman v. Belt*, 893 S.W.2d 898, 900-01 (Mo.App.,W.D.1995). The *Nixon* Court, recognizing a criminal defendant's rights to production of evidence, confrontation, compulsory process and due process, stated, "It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced…." *Nixon*, at 711-12. Thus, when the assertion of privilege is based only on a generalized interest in confidentiality, "it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713; *Davis v. Alaska*, 415 U.S. 308, 319 (1974). To protect against public disclosure of privileged information, the trial court must review the material *in camera* to determine its relevance and materiality. *Nixon*, at 714; *State v. Newton*, 925 S.W.2d 468, 471 (Mo.App.,E.D.1996).

The trial court performed that *in camera* review and ordered Eva's records sealed. This Court must review those records *in camera* to determine whether the trial court's ruling was an abuse of discretion. *State v. Newton*, 963 S.W.2d 295,

297 (Mo.App.,E.D.1997). Richard has reason to believe they contain exculpatory evidence that could have supported Eva's participation and instigation of the confrontation and negated the existence of the non-statutory aggravator of the November, 1999 assault.

This is not a mere fishing expedition. The state's evidence gives it credence. Officer Patrick, who responded to the November, 1999 "911" call, testified that Richard had told him that Eva had hit him. (T1577). Patrick noticed a cut on Richard's nose and one under his earlobe that seemed to support this charge. (T1577).

Richard's statement to Lt. Hawkins again attributes violence and odd behavior to Eva, who was six to seven months post-partum. Richard told the officers that he had not gotten the knife but "two times I hid them from Eva." (LF272). The officers suggested that Eva seemed to have split or multiple personalities. (LF273). Richard later told them that he had grabbed the knife away from "Michelle," Eva's other personality. (LF284,312). He also stated that she had cut him with the knife. (LF301).

This Court must independently examine Eva's psychiatric records since, from this record, there is reason to believe that she may have had some complicity in this confrontation and in the November assault. If those records contain relevant, material information, this Court must reverse and remand and order that the defense be given access to this information so that a fair trial may be had.

## VI. STATUTORY AGGRAVATOR INVALID

**The trial court erred in submitting, over objection, Instructions 16 and 21, patterned after MAI-Cr3d 313.40, and accepting the jury's penalty phase verdicts on both counts because these actions denied Richard's rights to due process, a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14; Mo.Const.,Art.I,§§10, 18(a),21 in that the state charged that the killings were outrageously and wantonly vile, horrible and inhuman because "the defendant committed repeated and excessive acts of physical abuse upon [the victim] and the killing was therefore unreasonably brutal." Because the Legislature premised the statutory aggravator upon findings of "abuse," it clearly intended that it only apply to cases involving the victim's conscious suffering. If it is not so limited in effect, the statutory language is vague and overbroad, gives the jury standardless discretion and Richard's death sentences are thus invalid. If limited to those cases involving conscious suffering, insufficient evidence exists to support the aggravator since no evidence shows either victim was conscious after the first blow.**

"If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Godfrey v. Georgia*, 446 U.S.

420, 428 (1980), *citing Gregg v. Georgia*, 428 U.S. 153, 196 n.47 (1976)(Stewart, Powell, Stevens, JJ.). If the sentencer has discretion to decide penalty, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*at 189. Since capital sentencing systems could have standards so vague as to not adequately channel sentencing discretion, aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Richard's jury was instructed, over objection, that it could find, as a statutory aggravator:

> Whether the murder of Eva Washington[12] involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find the defendant committed repeated and excessive acts of physical abuse upon Eva Washington and the killing was therefore unreasonably brutal.

(LF549,555). The jury found this aggravator on both counts. (LF573-74). Counsel challenged it as unconstitutionally vague.(T1713,1716). Since the

[12]The jury received instructions identical except as to the name of the victim. Richard challenges both.

aggravator, as defined and found, is unconstitutionally vague, this Court must re-sentence Richard to life without probation or parole.[13]

Missouri juries may consider, as a statutory aggravator, whether "the murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." §565.032.2(7). This language, without further definition, is too vague to provide adequate guidance. *State v. Feltrop*, 803 S.W.2d 1, 14 (Mo.banc1991); *Godfrey*, *supra*. This Court attempted to give that guidance by providing so-called limiting constructions. *State v. Preston*, 673 S.W.2d 1, 11 (Mo.banc1984). It further determined that, without at least one of those limiting constructions, it would not find the evidence supported a finding of that aggravator. *Feltrop*, 803 S.W.2d at 15; *State v. Griffin*, 756

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[13]Despite the existence of another statutory aggravator, since under *Ring v. Arizona*, 536 U.S. 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc2003), the jury must make all of the factual findings under the first three steps of the sentencing process, this Court cannot assume a death sentence would stand after the balance has been changed by the elimination of one aggravator. As this Court noted in *Whitfield*,at 263, "Even were there a basis for this Court to hold, based on the jury instructions and verdict, that it can be presumed the jury unanimously found against the defendant under step 2, and that such a presumption constituted proof beyond a reasonable doubt of harmless error, no similar determination, much less presumption, can be made as to step 3."

S.W.2d 475, 490 (Mo.banc1988). This Court enumerated, as adequate limiting constructions of the statutory language: the defendant's mental state; infliction of physical or psychological torture on the victim (giving the victim a substantial period of time to reflect on and anticipate death; brutality of the defendant's conduct; body mutilation post-mortem; absence of any substantive motive, absence of remorse; and nature of the crime. *Preston*, 673 S.W.2d at 11. It later added that the aggravator would be supported if the following were proved: the defendant's mental state; physical or psychological torture as when the victim has substantial time before death to anticipate and reflect on it; the brutality of the defendant's conduct; the body's post-mortem mutilation; no substantive motive; no remorse and nature of the crime. *Griffin*, 756 S.W.2d at 489.

Trying to save the aggravator from a successful vagueness challenge here, the state instructed the jury it could "make a determination of depravity of mind only if you find the defendant committed repeated and excessive acts of physical abuse upon Eva Washington/Zandrea Thomas and the killing was therefore unreasonably brutal." (LF549,555). This instruction can save the aggravator, however, only if the "physical abuse" connotes **conscious suffering** by the victim. *See Godfrey*, *supra*; *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976)(since all killings are "atrocious," to distinguish those that are death-eligible, this aggravator is directed at the "conscienceless or pitiless crime which is unnecessarily torturous to the victim.").

A statutory aggravator must limit the class of persons to whom the death penalty is applicable. If the aggravator applies **both** if the victim experienced conscious suffering **and** if she did not, it has no limiting effect. This Court, in applying the "vile, horrible, and inhuman" aggravator has found conscious suffering by the victim, *see State v. Black*, 50 S.W.3d 778 (Mo.banc2001); *State v. Tisius*, 92 S.W.3d 751 (Mo.banc2002); *Feltrop, supra*; and has implicitly found no conscious suffering or time to contemplate her fate. *State v. Newlon*, 627 S.W.2d 606 (Mo.banc1982). By adopting "mutilation of the body" as a limiting construction, *see Preston, supra*, this Court has implicitly also found that conscious suffering is **not** required. Such constructions, including the entire range of cases—victims who consciously suffered and those who did not—demonstrate the aggravator's unconstitutional nature. It does not limit the applicability of the death penalty. It does not meet constitutional standards.

Other states confronting the issue have found that the victim's conscious suffering is necessary to find this aggravator. *See, e.g., Norris v. State*, 793 So.2d 847 (Ala.Crim.App.,1999); *Turrentine v. State*, 965 P.2d 955 (Okla.Crim.App.1998); *State v. Johnson*, 751 A.2d 298 (Conn.2000); *State v. Djerf*, 959 P.2d 1274 (Ariz.1998); *Mansfield v. State*, 758 So.2d 636 (Fla.2000); *State v. Cauthern*, 967 S.W.2d 726 (Tenn.1998); *Underwood v. State*, 708 So.2d 18 (Miss.1998); *State v. Walls*, 463 S.E.2d 738 (N.C.1995); *Comm. v. Luce*, 505 N.E.2d 178 (Mass.1987); *State v. Victor*, 457 N.W.2d 431 (Ne.1990); *Contra, State v. Lessley*, 26 P.3d 620 (Kan.2001); *People v. Taylor*, 663 N.E.2d 1126

(Ill.App.1996). Judge Blackmar suggested as much in *State v. Smith*, 756 S.W.2d 493 (Mo.banc1988). He stated that, under *Maynard v. Cartwright*, 486 U.S. 356 (1988), "I doubt very much that a finding based on 'depravity of mind,' without 'torture,' would suffice to authorize a death sentence. I also doubt whether the circumstances detailed in *Preston*, 673 S.W.2d at 11, would suffice, unless torture is shown." *Smith*, 756 S.W.2d at 502 (Blackmar, J., concurring). Judge Blackmar suggests that the defendant's conduct must be tied to the psychic effect on the victim—i.e., did she suffer?—for the aggravator to survive challenge.

A fair reading of the limiting language suggests this was its intent. Under the instruction, depravity means "repeated and excessive acts of **physical abuse,**" rendering the killing "unreasonably brutal." Merriam-Webster's Collegiate Dictionary (11th Ed.) defines "abuse" as "physical maltreatment. Implicit in that definition is that the person upon whom the actions are visited is aware of them—she is conscious. This jury was not instructed to limit the aggravator's effect. The instruction gave insufficient guidance and virtually untrammeled discretion.

Even had the jury been properly instructed, the state did not prove it beyond a reasonable doubt? The state proved repeated acts of physical violence. But, it did not prove that either person was conscious after the first blow. And merely proving multiple blows does not prove conscious suffering. Since that must, of necessity, be proved by circumstantial evidence, we must seek evidence of defensive wounds, statements from the defendant about what occurred, and

medical evidence showing that the victim was conscious during the offense. *Norris*, *supra*.

The state adduced no such evidence. Dr. Turgeon, the medical examiner, described Eva and Zandrea's injuries. (T1320-86). He stated it was impossible to tell in what order the wounds were inflicted. (T1402). He noted that several of their wounds would have caused immediate unconsciousness. (T1360,1364,1373-74,1377,1380-82,1384). He identified no so-called "defensive wounds" that would have suggested consciousness and an attempt to thwart the attack. The state thus presented no evidence to support that either Eva or Zandrea was conscious after the first blow. The evidence is thus insufficient to support the aggravator, even if it were properly limited to channel the jury's discretion.

Because this aggravator was not limited to channel the jury's discretion and because there was no evidence to support a properly-limited aggravator, no principled way exists to distinguish this case from others in which the death penalty is not appropriate. *See Godfrey*, 446 U.S. at 433; *Furman v. Georgia*, 408 U.S. 238, 313 (1972). This Court must order Richard be re-sentenced to life imprisonment without probation or parole.

## VII. GRUESOME PHOTOS AND VIDEO RENDERED GUILT PHASE UNRELIABLE

**The trial court abused its discretion in admitting, over objection, and then repeatedly showing in guilt phase Exhibits 4-17,19-34,4245,47-48,52-54—photographs of Eva, Zandrea and the scene—and Exhibit 35—the videotape—because those rulings denied Richard due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I, §§10,18(a),21 in that the exhibits were cumulative and duplicative, and their cumulative effect was magnified because the state used them with all but three of his guilt phase witnesses. Their prejudicial impact far outweighed any probative value, individually or together, they might otherwise have had. Because they were shown multiple times and they showed multiple views of the same things—none of which were even at issue—they encouraged the jury to disregard the facts and to convict Richard based on raw emotion.**

Eva and Zandrea died from multiple knife wounds leading to massive blood loss. (T1369,1391). Although uncontested, the state presented, over objection, testimony describing and multiple photographs of the scene and their bodies, and a detailed videotape, through six guilt phase witnesses. (T1069-73,1109-16,1180-84,1226,1257-58,1320-91;Exh.10-17,19-34,35). In guilt phase closing, he argued, "And you know what? I will not make a single apology to anybody for putting those pictures up there. I won't do that." (T1479). He later stated, "…and as

many of those pictures as possible contain as many wounds and injuries suffered by them as possible for that very reason, so we don't have four hundred of these pictures up there, or however many we have. They were kept to a minimum." (T1481).

"The [prosecutor] doth protest too much, methinks." W. Shakespeare, *Hamlet,(III,ii,239).* His actions served only to inflame the jury's passions. That was his purpose. He denied Richard's state and federal constitutional rights to due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. Since how the deaths occurred was not at issue, and, as he indicated, the sole real issue in the case was whether Richard deliberated, (T1474), his presentation of these graphic images multiple times must be condemned.

Trial courts have broad, but not unfettered, discretion in admitting evidence. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993). Evidence must be relevant to be admissible. Relevance is two-pronged: logical relevance means the evidence tends to make the existence of a material fact more or less probable. *State v. Smith*, 32 S.W.3d 532, 546 (Mo.banc2000); *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc2002). Legal relevance means the probative value of the evidence outweighs its prejudicial effect. *Id*. Prejudicial effect encompasses unfair prejudice, issue confusion, misleading the jury, undue delay, wasted time, or cumulativeness. *Id.; State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc1992)(Thomas, J., concurring).

If a trial court abuses its discretion in admitting photographs, its decision may be overturned. *State v. Kincade*, 677 S.W.2d 361, 366 (Mo.App.,E.D.1984); *State v. McMillin*, 783 S.W.2d 82,100 (Mo.banc1990). If photographs of a victim's body are used solely to arouse the jury's emotions and prejudice the defendant, *State v. Wood*, 596 S.W.2d 394 (Mo.banc1980), or their probative value is outweighed by their needlessly inflammatory nature, they should be excluded. *State v. Robinson*, 328 S.W.2d 667 (Mo.1959); *see also, State v. Floyd*, 360 S.W.2d 630 (Mo.1962). After all, prosecutors "have a greater responsibility than to assure the conviction of a defendant. It is their responsibility to assist the trial court in assuring that both the state and the defendants get a fair trial." *State v. Stevenson*, 852 S.W.2d 858,865 (Mo.App.,S.D.1993)(Parrish, J.,concurring). As Judge Blackmar stated in the penalty phase context, "It is suggested that a little more gore would make no difference. I cannot accept this argument when a man is on trial for his life." *State v. Leisure*, 749 S.W.2d 366, 384 (Mo.banc1988).

So, did these images, displayed "early and often," have any logical relevance—did they tend to prove or disprove a fact in issue? *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc1998). Neither the videotape nor the photographs, especially Exh.1-17,19-35, proved any fact in issue. They showed Eva and Zandrea received multiple injuries causing enormous blood loss and their ultimate deaths. But they did not prove that Richard committed the offenses or his mental state, **the** facts in issue. At most, the exhibits tend to prove the *corpus delicti*, which was not disputed. Thus, even as to that prong, their admissibility is

questionable. *See, State v. Conley*, 873 S.W.2d 233, 237 (Mo.banc1994)(evidence must be related to "legitimate issues" to be admissible); *see also*, *State v. Revelle*, 957 S.W.2d 428, 438 (Mo.App.,S.D.1997)(en banc). Even assuming the exhibits are logically relevant, that does not make them legally relevant and thereby admissible. *Id.*

The state placed these images of Eva and Zandrea's bodies before the jury through six witnesses and left them displayed on a projector, over objection (T1260). These repeated viewings demonstrate its clear purpose—to arouse the jury's emotions and prejudice Richard. If evidence diverts jurors' attention from their task or causes "prejudice wholly disproportionate" to its logical relevance, it should be excluded. *Rousan*, 961 S.W.2d at 848. Did these images tend "to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). They did because, by their duplicative nature—multiple photographs showing the same thing—and cumulative effect—showing them through six witnesses—they encouraged the jury to convict based on raw emotion, not proof beyond a reasonable doubt. Particularly since the state equated the number of wounds to deliberation and argued that deliberation "is not cool, it's not something that has to be reflected on," (T1474), the prejudice created was enormous.

This situation is similar to one the Illinois Supreme Court condemned in *People v. Blue*, 724 N.E.2d 920 (Ill.2000); *People v. Johnson*, __N.E.2d__, 2003 WL 22367132 (Ill., October 17, 2003). In *Blue*, prosecutors "coerced the jury into

returning a verdict more likely grounded in sympathy than on a dispassionate evaluation of the facts." *Blue*, 724 N.E.2d at 931. The court observed "a coalescence of facts that tip the evidentiary scale from items that are merely useful to those that are aimed directly at the sympathies, or outrage, of the jury." *Id*.at 934. To obtain Blue's conviction and death sentence, the state used the victim's "bloodied and brain-spattered uniform." *Id.*at 922, 931. Although the court agreed the uniform could establish the nature and location of a fatal wound, its "evidentiary value" was "minimal. *Id*.at 934. The court thus reversed. *Id.*

Here, McCulloch's use of multiple images through multiple witnesses and his argument equating multiple blows with an element of the offense—deliberation—converted something "merely useful" to something "aimed directly at the sympathies, or outrage, of the jury." *Id*.at 934. Had he presented these images once—perhaps through the medical examiner, or even one of the officers who responded to the scene—his purpose might not have been so clear. But, by these multiple presentations, we are aware that his sole purpose, despite his protests to the contrary, (T1482), was that the jury decide guilt on "shock value".

In *Stevenson, supra*, the Southern District strongly admonished prosecutors about using unduly-gruesome photographs. There, the state offered autopsy photos of the victim's opened chest and argued they were gruesome only because of the nature of the wound. 852 S.W.2d at 861-62. The court wrote, "we would be hard-pressed not to reverse the judgment because of the introduction of the two photographs were it not for two facts: punishment was assessed by the court and

not the jury, and the evidence of the defendant's guilt was strong." *Id*.at 863. Because of those unique circumstances, the court found no legal prejudice and did not reverse. Chief Judge Parrish wrote separately to:

> Comment[] further on the admission into evidence of photographs that displayed the surgically exposed thoracic cavity and organs of the victim. The attempt of the prosecuting attorney to offer such evidence is, in my opinion, reprehensible. The admission of the evidence was erroneous.

*Id*.at 865 (Parrish, J.,concurring).

Here, the cause of death was not at issue. Since the issue, as even the prosecutor framed it, was whether Richard deliberated, the number of wounds inflicted, their location, and the amount of blood lost do not assist the jury in that determination. Unlike *Stevenson*, this Court cannot conclude that Richard was not prejudiced.

Admission of evidence can be harmless. But the state must prove it harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). It cannot meet that burden here because it cannot show beyond a reasonable doubt that the jury did not consider or could not have been influenced by the "shock value" (T1482) of these images. *See State v. Alexander*, 875 S.W.2d 924, 929 (Mo.App.,S.D.1994).

Richard's jury saw multiple images multiple times of Eva and Zandrea. The state's visual bombardment paid off. A picture is worth a thousand words—or two guilty verdicts. This Court should reverse and remand for a new trial.

## VIII. WITNESS GIVES OPINION OF GUILT

**The trial court erred and abused its discretion in overruling Richard's objection to Officer Kick's testimony that Richard was "nonchalant" after running from the apartment because this ruling denied Richard due process, a fair jury trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I,§§10, 18(a),21 in that Kick's testimony was improper lay testimony, that co-opted the jury's decision-making authority, since Richard's outer appearance was as susceptible of an innocent interpretation as a culpable interpretation and suggested that, if guilty, Richard felt no remorse. Especially since the state's theory was that Richard "coolly reflected," this interpretation was damning. Because of this susceptibility of interpretation, its probative value is vastly outweighed by its prejudicial effect.**

The right to a jury trial reflects "a profound judgment about the way in which law should be enforced and justice administered…." *Ring v. Arizona*, 536 U.S. 584, 609 (2002), *quoting*, *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). Even in 1791, "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense." *Walton v. Arizona*, 497 U.S. 639, 710-11 (1990).

Letting Officer Kick tell the jury that, upon arrest, Richard was "nonchalant" supplanted its fact-finding role on a critical issue—Richard's state of

mind. McCulloch urged the jury to convict Richard of first degree murder because, it claimed, Richard deliberated. Telling them that Richard was nonchalant encouraged them to find Richard was not concerned or remorseful and "coolly reflected." The court abused its discretion in overruling the defense objection and violated Richard's state and federal constitutional rights to due process, a fair jury trial and freedom from cruel and unusual punishment.

Officer Kick chased Richard from the apartment. He described that Richard stopped before a fence, turned, looked at Kick and, "just said go ahead and shoot me." (T1099-1100). The state asked, "Would you describe his demeanor when he said that to you?" Kick responded, "Kind of nonchalant." (T1100). The court overruled defense counsel's objection.[14](T1100).

McCulloch's guilt phase closing focused on Richard's mental state, arguing he deliberated and thus committed first degree murder. He argued, once Richard left the apartment, "He does what a guilty man does, he does what a guy who knows what he did to these people does, what do you expect him to do, he took off as quick as he could." (T1448). And, when stopped, "he knows what he did, and

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[14]Dede objected that the comment was conclusory and vague. (T1100). Although the objection did not refer to the denial of a jury trial, that Kick stated a conclusion is the essence of this claim—denying the jury the right to make conclusions or findings of fact. Should this Court find this objection inadequate, Richard requests plain error review. *Rule 30.20*.

he knows he's responsible for it, and he doesn't want to face up to it. What he wants to do, what he even wants? He wants the cops to shoot him so he doesn't have to face up to it, so he doesn't have to sit here in a courtroom and face up to what he did to these people. That's what he wanted." (T1449).

A trial court's decision to admit evidence will not be disturbed on appeal absent an abuse of discretion. *State v. Simmons*, 955 S.W.2d 729, 737 (Mo.banc1997). To be admissible, evidence must be logically and legally relevant. *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc1992)(Thomas,J., concurring). Evidence is logically relevant if it tends to make a material fact's existence more or less probable. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc 2002); *State v. Smith*, 32 S.W.3d 532, 546 (Mo.banc2000). Evidence is legally relevant if its probative value outweighs its prejudicial effect. *Anderson; Sladek*.

McCulloch's guilt phase argument demonstrates that he adduced Officer Kick's testimony that Richard acted "nonchalant" to bolster his theory that Richard committed the offenses with deliberation. He argued that Richard knew what he had done and from that, argued he had deliberated. The clear inference McCulloch wished the jury to draw was that Richard was nonchalant because he knew what he had done, because he had deliberated, and because he felt no remorse.

This evidence might meet the test for logical relevance since the real issue in guilt phase was whether Richard deliberated.[15] Even if it is deemed logically relevant, however, it is not legally relevant because its prejudicial effect outweighs its probative value. The problem with it is that the jury was being asked to rest its finding of deliberation upon a witness's subjective evaluation of another person's demeanor. This also let the witness's fact-finding supplant the jury's decision on a critical issue.

In *People v. Peterson*, 698 N.Y.S.2d 777 (NYAD 3rd Dept.1999), the appellate court reviewed the trial court's grant of a suppression motion. Adduced at the suppression hearing was that the defendant appeared "nonchalant" throughout the stop. The court held, "Inasmuch as the defendant's behavior was 'as susceptible of innocent as well as culpable interpretation,' we affirm." *Id.*at778, *citing People v. DeBour*, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 352 N.E.2d 52.

Kick's evaluation of Richard's behavior should not have been admitted because that behavior was "as susceptible of innocent" as of culpable behavior.

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[15]As Richard argues in Point II, *supra*, a defendant's mental state *after* the offense is irrelevant to his mental state *during* the offense, the element of the crime. Richard does not concede this point, but acknowledges this Court might find the evidence logically relevant.

That he acted "nonchalant" could just as easily have signaled someone in shock, still not in control of his faculties, as someone who had "coolly reflected."

Kick's testimony created the same problem as does admitting testimony about a defendant's post-arrest silence. As the Supreme Court has stated, "Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle v. Ohio*, 426 U.S. 610, 617 (1976).

Here, since Richard's appearance to Kick as "nonchalant" may well have signaled something entirely different from cool reflected and no remorse—like being still stunned by what had occurred—it is susceptible of diametrically-opposed interpretations. And, since it is "insolubly ambiguous," its prejudicial effect outweighed any probative value it may have had. It should not have been admitted.

As with any question of admissibility, this Court must review for prejudice. It will reverse if the error denied the defendant a fair trial. *State v. Johns*, 34 S.W.3d 93, 103 (Mo.banc2000). The state has the burden to show harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Miller*, 650 S.W.2d 619, 621 (Mo.banc1983).

The state cannot meet that burden. McCulloch's closing told the jury that the sole question was whether Richard deliberated. He told the jury to consider Richard's behavior after he came out of the apartment in finding deliberation.

Especially when coupled with McCulloch's confusion of the concept of deliberation, it cannot be said that this testimony did not affect the jury's verdicts.

The trial court abused its discretion in allowing this testimony. This Court should reverse and remand for a new trial.

## IX. VICTIM'S PRIOR STATEMENTS IMPROPERLY ADMITTED

**The trial court erred and abused its discretion in admitting, over continuing objection, Eva Washington's statements to Officer Patrick that Richard assaulted her in November, 1999, because this denied Richard rights to due process, confrontation, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14;Mo.Const.,Art.I,§§10, 18(a),19,21 in that her statements were hearsay, admitted to establish that Richard assaulted Eva before and were inadmissible under any exception to the hearsay rule. Richard was prejudiced because the state used this evidence to obtain a death sentence and argued his prior conduct was why he could not be sentenced to life imprisonment but must instead be sentenced to death.**

Prosecutor McCulloch told the jury in closing to consider whether the mitigation "outweighs the pounding and choking of Eva Washington, in November of '99" (T1728). "Let me tell you why death is the appropriate punishment based on this evidence, and why life in prison is not an appropriate punishment based on this….The question is what is justice in this case, and what's appropriate in this case." (T1730,1733-34). He reminded them, "And Eva Washington, who, in November of 1999, he choked her, choked her to the point where she urinated on herself. She had marks on her neck, she had marks on her head from being pounded. And all pounded by this guy. And, you know, she was pregnant at the time, too, with his child, just as Kim Strong was." (T1737). The prior assault allegation was part-and-parcel of the state's rationale for imposing

death. Yet, how did McCulloch prove it? Through Eva's words. They were hearsay and denied Richard's state and federal constitutional rights to due process, confrontation, a fair trial and freedom from cruel and unusual punishment.

Before penalty phase, McCulloch stated that he would adduce Eva's statements to the police officer who responded to a call in November, 1999. (T1510-11). The court overruled the objection, holding that her statements constituted excited utterances. (T1511). Dede requested his objections be made continuing and moved for a mistrial. (T1528).

Officer Patrick responded to a 911 call in November, 1999 to Eva's apartment. (T1570). As he and another officer arrived, they saw two men, one being Richard, getting into separate cars. (T1571-72). The other officer stayed with the men while Patrick entered Eva's apartment. (T1572). She was crying and visibly upset. (T1572-73). She had a knot on her forehead and her left eye was bruised. (T1573). Patrick stated Eva said, "he hit me, he hit me in the eye, and he hit me in the mouth, and he choked me until I passed out." (T1573). Patrick stated that Eva identified Richard as her assailant. (T1576).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *State v. Revelle*, 957 S.W.2d 428, 431 (Mo.App.,S.D.1997); *State v. Shurn*, 866 S.W.2d 447, 457 (Mo.banc1993). Hearsay statements are generally considered inadmissible, *Id*. at 457-58, to protect the defendant's right to confront witnesses. *Bear Stops v. United States*, 339 F.3d 777, 781 (8$^{th}$Cir.2003). The defendant's constitutional rights to confrontation and due process are deemed

satisfied, however, if the hearsay evidence falls within a generally-accepted exception to the hearsay rule, is supported by facts otherwise supporting its trustworthiness or the declarant testifies at trial and is subject to cross-examination. *Id*. at 782; *United States v. Owens*, 484 U.S. 554, 557 (1988).

The trial court let the state present Eva's out-of-court statements through Officer Patrick, stating they were excited utterances. (T1511). An "excited utterance" is "made under the immediate and uncontrolled dominion of the senses and during the time when consideration of self-interest could not have been brought to bear through reflection or premeditation." *State v. Post*, 901 S.W.2d 231, 234 (Mo.App.,E.D.1995); *State v. Edwards*, 31 S.W.3d 73 (Mo.App.,W.D.2000). The premise for admitting such evidence is, "if the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by an event, the utterance may be taken as expressing the true belief of the declarant." *Id.* at 78; *State v. Van Orman*, 642 S.W.2d 636, 639 (Mo.1982).

Patrick's testimony included hearsay. He recounted Eva's out-of-court statements to him, identifying Richard as her assailant and stating what Richard had done. His testimony was offered to prove Richard assaulted Eva before. But it isn't an exception to the hearsay rule.

Dispositive is this Court's opinion in *State v. Bell*, 950 S.W.2d 482 (Mo.banc1997). Bell was convicted of his wife's first degree murder and sentenced to death. The state challenged Bell's account, in which he claimed her

injuries resulted after she tried to kill him with a cleaver and then poured gasoline over both of them. *Id*.at 482-83. The state introduced testimony that the victim had told a co-worker and police officers about prior assaults. The co-worker testified that she had told varying stories about how she received the injuries but had ultimately asserted Bell had injured her. *Id.*at 483. Two officers who had responded to her in March, 1994 testified she appeared to have been assaulted—having facial abrasions, appeared frightened, and told them she and Bell had fought, he beat her for an hour and tried to break her leg. *Id.* This Court reversed, finding this testimony's admission erroneous. *Id.*at 484.

This case is virtually indistinguishable. Officer Patrick received a call and, upon responding, spoke to Eva, who recounted alleged past events. Like the victim in *Bell*, Eva "appeared to have been assaulted" and "appeared frightened." Nonetheless, no showing was made that her statements were "made under the immediate and uncontrolled domination of the senses as a result of the shock produced by [the] event." *Edwards*, *supra*. Appearances, after all, can be deceiving. Since it was not shown how much time had elapsed since the alleged assault or what happened before the officers' arrival, Eva's statements may well have been prompted by a calculated motive, and not from shock the event produced. Without that link, the evidence should not have been admitted as an exception to the hearsay rule.

The question thus becomes whether the error in admitting the evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24

(1967). The burden of proving harmlessness falls on the state. *Id.* It cannot meet that burden.

As in *Bell*, the state used evidence of Richard's alleged prior violence toward Eva to obtain death sentences. McCulloch repeatedly argued that Richard's earlier assault on Eva was a major reason why he could not be sentenced to life imprisonment without parole but needed to be sentenced to death. Without the hearsay evidence that put those accusatory words in Eva's mouth, whose pictures McCulloch then prominently displayed on his power-point presentation, the verdict may well have been different.

This Court must reverse and remand for a new penalty phase.

## X. PROSECUTOR'S ARGUMENT GROSSLY IMPROPER

**The trial court erred and plainly erred in overruling defense counsel's objections, not striking the venire panel, and not declaring a mistrial *sua sponte* to the prosecutor's arguments in**

**VOIR DIRE**

**1. "…in most cases, we don't seek death, we don't ask for a death sentence in most first degree cases";**

**2. "But there are sometimes certain facts that may be so overwhelming and overbearing that they impact a person's ability to be fair and impartial. We only do that in very rare instances, but…";**

**GUILT PHASE**

**3. "It's just as important what you didn't hear in that defense argument, and you didn't hear anything about what was going on in that room. Now, is it possible—you saw the injuries. You heard the doctor testify. Is it possible—and the doctor told you—";**

**4. "The deliberation is not cool, it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief";**

**5. "And you know what? I will not make a single apology to anybody for putting those pictures up there. I won't do that. I won't do that because he did it."**

**6. "You recall the evidence that went up there, and as many of those pictures as possible contain as many wounds and injuries suffered by them as possible**

**for that very reason, so we don't have four hundred of these pictures up there, or however many we have. They were kept to a minimum."**

**7. "I wish this was, and it isn't, it's not an episode of CIS. If it was, and I wish it was, I wish it was because then—".**

**PENALTY PHASE**

**8. "I'll have an opportunity to argue why I think death is the appropriate punishment in this case, why I think you should sentence Richard Strong to death based upon the evidence and the information that you received in this case. Why I think that should be the sentence imposed upon him for murder in the first degree of both Eva Washington and Zandrea Thomas.";**

**9. "If I have proven that beyond a reasonable doubt to your satisfaction as a jury..."**

**10. "And remember what I said earlier, the instructions are as important for what they don't say as what they do say. At that point it doesn't say must decide whether there are facts and circumstances in statutory aggravation. It says at that point in aggravation of punishment, taken as a whole, which warrants the imposition of death."**

**11. "If, in your opinion, your view, your conscience what's true and just in this case at that point is the imposition of a death sentence on Richard Strong, then you consider evidence in mitigation, and determine if that mitigation outweighs that evidence in aggravation."**

**12. "And they're not the only victims in this case. Consider all of the evidence, all of the evidence that you saw in this case, and you will see just how much this tragedy affects people. It affected everybody that came into this courtroom, and who knows how many people beyond what you saw this case has done.";**

**13. "You can't describe the pain and suffering that so many other people have to experience because of the conduct of Richard Strong…Michelle Brady, when she tried to read about her friend, she could hardly get the words out, after two and a half years could barely read about the life of her good friend."**

**14. "You saw the effect and the impact that it had on his ex-wife, on Kim Strong…You saw the impact, and you know the impact and the pain and the suffering that it has caused to his mother, and that it has caused to his children, and that it has caused to his brothers, and that is has caused to his sisters and their children."**

**15. "But should we allow Richard Strong to escape justice because we can't provide complete justice?...he would escape justice, he would escape paying the price that he ought to be paying for what he did in this case, if he is sentenced to life without parole."**

**because these arguments denied Richard due process, a fair trial and freedom from cruel and unusual punishment, U.S.Const.,Amends5,6,8,14; Mo.Const.,Art.I,§§10, 18(a),21;§565.030.4 in that the prosecutor argued facts**

**outside the record (1,2,6,7), misstated the law (4,9,10,11,16), misstated the facts (12), personalized the case, making himself a 13th juror (5,8), and argued improper victim impact evidence (13,14,15), prejudicing Richard and rendering the verdicts unreliable.**

**IMPROPER ARGUMENT**

McCulloch committed repeated misconduct in his arguments despite having been put on notice of their improper nature through the Motion in limine to Prohibit Improper Arguments. (LF83-99). "The touchstone of due process analysis is the fairness of the trial." *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524 (W.D.Mo.1996), *aff'd*, 145 F.3d 1006 (8thCir.1998). The accused is entitled to a fair trial and a prosecutor must not deprive him of one or obtain a wrongful conviction. *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27 (banc1947); *Berger v. United States*, 295 U.S. 78, 88 (1935); *Rule 4.3.8*.

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). It may be so outrageous that it violates due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8thCir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364 (8thCir.1995). Here, McCulloch's repeated, intentional misconduct denied Richard's state and federal constitutional rights to due process, a fair trial and freedom from cruel and unusual punishment. The trial court erred and plainly

erred[16] in overruling Counsel Dede's objections and requests for relief and not *sua sponte* declaring a mistrial.

## VOIR DIRE

Voir dire is intended to expose juror bias so that strikes can be exercised intelligently. *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc1998); *State v. Lacy*, 851 S.W.2d 623, 629 (Mo.App.,E.D.1993). Questions calculated to create prejudice are impermissible. *Id.* Inaccurate or incorrect statements about facts or law are condemned because they tend to mislead the jury, rendering its decisions inaccurate. *Tucker v. Kemp*, 762 F.2d 1496, 1507 (11th Cir.1985); *Drake v. Kemp*, 762 F.2d 1449, 1458-59 (11th Cir.1985)(en banc).

McCulloch compared this case to others, stating that in most circumstances, death was not appropriate but here it was. He stated, "…in most cases, we don't seek death, we don't ask for a death sentence in most first degree cases." (T60). He continued, "But there are sometimes certain facts that may be so overwhelming and overbearing that they impact a person's ability to be fair and impartial. We only do that in very rare instances…." (T110). McCulloch thus told the jury that he had compared this case to others and found this one worse than most, deserving of death. This was improper because it argued facts outside the record and thus was the prosecutor's unsworn testimony. *State v. Storey*, 901 S.W.2d 886, 900-01

[16] Dede did not object to each allegation of error. Plain error review is requested. *Rule 30.20*.

(Mo.banc1995). When a prosecutor argues facts outside the record, it is highly prejudicial. As assertions of personal knowledge, they are "'apt to carry much weight against the accused when they should carry none' because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Id*.at 901, *quoting Berger*, 295 U.S. at 88; *Rule 4.3.8*. Here, McCulloch set the stage by his comparisons, encouraging the jury to believe that this case was appropriate for death because he reviewed his cases over time and, by comparison, this was one of the worst.

**GUILT PHASE**

McCulloch argued, over objection and a mistrial request, that, "It's just as important what you didn't hear in that defense argument, and you didn't hear anything about what was going on in that room." (T1472). The Fifth Amendment and Article I,§19 protect against compelled self-incrimination. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *Estelle v. Smith*, 451 U.S. 454 (1981); *Storey*, *supra*; *State v. Dexter*, 954 S.W.2d 332, 337-41 (Mo.banc1997). McCulloch's argument speculated about what had happened and that only Richard, who had not testified, could end the speculation. This comment on Richard's failure to testify violated due process and Richard's right to remain silent. *State v. Barnum*, 14 S.W.3d 587, 591 (Mo.banc2000);§546.270 RSMo.

McCulloch argued, "The deliberation is not cool, it's not something that has to be reflected on, it is coolly reflected upon for any length of time, no matter how brief." (T1474). This misstated the law, encouraging the jury to ignore first

degree murder's distinguishing characteristic—deliberation. Misstating the law is never to be condoned. *Storey*, 901 S.W.2d at 902; *Tucker*, 762 F.2d at 1507; *Drake*, 762 F.2d at 1458-59. Since "deliberation [is] the distinctive quality which separates murder in the first degree from murder in the second degree," *State v. Garrett*, 207 S.W. 784 (Mo.1918), and "only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation," *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo.banc1993), the jury cannot be encouraged to cavalierly toss it aside. The prosecutor argued "cool reflection" wasn't required. Instead, he focused upon the passage of time, encouraging the jury to believe the mere passage of time was sufficient to establish deliberation. This contravenes common sense and the law. *State v. Black*, 50 S.W.3d 778,797 (Mo.banc2001); *State v. Thompson*, 65 P.3d 420,427 (Ariz.2003); C. Torcia, *Wharton's Criminal Law*, §142 (15th ed.1994).

McCulloch personalized the case, arguing, over objection, "And you know what? I will not make a single apology to anybody for putting those pictures up there. I won't do that. I won't do that because he did it." (T1479). A prosecutor's statements about his personal opinion, belief or feelings are improper. *Storey*, 901 S.W.2d at 901; *Brooks*, 762 F.2d at 1408. This statement of personal belief tends to carry unwarranted weight with the jury since he is perceived in his capacity as the elected prosecutor, whose duty it is to serve justice, not just win the case. *Storey*, 901 S.W.2d at 901; *Berger*, 295 U.S. at 88.

McCulloch told the jury to "recall the evidence that went up there, and as many of those pictures as possible contain as many wounds and injuries suffered by them as possible for that very reason, so we don't have four hundred of these pictures up there, or however many we have. They were kept to a minimum." (T1482). Despite objections to cumulative photographs intended to engender passion and prejudice against Richard, and despite McCulloch's initial assurances that it would limit those numbers to forty, (T952-53), he succeeded in showing those images anyway, referring to 400 photographs he **could have** adduced. He thus argued evidence not before the jury. *State v. White*, 440 S.W.2d 457, 460 (Mo.1969); *State v. Cuckovich*, 485 S.W.2d 16 (Mo.banc1972); *State v. Raspberry*, 452 S.W.2d 169, 172 (Mo.1970); *Tucker*, 762 F.2d at 1507.

McCulloch also argued, over objection, facts outside the record, "I wish this was, and it isn't, it's not an episode of CSI. If it was and I wish it was, I wish it was because then—." (T1482). By referring to that program, he encouraged the jury to consider facts outside the record and to consider those facts and the results of those hypothetical cases. *Id.*; *Storey*, 901 S.W.2d at 900-01. The jury's decision-making may well have been contaminated by considering external sources of law. *Id.*; *see also, Comm. v. Chambers*, 599 A.2d 630 (Pa.1991); *State v. Debler*, 856 S.W.2d 641, 656 (Mo.banc1993).

## PENALTY PHASE

In capital cases, closing arguments must undergo a "greater degree of scrutiny" than in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

McCulloch began closing by arguing, "I'll have an opportunity to argue why I think death is the appropriate punishment in this case, why I think you should sentence Richard Strong to death based upon the evidence and the information that you received in this case. Why I think that should be the sentence imposed upon him for murder in the first degree of both Eva Washington and Zandrea Thomas." (T1723). He relied upon his position as elected prosecutor, someone supposed to fight for justice, to encourage the jury to vote for death. *Storey*, 901 S.W.2d at 901; *Tucker*, 762 F.2d at 1507. This undermined the jury's discretion and rendered its decision unreliable. *Brooks*, 762 F.2d at 1410.

He further argued, "If I have proven that beyond a reasonable doubt *to your satisfaction* as a jury,…." (T1726)(emphasized). He went on, "If, in your opinion, your view, your conscience what's true and just in this case at that point is the imposition of a death sentence on Richard Strong, then you consider evidence in mitigation and determine if that mitigation outweighs that evidence in aggravation." (T1728).

Courts repeatedly have condemned argument defining reasonable doubt. Although counsel may discuss the concept, they may not define it. *State v. Williams*, 659 S.W.2d 778, 781 (Mo.banc1983); *State v. Shelby*, 634 S.W.2d 481, 484 (Mo.1982); *State v. Massey*, 817 S.W.2d 624, 626 (Mo.App.,E.D.1991). Even

if evidence of guilt is strong, they may not define reasonable doubt incorrectly. *Id.; Williams*, 659 S.W.2d at 781. Attorneys "should be advised that arguments attempting to define reasonable doubt represent plain error." *Shelby*, 634 S.W.2d at 484.

These arguments misstated the law by mis-defining reasonable doubt, equating it with a standard "to your satisfaction," "in your opinion, your view, your conscience." This lowered the state's burden of proof and let the jury sentence Richard to death based on a lesser quantum of proof than constitutionally-required. *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 362-63 (1970).

McCulloch continued misstating the law, "And remember what I said earlier, the instructions are as important for what they don't say as what they do say. At that point it doesn't say must decide whether there are facts and circumstances in statutory aggravation. It says at that point in aggravation of punishment, taken as a whole, which warrants the imposition of death." (T1727). He thus encouraged the jury to ignore its constitutional obligation unanimously and beyond a reasonable doubt to find the facts upon which the death penalty rested. *Ring v. Arizona*, 536 U.S. 584 (2002); *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc2003). Justice Scalia explained, "[t]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by

the jury beyond a reasonable doubt." *Ring*¸ 536 U.S. at 610 (Scalia, J., concurring). (See Point III, *supra*).

McCulloch improperly expanded the scope of victim impact, arguing, "And they're not the only victims in this case. Consider all of the evidence, all of the evidence that you saw in this case, and you will see just how much this tragedy affects people. It affected everybody that came into this courtroom, and who knows how many people beyond what you saw this case has done." (T1735). He stated, "You can't describe the pain and suffering that so many other people have to experience because of the conduct of Richard Strong…Michele Brady, when she tried to read about her friend, she could hardly get the words out, after two and a half years could barely read about the life of her good friend." (T1754). And, finally, "You saw the effect and the impact that it had on his ex-wife, on Kim Strong…You saw the impact, and you know the impact and the pain and the suffering that it has caused to his mother, and that it has caused to his children, and that it has caused to his brothers, and that is has caused to his sisters and their children." (T1754).

The Eighth Amendment does not *per se* bar victim impact evidence and argument, *Payne v. Tennessee*, 501 U.S. 808 (1991), but even evidence that might properly be considered, like the victim's characteristics and the impact of the victim's death on survivors, can violate the Due Process Clause. *Id.* at 825,836. Both the majority and concurring opinions in *Payne* emphasized the brief nature of the evidence admitted there and the brevity of the state's closing argument in

finding no Eighth Amendment or Due Process violation. *Id.* Here, however, McCulloch's argument far exceeded the parameters discussed in *Payne* and codified in §565.030.4 ("such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others").

McCulloch encouraged the jury to consider as victims, and thus sentence Richard to death, anyone who came into contact with this case— "everybody that came into this courtroom" and Richard's family also. This far exceeds what the Legislature contemplated in §565.030.4 and the Supreme Court authorized in *Payne*, since victim impact evidence and argument is only relevant and admissible if the defendant somehow foresees it, making it relevant to blameworthiness. *Id*. at 838. Further, it improperly converts mitigation into aggravation, *Zant v. Stephens*, 462 U.S. 862, 885 (1983), arguing that Richard's family's suffering could only be alleviated by killing him.

McCulloch again misstated the law and facts, *Tucker*, 762 F.2d at 1507; *Debler*, 856 S.W.2d at 651, encouraging the jury to believe that life without parole sentence was not punishment. "But should we allow Richard Strong to escape justice because we can't provide complete justice?...he would escape justice, he would escape paying the price that he ought to be paying for what he did in this case, if he is sentenced to life without parole." (T1755). This suggested a life sentence was tantamount to letting Richard off scot free, when so sentenced, Richard would die in prison.

McCulloch's repeated, highly improper arguments impacted both phases of trial, rendering its outcome unreliable. This Court should reverse and remand for a new trial or new penalty phase.

## XI. RICHARD'S SENTENCES MUST BE REDUCED

**This Court, in exercising its independent duty, under §565.035, to review all death sentences, must set aside Richard's death sentences because they were imposed under the influence of passion and prejudice and the evidence does not support the existence of one statutory aggravator, which denies Richard due process and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,8,14;Mo.Const.,Art.I,§§10,21 in that the state obtained these death sentences by flooding the jury's consciousness with gory, cumulative images in penalty phase and encouraging them to decide the case, not on the facts but on their emotions and one of its statutory aggravators—that the murders were outrageously or wantonly vile, horrible or inhuman, involving depravity of mind, was defined as repeated and excessive acts of physical abuse. Since the state did not prove beyond a reasonable doubt that Eva and Zandrea were conscious after the first blow, it could not prove conscious suffering. Either the aggravator was unsupported by the evidence or it is unconstitutionally vague and overbroad since the various limiting constructions offered to save it allow findings based on conscious suffering and lack thereof.**

Because the death penalty is qualitatively different from any term of imprisonment, no matter how long, a "corresponding difference [exists] in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Death

may not be imposed under procedures creating a substantial risk of arbitrary or capricious sentencing. *Furman v. Georgia*, 408 U.S. 238 (1972). A "meaningful basis [must exist] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978).

This Court must, under §565.035,[17] ensure that death sentences are proportionate. It is authorized to consider whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the statutory aggravators are supported by the evidence and whether the sentence is excessive or disproportionate considering the crime, strength of the evidence and the defendant. This Court may not merely detail "the aggravating circumstance, reciting the supporting evidence, and concluding that if the jury found the circumstance, the death penalty must be appropriate." *State v. Davis*, 814 S.W.2d 593, 607 (Mo.banc1991)(Blackmar, J., concurring and dissenting in part); *see also, Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524-26 (W.D.Mo.1996).

The state obtained Richard's death sentences by bombarding the jury in penalty phase with a multitude of color photographs, enlarged and projected

[17] Although appellate comparative proportionality review is not constitutionally-mandated, *Pulley v. Harris*, 465 U.S. 37 (1984), since §565.035 provides for it, due process is denied if it is not provided. *Harris v. Blodgett,* 853 F.Supp. 1239, 1286 (W.D.Wash.1994); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

throughout closing argument in a power point presentation. (CD labeled "Strong"). As the St. Louis Post-Dispatch recorded, "Just before jurors started deliberating Thursday on Richard Strong's punishment for murder, prosecutor Robert P. McCulloch flashed a montage of photographs—some gruesome—on a screen in court. So powerful were the images that members of the victims' families fled the St. Louis County courtroom." Lhotka, William C., "Killer of Woman, Girl Should Die, Jury Says," *St. Louis Post-Dispatch*, March 7, 2003, page B3.

Because McCulloch used these photographs as his trump card, "the effect is to take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury." *Stringer v. State*, 500 So.2d 928, 935 (Miss.1986); *State v. Clawson*, 270 S.E.2d 659, 674 (W.Va.1980). They were not used to prove any fact at issue. Their sole purpose was to inflame the jury's passions and prejudices. They did so, rendering sentencing unreliable. *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Mann v. Oklahoma*, 488 U.S. 876 (1988)(Marshall, J., dissenting from denial of certiorari); *Tucker v. Kemp*, 480 U.S. 911 (1987)(Brennan, J., dissenting from denial of certiorari).

The Indiana and West Virginia Supreme Courts have noted, "to introduce evidence only for the purpose of arousing the passions and prejudices of the jury, in such a manner as to cause them to abandon any serious consideration of the facts of the case and give expression only to their emotions, is clearly outside the scope of such duty and a violation of an accused's right to a fair trial." *Kiefer v. State*, 239 Ind. 103, 153 N.E.2d 899, 905 (1958); *Clawson*, 270 S.E.2d at 612-13.

This Court must recognize the state's actions as a blatant attempt to shanghai the jury's emotions.

If capital punishment is to be imposed, states must "tailor and apply [the] law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *citing Gregg*, 428 U.S. at 196 n.47.

Statutory aggravators are supposed to ensure this discretion but, since they "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant v. Stephens*, 462 U.S. 862, 877 (1983), they must not be vague or overbroad.

One statutory aggravator submitted and found here was that the crimes involved depravity of mind, defined as "repeated and excessive acts of physical abuse" on the victims. (LF549,555). This aggravator is not supported by the evidence or is vague and overbroad. Either way, it and Richard's death sentences must be struck down.

For the aggravator to be constitutional, the "physical abuse" referenced in the instruction must connote conscious suffering by the victim. *See Godfrey v. Georgia*, 446 U.S. 420 (1980); *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976)(since all killings are "atrocious," to distinguish those that are death-eligible, the depraved aggravator is directed at the "conscienceless or pitiless

crime which is unnecessarily torturous to the victim"). *See also, Norris v. State*, 793 So.2d 847 (Ala.Crim.App.1999); *Turrentine v. State*, 965 P.2d 955 (Okla.Crim.App.1998); *State v. Johnson*, 751 A.2d 298 (Conn.2000); *State v. Djerf*, 959 P.2d 1274 (Ariz.1998). As Judge Blackmar suggested in *State v. Smith*, 756 S.W.2d 493, 502 (Mo.banc1988)(Blackmar, J., concurring), under *Maynard v. Cartwright*, 486 U.S. 356 (1988), "I doubt very much that a finding based on 'depravity of mind,' without 'torture,' would suffice to authorize a death sentence. I also doubt whether the circumstances detailed in *Preston*, 673 S.W.2d at 11, would suffice, unless torture is shown." Since the state's evidence did not prove conscious suffering, insufficient evidence proved the aggravator beyond a reasonable doubt.

If this aggravator also applies if the victim did not experience conscious suffering, the aggravator cannot stand because it is unconstitutionally vague and overbroad. This Court's opinions suggest that this may be so since this Court's opinions go both ways. This Court has affirmed the jury's finding of the aggravator by noting the victim's conscious suffering. *See State v. Black*, 50 S.W.3d 778 (Mo.banc2001); *State v. Tisius*, 92 S.W.3d 751 (Mo.banc2002); *State v. Feltrop*, 803 S.W.2d 1 (Mo.banc1991). It has also affirmed the jury's finding if no evidence of conscious suffering existed and the defendant's actions are post-mortem. *State v. Newlon*, 627 S.W.2d 606 (Mo.banc1982); *State v. Preston*, 673 S.W.2d 1, 11 (Mo.banc1984).

Although this Court's opinions go both ways, it cannot have it both ways. Statutory aggravators must "genuinely narrow the class of persons eligible for the death penalty…." *Zant*, 462 U.S. at 877. By making an aggravator applicable no matter what the facts, that narrowing function has not occurred. The aggravator is unconstitutionally vague and overbroad.

Richard, who loves his children (T1549,1625-27,1632,1635-37,1647-49,1651-53,1655-57,1658-62,1663-66) and for whose children it is important to maintain their relationship (T1550,1662), adjusted well to confinement when incarcerated. (T1638-39). William Bradford, the Unit Supervisor for the Department of Justice Services who, at the time of trial had supervised Richard since he was incarcerated, stated that he posed a threat to nobody and was not a troublemaker. (T1639-40). Given this information, this Court cannot be sure that the prejudice from the state's excessive use of images in penalty phase closing and its reliance on the "depravity of mind" aggravator did not affect the verdicts.

This Court should reduce Richard's sentences to life without probation or parole.

## XII. AGGRAVATORS NOT PLED

**The trial court plainly erred in not sua sponte quashing the information in lieu of indictment for failure to comply with *Jones v. United States* and *Apprendi v. New Jersey* and exceeded its authority in sentencing Richard to death because the court's actions denied Richard due process, a jury trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21 in that, in neither the indictment nor the information in lieu of indictment, did the state charge any statutory aggravating circumstance, a fact necessary to qualify the offense as one capitally-eligible in Missouri. Since the charging document did not include any of those factors, Richard was not charged with the capitally-eligible offense of first degree murder and his death sentences cannot stand.**

The trial court plainly erred in failing *sua sponte* to quash the information for its failure to comply with *Jones v. United States* and *Apprendi v. New Jersey* and exceeded its authority and jurisdiction in sentencing Richard to death. This violated Richard's constitutional rights to jury trial, freedom from cruel and unusual punishment, and due process of law. Because Missouri's statutes authorize a death sentence only upon a finding of at least one of the enumerated statutory aggravators in §565.032, those aggravators are facts the prosecution must prove to increase the punishment for first degree murder from life imprisonment without parole to death, and are alternate elements of the offense of "aggravated

first degree murder." Since the information failed to plead any aggravators, the offenses actually charged were un-aggravated, non-capitally-eligible first degree murder, for which the only authorized sentence is life imprisonment without probation or parole. The judgment must be reversed and Richard's death sentences vacated.

In *Jones v. United States*, 526 U.S. 227 (1999), the Supreme Court announced a broad constitutional principle governing criminal cases that, until then, was only implicit: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6. Subsequently, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applied this rule of jury fact-finding to the states through the Fourteenth Amendment. *Apprendi*, 530 U.S. at 476. In *Ring v. Arizona* 536 U.S. 584 (2002), the Court held that the jury fact-finding rule applies to eligibility factors in state capital prosecutions. *Ring*, 536 U.S. at 600, 609.

The Court has repeatedly acknowledged the relationship between facts a jury must find beyond a reasonable doubt, facts that must be pled in the charging document, and the lack of constitutionally-required "notice" when such facts are not so pled. The Court's opinions suggest that aggravating facts a jury must find beyond a reasonable doubt are elements of a greater offense. *See e.g., Sattazahn v.*

*Pennsylvania*, 537 U.S. 101, 111 (2003) ("[T]he underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances': Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death..."); *Harris v. United States*, 536 U.S. 545, 564 (2002) *quoting Apprendi*, 530 U.S. at 483 n.10 ("Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"); *Ring v. Arizona*, 536 U.S. at 609 *citing Apprendi*, 530 U.S. at 494, n.19 (Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense…," the Sixth Amendment requires that they be found by a jury).

Recently, in ruling that *Ring* announced a rule of substantive criminal law, the Ninth Circuit expressly held that under *Ring*, an aggravated murder is a "distinct" offense:

> Under substantive Arizona law, there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense…. That is, when *Ring* displaced *Walton*,[18] the effect was to declare Arizona's understanding and treatment of the separate crime of capital murder as Arizona defined it, unconstitutional. And when *Ring* overruled *Walton*, repositioning Arizona's aggravating factors as elements of the separate

> offense of capital murder and reshaping the structure of Arizona murder law, it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally. *Cf. Jones v. United States*, 526 U.S. 227, 229 (1999)….

*Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) *petition for cert. granted*, Dec.1, 2003 (No. 03-526).

The logical corollary of these cases is: aggravators, as elements of the greater offense of capital or *aggravated* murder, must be pled in the document charging capital or aggravated murder. This corollates with established federal law. "An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). "[A] conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *E.g., Jackson v. Virginia*, 443 U.S. 307, 314 (1979) *citing Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978); *Cokeley v. Lockhart*, 951 F.2d 916 (8thCir.1991). Indeed, the 8th Circuit, in this precise factual situation, has held that, where an indictment could not "reasonably [be] construed to charge a statutory aggravating factor, *as required for imposition of the death penalty*, it is constitutionally deficient to charge a capital offense." *United States v. Allen, supra, No. 98-2549(8thCir., February 2, 2004),slip op. at 9*.

In Missouri, "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information… ."

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[18] *Walton v. Arizona*, 497 U.S. 639 (1990).

Mo.Const.,Art.I,§17. An indictment or information must "contain all of the elements of the offense and clearly apprise the defendant of the facts constituting the offense." *State v. Barnes*, 942 S.W.2d 362, 367 (Mo.banc1997). "[A] person cannot be convicted of a crime with which the person was not charged unless it is a *lesser* included offense of a charged offense." *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo.banc1992)(emphasized).

Although §565.020 ostensibly establishes a single offense of first degree murder for which the punishment is either life without parole or death, under *Ring*, *Apprendi*, *Jones*, and *Whitfield*, the effect of §§565.020 and 565.030.4, which establishes the three death-eligibility steps, is to create two kinds of first degree murder: 1) *unaggravated* first degree murder, for which the elements are set out in §565.020.1 and which does not require proof of any statutory aggravating circumstances, and 2) the greater offense of *aggravated* first degree murder.

The difference between charging *aggravated* and *unaggravated* first degree murder is constitutionally significant. To prosecute a defendant for *aggravated* first degree murder, the charging document must plead not only the elements of the lesser offense of *unaggravated* first degree murder. The charging document must also plead the statutory aggravators on which the state will rely to establish

the defendant's eligibility for death.[19] Under *Ring, Whitfield,* and this Court's prior decisions, these additional facts are elements of the greater offense of aggravated first degree murder and must be pled in the charging document. *See, e.g., State v. Whitfield, supra; State v. Taylor,* 18 S.W.3d 366, 378n.18 (Mo.banc2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); *State v. Shaw,* 636 S.W.2d 667, 675 (Mo.banc1982) *quoting State v. Bolder,* 635 S.W.2d 673, 683 (Mo.banc1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence").

The state pled no statutory aggravating circumstances – nor any facts required by §565.030.4(1), (2),(3) in the information charging Richard with first degree murder. The state charged Richard with the lesser offense of *unaggravated* first degree murder. Thus, that is the "greatest" offense of which he could be convicted. *Jackson v. Virginia, Presnell v. Georgia, Cole v. Arkansas, Cokely v. Lockhart, State v. Parkhurst, supra*.

This Court's opinion in *State v. Nolan*, 418 S.W.2d 51 (Mo.1967), illustrates these principles. Nolan was charged with first degree robbery.

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[19] In light of *Whitfield, supra,* the charging document should plead the statutory aggravating circumstances and all facts that, under §565.030.4(1),(2),(3) must be proved beyond a reasonable doubt before a defendant is eligible for death.

Although the robbery statute authorized an enhanced punishment of ten years imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the amended information failed to charge this aggravating fact. *Id.*at 52. The jury found Nolan guilty of "[r]obbery first degree, by means of a dangerous and deadly weapon" and based on the aggravating fact of the "dangerous and deadly weapon," enhanced hiss punishment to fifty years. *Id*.

On appeal, the issue was the necessity of "pleading" in the charging document, "aggravating circumstances which would authorize the imposition of additional punishment." *Id.*at 53. The state claimed that, because Nolan had adequate notice "of the cause and the nature of the offense for which he was convicted," it need not charge the aggravator in the information. *Id.*at 53-54. The state's two-fold argument was a) it was obvious from "the words used in the information" that the offense involved the use of a weapon, and b) Nolan's motion to vacate his sentence indicated he was aware during voir dire that the state intended to try the case as an aggravated robbery and he never objected. *Id.*at 53-54.

This Court rejected these arguments, holding, "The charge 'with force and arms' does not include the allegation that the robbery was committed by means of a dangerous and deadly weapon." *Id.*at 54. "The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal" and "[t]he trial court was without power or jurisdiction to impose that

sentence." *Id*.

The Fourteenth Amendment's Due Process Clause affords no less protection to defendants charged with murder than those accused of robbery. If, to charge the aggravated form of robbery and thus subject the defendant to enhanced punishment, aggravators must be alleged in a robbery indictment, *Nolan*, *supra*, Due Process must also require that aggravators be alleged in the document charging first degree murder to subject a defendant to the enhanced punishment of death.

Although *Hurtado v. California*, 110 U.S. 516 (1884), holds that the Fifth Amendment's Indictment Clause does not apply to the states, *Hurtado* does not go so far as to say a state need not be consistent in whatever processes and procedures it chooses to adopt. The Fourteenth Amendment's Due Process Clause requires, at a minimum, that a state consistently follow the procedure elected for prosecuting criminal charges. Nor is *Hurtado* inconsistent with requiring states, under the Fourteenth Amendment's Due Process Clause, to adopt procedures for criminal prosecutions that provide the same level of notice of charges a grand jury indictment provides.

Even assuming that the states, Missouri included, are not bound by the Indictment Clause and are free to choose the procedures by which criminal cases are prosecuted, Due Process mandates that a state consistently apply its rules. After all, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the

Constitution--and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Missouri has chosen to require that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information..." Mo.Const.,Art.1,§17; *Barnes, supra*, *Parkhurst, supra*. Having made this choice, Missouri may not, consistent with Due Process, provide less protection for prosecutions of aggravated forms of first degree murder than for other crimes. *Evitts v. Lucey*, *supra*.

Although cognizant that this Court has previously rejected similar claims, *e.g., State v. Tisius*, 92 S.W.3d 751, 766-67 (Mo.banc2002), Richard raises this claim because the Supreme Court has not directly addressed whether facts that must be found by a jury beyond a reasonable doubt before a sentence of death may be imposed are required to be included in the charging document to charge the greater offense of "aggravated" or capital murder punishable by death. He further raises the issue because the 8th Circuit has addressed this issue in *United States v. Allen, supra*, a case arising out of the Eastern District of Missouri, and has specifically found that the failure to charge at least one statutory aggravator in the charging document renders that charging document constitutionally-deficient to charge a capital offense.

This Court should find that, although the trial court had jurisdiction over Richard on the charges of *unaggravated* first degree murder, it exceeded its jurisdiction and authority in sentencing Richard to death on *aggravated* first

degree murder. This Court must vacate Richard's death sentences and order him re-sentenced to life without parole.

## CONCLUSION

Based on the foregoing arguments, Richard requests that this Court reverse and remand for a new trial, for a new penalty phase, or vacate his death sentences and re-sentence him to life without parole.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2004, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to Richard Starnes, Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

## CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 30,955 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Janet M. Thompson