**IN THE**
**SUPREME COURT OF MISSOURI**
**No. SC96737**

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**STATE OF MISSOURI,**

**Respondent,**

**vs.**

**MARVIN D. RICE,**

**Appellant.**

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**APPEAL FROM THE CIRCUIT COURT OF**
**SAINT CHARLES COUNTY, MISSOURI**
**11TH JUDICIAL CIRCUIT, SAINT CHARLES CO. NO. 1611-CR00967-01**
**THE HONORABLE KELLY PARKER, SPECIAL JUDGE**

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# APPELLANT'S BRIEF

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## JURISDICTIONAL STATEMENT

Appellant, Marvin Rice, was convicted after a jury trial in Saint Charles County, Missouri of murder in the first degree, § 565.020, and murder in the second degree, §565.021. As to Count I, the jury was unable to agree on punishment, with 11 jurors in favor of life imprisonment and 1 in favor of death (Docs.25, 26, 35, 36). The jury recommended life on Count II (Doc.26,pg.3). On October 6, 2017, the trial court sentenced Marvin to death for Count I and life imprisonment for Count II (Tr.2426-28; Docs.37,38, 40).[1] A timely notice of appeal was filed on October 12, 2017 (Docs.39,41,42). This Court has exclusive appellate jurisdiction of this direct appeal. Art.V,Sec.3,Mo.Const.(amend.1982).

[1] All statutory references are to RSMo (2000) unless otherwise indicated. References to the Record on Appeal are to a transcript (Tr.) and legal file, which will be referenced first by the document number of the electronic legal file, followed by the page number (e.g.,"Doc.2,pg.1;" if the entire document is referenced, then the citation will only be to the document,"Doc.2.").

## STATEMENT OF FACTS

### Background:

Marvin Rice (Marvin) served in the army from 1986 to 1992 (Tr.1667, 1769). While in the army, he suffered a knee injury, which resulted in an honorable discharge (Tr.1701-02, 1705, 1769-72).[2] Also while serving in the army, he was treated for his first episode of major depressive disorder (Tr.1769-70). Marvin's knee injury combined with his major depressive disorder resulted in him being classified as a disabled veteran (Tr.1770, 1772).

After his time in the army, Marvin became a police officer in Houston, Missouri (Tr.1697, 1773). While there, he continued to be treated for depression (Tr.1773). Later, Marvin served as a Dent County Deputy Sheriff for about six years and was a model police officer (Tr.1648-49, 1661-62, 1777). Marvin had a reputation as being a peaceful, non-violent, law abiding person (Tr.1648-49,1655-56,1658,1661,1717,1721,1725,1730,1735,1739-40,1743,1747). In 2005, while working as an officer in Dent County, he suffered another knee injury (Tr.1777).

When Marvin was a Dent County Deputy Sheriff, he and Annette Durham, who had been incarcerated several times, had an affair (Tr.1206, 1317, 1663, 1676, 1781). This was out of character for Marvin (Tr.1650). As a result of the affair, Marvin was fired in 2009 (Tr.1370-71, 1781-83).

Marvin's behavior changed after he was fired (Tr.1673,1688,1700-01, 1706,1712,1714). He had always identified himself as being a police officer; without that identity, he slept more and became withdrawn (Tr.1673,1688,1700-01,1706,1712,1714). This change became severe (Tr.1673). Marvin also periodically became manic and reckless (Tr.1674-75).

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[2] Because some witnesses have the same surname, Appellant's Brief will refer to Appellant as Marvin, and to the two victims by their first names for consistency. Other witnesses will be referred to by their surnames, except for one of Annette Durham's daughters, Shailey, who will also be referred to by her first name to protect her identity. No disrespect is intended.

As a result, Marvin was treated at the "V.A." (Tr.1702,1712-13). He was placed on various medications, which changed frequently. *Id*. Marvin took so many medications that his family had to keep a list of what he was supposed to be taking (Tr.1713). In 2010-11, Marvin was still taking several medications to treat his major depression disorder (Tr.1784-86,1791-93). He also discovered that he had a pituitary gland tumor, which caused a thyroid abnormality, effecting some of his hormone levels, and worsening his depression (Tr.1793-97,1801).

Annette was sent to prison while she was pregnant with Marvin's child (Tr.1214,1218,1663,1704). She told Marvin that once she delivered the baby, he could get the baby (Tr.1215). Annette delivered their child, Ayden, while in prison (Tr.1215). After Marvin got Ayden, he made sure that Ayden would visit with Annette's other children (Tr.1215-16,1219).[3]

In 2011, Annette was released from prison and started having supervised visits with Ayden (Tr.1204-05,1220,1222-23,1677-78). At some point, Annette moved in with Steven Strotkamp, in Dent County, Missouri (Tr.1205-06,1253).[4] They lived on the same property as Steven's mother and her significant other, Stanley Watson (Tr.1206,1251-52,1268,1270). Their homes were right next door to each other and shared a driveway (Tr.1246).

On December 6, 2011, just four days before the charged crimes, Marvin was again treated for his depression (Tr.1803-04,1815). The dose of his depression medication (venlafaxine) needed to be increased, but never was before the charged crimes (Tr.1804-05,1808). As of December 10, 2011, Marvin was taking 17 different medications and he had been diagnosed with 12 various medical and psychiatric conditions, including a tumor of his pituitary gland, major

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[3] Annette's brother and his wife, Rachel Casey, had an on-and-off again guardianship of Annette's other three children because Annette struggled with drug addiction, and sometimes Annette had her oldest daughter watch the other children while Annette was "high" (Tr.1203,1212-14,1216).

[4] A change of venue was granted to St. Charles County where the case was tried.

depressive disorder (since 1989), and chronic pain from multiple injuries (Tr.1807-13). Some of the medications used to treat his physical conditions added to his impulsivity, irritability, misperception of reality, and also exacerbated his depression (Tr.1814-15).

**December 10, 2011:**

On December 10, 2011,[5] Annette picked up Ayden, now one-year-old, from Marvin for her first unsupervised visit with Ayden (Tr.1207,1223,1231,1247, 1678-79). She was supposed to return him later that night (Tr.1207,1223,1231, 1247,1678-79).

But Annette told her sister-in-law Rachel Casey that she was going to keep Ayden longer than promised since she had three days off from work (Tr.1207-08, 1224).[6] Casey told Annette that it was "basically a free for all unless there's a custody agreement," and as long as Annette had physical custody of Ayden, then Marvin could not take Ayden, and Annette did not have to give Ayden back to him (Tr.1208-09,1223-24,1227-28).

At some point, Annette called Marvin and told him that she was not going to return Ayden that night (State's Exhibit 134,pg.17;Tr.1680-81). As a result, Marvin showed up at Casey's home around 5:00 p.m., looking for Ayden; he was upset (Tr.1224-25). Never before had Casey heard Marvin raise his voice (Tr.1225). Afterwards, between 5:30 p.m. and 6:00 p.m., Casey sent a text message to Annette telling her that Marvin was likely heading in her direction (Tr.1209-10).

When Marvin arrived at Steven's and Annette's residence, six-year-old Shailey, who was one of Annette's daughters, was also there along with Ayden (Tr.1231-33). Shailey heard a noise "like something jamming into the door"

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[5] It was the five year anniversary of Marvin's mother's death (Tr.2305-06,2309).

[6] Casey met Annette when they were incarcerated together during one of Casey's six criminal convictions (Tr.1202-03,1211-12).

(Tr.1237). Annette told Shailey to take Ayden into the bedroom and shut the door (Tr.1238).

From the bedroom, Shailey heard Annette tell Marvin to go away; it sounded like Annette was in the doorway (Tr.1239-40,1405). Annette also told Marvin that she was not going to let Marvin have Ayden (Tr.1248,1405-06). Shailey then heard Steven stomping up to where Annette and Marvin were and say something, and then Shailey heard a gunshot (Tr.1239-40). Shailey did not know how many gunshots she heard, although she thought she heard two shots (Tr.1241).

Marvin came into the bedroom carrying a gun (Tr.1242). He picked up Ayden and walked out of the room (Tr.1242). Shailey left the bedroom and saw Steven lying in the hallway and groaning (Tr.1243-44). She went outside and saw her mother lying on the ground (Tr.1245). Shailey then ran next door to tell Steven's mother's what had happened (Tr.1245-46).

Ms. Strotkamp ran next door and found Annette dead on the front porch (Tr.1246,1255-58,1271-73,1279-80,1283,1331). Part of the screen door had been broken off (Tr.1273,1364). Inside, Steven lay partway between the bathroom and hallway (Tr.1246,1255-58,1271-73,1279-80,1283,1331). Ms. Strotkamp asked him what had happened and he said, "Marvin Rice" (Tr.1261). She ran back home to call for help (Tr.1262,1272). Watson went to check on Steven, who again said, "Marvin" (Tr.1273). By the time emergency personnel arrived, Steven was dead (Tr.1280-81,1284).

After emergency personnel arrived at the scene, they found an indentation in the concrete of the front porch where Annette was found (Tr.1339,1345,1347, 1352). Bullet fragments were found under her body, indicating that there had been a shot fired outside the home (Tr.1340,1352).

An autopsy revealed that Annette died from four gunshot wounds (Tr.1289, 1299-1300,1302,1322). Steven died from two gunshot wounds (Tr.1311-14). Toxicology reports indicated the presence of cannabis in Steven's body, and oxycodone, morphine and other opiates in Annette's body (Tr.1318-19,1323-24, 1326-27).

Meanwhile, Marvin left Ayden with his wife, Kelly (Tr.1385-86,1397-1403, 1408). He dictated a note to his wife that he then signed: "To whom it may concern. Ayden Rice is to be kept with Kelly Rice forever and always. These are my wishes. Marvin Rice." *Id*. Marvin swapped his car for his wife's car and headed to the V.A. hospital in Columbia. *Id*.

Dent County Deputy Sheriff Leonard Pabin learned that Marvin had been involved in the murders, so he attempted to call him (Tr.1372-73). Marvin returned the call (Tr.1373-74). When Pabin urged Marvin to turn himself in, Marvin said that he was not going to survive what happened (Tr.1378). Marvin also mentioned that he had a brain tumor and was on a lot of medications that were affecting him (Tr.1378,1389). Marvin talked about finding a place to kill himself (Tr.1380-81). He warned that everybody needed to stay out of his way or they would have to shoot him (Tr.1381). Marvin asked Pabin to write down Marvin's last will and testament, but the phone died before that happened (Tr.1382,1389). Afterwards, Pabin talked to Marvin's wife, who disclosed that Marvin was driving to the V.A. Hospital in Columbia (Tr.1385-86).

En route to Columbia, Marvin was involved in a high-speed chase with law enforcement officers (Tr.1411-15,1433). In Jefferson City, Missouri, an officer deployed "spike strips" in an attempt to stop Marvin's car (Tr.1417-18). Marvin's car drove toward the officer deploying the strips, but the officer got out of the way and Marvin's car ran over the spike strips (Tr.1418-19,1440-41). Marvin then drove his vehicle, with a flat tire, through several intersections before ending in the parking lot of the Capital Plaza Hotel (Tr.1441-42).

As Marvin drove underneath the awning of the front of the hotel, he jumped out of the moving car, leaving the car to roll through the parking lot with some officers chasing it (Tr.1443-44). Marvin then ran inside the hotel (Tr.144). Officer Curtis Bohanan saw Marvin, however, and pursued Marvin into the hotel (Tr.1444-45).

From behind a wall inside the hotel, Marvin shot at Bohanan (Tr.1448-54). Bohanan took cover and returned fire (Tr.1451-54). Meanwhile, Officer Chris Suchanek, who was working an off-duty job at the hotel that evening, got behind Marvin and shot him (Tr.1453-55,1488-89,1494-96). Marvin sustained bullet wounds to his hand, arm, and lower back or hip area (Tr.1455,1495-96,1506, 1576,1598).

**The interrogation of Marvin while in the hospital:**

Sgt. David Rice of the Missouri State Highway Patrol interrogated Marvin while Marvin was in the emergency room at the hospital (Tr.1575-78). Sgt. Rice read Marvin his *Miranda* rights,[7] and Marvin said that he understood them (Tr.1577-78). After several attempts to question Marvin at the hospital, Marvin finally told Sgt. Rice the following regarding the charged homicides:[8]

Annette picked up Ayden for a visit, but then later called Marvin and told him that she was never bringing Ayden back and that Marvin would never see him

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[7]*Miranda v. Arizona*, 384 U.S. 436 (1966). Further details regarding the interrogation are set out in Point III of this brief.

[8] As set out in Points II and III, dealing with the State's comments on Marvin's post-*Miranda* silence and the denial of a Motion to Suppress, Marvin told Sgt. Rice at various points in the questioning, and before Marvin answered Sgt. Rice's questions about the homicides: "I'm sorry Sir I don't wanna talk no more;" "I got nothin' to say Sir;" and, "I don't wanna talk;" yet Sgt. Rice continued to question Marvin (State's Exhibit 134,pgs.3,6). Other relevant facts regarding that interrogation, including that both issues were raised in the motion for new trial, are set out in the arguments to those points.

again (State's Exhibit 134,pg.17). As a result, Marvin looked for Ayden and when he found him, he "basically got assaulted at the front door." *Id*.at 17. When Marvin arrived, Annette met him at the door and she said that Marvin should leave because he was not getting Ayden back. *Id*.at 23. Marvin said that he wanted his son, and he tried to get inside the house and get Ayden. *Id*.at 18,23.

Both Annette and Steven came at Marvin. *Id*.at 18,23. Steven tried to get around Annette to get to Marvin. *Id*.at 18, 23,24. Annette grabbed Marvin's shoulder and Steven started to go around her side to get him. *Id*.at 24. Annette had a hold of Marvin and tried to wrestle him down. *Id*.at 24. All Marvin could think about was getting Ayden out of there. *Id*.at 24.

Marvin drew his gun when Steven came at him. *Id*.at 25. Marvin did not know if Steven had a weapon because he never saw his hands, so he could not see what was in them. *Id*.at 25. But Steven kept coming at Marvin even though Marvin had his gun drawn. *Id*. So Marvin shot Steven inside the house. *Id*.at 25.

Marvin found Ayden in a back bedroom with Shailey. *Id*.at 17, 24-26. Shailey said she was sorry, and Marvin told her, "baby it's not your fault, you ain't got nothin to do with this." *Id*.at17. Marvin then left with Ayden. *Id*.at26.

Marvin told Sgt. Rice that he did not go to Annette's house with any plans except to get Ayden. *Id*.at21-22. He had no intention to shoot anyone, although he was worried that he "would be met with firearms." *Id*.at 22.

**The charges:**

Marvin was charged by amended information with the first-degree murders of Annette (Count I) and Steven (Count II) (Doc.2). Later, the State filed a supplemental notice that it would be seeking the death penalty, listing two possible statutory aggravating circumstances: 1) the murders were committed while Marvin was engaged in the commission or attempted commission of another unlawful homicide; and, 2) the murders were outrageously or wantonly vile, horrible or inhuman in that they involved torture or depravity of mind (Doc.44). The State also listed three non-statutory aggravating circumstances all pertaining

to Marvin's flight from the crime scene and his subsequent capture in Cole County, Missouri. *Id*.

**The defense and verdicts:**

The evidence recounted above was presented at Marvin's trial. Further, in his defense, Marvin presented testimonies from twelve witnesses, including law enforcement officers, who testified that throughout Marvin's life preceding the crimes, Marvin had a reputation as being a peaceful, or non-violent, or law abiding citizen and/or that they were shocked and could not believe that Marvin had committed the crimes (Tr.1648-49,1653,1654-58,1661-62,1717,1721,1725,1730, 1735,1739-40,1743,1747).

In addition, Dr. Jose Mathews, Chief of Psychiatry at the St. Louis Veterans Affairs Hospital and Assistant Professor of Psychiatry at Washington University in St. Louis, Missouri, testified that on the day in question, Marvin was suffering from major depressive disorder, severe, with atypical features and was experiencing extreme emotional distress (Tr.1756-57,1839-42). Dr. Mathews noted that the combination of Marvin's medications made him prone to misinterpret reality in a paranoid manner and that his pituitary tumor and hormone treatments further impaired his ability to control his impulses. *Id*. Dr. Mathews concluded that Marvin's mental state at the time of the shootings was not combatable with deliberation or cool reflection; and, that Marvin was acting impulsively in a way that was combatable with sudden passion. *Id*.

Regarding the homicides, Marvin related the following to Dr. Mathews. December 10, 2011, was the first time that Marvin allowed Ayden to have an unsupervised visit with Annette (Tr.1816-17). She agreed to have Ayden back before bedtime, but later she called him and told her that she was not bringing Ayden back (Tr.1817).

Marvin decided to kill himself (Tr.1818). After he left his house, however, he decided to look for Annette (Tr.1819). He went to several places before going to the Strotkamp residence where he saw Annette's parked car (Tr.1819-20).

Marvin walked to the door, and Annette went outside and shoved Marvin to the ground (Tr.1821-22). Marvin was concerned because the only time that he had seen Annette become aggressive was when she was using drugs (Tr.1821). She told Marvin that neither Marvin nor his family would ever see Ayden again (Tr.1821-22). She would not give up Ayden unless Marvin had some legal paperwork requiring it (Tr.1823). Marvin had an uncontrollable fear that something bad was going to happen to Ayden, so he wanted to get Ayden out of there; Marvin admitted to Dr. Mathews that this fear was not rational and he could not justify why he had the fear that Ayden was in danger (Tr.1822).

Annette turned around, went inside and tried to close the main door (Tr.1822). Marvin jumped up and rushed the door; he tried to put his foot in the door and broke the door frame (Tr.1823). Marvin told Dr. Mathews that he was not thinking clearly and that his overwhelming concern was his belief that Ayden was in danger and that he needed to get Ayden out of there (Tr.1824).

Once inside, Marvin saw Steven and heard Steven tell Annette to get away from Marvin (Tr.1824). Because Steven told Annette to get away from Marvin, Marvin thought that Steven had a firearm and wanted Annette to get out of harm's way (Tr.1824,1867-68,1901). So Marvin drew his gun and shot Steven (Tr.1824).

Annette was holding onto Marvin's jacket and striking him with a cell phone (Tr.1827,1901-02,1904). Marvin shot Annette and then took Ayden with him (Tr.1827).

After this evidence was presented, as to Count I, the jury found Marvin guilty of the first-degree murder of Annette (Doc. 15,pg.1;Tr.2082). As to Count II, however, the jury found Marvin guilty of the second-degree murder of Steven (Doc.15,pg.2;Tr.2082).[9]

[9] The trial court refused Marvin's instructions relating to the lesser included offense of voluntary manslaughter (Doc.8,pgs.3-4;Tr.1991-97,2002-03). Marvin raised the trial court's refusal to give the instructions in his timely motion for new trial (claims 23 and 24) (Doc.32,pgs.23-24). See Point IV.

**Penalty phase:**

During the penalty phase, the State presented four victim impact witnesses – Shailey, Ms. Strotkamp, Mr. Watson, and Alexa, a daughter of Steven (Tr.2110-27). Shailey detailed her difficulties growing up and finding a new home as a result of her mother's murder until she was later adopted into a loving family (Tr.2112-13). Watson testified about his relationship with Steven, Steven's good qualities, and how Steven's loss has affected him (Tr.2116-19). Ms. Strotkamp testified about Steven's good qualities, Steven's relationship with his children, and how the loss of her son has impacted her (Tr.2120-24). Alexa testified about what she remembered about her father and how she missed him (Tr.2125-27). Other than the evidence from the guilt portion of the trial and this victim impact evidence, the State presented no other evidence in aggravation.

The defense presented testimonies, including a video deposition and a written letter, from 27 witnesses detailing various aspects of Marvin's life.

Numerous witnesses testified about Marvin's life growing up as a child and into adolescence, including that he always wanted to be a police officer or in the army, and how the crimes were not characteristic of Marvin (Tr.2134-35, 2143, 2152, 2155-56, 2161, 2175, 2177, 2179, 2186-87, 2202, 2216, 2222, 2228, 2237, 2304, 2308).

Marvin did in fact serve in the military in the 1990's (Tr.2187, 2199, 2239-40, 2304-05). A fellow soldier testified that he had never seen Marvin with a temper (Tr.2240). Marvin was the kind of soldier who would help others and deescalate disputes (Tr.2240-41).

After serving in the military, Marvin became a police officer (Tr.2200, 2211). As a police officer, he did admirable things such as help diffuse a potentially dangerous situation at a hospital (Tr.2200). He also helped a man and his pregnant wife regarding a neighbor who had threatened to kill the man and had engaged in other criminal activity toward that family (Tr.2205-06). The neighbor

ended up spending nine months in jail and never bothered the man or his wife again (Tr.2206, 2208-09).

Marvin was a great asset to the Dent County Sheriff's Department and was very good at resolving tense situations (Tr.2212). Marvin was not a violent person, and while working as a deputy sheriff, he was never "heavy handed" or violent or out of control, and he was extraordinary in confrontational situations (Tr. 2215, 2226). He was well thought of by his fellow officers (Tr.2211-12, 2215, 2228). Marvin received a certificate of achievement from the Dent County Sheriff (Tr.2225-26). The certificate noted that Marvin was an extremely versatile and talented deputy, he was possibly the best officer testifying in court, he forfeited personal time to assist other deputies, and he was credit to law enforcement officers (Tr.2226).

Aside from Ayden, Marvin had several other children -- Derrick, Dakota, Natasha, Lacey and Brett (Tr.1695-96, 1708-09, 2243, 2269, 2292, 2294-95, 2297, 2311). He was a fiercely devoted father, who spent a lot of time with his children (Tr.2202, 2244-45, 2270-71, 2295, 2311-13). His children were well behaved, well-mannered, and respectful (Tr.2227).

When Marvin's mother died on December 10, 2006, Marvin was never the same (Tr.2262, 2296, 2305-06, 2309-10, 2314). He went downhill physically and emotionally (Tr.2263, 2296). Also, Marvin had some physical problems because of his accidents (Tr.2262, 2314). Additionally, Marvin got diagnosed with a tumor on his pituitary gland and was taking so many pills that he could just barely get through the day (Tr.2264, 2275-76, 2309, 2314-15). There were times when he would fall asleep in the middle of a conversation (Tr.2309).

Marvin did not testify at either the guilt or penalty phase of trial. Yet in the penalty phase argument, the assistant attorney general argued:

> Mr. Zoellner: … But when you go back there and when you do this, I hope you remember only twelve of you are going to do it, there's a 13th juror in this room. *The 13th juror is sitting behind you, we often call them the*

> *defendants, but he's the 13th juror and if I'd been allowed to ask him those questions last week, he would have told us …*

The trial court overruled Marvin's objections that this was a comment on his right not to testify and involved speculation (Tr.2357-59).[10]

During deliberations, the jury sent out a question:

> We have an 11 to 1 decision on punishment and we have weighed all the evidence and still have 1 opposing opinion. What is your opinion on what we should do? Example: fill out the verdict form that says we are unable to decide? Is there a set time we need to debate? Everyone is firm on their decision and not willing to change.

(Doc.25;Tr.2381-82).

The court responded:

> You are to be guided in you deliberations by the evidence as you remember it and the instructions of the court.
>
> Whenever you complete your deliberations, appropriate verdict forms have been provided for your use.

(Doc.27;Tr.2385).

Regarding the verdict for Count I, the jury was unable to decide or agree upon the punishment (Doc.26;Tr.2386). In answering the questions listed in the verdict form, the jury: answered "Yes" to the question "Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?," and, "No." to the question, "Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?" (Doc.26,pg.1; Tr.2386).[11] The only statutory aggravating circumstance that the jury

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[10] Marvin raised the issue in his motion for new trial (claim 30,Doc. 32,pgs.30-31). See Point I.

[11] During the instruction conference, Marvin objected to the verdict form because the jury was "not required to make any factual finding and submit that in terms of whether the evidence in mitigation of punishment outweighs the evidence in aggravation of punishment," citing a case, which "recently found that this verdict directing form and the statute that allows the judge to determine punishment under

unanimously found beyond a reasonable doubt was: "the murder of Annette Durham was committed while the defendant was engaged in the commission of another unlawful homicide of Steven Strotkamp." (Doc.26,pg. 2;Tr.2386). As to Count II, the jury returned a verdict of life imprisonment for second-degree murder (Doc.26,pg. 3;Tr.2386-87).

Marvin was granted additional time to file Motion for New Trial, which he timely filed (Docs.23, 24, 32;Tr.2380-81).

**Post-trial matters and sentencing:**

After trial, Marvin filed a Motion for the Court to Impose a Sentence of Life without Parole Because Eleven Jurors Wanted a Sentence of Life (Doc.35). Attached to that motion were signed statements by two jurors who agreed that the jury was "deadlocked on punishment 11 to 1 in favor of" "Life" and "Life in Prison." (Doc.36). The trial court considered that motion in determining punishment (Tr.2413,2427).

The trial court overruled Marvin's Motion for New Trial (Tr.2399). The trial court then sentenced Marvin to death as to Count I, finding beyond a reasonable doubt that Marvin committed the statutory aggravating circumstance of, "the murder of Annette Durham was committed while the defendant was engaged in the commission of another unlawful homicide of Steven Strotkamp," and the court also found beyond a reasonable doubt that "there are not facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment" (Doc.38;Tr.2426-28). The trial court also sentenced Marvin to life imprisonment for Count II (Tr.2428;Docs.37,40).

Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

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these circumstances violates U.S. Constitution" (Tr.2335-36). The trial court overruled the objection (Tr.2336). Marvin repeated that objection at sentencing prior to pronouncement of sentence, which was again overruled (Tr.2399-2404).

## POINTS RELIED ON

### I.

**The trial court erred in overruling Marvin's objection during penalty phase argument when the assistant attorney general told the jury, "*[t]he 13th juror is sitting behind you, we often call them the defendants*, but he's the 13th juror and *if I'd been allowed to ask him those questions last week, he would have told us* …," because this violated Marvin's rights against self-incrimination, to not have the State comment on his failure to testify, to due process, and to a fair trial, guaranteed by the 14th Amendment to the U.S. Constitution, Article I, §§10 and 19 of the Missouri Constitution, Rule 27.05, and §546.270, in that this argument was an impermissible, direct comment on Marvin's right not to testify because the prosecutor used words such as "defendant" and the equivalent of "testify" ("ask him questions;" "he would have told us"), and was reasonably likely to direct the jury's attention to Marvin's failure to testify and have jurors speculate as to what Marvin's answers would have been to the assistant attorney general's questions; further, because an objection was made and overruled, this direct comment on Marvin's failure to testify requires reversal of his sentences and a new penalty phase because the jury voted 11-1 that he should receive a life without parole sentence instead of the death sentence the judge ultimately gave as a result of the sole holdout juror.**

*State v. Neff*, 978 S.W.2d 341 (Mo.banc 1998);

*State v. Busey*, 143 S.W.3d 6 (Mo.App.W.D.2003);

*State v. Shuls*, 329 Mo. 245, 44 S.W.2d 94 (1931);

*State v. Lindner*, 282 S.W.2d 547 (Mo.1955);

U.S. Const.,Amend.XIV;

Mo.Constitution, Article I,§§10 & 19;

§§546.270, 565.023, 565.025; and

Rule 27.05(a).

## II.

**The trial court erred in overruling Marvin's objections and request for a mistrial and in allowing the State to adduce evidence that when Sgt. Rice interrogated Marvin, he asked Marvin several times about what happened regarding the charged homicides, and Marvin invoked his right to remain silent and refused to answer those questions, because this violated Marvin's rights to due process, to remain silent and to be free from self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Const. and Article I, §§10 and 19 of the Mo. Const., in that this evidence was an impermissible comment on Marvin's post-*Miranda* silence since it revealed that Marvin remained silent under circumstances calling imperatively for an admission or denial; although Marvin initially talked to Sgt. Rice before invoking his right to silence at least three times, Marvin's waiver of his rights was conditioned upon the implicit promise that he could stop talking at any time without having that silence used against him, but the State used his post-*Miranda* silence as evidence against him. The State cannot show that this constitutional error was harmless since (1) the State made repeated *Doyle* violations; (2) the trial court did not take any curative effort; (3) Marvin's exculpatory evidence was not transparently frivolous; and (4) evidence of guilt was not otherwise overwhelming.**

*State v. Brooks*, 304 S.W.3d 130 (Mo.banc 2010);
*State v. Dexter*, 954 S.W.2d 332 (Mo.banc 1997);
*State v. Tims*, 865 S.W.2d 881 (Mo.App.E.D.1993);
*Doyle v. Ohio*, 426 U.S. 610 (1976);
U.S. Const., Amends. V and XIV; and
Mo. Constitution, Article I,§§10 & 19.

## III.

**The trial court clearly erred in denying Marvin's motion to suppress and in admitting at trial the statements he made to Sgt. Rice, because the admission of such statements violated Marvin's rights to due process, and to be free from self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Const. and Art. I, §§10 & 19 of the Mo. Const., in that the statements were made during custodial interrogation and after Marvin unequivocally invoked his right to silence; and continued interrogation, questioning, and attempts to persuade Marvin to talk to the officer was improper once Marvin had invoked his right to remain silent because Marvin did not initiate further communications, exchanges, or conversations with the police, and his right to remain silent was not scrupulously honored, because (1) the police did not immediately cease the interrogation upon Marvin's several unequivocal requests to terminate questioning; instead Sgt. Rice tried to persuade Marvin to change his mind; (2) Sgt. Rice resumed questioning only after the passage of a short period of time; (3) the object of subsequent interrogation was to wear down Marvin's resistance and make him change his mind; (4) many subsequent interrogations were undertaken; and (5) the subsequent questioning involved the same crime.**

*State v. Bucklew*, 973 S.W.2d 83 (Mo.banc1998);

*Miranda v. Arizona*, 384 U.S. 436 (1966);

*State v. Glear*, 696 S.W.2d 820 (Mo.App.E.D.1985);

*Michigan v. Mosley*, 423 U.S. 96 (1975);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I,§§10 & 19; and

*Webster's Third New International Dictionary* 2543 (unabridged ed.2002).

## IV.

**As to Count II, the trial court erred in not giving Marvin's refused Instruction D, a second-degree murder instruction submitting sudden passion arising out of adequate cause, and its associated Instruction E, a voluntary manslaughter instruction, because the failure to give those instructions violated the provisions of §556.046, and Marvin's constitutionally protected rights to due process, to present a defense, and a properly instructed jury, as guaranteed by the 5th and 14th Amendments to the U.S. Constitution, Article I, §10 of the Missouri Constitution, in that: a) there was a basis for a verdict acquitting Marvin of the offense of conventional second-degree murder (the offense found by the jury as to Count II) because there was evidence that Marvin caused Steven's death under the influence of sudden passion arising from adequate cause; b) voluntary manslaughter is a lesser included offense of second-degree murder and was supported by the evidence; and, c) Marvin timely requested these instructions.**

*State v. Avery*, 120 S.W.3d 196 (Mo.banc 2003);

*State v. Brown*, 524 S.W.3d 44, 47 (Mo.banc 2017)

*State v. Jackson*, 433 S.W.3d 390 (Mo.banc 2014);

*State v. Fears*, 803 S.W.2d 605 (Mo.banc 1991);

U.S. Const. Amends. V & XIV;

Mo. Const. Article I,§10;

§§556.046, 556.051, 565.002, 565.021, 565.023, 565.025;

§§556.061, 565.029, RSMo 2016; and

MAI-CR3d 314.40(B).

## V.

**The trial court erred in overruling Marvin's motion regarding the unconstitutionality of Missouri's death penalty scheme, his objection to the verdict form used when the jury is deadlocked on punishment, his motions for the court to impose a sentence of life without parole, and in sentencing Marvin to death after the jury was unable to agree upon a sentence as to Count I, having deadlocked 11 to 1 in favor of a sentence of life without parole, because the imposition of a sentence of death by the trial court when the jury was unable to agree upon punishment, as allowed by §565.030, violated Marvin's constitutionally protected rights to due process, a trial by jury, and to a unanimous jury verdict, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, Article I, §22(a) of the Missouri Constitution, in that §§565.030 and 565.032, in conjunction with the improperly-worded verdict form, impermissibly allows a judge to make the required sentencing determinations needed to impose death when the jury is unable to unanimously agree upon the punishment or after the jury is not unanimous when weighing aggravating and mitigating circumstances.**

*Hurst v. Florida*, 136 S.Ct. 616 (2016);

*McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D.Mo.2016);

*Hurst v. State*, 202 So.3d 40 (Fla.2016);

*Rauf v. State*, 145 A.3d 430 (Del.2016);

U.S. Const. Amends. VI & XIV;

Mo. Const. Article I,§22(a);

§565.032;

MAI-CR 4th 414.58; and

MAI-CR3d 314.58.

## VI.

**The trial court erred in overruling Marvin's motions regarding the unconstitutionality of Missouri's death penalty scheme and in sentencing Marvin to death after the jury was unable to agree upon a sentence as to Count I, having deadlocked 11 to 1 in favor of a sentence of life without parole, because the imposition of a sentence of death by the trial court when the jury was unable to agree upon punishment, as allowed by §565.030, violated Marvin's constitutionally protected rights to be free from cruel and unusual punishment, as guaranteed by the 8th and 14th Amendments to the U.S. Constitution, Article I, §21 of the Missouri Constitution, in that there is a strong national consensus against judge-imposed death sentences as well as death sentences premised on a non-unanimous jury verdict -- Missouri is only one of two states that legislatively authorize a judge to impose a death sentence when a jury has deadlocked during its penalty deliberations--; and, such a procedure fails to provide the heightened reliability in capital sentencing that the Eighth Amendment requires.**

*Hurst v. State*, 202 So.3d 40 (2016);

*Atkins v. Virginia*, 536 U.S. 304 (2002);

*Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986 (2014);

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

U.S. Const. Amends. VIII & XIV;

Mo.Const. Article I,§21; and

§565.030.

## VII.

**The trial court erred in overruling Marvin's motions regarding the unconstitutionality of Missouri's death penalty scheme and in sentencing Marvin to death, because §§565.030 and 565.032, violated Marvin's constitutionally protected rights to be free from cruel and unusual punishment, as guaranteed by the 8th and 14th Amendments to the U.S. Constitution, Article I, §21 of the Missouri Constitution, in that Missouri's death penalty scheme fails to adequately narrow the class of death-eligible homicides as constitutionally required by Supreme Court precedent, resulting in a significant risk that death sentences are being imposed arbitrarily; as a result, prosecutorial discretion defines which defendants face the death penalty, and because prosecutors apply their discretion in vastly different ways, this has resulted in large geographic disparities in the rates of death penalty prosecutions and convictions in Missouri.**

*Zant v. Stephens*, 462 U.S. 862 (1983);

*Lowenfield v. Phelps*, 484 U.S. 231 (1988);

*Godfrey v. Georgia*, 446 U.S. 420 (1980);

*Tuilaepa v. California*, 512 U.S. 967 (1994);

U.S. Const. Amends. VIII & XIV;

Mo. Const. Article I,§21;

§§565.030 and 565.032;

Barnes, Sloss, & Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision–Making in Death–Eligible Cases*, 51 Ariz.L.Rev. 305 (2009);

A.B.A., *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report*; and

F. Baumgartner, *The Impact of Race, Gender, and Geography on Missouri Executions*, July 16, 2015.

## ARGUMENTS:

### I.

**The trial court erred in overruling Marvin's objection during penalty phase argument when the assistant attorney general told the jury, "*[t]he 13th juror is sitting behind you, we often call them the defendants*, but he's the 13th juror and *if I'd been allowed to ask him those questions last week, he would have told us* …," because this violated Marvin's rights against self-incrimination, to not have the State comment on his failure to testify, to due process, and to a fair trial, guaranteed by the 14th Amendment to the U.S. Constitution, Article I, §§10 and 19 of the Missouri Constitution, Rule 27.05, and §546.270, in that this argument was an impermissible, direct comment on Marvin's right not to testify because the prosecutor used words such as "defendant" and the equivalent of "testify" ("ask him questions;" "he would have told us"), and was reasonably likely to direct the jury's attention to Marvin's failure to testify and have jurors speculate as to what Marvin's answers would have been to the assistant attorney general's questions; further, because an objection was made and overruled, this direct comment on Marvin's failure to testify requires reversal of his sentences and a new penalty phase because the jury voted 11-1 that he should receive a life without parole sentence instead of the death sentence the judge ultimately gave as a result of the sole holdout juror.**

*"Obviously, if an objection to a prosecutor's direct reference is made and overruled, a new trial will be ordered on appeal."*

-- *State v. Neff*, 978 S.W.2d 341, 347 (Mo. banc 1998)

**Facts and Preservation:**

Marvin did not testify at either the guilt or penalty phase of trial. The United States and Missouri Constitutions forbid the State to comment on the defendant's exercise of the right not to testify. *State v. Neff*, 978 S.W.2d 341, 344

(Mo.banc 1998). Yet in the penalty phase argument, the assistant attorney general made a direct comment on Marvin's failure to testify:

> Mr. Zoellner: … But when you go back there and when you do this, I hope you remember only twelve of you are going to do it, there's a 13th juror in this room. ***The 13th juror is sitting behind you, we often call them the defendants, but he's the 13th juror and if I'd been allowed to ask him those questions last week, he would have told us*** …
>
> Ms. Turlington: Judge I'm going to object. This is commenting on the defendant's right not to testify.
>
> Mr. Zoellner: No it is not judge, it is not.
>
> (Bench conference had at this time.)
>
> Ms. Turlington: Judge Mr. Zoellner just said well this week I could have talked to him, I don't know I mean.
>
> Mr. Zoellner: Judge the argument that I'm making is that if I could have talked to him last week he would have told you he could give meaningful consideration to the sentence of death. Not only that he is will to carry out that sentence.
>
> The Court: You're talking about during the voir dire process when you're referencing the voir dire process last week. Anything else on that Ms. Turlington?
>
> Ms. Turlington: Judge I don't think this is being made clear that it's during the voir dire process, I think it's a reference to being able to question the defendant who did not take the stand. We've had numerous references to him not apologizing [12] which I also feel is an oblique reference to him not

[12]Mr. Zoellner argued, "[Marvin] never has once apologized for shooting Steve and Annie has he? …Doctor my question was has he ever apologized for shooting Steve and Annie?" (Tr.1929); "He has yet to this day to apologize to anybody except for expressing remorse to you for killing these people correct?" (Tr.1930); "He's never apologized for murdering two people in cold blood" (Tr.2028). *See, Lesko v. Lehman*, 925 F.2d 1527 (3d Cir.1991) (argument about defendant's failure to say he was sorry was a comment on failure to testify); *State v. McClure*, 537 S.E.2d 273 (S.C.2000) (Prosecutor violated defendant's privilege against self-incrimination in penalty phase of capital murder trial by commenting that defendant had not stated "I'm sorry" or "I wish I could take it back").

> taking the stand. This seems to be like a running theme here rather than argument. I think this is improper, it's just highlighting the fact that Mr. Rice did not take the stand and that in addition it's completely speculative what Mr. Rice's answers would have been.
>
> The Court: Under the circumstances the objection is overruled. Let's make sure you clarify that yore' talking about last week during the voir dire process.
>
> Mr. Zoellner: I will.
>
> (Bench conferenced concluded at this time).
>
> The Court: You may.
>
> Mr. Zoellner: As I was describing to each of you the questions you answered, what I was saying to you is last week Mr. Rice, the defendant, would have been a potential juror. He is a potential juror and if he had been asked those questions he would have told us not only does he believe in the death penalty, he's willing to carry it out without the need for attorneys, judges, trial or jurors. When you twelve go back there, remember that he's the 13th juror.

(Tr.2357-59).

Marvin raised the issue in his timely motion for new trial (claim 30,Doc. 32,pgs.30-31).

**Standard of Review:**

The standard of review for alleged error in closing argument generally depends upon whether defense counsel objects. Where there is an objection, appellate courts will reverse the trial court's decision with regard to closing argument upon a showing of abuse of discretion by the trial court. *State v. Shurn*, 866 S.W.2d 447, 460 (Mo.banc 1993).

When considering a defendant's claim of an improper comment on his right to remain silent, the prejudicial impact of such a statement is a matter within the sound discretion of the trial court, and a prompt instruction by the trial court to the

jury to disregard the comment may cure any error in a particular case. *Neff*, 978 S.W.2d at 345. But "[o]bviously, if an objection to a prosecutor's direct reference is made and overruled, a new trial will be ordered on appeal." *Id.* at 347. *Also see*, *State v. Lindner*, 282 S.W.2d 547, 550 (Mo.1955) ("If the prosecuting attorney in fact, either directly or indirectly, referred to the appellant's failure to testify he is entitled to a new trial").

**Analysis:**

The Fifth Amendment to the U.S. Constitution, Article I, §19 of the Missouri Constitution, §546.270, and Rule 27.05(a) all grant criminal defendants the right not to testify, and they forbid others to comment on the exercise of that right. *Neff*, 978 S.W.2d at 344.[13] Thus, it is impermissible for a prosecutor to comment, either directly or indirectly, on a defendant's failure to testify. *State v. Lindsey*, 578 S.W.2d 903 (Mo.banc 1979).

A direct reference to an accused's failure to testify occurs when the prosecutor uses words such as "defendant," "accused," and "testify" or their equivalent. *State v. Busey*, 143 S.W.3d 6, 11 (Mo.App.W.D.2003). Where an objection is made and overruled, a direct reference to the accused's failure to testify will almost invariably require reversal of the conviction. *Neff*, 978 S.W.2d at 345.

An indirect reference is one reasonably likely to direct the jury's attention to the accused's failure to testify. *Id*. Indirect references to the failure of the accused to testify can be just as damaging as direct references. *State v. Williams*, 673 S.W.2d 32, 36, n.6 (Mo.banc 1984). An indirect reference requires reversal if there is a calculated intent to magnify the defendant's silence so as to call it to the jury's attention. *Neff*, 978 S.W.2d at 344.

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[13] Section 546.270 and Rule 27.05(a) both provide that if the accused or defendant "shall not avail himself ... of his ... right to testify ..., it shall not ... be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

The prohibition against self-incrimination bars a prosecutor from commenting on the defendant's failure to testify at either the guilt or the penalty phase of trial. *State v. Storey*, 986 S.W.2d 462, 463-64 (Mo.banc 1999); *Shelton v. State*, 744 A.2d 465, 501 (Del.2000); *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981) (discerning no basis to distinguish between the guilt and penalty phases of a capital murder trial so far as the Fifth Amendment is concerned).

Here, the assistant attorney general, an experienced capital litigator, made a direct comment on Marvin's right not to testify. He chose words that were the equivalent of "defendant," "accused," and "testify." *Busey*, 143 S.W.3d at 11. The assistant attorney general specifically referred to Marvin ("The 13th juror is sitting behind you, we often call them the defendants, but he's the 13th juror") and also used the equivalent to testify ("if I'd been allowed to *ask him those questions* last week, he *would have told us*"). *See, State v. Nelson*, 719 S.W.2d 13, 16 (Mo.App.W.D.1986) (prosecutor's argument was an inadmissible comment on the defendant's failure to testify, warranting a new trial: "…[W]e want to ask you, Odell Nelson, we want to ask you what you were doing with these guys.").

Here, the comment was not inadvertent. But even if it had been an inadvertent, "slip of the tongue," it does not matter -- a direct comment on the defendant's right not to testify, particularly when an objection is overruled, warrants a new trial. *Busey*, 143 S.W.3d at 11-12.

Additionally, this argument improperly asked the jury to speculate on matters outside the record, and it did so in a way that would cause jurors to imagine what Marvin would say if he was required to answer questions posed by the assistant attorney general, i.e., testify. See, *State v. Jeffrey*, 31 Kan.App.2d 873, 881, 75 P.3d 284, 291 (2003): "It is improper for a prosecutor to create an 'imaginary script' in order to create and arouse the prejudice and passion of the sentencing jury.'" *Id*., quoting *State v. Kleypas*, 272 Kan. 894, 40 P.3d 129 (2001).

Because an objection was made to the assistant attorney general's argument, but was overruled, "[o]bviously, … a new trial will be ordered on appeal." *Neff*, 978 S.W.2d at 347. This is in part because when a trial court overrules an objection, the improper argument receives the imprimatur of the trial court. *State v. Williams*, 659 S.W.2d 778, 782 (Mo.banc1983). By implying that the State's argument was proper, the court's ruling allowed the jury to consider Marvin's silence as aggravating evidence and hence exacerbated the argument's prejudicial effect:

> The jury would naturally understand from that ruling that the court considered the argument proper and notwithstanding the instruction would likely draw the inference, unfavorable to the defendant, which the argument obviously suggested. We cannot say that the error was nonprejudicial.

*State v. Shuls*, 329 Mo. 245, 44 S.W.2d 94, 96 (1931)

Because the reference occurred in the penalty phase, a new penalty phase is warranted. Too great a risk exists that the improper reference influenced the sole holdout jury, and that without that reference, the jury would have voted unanimously in favor of a sentence of life without parole. Because the State commented upon Marvin's failure to testify, he was denied due process, a fundamentally fair trial, and his right to be free from self-incrimination. This Court should reverse and remand for a new penalty phase.

## II.

**The trial court erred in overruling Marvin's objections and request for a mistrial and in allowing the State to adduce evidence that when Sgt. Rice interrogated Marvin, he asked Marvin several times about what happened regarding the charged homicides, and Marvin invoked his right to remain silent and refused to answer those questions, because this violated Marvin's rights to due process, to remain silent and to be free from self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Const. and Article I, §§ 10 and 19 of the Mo. Const., in that this evidence was an impermissible comment on Marvin's post-*Miranda* silence since it revealed that Marvin remained silent under circumstances calling imperatively for an admission or denial; although Marvin initially talked to Sgt. Rice before invoking his right to silence at least three times, Marvin's waiver of his rights was conditioned upon the implicit promise that he could stop talking at any time without having that silence used against him, but the State used his post-*Miranda* silence as evidence against him. The State cannot show that this constitutional error was harmless since (1) the State made repeated *Doyle* violations; (2) the trial court did not take any curative effort; (3) Marvin's exculpatory evidence was not transparently frivolous; and (4) evidence of guilt was not otherwise overwhelming.**

*"[I]t is fundamentally unfair to implicitly assure a person his silence will not be used against him and then breach that promise by using that silence against him."*

-- *State v. Brooks*, 304 S.W.3d 130, 133 (Mo.banc 2010)

### Introduction:

As noted in Point I, the assistant attorney general made a direct comment on Marvin's right not to testify when he hypothesized, "if I'd been allowed to ask

him those questions last week, he would have told us…," and he also repeatedly told the jury that Marvin had never apologized for the homicides.

Compounding the prejudice of commenting on Marvin's silence, the assistant attorney general introduced evidence that when Sgt. Rice asked Marvin several times about what happened regarding the charged homicides, Marvin invoked his right to remain silent several times and refused to answer those questions. The experienced attorney general did this even though Missouri cases have consistently held that post-*Miranda*[14] silence cannot be used as evidence to incriminate a defendant, and that such comments will often result in a manifest injustice. A new trial is required.

**Facts and Preservation:**

Preceding Sgt. David Rice's interrogation of Marvin at the hospital, Sgt. Rice read Marvin his *Miranda* rights, including, "[y]ou have the right to remain silent," and "[i]f you wish you can decide *at any time* to exercise your rights to not answer any questions or make any statements." (State's Exhibit 134,pg.1; emphasis added).

During the interrogation, Marvin invoked his right to silent several times, as Sgt. Rice promised that he could:

> [Sgt. Rice]: … Marvin what happened before you came, before you were comin to the VA tonight?
>
> Marvin: My mouth is so dry.
>
> [Sgt. Rice]: Yeah. Marvin what, what happened before you came, before you came to the VA tonight?
>
> Marvin: **I'm sorry Sir I don't wanna talk no more.**
>
> [Sgt. Rice]: You don't want to talk? You hurtin' too much?
>
> Marvin: Yes.

[14]*Miranda v. Arizona*, 384 U.S. 436 (1966).

*Id*. at pg. 3.

> [Sgt. Rice]: Okay. Um what I need for you to tell me about here … you know the reason this whole thing started (sighs) what happened tonight at Steve's that kinda kicked this whole thing off? I need you to be honest with me.
>
> Marvin: **I got nothin' to say Sir.**
>
> [Sgt. Rice]: 'Kay **you got nothin' to say uh about at Steve's** or … obviously you're upset with what happened down there with, with Annie but I want ya to understand bein', bein' a cop…you're a cop and I'm a cop. I'm not gonna play games with ya. I'm not gonna, I'm not gonna jerk ya around but you understand ya know we got folks down there that worked it. We got you know a seven year old who saw what occurred. **Uh I'd like to be able to give your side of the story because as you know if you don't have, if you don't have a voice in this somebody else is gonna give you one and that voice probably isn't gonna say what you want it to say. It's not gonna give your side of the story as far as what led up to this**. Uh especially in light of what occurred afterwards with you know gunfire with, a busy hotel. Uh **I'd like to be able to … at least be able to give a side of the story as far from Marvin what, what led up to this** or … you understand where I'm comin' from Marvin?
>
> Marvin: Mm hmm.
>
> [Sgt. Rice]: I mean if, **if you don't give some kind of reason as to why people are gonna assume the worst in ya** and especially comin' from law enforcement uh you know we, we sure don't need people to say that you're some, some lunatic crazy cop who had this all planned out and went on a shooting spree intendin' to hurt all these people. 'Cause you know obviously that, that wasn't the case. If you, with all your training, if you wanted to hurt a lot of people you could and you, you didn't. Uh so I, I'm guessin' that things got outta hand and emotions took over. But I don't know that. **I can't put words in our mouth. I, I need to hear from your side of the story as far as what happened**.
>
> Marvin: My heart dudn't like this. **I don't wanna talk.**
>
> [Sgt. Rice]: Mm 'kay. I , I understand that. Uh can you tell me anything about what happened before I go?
>
> Marvin: Mm mmm.

*Id*. at pg.6.[15]

Further, Sgt. Rice, through questioning by the assistant attorney general, drew attention to Marvin's post-*Miranda* silence in an attempt to draw an inference of guilt:

> Q. And did you ask him several times about what happened down in Dent County at his home in regard to Annie?
>
> A. Yes I did.
>
> Q. And did he answer any of those questions?
>
> A. No he did not.
>
> * * * * * *
>
> Ms. Turlington [Defense counsel]: Judge at this time I would like to ask for a mis-trial and Mr. Zoellner just asked Mr. Rice or he asked him questions about what happened in Dent County regarding Annie and the answer was that [Marvin] did not answer those questions. [Marvin] has a Fifth Amendment right not to answer questions and I believe that that was a comment on [Marvin's] right not to answer questions regarding those incidents and for that reason I do not believe there is any curative instruction that can be given, it will only draw more attention to the fact that there is a comment on the fact that [Marvin] did not answer questions regarding Dent County and the implication being that he is guilty. Those types of questions are completely improper and for that reason at this time I would to request a mistrial.
>
> Mr. Zoellner [Assistant Attorney General]: Judge as you know from the entire audio transcript from listening to it is kind of a continuing conversation where if you will he avoids discussing that and discuss what happens at the hotel in Jefferson City for a period of time and ultimately he does discuss those options. This is not an invocation of rights situation. I

[15] Sgt. Rice's comments, as well as Marvin's assertions of his right to silence, are similar to examples given by this Court in *Brooks* when it identified unpreserved, impermissible comments on the defendant's silence that were included in a recorded police interview that was played for the jury. *Brooks*, 304 S.W.3d at 136. "Once a *Doyle* violation has been found, this Court has discretion to review the violation or violations in the context of the entire record." *Id*.at 137.

believe as Ms. Turlington alleges it's simply describing this portion of the conversation and then took a brief break and continued on.

Ms. Turlington: I will note he is basically, this is a series of question sessions. It's not just one continuous discussion. [Marvin] answers more questions it's actually the next day so I don't think that this, I'm sorry it's actually the next day when [Marvin] answers more questions. I don't think this can be treated, we're doing this because of the way it's done as one tape but it's really a series of questioning that happens over a period of time and so I don't think the fact that later he answers questions is curative of him not originally answering questions because it's many hours later.

The court: The objection is overruled and the motion for mis-trial is overruled and denied….

* * * * * *

Q. And just prior to the end of that or to that break, you brought up again what happened to Ann, correct?

A. I did.

Q. And his reaction was what?

Ms. Turlington: Judge I'm going to make the same objection.
The Court: The objection is overruled.

A. He appeared to have more pain at that point and began groaning is what happened.

Q. Well let me ask you this when you brought up Ann and down there and asked him about that did his demeanor change?

A. To me every you know when I brought up Ann and asked him about what happened last night as you heard it seemed that his pain increased and he began moaning more and complaining.

Q. Does that sort of happen later on in these interviews?

A. It does consistently throughout the interview.

(Tr.1582-86).

This issue was included in Marvin's timely motion for new trial (Doc.32, pgs.13-14, points 13 & 14).

**Standard of Review:**

"When a criminal defendant alleges his or her constitutional rights have been violated, this Court's review is *de novo*." *State v. Nathan*, 522 S.W.3d 881, 885 (Mo.banc 2017).

The standard of review, when the error is preserved, is the harmless-beyond-a-reasonable-doubt standard. *State v. Brooks*, 304 S.W.3d 130, 137 (Mo.banc 2010). Under this standard, the State bears the burden of proving that a federal constitutional error was harmless beyond a reasonable doubt, which means that no reasonable doubt exists that the admitted evidence failed to contribute to the jury's verdict. *Id*.

To determine the effect of a *Doyle*[16] violation on the jury's verdict, this Court analyzes four factors: "(1) whether the government made repeated *Doyle* violations; (2) whether the trial court made any curative effort; (3) whether the defendant's exculpatory evidence is transparently frivolous; and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming." *Brooks*, 304 S.W.3d at 137 (citing *State v. Dexter*, 954 S.W.2d 332, 340 n.1 (Mo.banc 1997)). Identification of even a single *Doyle* violation invites scrutiny of the entire record. *Dexter*, 954 S.W.2d at 340. These factors are the same as those used to determine whether a non-preserved *Doyle* violation error is a plain error affecting substantial rights and resulting in manifest injustice. *Id*. at 340, n. 1.

**Analysis:**

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination is safeguarded by the mandatory procedures set out in

[16] *Doyle v. Ohio*, 426 U.S. 610 (1976)

*Miranda*, *supra*, including the requirement that those in police custody be advised that they have the right to remain silent and that anything they say can be used against them. *Miranda*, 384 U.S. at 468-69.

Thus, a person accused of a crime has no duty to speak to law enforcement officers about the charged offense. *Doyle*, 426 U.S. at 618-19. Comments on an accused's silence violate due process because the *Miranda* warnings seek implicitly to assure the accused that his silence in the face of accusation carries no penalty. *Id*. at 617. Breaching the implied assurance of the *Miranda* warning violates fundamental fairness as required by the Due Process Clause. *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986); *Brooks*, 304 S.W.3d at 133. After all, it is fundamentally unfair to implicitly assure a person his silence will not be used against him and then breach that promise by using that silence against him. *Wainwright*, 474 U.S. at 291; *Brooks*, 304 S.W.3d at 133.

Relying on *Doyle's* notion of fundamental fairness, Missouri cases have consistently held that post-*Miranda* silence cannot be used as evidence to incriminate a defendant. E.g., *Brooks*, 304 S.W.3d at 133-34; *Dexter*, 954 S.W.2d at 335, 338 (failure to *sua sponte* declare a mistrial); *State v. Zindel*, 918 S.W.2d 239, 241 (Mo.banc1996) (plain error - no objection made); *State v. Stuart*, 456 S.W.2d 19, 22 (Mo.banc1970) (questioning officer about defendant's silence); *State v. Tims*, 865 S.W.2d 881, 885 (Mo.App.E.D.1993); *State v. Martin*, 797 S.W.2d 758 (Mo.App.E.D.1980); *State v. Whitemore*, 948 S.W.2d 643 (Mo.App.W.D.1997). A defendant's post-arrest silence or language representing silence "cannot be remarked on, testified to nor implied in the prosecution's presentation of its case." *Tims*, 865 S.W.2d at 885-86.

"Silence" does not mean only muteness; it also includes the statement of an accused's desire to remain silent as well as a desire to remain silent until an attorney has been consulted. *Greenfield*, 474 U.S. at 295 n.13; *Dexter*, 954 S.W.2d at 337-38. When analyzing a *Doyle* violation claim, a defendant's

invocation of his *Miranda* rights is not treated as a statement, but as post-*Miranda*, warnings silence. *Dexter*, 954 S.W.2d at 338.

"Introduction of a defendant's express invocation of his right to remain silent is prejudicial to a defendant because the introduction of such evidence invites the jury to draw an adverse inference of guilty from the exercise of a constitutional right." *Friend v. State*, 473 S.W.3d 470, 478 (Tex.App.2015) (trooper's testimony reciting defendant's "not saying" responses violated defendant's right to remain silent). This is because the "probable collateral implication of a defendant's invocation of his right to remain silent is that he is guilty." *Id*. Thus, if a defendant invokes his right to remain silent after receiving his post-arrest *Miranda* warnings, the State cannot use the defendant's invocation of his constitutionally-protected right to remain silent as evidence of his guilt. *Id*.

A witness's testimony that describes the conclusion of an interrogation after the defendant revokes the waiver of his right to remain silent must be carefully scrutinized. *Dexter*, 954 S.W.2d at 338. Evidence that reveals that the defendant failed to answer a direct charge of guilt is improper. *Id*. Further, evidence describing the conclusion of an interrogation that creates an inference of guilt is not admissible. *Id*. *See*, *Fields v. Leapley*, 30 F.3d 986, 990 (8th Cir.1994) (*Doyle* violations included defendant's responses to police questioning, "I ain't saying nothing," to the question of whether he had stabbed the victim, and "I won't talk to you about that without an attorney," to questions regarding what happened when the defendant and the victim were in the bushes; a *Doyl*e violation includes the invocation of *Miranda* rights, including a defendant's statement of a desire to remain silent).

Marvin's assertion of his right to remain silent occurred post-*Miranda*. Thus, governmental action (i.e., giving the *Miranda* warnings) encouraged or induced his silence by assuring him that such silence is protected. Thus, it was impermissible for the State to introduce evidence or comment on his invocations of his right to remain silent in an attempt to incriminate him by his silence.

It is true that Marvin did not initially remain silent as to some topics. Some cases hold that the rule against admissibility of an accused's post-*Miranda* silence does not apply if the accused chooses to waive his Fifth Amendment right against self-incrimination by making statements. *State v. Pulis*, 822 S.W.2d 541 (Mo.App.S.D.1992). "Once an accused agrees to answer questions, his failure to answer certain inquires is a fair subject for comment at trial." *Id*.

But an accused who waives his or her *Miranda* rights and consents to being questioned does not irrevocably lose the right; he or she may thereafter choose to terminate the interrogation. *State v. Smart*, 756 S.W.2d 578, 581 (Mo.App.W.D. 1988). The waiver of the right to remain silent may be revoked at any time, at which point a defendant's silence is again protected. *Tims*, 865 S.W.2d at 885. *Also see*, *Miranda*, 384 U.S. at 475-76: "[W]here in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogation;" "[t]he mere fact that [a defendant] answered some questions … does not deprive him of the right to refrain from answering any further inquiries." *Id*.at 445.

*Miranda* warnings contain an implicit assurance that silence will carry no penalty, no matter when the silence is exercised. *Doyle*, 426 U.S. at 618. Indeed, Marvin was specifically told that "*at any time"* he could exercise his rights to not answer questions or not make a statement (State's Exhibit 134,pg.1); this carried an implied promise that such an invocation of silence *at any time* during the interrogation would not be used against him. Additionally, Marvin's previous statements during the interrogation related to what occurred in Jefferson City, not in Dent County where the homicides occurred, and thus there was no waiver of his right to remain silent as to the Dent County charges. *See State v. Crow*, 728 S.W.2d 229, 232 (Mo.App.E.D.1987), which held that to "waive his right to not have the State comment on the exercise of his right to silence, a defendant must make a statement obviously related to something, and then the waiver is only as to

the subject matter of that statement;" this proposition was cited with approval by this Court in *Brooks*, 304 S.W.3d at 134. *Also see*, *Bartley v. Commonwealth*, 445 S.W.3d 1, 10-12 (Ky.2014) (Fifth Amendment privilege against self-incrimination extends to an accused's selective silence in post-*Miranda* situations).

In *Tims*, 865 S.W.2d at 885-86, the defendant waived his right to remain silent and indicated that he would give a videotaped confession. After the video was completed, the officers questioned the defendant off tape regarding discrepancies between his version of events and the victim's report. The defendant eventually declined to answer any further questions and requested an attorney. The questioning ceased at that point. Defense counsel objected to testimony concerning the defendant's invocation of his to silence on the ground that it violated his Fifth Amendment right to remain silent. The trial court overruled the objection.

The appellate court in *Tims* first noted that a defendant's post-*Miranda* silence or language representing silence cannot be used as evidence to incriminate the defendant. 865 S.W.2d at 885. But, the court also noted that once the right to remain silent has been waived, all speech, or non-silence by a defendant may be admitted into evidence and remarked on, and even testimony describing certain "silence" is "fair subject for comment at trial" *until* this waiver is revoked. *Id.* "The waiver of this right may be revoked at any time, at which point a defendant's silence is again protected." *Id.* A witness's testimony that describes the conclusion of an interrogation after the defendant revokes the waiver of his right to remain silent "must be carefully scrutinized." *Id.* If the testimony reveals that the defendant was failing to answer a direct charge of guilt, it should not be admitted. *Id.*at 886. Or, if it is a case where the defendant "clammed up" under circumstances calling imperatively for an admission or denial, the evidence should likewise be refused. *Id.* A defendant's reclamation of his right to silence "is not proper comment in testimony." *Id.* Thus, the trial court should have restricted

both the prosecutor's question and the witness' response to exclude the defendant's request for an attorney. *Id.*[17]

Similarly, here evidence describing Marvin revoking the waiver of his right to remain silent should have been carefully scrutinized, and should not have been admitted. *Id*. The State cannot show that this federal constitutional error was harmless beyond a reasonable doubt. The introduction of evidence concerning Marvin's express invocations of his right to remain silent prejudiced Marvin because it invited the jury to draw an adverse inference of guilt from the exercise of his constitutional right.

As noted above, to determine the effect of a *Doyle* violation on the verdict, this Court analyzes four factors: "(1) whether the government made repeated *Doyle* violations; (2) whether the trial court made any curative effort; (3) whether the defendant's exculpatory evidence is transparently frivolous; and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming." *Brooks*, 304 S.W.3d at 137. Each of these four factors shows that the error was not harmless.

Although not as numerous as the violations in *Dexter* and *Brooks*, there can be no doubt the State made repeated *Doyle* violations here. The taped interview played for the jury included repeated references to Marvin's silence as to the homicides, both through Sgt. Rice's comments and Marvin's repeated assertions that he did not want to talk or say anything about it. The assistant attorney general followed up by questioning Sgt. Rice about Marvin's silence, with an implicit inference of guilt because Marvin was silent.

The trial court undertook no curative efforts; in fact the trial court overruled Marvin's objections and request for mistrial. By giving its stamp of approval to the State's evidence and line of questioning, the court communicated to the jurors that they could properly consider Marvin's refusal to answer questions as evidence

[17]This Court in *Dexter*, 954 S.W.2d at 338-39, agreed with the *Tims* analysis.

of his guilt. *See, e.g., State v. Barton*, 936 S.W.2d 781, 787 (Mo.banc 1996) ("By sustaining the objection, the judge not only precluded the defense from driving the point home, but effectively gave the prosecutor's statement, that the defense's argument was impossible, the court's stamp of approval").

In *Dexter*, this Court reversed for a new trial under the manifest injustice standard even though the trial court advised the jury to disregard the questions posed to Dexter during both cross-examination and recross examination that would have required Dexter to refer to his post-*Miranda* silence. 954 S.W.2d at 341. In *Brooks*, reversal was warranted even though the trial court admonished the jury to disregard the prosecutor's comments in opening statement regarding the defendant's post-*Miranda* silence. 304 S.W.3d at 137-38. In *Brooks*, this Court found the trial court's efforts were minimal. *Id*.at 138. Here, the efforts were nonexistent.

Marvin's exculpatory evidence was not transparently frivolous, particularly as to the murder in the first-degree counts. His defense that he did not coolly reflect upon the murders, and therefore did not deliberate, was amply supported by Dr. Mathews' testimony (Tr.1839-42). In fact, that defense was successful as to Count 2, where the jury did not find that he killed Steven after deliberation, and thus it cannot be said that his defense was transparently frivolous.

Finally, the evidence of guilt, while substantial, was not overwhelming as to deliberation, for the reasons stated in the preceding paragraph.

The State cannot show that this federal constitutional error was harmless beyond a reasonable doubt because the record does not show that the evidence could not have contributed to the jury's verdict. *Brooks*, 304 S.W.3d at 137. Because of: (1) the repeated *Doyle* violations; (2) the nonexistent curative efforts; (3) the plausibility of Marvin's defense of lack of deliberation; and (4) the fact that the evidence of his guilt as to his mental state during the homicides was not otherwise overwhelming, Marvin is entitled to a new trial.

## III.

**The trial court clearly erred in denying Marvin's motion to suppress and in admitting at trial the statements he made to Sgt. Rice, because the admission of such statements violated Marvin's rights to due process, and to be free from self-incrimination, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Const. and Art. I, §§10 & 19 of the Mo. Const., in that the statements were made during custodial interrogation and after Marvin unequivocally invoked his right to silence; and continued interrogation, questioning, and attempts to persuade Marvin to talk to the officer was improper once Marvin had invoked his right to remain silent because Marvin did not initiate further communications, exchanges, or conversations with the police, and his right to remain silent was not scrupulously honored, because (1) the police did not immediately cease the interrogation upon Marvin's several unequivocal requests to terminate questioning; instead Sgt. Rice tried to persuade Marvin to change his mind; (2) Sgt. Rice resumed questioning only after the passage of a short period of time; (3) the object of subsequent interrogation was to wear down Marvin's resistance and make him change his mind; (4) many subsequent interrogations were undertaken; and (5) the subsequent questioning involved the same crime.**

*"Once a suspect invokes Fifth Amendment privileges interrogation must cease and the right to remain silent must be scrupulously honored."*

-- *State v. Bucklew*, 973 S.W.2d 83, 88 (Mo.banc1998)

**Facts:**[18]

Sgt. David Rice of the Missouri State Highway Patrol interrogated Marvin when he was in the emergency room at the hospital (Tr.36-37). Sgt. Rice arrived at the hospital about 11:00 p.m. (Tr.37, 57). Marvin had suffered gunshot wounds to his right arm or hand and also somewhere in his right hip or flank area (Tr. 1576, 1598). When Sgt. Rice arrived, the emergency room staff was working on Marvin, attempting to start I.V.'s, taking x-rays, and performing medical tasks (Tr.40). Sgt. Rice was aware that Marvin was in pain and that he had been given fentanyl which is an opioid pain medication about 50 times more powerful than heroin and a 100 more times powerful than morphine (Tr.40-42, 60-61, 1600-01). There were also several other officers present in the room, who were guarding Marvin (Tr. 40, 58). Marvin was not fee to leave (Tr.58).

Part of the interrogation occurred that night, and part occurred the following morning (Tr.37). The interrogation was recorded except for breaks where the recording device was turned off (Tr.37-38; State's Exhibit Nos. 133 & 134).[19]

Preceding that interrogation, while Marvin was still being attended to by medical staff in the emergency room, Sgt. Rice read Marvin his *Miranda* rights,[20] including, "[y]ou have the right to remain silent," and "[i]f you wish you can decide *at any time* to exercise your rights to not answer any questions or make any statements." (State's Exhibit 134,pg.1, emphasis added; Tr.41).

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[18] This Court's review of a ruling on a motion to suppress is based upon the whole record, both at the motion hearing and at trial. *State v. Grayson*, 336 S.W.3d 139, 142 (Mo.banc 2011).

[19] The CD of the recording is State's Exhibit No. 133 and the transcript of that recording is State's Exhibit No. 134; Marvin objected to the admission into evidence of those exhibits based upon his motion to suppress (Tr.1578-80).

[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Marvin said that he understood those rights and that he did not have any questions about them. State's Exhibit 134, pg. 1. He understood that he did not have to talk to Sgt. Rice or answer any questions. *Id.*[21] Marvin mentioned that he was under psychiatric care. *Id.*at 2.

During the interrogation, Marvin invoked his right to remain silent several times, as Sgt. Rice promised that he could:

> [Sgt. Rice]: … Marvin what happened before you came, before you were comin to the VA tonight?
>
> Marvin: My mouth is so dry.
>
> [Sgt. Rice]: Yeah. Marvin what, what happened before you came, before you came to the VA tonight?
>
> Marvin: **I'm sorry Sir I don't wanna talk no more.**
>
> [Sgt. Rice]: You don't want to talk? You hurtin' too much?
>
> Marvin: Yes.

*Id.*at pg. 3. The recording then ended for a bit. *Id.* Sgt. Rice testified that during this time, the nurses were having difficulties attempting to start a second I.V. and stuck Marvin with a needle multiple times causing him a lot of pain, and it was somewhere during that time when Marvin said that he did not want to talk anymore (Tr.43-44).

About 20-30 minutes later, Sgt. Rice resumed the interrogation (Tr.45, 1585-86). He did not "re-*Mirandize*" Marvin (Tr. 46). Marvin again mentioned that he had been having psychological problems (State's Exhibit 134, pg.4).

Sgt. Rice told Marvin that he wanted to get Marvin's side of the story as to "why this happened," and wanted to know if there had been an argument or if things got out of hand or if he had been planning it for a long time or if he was just

[21] Officer Rice, however, did not ask Marvin if he waived those rights.

upset. *Id*.at 4-5. Sgt. Rice asked Marvin if he could divulge what had been going on, and Marvin replied, "I don't know Sir." *Id*.at 5. Sgt. Rice pressed the issue and asked, "[H]ow did it start tonight? Was it an argument or what? You tell me." *Id*. Sgt. Rice said that he wanted to hear from Marvin's standpoint what happened between him and Anne. *Id*. Marvin indicated that he needed to use the bathroom, so Sgt. Rice stopped the recording and got a nurse. *Id*.; Tr.46. Throughout the evening and early morning hours, Marvin was being given more fentanyl (Tr.71-72, 89).

About 20-30 minutes later, at about 1:15 a.m., while still in the emergency room (Tr.47), Sgt. Rice gave Marvin a cursory reminder of the *Miranda* rights: "Um I wanna remind you of your rights, your *Miranda* Rights that I read to ya earlier. Do you still remember those?" (State's Exhibit 134,pg.5). Marvin acknowledged that he remembered and understood those rights and that he did not have any questions about them. *Id*. Shortly thereafter, Sgt. Rice again questioned Marvin about the charged homicides:

> [Sgt. Rice]: Okay. Um what I need for you to tell me about here … you know the reason this whole thing started (sighs) what happened tonight at Steve's that kinda kicked this whole thing off? I need you to be honest with me.
>
> Marvin: **I got nothin' to say Sir.[22]**
>
> [Sgt. Rice]: 'Kay you got nothin' to say uh about at Steve's or … obviously you're upset with what happened down there with, with Annie but I want ya to understand bein', bein' a cop…you're a cop and I'm a cop. I'm not gonna play games with ya. I'm not gonna, I'm not gonna jerk ya around but you understand ya know we got folks down there that worked it. We got you know a seven year old who saw what occurred. Uh I'd like to be able to give your side of the story because as you know if you don't have, if you don't have a voice in this somebody else is gonna give you one and that voice probably isn't gonna say what you want it to say. It's not

[22] Over objection, Sgt. Rice testified, "I did not believe at that time he was invoking when he said I've got nothing to say so I continued to ask him questions to clarify." (Tr.47-48).

gonna give your side of the story as far as what led up to this. Uh especially in light of what occurred afterwards with you know gunfire with, a busy hotel. Uh I'd like to be able to … at least be able to give a side of the story as far from Marvin what, what led up to this or … you understand where I'm comin' from Marvin?

Marvin: Mm hmm.

[Sgt. Rice]: I mean if, if you don't give some kind of reason as to why people are gonna assume the worst in ya and especially comin' from law enforcement uh you know we, we sure don't need people to say that you're some, some lunatic crazy cop who had this all planned out and went on a shooting spree intendin' to hurt all these people. 'Cause you know obviously that, that wasn't the case. If you, with all your training, if you wanted to hurt a lot of people you could and you, you didn't. Uh so I, I'm guessin' that things got outta hand and emotions took over. But I don't know that. I can't put words in our mouth. I, I need to hear from your side of the story as far as what happened.

Marvin: My heart dudn't like this. **I don't wanna talk.**

[Sgt. Rice]: Mm 'kay. I , I understand that. Uh can you tell me anything about what happened before I go?

Marvin: Mm mmm. [no; Tr.79]

[Sgt. Rice]: M'kay. Will you visit with me here in a little bit when they get yor pain under control? I mean can you tell me somethin' about

Marvin: We'll see.

[Sgt. Rice]: why this happened with Annie?

Marvin: If they get my pain under control we'll see.

*Id*.at pg. 6. Instead of leaving, Sgt. Rice stayed in Marvin's room until Marvin started to talk (Tr.80-82).

Later that morning, after another break in the recording, Sgt. Rice reread the *Miranda* rights to Marvin. (State's Exhibit 134,pg. 13;Tr.53-54). Marvin had

been given several more doses of fentanyl that morning (Tr.91-94). Marvin did not have any questions about his rights. (State's Exhibit 134,pg. 13).

Sgt. Rice asked Marvin if he felt up to talking a few minutes until he got his pain medication, and Marvin replied, "I can I just don't' think it'll matter. I don't think anybody's gonna give a shit." *Id*. Sgt. Rice told him, "we've gotta get a statement from you and we've gotta get your side of the story" … And I would hate for that to be the only side of the story." *Id*.at 14.

Later, after discussing several other topics not directly related to the charged crime, Marvin told Sgt. Rice what had happened regarding the charged homicides. *Id*.at 17-18, 21-26. Sgt. Rice knew that during this period of time when Marvin was talking that he was in pain and under the influence of some sort of pain medication, although he appeared to be lucid (Tr.54).

**Preservation:**

Prior to trial, Marvin filed a motion to suppress statements (Doc.71). That motion alleged that the statement was not voluntary in that Marvin was interrogated in the hospital while in pain; he told Sgt. Rice that he had substantial psychological and psychiatric problems and that he had been suicidal; he told Sgt. Rice that he did not want to talk but his will was overborne by questioning that continued after he asserted his right to remain silent; and Sgt. Rice told Marvin that the questioning was not optional and would have to happen. *Id*.at pg. 2.

The motion also alleged that Marvin was not properly advised of his constitutional rights because Sgt. Rice did not honor repeated assertions of the right to remain silent; although Sgt. Rice had read the technical words of *Miranda* -- that Marvin did not have to answer questions and that he could exercise his right to not answer questions -- Sgt. Rice's actions were to the contrary and he also told Marvin that he did not have any choice but to talk to him. *Id*.at pg. 4. Sgt. Rice's statements and actions undercut the actual *Miranda* warnings regarding Marvin's right to remain silent, which Marvin asserted. *Id*.at pgs. 4-5. Marvin did not waive his right to remain silent or to have counsel. *Id*.at 6.

The motion also alleged that during the interrogation, Sgt. Rice did not cease the interrogation after Marvin indicated that he wished to remain silent: "I'm sorry sir, I don't want to talk no more;" "I've got nothing to say, sir;" "I don't wanna talk;" and, when Sgt. Rice asked if Marvin could tell him anything about what happened before he left, Marvin indicated that he would not. *Id*. at 6-7. After Marvin repeatedly asserted his right to remain silent, Sgt. Rice returned to question him; no legally significant break in time occurred between the assertion of the right to remain silent and the re-initiation of interrogation by Sgt. Rice. *Id*. at 8. None of Marvin's assertions of his right to remain silent were conditional or equivocal, yet Sgt. Rice continued to question Marvin. *Id*.

The trial court overruled the motion to suppress (Doc.1; docket entry, 11/08/2013). Marvin renewed his motion to suppress at trial, which was overruled, but Marvin was allowed a continuing objection (Tr.1174-75, 1570-71, 1579-80). This claim was included in Marvin's timely motion for new trial (Doc.32,pgs.7-9).

**Standard of Review:**

At a motion to suppress hearing, the State has the burden to produce evidence and bears the risk of nonpersuasion. *State v. Grayson*, 336 S.W.3d 139, 142 (Mo.banc 2011). The State has the burden of showing, by a preponderance of the evidence, that the motion to suppress must be overruled. *Id*.

This Court will not reverse unless the trial court's order is clearly erroneous. *State v. Holman*, 502 S.W.3d 621, 624 (Mo.banc 2016). A ruling is clearly erroneous if this Court is left with a definite and firm belief a mistake has been made. *Id*. "Whether conduct violates the Fifth Amendment is a question of law that this Court reviews *de novo*." *Id*.

On review, this Court will indulge every reasonable presumption against waiver of a fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This Court's determination of whether a waiver is knowing and intelligent depends on the facts and circumstances surrounding the case and review is based

on the totality of the circumstances, taking into account the background, experience, and conduct of the accused. *Id*.; *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

**The Right Against Self-Incrimination:**

The Fifth Amendment to the United States Constitution states that "[n]o person … shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This provision applies to the States in all criminal prosecutions. *Dickerson v. United States*, 530 U.S. 428, 432 (2000). Protection against self-incrimination under the Missouri Constitution is commensurate with that provided in the federal constitution. *State v. Tally*, 153 S.W.3d 888, 892 (Mo.App.S.D.2005); Mo.Const. art. I, §19.

This privilege against self-incrimination is safeguarded by the mandatory procedures set out in *Miranda, supra*, including the requirement that those in police custody be advised that they have the right to remain silent and that anything they say can be used against them. *Miranda*, 384 U.S. at 468-69.

**Marvin unequivocally invoked his right to silence:**

An accused who wants to invoke his right to remain silent must do so unambiguously. *Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010). If an accused says "that he wanted to remain silent or that he did not want to talk with the police," such "simple, unambiguous statements" invoke the right to cut off questioning and to remain silent. *Id*.at 382. Here, Marvin unequivocally invoked his right to remain silent: "I'm sorry Sir I don't wanna talk no more." (State's Exhibit134, pg.3); "I got nothin' to say Sir." *Id*.at 6; "My heart dudn't like this. I don't wanna talk." *Id*.

Other cases have held that similar responses are unambiguous invocations of the right to remain silent. E.g., *State v. Crump*, 834 S.W.2d 265, 269 (Tenn.1992) ("I don't have anything to say"); *Commonwealth v. Alfaro-Rodriguez*, No. 497 MDA 2017, 2018 WL 1477224, at *3 (Pa.Super.Ct. Mar. 27, 2018) ("I don't want to talk no more"); *Commonwealth v. Boyer*, 962 A.2d 1213, 1216

(Pa.2008) ("I don't want to talk to you"); *State v. Szpyrka*, 202 P.3d 524, 526–27 (Ariz.App.2008) ("I got nothin' to say"); *People v. Carey*, 183 Cal.App.3d 99, 227 Cal.Rptr. 813, 814–15 (1986) ("I ain't got nothin' to say"); *Cuervo v. State*, 967 So.2d 155, 163 (Fla.2007) ("No quiero declarar nada," or "I don't want to declare anything"); *State v. Morrisey*, 2009 MT 201, ¶ 40, 351 Mont. 144, 162, 214 P.3d 708, 722–23 ("I ain't saying nothing"); *State v. Strayhand*, 911 P.2d 577, 591 (Ariz.App.1995) ("Well I don't want [to] answer anymore"); *Smith v. State*, 915 So. 2d 692, 693–94 (Fla.Dist.Ct. App. 2005) ("nothing to say"); *United States v. Reid*, 211 F.Supp.2d 366, 372 (D.Mass.2002) ("I have nothing else to say"); *Minnesota v. Marshall*, 642 N.W.2d 48, 53–54 (Minn.Ct.App.2002) ("No. I don't wish to say anything").

**Marvin's right to remain silent was not scrupulously honored:**

As noted above, *Miranda* held that, in order to protect the exercise of the privilege against self-incrimination, a suspect subject to custodial interrogation must be informed of certain rights. 384 U.S. at 444, 457. *Miranda* further articulated the procedures to be followed after warnings have been given: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease...." *Id*. at 474.

But in *Michigan v. Mosley*, 423 U.S. 96 (1975), it was recognized that an exercise of the right to remain silent does not in all circumstances under all conditions preclude subsequent questioning of the suspect. *Id*. at 103-04. Through the exercise of the option to terminate questioning, the suspect can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. *Id*. The admissibility of statements obtained after the suspect has decided to remain silent depends on whether the suspect's right to cut off questioning was scrupulously honored. *Id*. at 104.

In *Mosley*, the court relied on three factors to find the defendant's right to remain silent was scrupulously honored: (1) the interrogation immediately ceased when the defendant said he did not want to talk anymore; (2) there was a

significant passage of time between the invocation of the right to remain silent and the second interrogation, and a fresh set of *Miranda* warnings preceded the resumption: and (3) the renewed interrogation related to a different crime. Thus, *Mosley* involved questioning on an unrelated crime after a prior invocation of the right to remain silent. That fact was highlighted by the court in finding an effective waiver. The *Mosley* court specifically distinguished its facts from a case where the police "failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." 423 U.S. 105–06. *Also see*, *State v. Glear*, 696 S.W.2d 820, 824 (Mo.App.E.D.1985) (after defendant exercised his right to remain silent, further interrogation less than an hour later, with or without further warnings, subjected him to continuing compulsion of custodial interrogation condemned by *Miranda*).

This Court has similarly held that once a suspect invokes Fifth Amendment privileges, interrogation must cease and the right to remain silent must be scrupulously honored. *State v. Bucklew,* 973 S.W.2d 83, 88 (Mo.banc 1998). Missouri courts consider multiple factors to determine whether the right to remain silent was scrupulously honored by renewed questioning: (1) whether the police immediately ceased the interrogation upon defendant's request; (2) whether they resumed questioning only after the passage of a significant period of time and provided fresh *Miranda* warnings; (3) whether the object of subsequent interrogation was to wear down the resistance of the suspect and make him change his mind; (4) how many subsequent interrogations were undertaken; and (5) whether subsequent questioning involved the same crime. *Bucklew,* 973 S.W.2d at 89 (citing *Mosley*, 423 U.S. at 104).

Consideration of the *Bucklew* factors establishes that the officers here did not "scrupulously honor" Marvin's right to remain silent.

As to the first factor, there is no dispute that Sgt. Rice did not immediately cease the interrogation upon Marvin's request. After the first invocation, Sgt. Rice

resumed the interrogation after a break of only 20-30 minutes, and he did not "re-*Mirandize*" Marvin (Tr.45-46, 1585-86). After the second invocation, Sgt. Rice immediately tried to dissuade Marvin from exercising those rights:

> [Sgt. Rice]: 'Kay you got nothin' to say uh about at Steve's or … obviously you're upset with what happened down there with, with Annie but I want ya to understand bein', bein' a cop…you're a cop and I'm a cop. I'm not gonna play games with ya. I'm not gonna, I'm not gonna jerk ya around but you understand ya know we got folks down there that worked it. We got you know a seven year old who saw what occurred. **Uh I'd like to be able to give your side of the story because as you know if you don't have, if you don't have a voice in this somebody else is gonna give you one and that voice probably isn't gonna say what you want it to say. It's not gonna give your side of the story as far as what led up to this**. Uh especially in light of what occurred afterwards with you know gunfire with, a busy hotel. Uh **I'd like to be able to … at least be able to give a side of the story as far from Marvin what, what led up to this** or … you understand where I'm comin' from Marvin?
>
> Marvin: Mm hmm.
>
> [Sgt. Rice]: I mean if, **if you don't give some kind of reason as to why people are gonna assume the worst in ya** and especially comin' from law enforcement uh you know we, we sure don't need people to say that you're some, some lunatic crazy cop who had this all planned out and went on a shooting spree intendin' to hurt all these people. 'Cause you know obviously that, that wasn't the case. If you, with all your training, if you wanted to hurt a lot of people you could and you, you didn't. Uh so I, I'm guessin' that things got outta hand and emotions took over. But I don't know that. **I can't put words in our mouth. I, I need to hear from your side of the story as far as what happened**.
>
> (State's Exhibit No.134,pg. 6).

Marvin again asserted his right to remain silent: "My heart dudn't like this. **I don't wanna talk**." *Id*. But Sgt. Rice pressed him again, "Mm 'kay. I, I understand that. Uh can you tell me anything about what happened before I go?," and Marvin again indicated that he did not want to talk, "Mm mmm. [no; Tr.79]."

Although that was the fourth time that Marvin had unequivocally asserted his right to remain silent, Sgt. Rice again attempted to persuade him to talk:

[Sgt. Rice]: M'kay. Will you visit with me here in a little bit when they get yor pain under control? I mean can you tell me somethin' about

Marvin: We'll see.

[Sgt. Rice]: why this happened with Annie?

Marvin: If they get my pain under control we'll see.

*Id*.at pg. 6. Instead of leaving, Sgt. Rice stayed in Marvin's room until Marvin started to talk (Tr.80-82).

This first factor weighs strongly in Marvin's favor for suppressing his statements. Sgt. Rice did not immediately cease the interrogation upon Marvin's request.

The second factor (whether officers resumed questioning only after the passage of a significant period of time and provided fresh *Miranda* warnings), is neutral. No significant period of time passed between most of Marvin's assertions and the continuation of interrogation, which weighs in Marvin's favor. But, finally, after Marvin's fourth assertion of his right to remain silent, Sgt. Rice waited a few hours to resume interrogation and gave Marvin fresh *Miranda* warnings, which weighs in the state's favor. Contrast, *Bucklew*, 973 S.W.2d at 87-88, where officers waited five days until again reading *Miranda* warnings and asking the defendant if he wanted to give a statement.

The third factor (whether the object of subsequent interrogation was to wear down the resistance of the suspect and make him change his mind), strongly weighs in favor of suppressing the statements. Sgt. Rice's statements to Marvin, as set out above in both the facts and the discussion of the first factor, clearly show that Sgt. Rice's interrogation tactic was to wear down Marvin's resistance and make him change his mind about not speaking. Law enforcement officers may not fail to honor the right of a suspect to cut off questioning "by persisting in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 102, 105–06.

Under the fourth factor, this Court must consider how many subsequent interrogations were undertaken. After Marvin first invoked his right to silence, Sgt. Rice questioned Marvin several times after breaks in the interrogation before Marvin's resistance was finally worn down. This factor slightly favors Marvin.

Finally, under the fifth factor, the subsequent questioning involved the same crimes, and thus it strongly favors Marvin and distinguishes his case from *Mosley*. If the subsequent interrogations concern the same subject matter as the first, the purpose behind reinitiating interrogation cannot be to wear down the suspect or convince him to change his mind. *State v. Gardner*, 955 S.W.2d 819, 825–26 (Mo.App.E.D.1997). The facts set out above show that was Sgt. Rice's purpose.

**The error cannot be held to be harmless:**

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Whitfield*, 107 S.W.3d 253, 262 (Mo.banc 2003). Under this test, the "beneficiary of a constitutional error," the state, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* The admission of inadmissible evidence creates a presumption of prejudice. *State v. Samuels*, 965 S.W.2d 913, 920 (Mo.App.W.D.1998).

The State's evidence was certainly not overwhelming as to Marvin's mental state, let alone whether any shooting was coolly reflected upon. *Cf. Samuels, supra* (it was not shown beyond a reasonable doubt that the jury in the defendant's second trial would have convicted the defendant of first-degree murder instead of second-degree murder without the erroneous admission of the defendant's testimony that had been provided in support of allegation of ineffective assistance of counsel in his first trial, and thus the admission of that testimony was not harmless in the second trial).

"A confession is like no other evidence" because it "is probably the most probative and damaging evidence that can be admitted against [a defendant]."*State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 80-81 (Mo.banc 2015), quoting, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Here, the erroneously admitted evidence factored too prominently in the State's case to conclude beyond a reasonable doubt that it did not contribute to the verdict obtained. *State v. Hastings*, 450 S.W.3d 479, 489 (Mo.App.E.D.2014). The jury watched the videotaped statement while being allowed to read a transcript of that statement, Sgt. Rice testified in great detail about the statement, and the assistant attorney general referenced the statement to the jury. This Court must reverse Marvin's convictions and remand for a new trial.

## IV.

**As to Count II, the trial court erred in not giving Marvin's refused Instruction D, a second-degree murder instruction submitting sudden passion arising out of adequate cause, and its associated Instruction E, a voluntary manslaughter instruction, because the failure to give those instructions violated the provisions of §556.046, and Marvin's constitutionally protected rights to due process, to present a defense, and a properly instructed jury, as guaranteed by the 5th and 14th Amendments to the U.S. Constitution, Article I, §10 of the Missouri Constitution, in that: a) there was a basis for a verdict acquitting Marvin of the offense of conventional second-degree murder (the offense found by the jury as to Count II) because there was evidence that Marvin caused Steven's death under the influence of sudden passion arising from adequate cause; b) voluntary manslaughter is a lesser included offense of second-degree murder and was supported by the evidence; and, c) Marvin timely requested these instructions.**

*"All decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges deciding what reasonable jurors must and must not do."*

-- *State v. Jackson*, 433 S.W.3d 390, 399 (Mo.banc2014)

### Introduction:

"The fundamental purpose of a criminal trial is the fair ascertainment of the truth." *State v. Carter*, 641 S.W.2d 54, 58 (Mo.banc 1982). To this end, both the prosecution and the defense present their evidence, and based on the evidence presented and the court's instructions, the jury ascertains what crime, if any, was committed. The jury cannot perform its task, however, if the trial court fails to instruct the jury on the various grades of crime the evidence presented. Unfortunately, that is what occurred here.

On Count II, the jurors were instructed on first-degree murder and second-degree murder (conventional). But they were given no avenue to give effect to the evidence they heard that Marvin acted with sudden passion arising from adequate cause. Because the jury was not allowed to consider voluntary manslaughter in gauging what grade of crime Marvin committed, the jury's verdict carries no assurance that the jury truly believed Marvin was guilty of second-degree murder and that it would not have returned a conviction for voluntary manslaughter if given the chance.

As a result, this Court must grant Marvin a new trial with a properly instructed jury as to Count II. Moreover, because the sole aggravating circumstance on Count I was based on the second-degree murder conviction, the Court must remand for a new penalty phase.

**Preservation of the issue:**

Marvin tendered two instructions relating to the lesser included offense of voluntary manslaughter: a second-degree murder instruction with sudden passion/adequate cause language included as an element; and, an associated voluntary manslaughter instruction:

INSTRUCTION NO.D

> As to Count II, if you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.
>
> As to Count II, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about the 10th day of december 2011 (sic), in the County of Dent, State of Missouri, the defendant caused the death of Steven Strotkamp by shooting him, and
>
> Second, that it was the defendant's purpose to cause the death of Steven Strotkamp, and
>
> Third, that defendant did not do so under the influence of sudden passion arising from adequate cause,
>
> then you will find the defendant guilty under Count I (sic) of murder in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of murder in the second degree.

As used in this instruction, the term "sudden passion" means passion directly caused by and arising out of provocation by Steven Strotkamp, or another acting with Steven Strotkamp, which passion arose at the time of the offense. The term "adequate cause" means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control.

(Doc.8,pg.3; Tr.1991-97, 2002-03).

INSTRUCTION NO. E

As to Count II, if you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter.

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about the 10th day of December, 2011, in the County of Dent, State of Missouri, the defendant caused the death of Steven Strotkamp by shooting him, and

Second, that it was the defendant's purpose to cause the death of Steven Strotkamp,

then you will find the defendant guilty under Count II of voluntary manslaughter.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of voluntary manslaughter.

(Doc.8,pg. 4; Tr.1991-97, 2002-03).

The State of Missouri objected to these instructions, and the trial court refused to give them (Tr.1991-97, 2002-03).

Marvin raised the trial court's refusal to give the instructions in his timely motion for new trial (claims 23 and 24) (Doc.32, pgs.23-24).

**Standard of Review:**

"This Court reviews *de novo* a trial court's decision whether to give a requested jury instruction under section 556.046, RSMo.Supp. 2002, and, if the

statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." *State v. Jackson*, 433 S.W.3d 390, 395 (Mo.banc 2014) (footnotes omitted).

In determining whether a refusal to submit an instruction was error, the evidence, in fact and by inference, is viewed in the light most favorable to the defendant. *State v. Avery*, 120 S.W.3d 196, 200 (Mo.banc 2003). Jurors may accept part of a witness' testimony while disbelieving other portions. *State v. Robinson*, 26 S.W.3d 414, 417 (Mo.App.E.D.2000). Jurors may also draw certain inferences from a witness's testimony, but reject others. *State v. Redmond*, 937 S.W.2d 205, 209 (Mo banc1996). If the evidence tends to support differing conclusions, the defendant is entitled to a lesser included offense instruction. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002).

A failure to give a requested lesser included offense instruction that is supported by the evidence "is reversible error." *State v. Jackson*, 433 S.W.3d 390, 395 (Mo.banc 2014). Prejudice is presumed in such a situation. *Id.*

**Analysis:**

A defendant has a due process right to a lesser included offense instruction if the evidence warrants such an instruction. *Hopper v. Evans*, 456 U.S. 605, 609, 611 (1982). Voluntary manslaughter is a lesser included offense of both first-degree and second-degree murders. Section 565.025, RSMo 2000 (now section 565.029, RSMo 2016).

"A trial court's obligation to instruct on lesser included offenses is governed by section 556.046.2 and section 556.046.3, RSMo Supp. 2002." *State v. Brown*, 524 S.W.3d 44, 47 (Mo.banc 2017). Collectively, these two sections obligate a trial court to give a lesser included offense instruction when: (1) "a party timely requests the instruction," (2) "there is a basis in the evidence for

acquitting the defendant of the charged offense,"[23] and (3) "there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." *Id*., quoting *Jackson*, 433 S.W.3d at 396. "When in doubt, courts should instruct on the lesser-included offense, leaving it for the jury to decide of which offense, if any, the defendant is guilty." *Avery*, 120 S.W.3d at 205.

Marvin timely requested both the second-degree murder instruction with the required sudden passion/adequate cause language and the related voluntary manslaughter instruction (Doc.8,pgs.3-4;Tr.1991-97, 2002-03).). He met the first requirement.

Second, there is a basis in the evidence to acquit Marvin of the offense of second-degree murder because, as in every case, the jury is free to disbelieve the evidence. *See Brown*, 524 S.W.3d at 47; *Jackson*, 433 S.W.3d at 399; *State v. Randle*, 465 S.W.3d 477, 479 (Mo.banc 2015); *State v. Roberts*, 465 S.W.3d 899, 901 (Mo.banc 2015); *State v. Pierce*, 433 S.W.3d 424, 430 (Mo.banc 2014). Moreover, had the jury been instructed on murder in the second degree with the language Marvin requested, there is a reasonable likelihood that the jury would not have found him guilty of second-degree murder given the evidence presented a trial that he acted with sudden passion arising from adequate cause, especially in light of the fact that the jury did not find that he coolly reflected on Strotkamp's murder.

The third requirement is also satisfied because there is a basis in the evidence for convicting Marvin of the lesser included offense of voluntary

[23] An offense is "charged" if it is in an indictment or information or if it is an offense submitted to the jury because there is a basis for a verdict acquitting the person of the offense charged and convicting the person of the included offense. Section 556.046.2.

manslaughter.[24] As charged, to be guilty of second-degree murder, Marvin had to cause the death of Steven by shooting him, with the purpose to cause Steven's death (Doc.9,pg.22); §565.021.1(1). Whereas, voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute second-degree murder, except that the death was caused "'under the influence of sudden passion arising from adequate cause.'" *Redmond*, 937 S.W.2d at 208, *quoting* §565.023.1(1).

Marvin had the burden of injecting this issue through evidence showing sudden passion and adequate cause for it. *Avery*, 120 S.W.3d at 205. "Burden of injecting the issue" means that the issue is not submitted to the trier of act unless supported by evidence. §556.051 (now §556.061(3), RSMo 2016). If the issue is submitted to the trier of fact, any reasonable doubt on the issue requires a finding for the defendant on that issue. *Id*.

Accordingly, the trial court was required to instruct on voluntary manslaughter if there was evidence, from any source, to support a finding that Marvin caused Steven's death while under the influence of sudden passion arising from adequate cause. *Avery*, 120 S.W.3d at 205-06.

"'Sudden passion' means passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." §565.002(7). Passion may be rage, anger, or terror that is so extreme that the actor is momentarily being directed by passion. *State v. Fears*, 803 S.W.2d 605, 609 (Mo.banc 1991). There is no requirement that the actor acted reasonably to get a voluntary manslaughter instruction. *Redmond*, 937 S.W.2d at 209.

"'Adequate cause' means cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an

[24] The elements of the refused voluntary manslaughter instructions are the same as those submitted by the State in the second-degree murder instruction for Count II, which Marvin was found guilty of at trial (Doc.9,pg.22).

ordinary person's capacity for self-control." §565.002(1). The provocation must be of a nature calculated to inflame the passions of an ordinary, reasonable, temperate person and must result from a sudden, unexpected encounter or provocation tending to excite the passion beyond control. *Fears*, 803 S.W.2d at 609. Words alone, no matter how opprobrious or insulting, are not sufficient to show adequate provocation. *Id*. At a minimum the provocation must at least involve a "pulling" or "tweaking" of the nose. *Id.* But there is no requirement that there be physical violence to Marvin's person to support adequate provocation. *State v. Newlon*, 721 S.W.2d 89, 92 (Mo.App.E.D.1986).

When the evidence, and inferences, are viewed in the light most favorable to Marvin, there was evidence that Marvin caused the death of Steven under the influence of sudden passion arising from adequate cause.

For years, Marvin had been raising his son because the boy's mother (Annette) was in prison for drug-related convictions (State's Exhibit No.134,pg.17). On the day in question, Annette picked Marvin's son up for a visit, but she later called to say she would not bring his son back. *Id*. at 18. She threatened that Marvin would never see his son again. *Id*. at 18. Marvin believed that Annette was still using drugs, and he feared for his son's safety. *Id*. at 17.[25]

Marvin went to Steven's home looking for his son. *Id*. at 17, 21-22; Tr. 1615-17. He was worried that he "would be met with firearms." *Id*. at 22. Marvin just wanted to get his son. *Id*. at 24.

Annette met Marvin at the door and told him that he should leave because he was not getting his son back. *Id*. at 23. Marvin pleaded that he wanted his son. *Id*. at 18, 23-24. Both Annette and Steven then came at Marvin. *Id*. at 23. Marvin

[25] While prior provocation can never be the *sole* cause of sudden passion, "[s]uch evidence may be relevant to show why, when combined with other evidence of events occurring immediately before the incident, the precipitating incident was adequate to show sudden passion." *Avery*, 120 S.W.3d at 205–06.

"basically got assaulted at the front door." *Id*. at 17; Tr. 1615. Annette grabbed Marvin's left shoulder, trying to wrestle him down, while Steven started to go around her to get Marvin. *Id*. at 18, 23-24.

As Steven came at Marvin around Annette's right-hand side, Marvin drew his gun. *Id*. at 25. Marvin did not know if Strotkamp had a gun because he could not see Steven's right hand, so he could not see what was in it. *Id*. Even though Marvin had drawn his gun, Steven kept coming at him, so Marvin shot him. *Id*.

Dr. Jose Mathews, Chief of Psychiatry at the St. Louis Veteran's Affairs Hospital and an Assistant Professor of Psychiatry at Washington University, performed a forensic psychiatric examination of Marvin (Tr.1756-57, 1764). Dr. Matthews testified that on the day in question, Marvin was suffering from major depressive disorder, severe, with atypical features, resulting in him becoming impulsive and having misperception of what the reality might have been (Tr. 1839). Marvin was also experiencing extreme emotional distress, which was incompatible with cool reflection (Tr.1840-41).

When Dr. Mathews was asked if the impulsivity that he had described was compatible with "sudden passion," he replied:

> Yeah so he's impulsive and he's actually reacting to things which are in a way that he's, may not be true …, so he is acting in an impulsive way and the passion is impulsiveness without forethought or without actually thinking through it then yes that would be true.

(Tr.1842).

In *Fears*, the defendant and victim had a heated quarrel, where the victim poked the defendant several times with his finger and swung at the defendant with his fist. The defendant blocked the swing and punched the victim causing him to fall to the ground. The victim died by a resulting head injury. This Court held this evidence was sufficient to inject the issue of sudden passion so as to warrant a voluntary manslaughter instruction. This Court found that a physical altercation in which the victim swung his fist at the defendant constituted adequate provocation:

> The aggregate of the insulting words, offensive gestures and physical contacts that occurred during this encounter was . . . sufficient to put Fears in fear of serious bodily harm, carried out in a time span insufficient for Fears' anger to cool, and sufficient for reasonable persons to have found that Fears acted under "sudden passion."

803 S.W.2d at 609.

In *State v. Creighton*, 52 S.W.2d 556 (Mo.1932), the prosecution introduced defendant's written confession in which he declared that he shot the deceased because "he was angered because of the deceased's conduct – brushing against him, taking hold of his coat, and asking him if he was looking for trouble." *Id*.at 560-561. At trial, the defendant testified that he killed in self-defense and denied that he was acting under heat of passion. *Id*.at 559-561. On appeal, the State urged that the defendant's trial testimony precluded a manslaughter instruction, though the defendant did testify the deceased committed a battery on him. *Id*.at 561. This Court disagreed, finding that a manslaughter instruction should have been given, and reversed for a new trial. *Id*. at 561-562:

> If there is substantial evidence of lawful provocation, the defendant is entitled to an instruction on manslaughter. Proof of an initial assault and battery upon him by the deceased is such evidence because it measures up to the standard exacted by the law and in point of fact warrants an inference that heat of passion was engendered thereby. That inference (not presumption) being introduced into the case, how can any amount of evidence to the contrary take it out, though, perhaps, clearly outweighing it?

*Id*. at 562. Neither the trial court nor this Court can pass on the weight of the evidence in a criminal case; that function belongs to the jury. *Id*.

In *Fears*, a manslaughter instruction was supported by the deceased poking the defendant several times with his finger and swinging at him with his fist. In *Creighton*, a manslaughter instruction was supported by the deceased brushing against the defendant, taking hold of his coat, and asking him if he was looking for trouble. In Marvin's case, the evidence supporting a manslaughter instruction was stronger than in either of those cases.

Sudden passion can be caused by the victim or another acting with the victim. §565.002(7). Thus, the actions of both Annette and Steven are relevant. Passion may be rage, anger, or terror that causes the actor to momentarily be directed by passion. *Fears*, 803 S.W.2d at 609. Both Marvin's statement to Sgt. Rice and Dr. Mathew's testimony were evidence supporting sudden passion – that Marvin was acting under rage, anger, or terror when Annette and Steven assaulted him and Steven would not stop coming at him even though he had his gun drawn. By its verdict, the jury had found that Marvin did not coolly reflect upon shooting Steven, so it is not difficult to conclude that the jury also might have found that he acted under sudden passion.

The "adequate cause" requirement was also supported by that evidence. While words alone are insufficient to show adequate provocation, little more is required—a mere tweaking of the nose has been found sufficient. *Fears,* 803 S.W.2d at 609; *Avery*, 120 S.W.3d at 205–06. The evidence set out above involved more than the "tweaking of the nose." *Id*. Both Annette and Steven came at him. *Id*. at 23. Marvin "basically got assaulted at the front door." *Id*. at 17;Tr.1615. Annette grabbed Marvin's left shoulder and was trying to wrestle Marvin down. *Id*.at 18, 23-24. While this was happening, Steven came at Marvin. *Id*. at 25. Marvin did not know if Steven had a gun because he could not see Steven's right hand. *Id*. Even though Marvin had drawn his gun, Steven kept coming at him. *Id*. This was sufficient to support a jury finding of sudden passion arising from adequate cause. *See*, *State v. Bidstrup*, 237 Mo. 273, 140 S.W. 904, 908 (1911) ("The fact that when [the victim] was advancing upon the defendant he said nothing but continued to advance, even after the first shot was fired and he was warned not to come nearer, strongly indicates that he was bent upon doing the defendant bodily injury.").

The jurors should have been given the opportunity to consider whether, given the evidence they heard about Marvin's sudden passion arising from adequate, a lower grade of felony was warranted. If the statutory requirements for

giving a lesser included offense instruction are met, as they were here, a failure to give a requested instruction "is reversible error." *Jackson*, 433 S.W.3d at 395. Prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence. *Id*. As a result, Marvin's second-degree murder conviction under Count II must be reversed, and he is entitled to a new trial before a properly instructed jury.

Further, the sole aggravating circumstance found by the jury as to Count I was: "Whether the murder of Annette Durham was committed while defendant was engaged in the commission of another unlawful homicide of Steven Strotkamp. A person commits the unlawful homicide of *murder in the second degree* if he knowingly causes the death of another person." (Doc.28,pg.8; emphasis added).

Because the sole aggravating circumstance was based on a conviction that must be reversed for the failure to give a lesser included offense instruction, this Court must similarly reverse the death sentence under Count I. Even though voluntary manslaughter is also a homicide, it is not the homicide that the jury found as the sole aggravator, and it is also a lesser degree of homicide with the element of sudden passion arising out of adequate cause; thus, the sole holdout juror might have weighed this lesser homicide differently. *Cf. State v. McFadden*, 216 S.W.3d 673, 678 (Mo.banc 2007) (jury's consideration of aggravating factors of defendant's prior felony murder conviction and death sentence in unrelated case, which was reversed for a new trial, rendered the imposition of death penalty invalid; this Court rejected the State's argument that even if the conviction and sentence could not be used as statutory aggravators, the underlying facts still could be considered as non-statutory aggravators); *Redmond*, 937 S.W.2d at 210 (reversal of Redmond's conviction of murder in the second degree also requires reversal of his conviction of armed criminal action, as conviction of the latter requires the commission of an underlying felony); *Seals v. State*, 2018 WL 3198759 (Mo.App.S.D.2018) (appellate counsel was ineffective for not asserting

that defendant's conviction for attempted victim tampering must be reversed when the appellate court reversed the underling conviction for second-degree domestic assault for failing to give a self-defense instruction).

Also, if the trial court had correctly concluded that there was sufficient evidence of sudden passion arising from adequate cause, and given the voluntary manslaughter instruction, then Note on Use No. 6 to MAI-CR3d 314.40(B) also requires that additional parenthetical material be added to the definition of murder in the second degree in the "another unlawful homicide" aggravator: "unless he caused the death under the influence of sudden passion arising from adequate cause." That Note on Use instructs that this parenthetical material be added "if the aggravating circumstance being submitted is that the other unlawful killing was murder in the second degree but there is evidence that the killing was done under sudden passion." Id. There was such evidence here, as set out above, and thus that aggravating circumstance – the only one found by the jury -- should have read: "Whether the murder of Annette Durham was committed while defendant was engaged in the commission of another unlawful homicide of Steven Strotkamp. A person commits the unlawful homicide of murder in the second degree if he knowingly causes the death of another person unless he cause the death under the influence of sudden passion arising from adequate cause." As a result, the failure to give the lesser included offense instruction of voluntary manslaughter, which was supported by the evidence, not only prejudiced Marvin as to the guilty verdict as to Count II, but it also prejudiced him as to his death sentence as to Count I.

## V.

**The trial court erred in overruling Marvin's motion regarding the unconstitutionality of Missouri's death penalty scheme, his objection to the verdict form used when the jury is deadlocked on punishment, his motions for the court to impose a sentence of life without parole, and in sentencing Marvin to death after the jury was unable to agree upon a sentence as to Count I, having deadlocked 11 to 1 in favor of a sentence of life without parole, because the imposition of a sentence of death by the trial court when the jury was unable to agree upon punishment, as allowed by §565.030, violated Marvin's constitutionally protected rights to due process, a trial by jury, and to a unanimous jury verdict, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, Article I, §22(a) of the Missouri Constitution, in that §§565.030 and 565.032, in conjunction with the improperly-worded verdict form, impermissibly allows a judge to make the required sentencing determinations needed to impose death when the jury is unable to unanimously agree upon the punishment or after the jury is not unanimous when weighing aggravating and mitigating circumstances.**

*"The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."*

-- *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016)

### Facts and Preservation:

Prior to trial, Marvin filed a Motion to Quash Information and Dismiss Due to the Unconstitutionality of Missouri's Statutory Scheme for the Imposition of the Death Penalty (Doc.60). That motion alleged, in part, that section 565.030 violates the Sixth and Fourteenth Amendments to the United States Constitution because it permits a judge to impose a death sentence when the jury is unable to decide or agree upon punishment (Doc.60,pgs.7-8). That motion was overruled

and denied, but the court allowed Marvin's a continuing objection (Tr.179-80). The denial of that motion was raised in Marvin's Motion for New Trial (Doc.32,pgs.1-2).

During penalty phase instruction conference, Marvin objected to MAI-CR 3rd 314.58.1(c), as submitted by the State, because the jury is "not required to make any factual finding and submit that in terms of whether the evidence in mitigation of punishment outweighs the evidence in aggravation of punishment" (Tr.2335-36). Marvin cited to an Eighth Circuit District Court's opinion in "McLaughlin,"[26] which found that this pattern verdict form and Section 565.030, allowing the judge to determine punishment, violates the United States Constitution (Tr.2336). The trial court overruled the objection (Tr.2336). This issue was raised in Marvin's motion for new trial (Doc.32,pgs.31-33).

> During penalty phase deliberations, the jury sent out a question:
>
> We have an 11 to 1 decision on punishment and we have weighed all the evidence and still have 1 opposing opinion. What is your opinion on what we should do? Example: fill out the verdict form that says we are unable to decide? Is there a set time we need to debate? Everyone is firm on their decision and not willing to change.

(Doc.25;Tr.2381-82). Ultimately, the jury was unable to agree upon the punishment for Count I (Doc.26;Tr.2386). After the jury indicated under question No. 1 of the verdict form that it had found the presence of one aggravating circumstance, under question No. 2 of their verdict form the jury answered:

> 2. Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?
>
> Yes [ ] No [√]

(Doc.26,pg.1)

[26] *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D.Mo.2016)(*Mclaughlin* II).

After trial, Marvin filed a Motion for the Court to Impose a Sentence of Life without Parole Because Eleven Jurors Wanted a Sentence of Life (Doc. 35). Attached to that motion were signed statements by two jurors who agreed that the jury was "deadlocked on punishment 11 to 1 in favor of" "Life" and "Life in Prison." (Doc.36).

That motion noted that the federal district court in *McLaughlin II* determined that the Missouri sentence scheme is unconstitutional (Doc.35,pg.5). The motion also asserted that the "record in this case only shows what the jury did not find. Like *McLaughlin*, the jury verdict states that they did not unanimously find that mitigating facts outweighed the aggravating factor" (Doc.35,pg.5).

Marvin also filed a "Motion for the Court to Impose a Sentence of Life Without Parole Because Section 565.030 RSMo is Unconstitutional" (Doc.30). That motion alleged, in part, that allowing the trial judge to sentence Marvin to death when the jury did not unanimously agree that death was appropriate, in fact was 11 to 1 against a death verdict, violated the Sixth Amendment, citing *McLaughlin II* and *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016) (*Hurst I*) (Doc. 30). That motion also noted that Article I, §22(a) of the Missouri Constitution guarantees the right to a unanimous jury verdict, citing *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo.banc 2011) (Doc.30, pgs.46-47). In that regards, the motion also noted that in Missouri, a capital sentencing trial is "like the trial on the question of guilt or innocence," and the jury's penalty phase deliberations bear "the hallmarks of the trial on guilt or innocence," citing *Bullington v. Missouri*, 451 U.S. 430, 444, 446 (1981). (Doc. 30,pg. 46).

The trial court overruled that motion (Tr.2404) and sentenced Marvin to death (Tr.2428).

**Standard of Review:**

Constitutional challenges to statutes are issues of law that are reviewed *de novo*. *State v. S.F.*, 483 S.W.3d 385, 387 (Mo.banc 2016). The party challenging

the validity of the statute bears the burden of proving that the statute clearly violates the constitution. *Id.*

**Analysis:**

In Missouri, before jurors may consider imposing a death sentence, they must find that the State has proven at least one statutory aggravating circumstance beyond a reasonable doubt, and they must conclude that they do not unanimously agree that the evidence in mitigation outweighs the evidence in aggravation. § 565.030.4(2), (3), RSMo; *State v. Shockley*, 410 S.W.3d 179, 198 (Mo.banc 2013). Only after the jurors make these two required findings may they decide whether to recommend a death sentence. §565.030.4(4); *Shockley*, 410 S.W.3d at 198.

Missouri requires that the trial court "follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree." §565.030.4. For instance, once the jury deadlocks, "the jury's findings simply disappear from the case and the court is to make its own independent findings." *State v. Whitfield*, 107 S.W.3d 253, 271 (Mo.banc 2003). Any resulting judgment of death is "based on the court's findings." *Id.* The judge must "independently go through" the statutory steps "and make his or her own determination whether the death penalty or life imprisonment should be imposed." *Id.*at 261. Even though the jury must make findings, "the judge must go through each of the … steps and independently make his or her own factual determination as to each step…." *Id.*at 263. The court may reconsider the facts in making its own determinations. *State v. McLaughlin*, 265 S.W.3d 257, 264 (Mo.banc 2008) (*McLaughlin I*).

In *Shockley*, the defendant contended that his death sentence was unconstitutional because it was the product of judicial rather that juror fact-finding. Rejecting this claim, this Court held that the jurors' responses to the interrogatories, now set out in MAI-CR 4th 414.58, "showed that the jury deadlocked only on the issue of whether to assess a penalty of death or of life

imprisonment." *Id*.at 198-99. Because the jurors made the required findings, the judge could independently find a statutory aggravating circumstance, weigh the aggravating and mitigating evidence, and impose a death sentence. *Id*. This Court concluded that Missouri's statute merely "provides an extra layer of findings that must occur before the court may impose a death sentence." *Id*.

In *Hurst I*, however, the Supreme Court of the United States struck down Florida's capital sentencing procedure because it delegated to the judge the responsibility of finding each fact necessary for imposition of the death penalty. Florida had a "hybrid" procedure by which the jury (1) determined if the State had proven an aggravating circumstance; (2) weighed the aggravating and mitigating circumstances; and (3) recommended whether the defendant should be sentenced to death. 136 S.Ct. at 620. But upon receiving the jury's recommendation, the trial court duplicated the steps taken by the jury. *Id*. at 625 (Alito, J., dissenting). It made its own independent finding of whether the State had proven the aggravating circumstances; it weighed the aggravating and mitigating circumstances; and it decided whether the defendant would be sentenced to death. *Id*. at 620.

In striking down Florida's statute, the Supreme Court reiterated that the Sixth Amendment right to trial by jury, together with the Fourteenth Amendment's Due Process Clause, required that "each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst I*, 136 S.Ct. at 621 (citing *Alleyne v. United States*, 570 U.S. 99, 104 (2013)). A jury must find the facts "necessary to sentence a defendant to death." *Hurst I*, 136 S.Ct. at 621 (citing *Ring v. Arizona*, 536 U.S. 584, 591 (2002)).

The Court concluded that Florida courts had erred in not requiring the jury to find the "critical findings necessary to impose the death penalty." *Hurst I*, 136 S.Ct. at 622. Instead, the judge played a "central and singular role." *Id*. Florida impermissibly required the trial court alone to find the facts "'[t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating

circumstances to outweigh the aggravating circumstances.'" *Hurst I*, 136 S.Ct. at 622. The jury did not make specific factual findings "with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge." *Id*.at 622. Without jury-made findings, the only sentence Hurst could have received was life without parole. *Id*. The Court held that Florida impermissibly increased the authorized punishment by its own findings and thereby violated the Sixth Amendment. *Id*. Moreover, the Court rejected Florida's argument that the judge's finding of an aggravator "only provides the defendant additional protection." *Id*.

In *Shockley*, this Court reasoned that no *Ring* violation occurred because by the time the trial judge made his own independent findings, the jury already had made the required findings; the statute merely "provides an extra layer of findings that must occur before the court may impose a death sentence." *Id*. at 198-99.

But the Supreme Court of the United States specifically rejected such reasoning. *Hurst I*, 136 S.Ct.at 622. In *Hurst I*, that jury too had previously found the existence of aggravating circumstances, rendering Hurst eligible for the death penalty. *Id*.at 625 (Alito, J., dissenting). Florida argued that "the additional requirement that a judge *also* find an aggravator only provides the defendant additional protection." *Id*.at 622 (emphasis in original). Rejecting that argument, the Supreme Court held that Florida failed to acknowledge the "the central and singular role" the judge played. *Id*. The defendant was not eligible for the death penalty until the court made findings that the defendant receive the death penalty. *Id*. The jury's role was only advisory; the court alone found the facts. *Id*.

Here, once the jury deadlocked, its findings carried even less weight than the jury's advisory verdict carried in *Hurst I*. The statute simply states, "The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree." Section 565.030.4. This Court has noted that the jury's findings "simply disappear" and the trial court may reconsider the facts in making its own determinations. *Whitfield*, 107 S.W.3d at

271; *McLaughlin I*, 265 S.W.3d at 264. Even though the trial court has the benefit of the jury's findings, "the judge must go through each of the four steps and independently make his or her own factual determination as to each step, not merely steps 3 and 4." *Whitfield*, 107 S.W.3d at 263. Nothing within the statute requires the judge to accept the findings made by the jury, or even to give them any weight. The judge makes his or her own independent findings, and that is what the death sentence is based on.

Following *Hurst I*, both Florida and Delaware recognized that, under the Sixth Amendment right to trial by jury, every fact necessary for imposition of the death penalty, including the ultimate decision to impose a death sentence, must be found by a jury, unanimously. *Hurst v. State*, 202 So.3d 40, 53-54 (Fla.2016) (*Hurst II*); *Rauf v. State*, 145 A.3d 430, 435-36, 483 (Del.2016).

In *Hurst II*, the Florida Supreme Court held that to satisfy the Sixth Amendment, jurors, not the judge, must find "each fact necessary to impose a sentence of death." *Hurst II*, 202 So.3d at 51 (*quoting Hurst I*, 136 S.Ct. at 619). These critical findings were elements, "the sole province of the jury," and had to be found unanimously. *Hurst II*, 202 So.3d at 44, 50-51, 57. Thus, a jury must find unanimously (1) that aggravating circumstances exist; (2) that the aggravating circumstances are sufficient; and (3) that the evidence in aggravation outweighs the evidence in mitigation. *Id.* at 53-54, 57.

Moreover, the Florida Supreme Court concluded that the ultimate decision of whether the defendant should live or die had to be made by the jury, unanimously. *Id*. at 54-55. The Sixth Amendment right to trial by jury "required Florida to base [the defendant's] death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 53 (*quoting Hurst I*, 136 S.Ct. at 624). "This recommendation is tantamount to the jury's verdict in the sentencing phase of trial; and historically, and under explicit Florida law, jury verdicts are required to be unanimous." *Id*. at 54.

Delaware also recognized the need for drastic change *Hurst I*. Under its now-defunct statute, the jury decided whether (1) a statutory aggravating circumstance existed and (2) the evidence in aggravation outweighed the evidence in mitigation. 11 Del.C.§4209(c)(3)(a). The court would consider the jury's recommendation but make its own findings. 11 Del.C.§4209(d).

In *Rauf v. Delaware*, 145 A.3d 430, 433 (Del.2016) (per curiam), the Delaware Supreme Court struck down its death penalty procedure as violating "the Sixth Amendment role of the jury as set forth in *Hurst*." The Delaware court stressed that *Hurst I* held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. (*quoting Hurst I*, 136 S.Ct. at 619). Thus, the jury must find, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. *Rauf*, 145 A.3d at 434. In addition, both the statutory and non-statutory aggravating circumstances must be found by a jury unanimously and beyond a reasonable doubt. *Id*. at 433-34.

In a concurring opinion, Justice Holland, joined by two other justices, explained *Hurst I*'s broader ruling:

> Although the United States Supreme Court's holding in *Hurst* only specifically invalidated a judicial determination of aggravating circumstances, it also stated unequivocally that the jury trial right recognized in *Ring* now applies to *all* factual findings *necessary* to impose a death sentence under a state statute. The logical extension of that broader statement in *Hurst* is that a jury must determine the relative weight of aggravating and mitigating circumstances.

*Id*. at 487 (Holland, J., concurring, joined by Strine and Seitz) (*citing Hurst I*, 136 S.Ct. at 622); *see also id*. at 436, 460-61.

In another concurring opinion, justices concluded that under *Hurst I*, the right to trial by jury in a capital trial was not limited to those findings that made the defendant eligible for the death penalty; it also encompassed the determinations "that must be made if the defendant is in fact to receive a death

sentence." *Rauf*, 145 A.3d at 435-36, 460 (Strine, J., concurring; Holland and Seitz, JJ.). The Sixth Amendment did not distinguish between "the decision that someone is eligible for death and the decision that he should in fact die." *Id.* Instead, the right to trial by jury extended to all phases of a death penalty case, especially the final decision, which was one "of existential fact." *Id.*at 437, 473.

The opinions of the Supreme Court of Florida and the Supreme Court of Delaware are in conflict with this Court's stance in *Shockley* and *McLaughlin I*. On one side of the conflict, the Supreme Courts of Florida and Delaware hold that the Sixth Amendment requires that every decision necessary for imposition of the death penalty, including the actual decision imposing death, be made by a unanimous jury. This Court, on the other side, holds that as long as the jury made the initial required findings, the trial court can start from scratch, reconsider the facts, make its own independent findings, and impose a death sentence based on those findings.

The resolution of this conflict is dictated by *Hurst I*. Missouri's procedure for dealing with penalty phase deadlock mirrors the hybrid procedure struck down in *Hurst I*. After the jurors indicated they could not agree on the sentence, Missouri effectively became a hybrid state. As this Court has acknowledged, the jury's factual findings "simply disappeared." *Whitfield*, 107 S.W.3d at 271. The trial court starts from scratch, reconsiders the facts, and makes its own independent findings. *Id*. It is the trial court's findings upon which a defendant's death sentence is based when there is a deadlocked jury. *Id*. As in *Hurst*, without the judge's independent – and unconstitutional – factual findings, there would be no death sentence. *Hurst I*, 136 S.Ct. at 622.

The only court to have assessed Missouri's death penalty scheme after *Hurst I* is *McLaughlin II*,[27] which held that Missouri's deadlock procedure

[27] The District Court has stayed the action pending decisions in this case and in another case pending in this Court, assuming that this issue is presented to this

violated the Sixth Amendment right to trial by jury. That court held that §565.030 violated the Sixth Amendment by allowing the trial court to assume the jury's sentencing responsibility when the jury could not agree on punishment. *McLaughlin II*, 173 F.Supp.3d at 890.

At McLaughlin's death penalty trial, the jurors returned a verdict stating they could not agree on punishment, so the trial judge repeated the procedure and decided that death was the appropriate punishment. *McLaughlin II*, 173 F.Supp.3d at 866. On appeal, McLaughlin contended that his death sentence violated the Sixth Amendment because it was the product of factual findings made by the trial court instead of the jury. *Id.*at 890.

The federal district court found that the trial court violated *Ring* and *Hurst I* by its finding at step two, the weighing stage. *Id*. The federal district court held that "from the verdict form in this case no court could determine whether the jury made the *other* factual findings required by Missouri law to render McLaughlin eligible for the death penalty, so those findings were made by the judge in violation of McLaughlin's Sixth Amendment right." *Id*. The record did not show "that the jury deadlocked after rather than before it made the requisite finding under [the weighing step]." *Id*. at 894 (*citing Whitfield*, 107 S.W.3d at 263-64). The federal district court stressed:

> In response to the second question, all the jury verdict said was that the jury had not *unanimously* determined that mitigating facts outweighed the aggravating factor. This is merely a finding of what the jury did *not* find – it does not tell us whether the factual finding necessary under the statute was made. It may be that eleven jurors found mitigating facts *did* outweigh aggravating factors: one person voting the other way would mean that finding was not unanimous, which is what the verdict form asked.

*McLaughlin II*, 173 F.Supp.3d 895 (emphasis in original).

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court; thus the opinion is not yet final because there is a pending motion to amend the judgment. McLaughlin v. Precythe, No.4:12CV1464 CDP.

The federal district court reasoned that because the record did not show what the jurors found, the procedure violated *Mills v. Maryland*, 486 U.S. 367 (1988). *Id*. at 895-97. In *Mills*, the Supreme Court struck down Maryland's capital sentencing procedure because the jurors may have believed they could not consider a mitigating circumstance in the weighing process unless all twelve jurors agreed that the mitigating circumstance existed. *McLaughlin*, 173 F.Supp.3d at 895 (*citing Mills*, 486 U.S. at 370). Under Maryland's procedure, eleven jurors could believe that six mitigating circumstances existed, but the jurors might not find any one mitigating circumstance unanimously. *McLaughlin*, 173 F.Supp.3d at 895 (*citing Mills*, 486 U.S. at 374). In such an instance, the jurors would be prevented from weighing any of the mitigating circumstances. *McLaughlin*, 173 F.Supp.3d at 895 (*citing Mills*, 486 U.S. at 374). A defendant could receive the death penalty even though eleven of the jurors thought the death penalty was inappropriate. *McLaughlin*, 173 F.Supp.3d at 895 (*citing Mills*, 486 U.S. at 374). "[I]t would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated." *McLaughlin*, 173 F.Supp.3d at 895 (*citing Mills*, 486 U.S. at 374).

The federal district court in *McLaughlin* noted that this Court, "interpreted the jury's answer to the weighing question to mean that the jury unanimously found the mitigators did not outweigh the aggravators, when in fact we cannot know whether that is what the jury actually found." *McLaughlin*, 173 F.Supp.3d at 896. The federal court recognized, "It is equally likely that the jury was deadlocked at this stage of the sentencing process." *Id*. The federal district court stressed:

> Because the question asked about unanimity for a negative proposition, it does not clear up whether it was zero or eleven jurors (or something in between) who found that the mitigating circumstances outweighed the aggravators. All we know from the special interrogatory is what they did *not* find.

*Id*. The weighing step is a factual finding that must be made by the jury. *Id*. The judge could not know what the jury decided, so he could not have relied upon it and must have made the factual finding himself, in violation of the Sixth Amendment. *Id*. We cannot rule out that same possibility in Marvin's case, particularly when the record shows that 11 jurors believed, after having "weighed all the evidence," that Marvin should receive a life sentence instead of death. (Doc.25;Tr.2381-82).

Not only is there a Sixth Amendment violation, what occurred also violates the Missouri Constitution. The Missouri Constitution provides, in pertinent part, "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate…." Mo. Const. art. I, sec. 22(a). "This Court has interpreted the phrase 'as heretofore enjoyed' as protecting 'all the substantial incidents and consequences that pertain to the right to jury trial at common law." *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo.banc 2011). "One of the 'substantial incidents' protected by article I, section 22(a) is the right to a unanimous jury verdict." *Id*. Because there was no unanimous jury verdict, a new penalty phase should have been ordered instead of the court deciding the issue. Section 565.030 violates article I, section 22(a) of the Missouri Constitution.

This unanimity argument is supported by *Hurst II*. In that case, the Florida Supreme Court noted that the Florida Constitution provides that "[t]he right of trial by jury shall be secure to all and remain inviolate," *Hurst II*, 202 So.3d at 55, quoting Art. I, §22, Fla.Const. As the court in *Hurst II* observed, the principle that, under the common law, jury verdicts shall be unanimous was recognized by that court very early in Florida's history. *Id*. The Florida Supreme Court held that because the Supreme Court in *Hurst I* made clear that the critical findings necessary for imposition of a sentence of death are the sole province of the jury, and because those findings occupy a position on par with elements of a greater offense, then all the findings necessary for the imposition of a sentence of death

must be made by the jury – as are all elements – unanimously. *Id*. at 57. The Florida Supreme Court reiterated its holding:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstance, and unanimously recommend a sentence of death.

*Id*.at 57.

Marvin's jury was unable to unanimously impose a sentence of death. Without the trial court's independent – and unconstitutional – factual findings, there would be no death sentence. Because Marvin's death sentence is the product of judicial rather than jury fact-finding, it is unconstitutional, and the only permissible sentence is life without parole. The practice in Missouri that allows a defendant to be sentenced to death even though 11 jurors believed that his life should be spared violates the Sixth Amendment to the United States Constitution and Article I, §22(a) of the Missouri Constitution. This Court should reverse and remand for Marvin to be sentenced to life without parole under Count I.

## VI.

**The trial court erred in overruling Marvin's motions regarding the unconstitutionality of Missouri's death penalty scheme and in sentencing Marvin to death after the jury was unable to agree upon a sentence as to Count I, having deadlocked 11 to 1 in favor of a sentence of life without parole, because the imposition of a sentence of death by the trial court when the jury was unable to agree upon punishment, as allowed by §565.030, violated Marvin's constitutionally protected rights to be free from cruel and unusual punishment, as guaranteed by the 8th and 14th Amendments to the U.S. Constitution, Article I, §21 of the Missouri Constitution, in that there is a strong national consensus against judge-imposed death sentences as well as death sentences premised on a non-unanimous jury verdict -- Missouri is only one of two states that legislatively authorize a judge to impose a death sentence when a jury has deadlocked during its penalty deliberations--; and, such a procedure fails to provide the heightened reliability in capital sentencing that the Eighth Amendment requires.**

*"If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting [the] constitutional requirements in the capital sentencing process."*

-- *Hurst v. State*, 202 So.3d 40, 60 (2016)

### Introduction:

The states and federal government demonstrate a near uniform rejection of death sentences imposed by judges or after juries have failed to unanimously agree a death sentence is appropriate and necessary. Further, unanimous jury agreement is necessary to ensure death sentences are imposed reliably, only on the most culpable defendants, and that the sentence reflects the judgment of the community.

Here, eleven triers of fact believed that Marvin should receive a sentence of life without parole for his first-degree murder conviction. Two triers thought that he should receive death. But even though the overall vote was 11-2 for life, Marvin received a death sentence because the trial judge was one of those two voting for death. Missouri's death penalty scheme, which allows only two people to decide that a defendant should receive death in a jury-tried case, violates the Eighth Amendment to the United States Constitution.[28]

**Facts and Preservation:**

Prior to trial, Marvin filed a Motion to Quash Information and Dismiss Due to the Unconstitutionality of Missouri's Statutory Scheme for the Imposition of the Death Penalty (Doc.60). That motion alleged, in part, that section 565.030 violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 21 of the Missouri Constitution because it permits a judge to impose a death sentence when the jury is unable to decide or agree upon punishment (Doc.60,pgs.7-8). The motion was overruled and denied, but the court allowed Marvin a continuing objection (Tr.179-80). The denial of that motion was raised in Marvin's Motion for New Trial (Doc.32,pgs.1-2).

During penalty phase deliberations, the jury sent out a question:

> We have an 11 to 1 decision on punishment and we have weighed all the evidence and still have 1 opposing opinion. What is your opinion on what we should do? Example: fill out the verdict form that says we are unable to decide? Is there a set time we need to debate? Everyone is firm on their decision and not willing to change.

[28] Although this Court has held that judge sentencing following a penalty-phase jury deadlock does not constitute improper judicial fact-finding under the Sixth Amendment, it has never addressed an Eighth Amendment consensus-based challenge to it. *See State v. Shockley*, 410 S.W.3d 179, 198-99 (Mo.banc 2013); *State v. McLaughlin*, 265 S.W.3d 257, 262-64 (Mo.banc 2008).

(Doc.25; Tr.2381-82). The jury was ultimately unable to agree upon the punishment for Count I (Doc.26;Tr.2386).

After trial, Marvin filed a Motion for the Court to Impose a Sentence of Life without Parole Because Eleven Jurors Wanted a Sentence of Life (Doc. 35). Attached to that motion were signed statements by two jurors who agreed that the jury was "deadlocked on punishment 11 to 1 in favor of" "Life" and "Life in Prison." (Doc.36).

Marvin also filed a Motion for the Court to Impose a Sentence of Life Without Parole Because Section 565.030 RSMo is Unconstitutional (Doc. 30). That motion alleged, in part, that allowing the trial judge to sentence Marvin to death when the jury could not unanimously agree that death was appropriate violated the Eighth Amendment (Doc.30,pgs. 3, 13-14, 16, 37, 45-46, 50-51). The trial court overruled that motion (Tr.2404) and sentenced Marvin to death (Tr.2428).

**Standard of Review:**

Constitutional challenges to statutes are issues of law that are reviewed *de novo*. *State v. S.F.*, 483 S.W.3d 385, 387 (Mo.banc 2016).

**Analysis:**

The Eighth Amendment prohibits "cruel and unusual punishments," U.S. Const. amend. VIII.[29] The Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society; "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting). To gauge whether a punishment practice has fallen outside these evolving standards, the Supreme Court looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

[29] The Eighth Amendment is applicable to the States through the Fourteenth Amendment. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

In this analysis, the Court first examines objective indicators, such as state legislation and death sentences, to determine whether the punishment or practice is consistent with contemporary standards of decency. *See Atkins*, 536 U.S. at 312. In doing so, the Court gives particular weight to legislation, "'the clearest and most reliable objective evidence of contemporary values.'" *Id.*, (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

This review of societal consensus, though significant, does not "wholly determine" the constitutional permissibility of capital punishment. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Rather, "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id*.

The Supreme Court of the United States has utilized this two-part analysis to evaluate the constitutionality of a category of sentences, *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the execution of juveniles); *Atkins*, *supra* (barring execution of the intellectually disabled); *Coker*, *supra* (barring execution as punishment for rape of an adult woman), as well as the adequacy of the procedures used to implement the Eighth Amendment principles contained in its precedent, *see Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 1996-2000 (2014).

In *Hall*, the Supreme Court held that Florida's bright-line IQ cutoff posed a procedural hurdle to establishing intellectual disability, violating the Eighth Amendment. *Id*. at 2001. As with its substantive Eighth Amendment jurisprudence, the Court looked to the national consensus by examining the means through which most states implemented the protections of *Atkins*. *Id*. at 1996. Because only two other states, in addition to Florida, had adopted a fixed score cutoff that failed to incorporate the standard error of measurement in IQ testing, the Court found that there was "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id*. at 1998; *see also Moore v. Texas*, 137 S.Ct. 1039, 1052 (2017) (finding Texas' use of "*Briseno* factors" to

determine whether a capital defendant is intellectually disabled violates the Eighth Amendment, in part because "no state legislature has approved the use of *Briseno* factors or anything similar.").

The Court's independent judgment supported the same conclusion, finding that Florida's law "created an unacceptable risk that persons with intellectual disability will be executed," *Id*. at 1990. The reasoning in *Hall* demonstrates that, where a state has adopted an outlier procedure that fails to adequately protect a defendant's substantive Eighth Amendment rights, that "rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id*. at 2001.

Application of this analysis to a judge-imposed death sentence following jury deadlock on penalty demonstrates that it cannot withstand constitutional scrutiny. There is a strong national consensus against judge-imposed death sentences, as well as death sentences premised on a non-unanimous jury verdict. In addition, such a procedure fails to provide the heightened reliability in capital sentencing that the Eighth Amendment requires.

Because requiring a unanimous jury to determine whether a defendant deserves the ultimate punishment produces more reliable results that are reflective of the community's judgment, the vast majority of death penalty jurisdictions require the unanimous agreement of twelve jurors before a death sentence may be imposed. Missouri, which permits a judge alone to impose a death sentence where the jury cannot agree, is a clear outlier.

There is a nationwide consensus against death sentences imposed by judges and pursuant to non-unanimous jury verdicts. In twenty jurisdictions, capital punishment is prohibited and can never be imposed.[30] The practices of these

[30] These jurisdictions are Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See* Death Penalty Information Center, *States with and without the death penalty*, (Nov. 9, 2016), https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited September 24, 2018).

jurisdictions, which have entirely rejected the death penalty, are relevant to the consensus analysis. *See Roper*, 543 U.S. at 564 (counting 30 states that prohibit the death penalty for juveniles, including 12 that have abolished the death penalty entirely and 18 that permit it, but not as applied to children).

In the vast majority of jurisdictions that do authorize the death penalty, a death sentence may only be imposed if a unanimous jury determines the sentence is warranted. If there is no unanimous agreement, either the penalty phase must be retried, or another sentence, usually a sentence of life without parole, must follow.[31]

Only five jurisdictions nationwide permit a death sentence to be imposed where a sentencing jury has not unanimously concluded the sentence is warranted. Those states are Alabama, Indiana, Missouri, Montana and Nebraska.

One of these states – Montana – is functionally abolitionist because no defendant has been sentenced to death there in over 20 years.[32] *See Hall*, 134 S.Ct.

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[31] These 27 jurisdictions are Arizona, A.R.S.§13-752 (retrial, but life after second deadlock), Arkansas,A.C.A.§5-4-603 (life), California, Cal PenalCode190.4 (retrial, but life or retrial after second deadlock), Colorado, C.R.S.§18-1.3-1201 (life), Florida,§ 941.141, Fla.Stat. (life), Georgia,Ga.CodeAnn.17-10-31(life), Idaho, IdahoCodeAnn.19-2515 (life), Kansas, KSA 21-6617 (life), Kentucky, KRS532.025 (retrial), Louisiana, LSA-C.Cr.P.Art. 905.8 (life), Mississippi, Miss.CodeAnn.§99-19-101;99-19-103 (life), Nevada, N.R.S. 175.556 (life or retrial), New Hampshire, N.H. Rev. Stat.§630:5 (life), North Carolina, N.C.G.S.A.§15A-2000 (life), Ohio,R.C.§929.03 (life), Oklahoma, 21Okl.St.Ann.§701.11 (life), Oregon, O.R.S.§163.150 (life), Pennsylvania, 42 Pa.C.S.A.§9711 (life), South Carolina, S.C.CodeAnn.§16-3-20 (life), South Dakota, SDCL§23A-27A-4 (life), Tennessee, T.C.A.§39-13-204 (life), Texas, Texas C.C.P.Art.37.071 (life), Utah, U.C.A.1953§76-3-207(4) (life), Virginia, VACodeAnn.§19.2-264.4 (life), Washington, RCWA10.95.080 (life), Wyoming,W.S.1977§6-2-102 (life), federal government, 18U.S.C.§ 3593 (life).

[32] See Death Penalty Information Center, *Death Sentences in the United States From 1977 By State and By Year*, http://deathpenaltyinfo.org/death-sentences-united-states-1977-present (last visited September 24, 2018, showing no death sentences imposed in Montana since 1996).

at 1997 (counting Oregon as abolitionist because it has suspended the death penalty and executed only two individuals in fifty years).

Nebraska's law places the death sentence determination exclusively in the hands of a three-judge panel after the jury has determined the existence of one or more aggravating circumstances, Neb.Rev.St. §§29-2521, 29-2522. Even then, the defendant cannot receive a death sentence unless the three-judge panel unanimously fixes the sentence at death; if even one judge believes that death is not appropriate, the defendant is sentenced to life imprisonment. Neb.Rev.St. §29-2522.

Alabama permits a death sentence on a jury's vote of 10-2 in favor of death, and a verdict of life without parole on a vote of a majority of the jurors. Ala.Stat. Ann.13A-5-46. If the jury is unable to reach a verdict recommending a sentence, the trial court may declare a mistrial of the sentence hearing. *Id*.

Only Missouri and Indiana legislatively authorize a judge to impose a death sentence when a jury has deadlocked during its penalty deliberations. Section 565.030(4); I.C.35-50-2-9.

That only five active death penalty jurisdictions permit a death sentence to be imposed in the absence of a jury's unanimous agreement on punishment, and only two states (Missouri and Indiana), authorize a judge to impose a death sentence when a jury has deadlocked during its penalty deliberations, weighs heavily against its constitutionality. As in *Hall*, which addressed procedures adopted by only three death penalty states, the scarcity of state laws permitting capital sentencing without a unanimous jury penalty verdict is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." 134 S.Ct. at 1998; *see also Coker*, 433 U.S. at 596 (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective

judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.").

In addition to evaluating consensus, the Court must also exercise its "'own judgment … on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Hall*, 134 S.Ct. at 2000, *quoting Coker*, 433 U.S. at 597. Judicially-imposed death sentences, in the absence of unanimous jury agreement, fail in this respect as well.

Because of the severity and finality of the punishment, the Eighth Amendment demands heightened "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Supreme Court has required multiple procedures and protections in capital cases to ensure that the death penalty is only imposed on "offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568, quoting *Atkins*, 536 U.S. at 319. *See*, *e.g.*, *Woodson*, *supra* (prohibiting a mandatory death penalty); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (requiring aggravating circumstances to meaningfully narrow the number of death-eligible offenses).

"[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity." *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting and citing *Gregg*, 428 U.S. at 184). Jurors "possess an important comparative advantage over judges . . . [because] they are more likely to express the 'conscience of the community' on the ultimate question of life or death." *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in judgment) (citation omitted).

In *Hurst v. Florida*, --- U.S. ---, 136 S.Ct. 616 (2016)(*Hurst I*), the Supreme Court of the United States reversed and held that Florida's capital sentencing scheme was unconstitutional to the extent it failed to require the jury, rather than the judge, to find the facts necessary to impose the death sentence. On remand, the Florida Supreme Court not only found that its sentencing scheme violated the Sixth Amendment, it also found that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment. *Hurst v. State*, 202 So.3d 40, 59-63 (2016)(*Hurst II*).

The court in *Hurst II* held that the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a death sentence. *Id*. at 59. The court reasoned that "[i]f death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting [the] constitutional requirements in the capital sentencing process." *Id*. at 60. In part, this is because the jury is a "significant and reliable objective index of contemporary values." *Id*., quoting *Gregg*, 428 U.S. at 181. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury – a veritable microcosm of the community – the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency." *Hurst II*, 202 So.3d at 60, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion).

In finding an Eighth Amendment violation, the *Hurst II* court noted that of the states that have retained the death penalty, Florida was one of only three states that did not require a unanimous jury recommendation of death, and that federal law requires the jury's recommendation of death in a capital case to be unanimous. *Id*.at 61. Thus, capital sentencing laws in this country "provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon

all the evidence of aggravating factors and mitigating circumstances." *Id.* at 61. "When all jurors must agree to a recommendation of death, their collective voice will be heard and will inform the final recommendation. This means that the voices of minority jurors cannot simply be disregarded by the majority, and that all jurors' views on the proof and sufficiency of the aggravating factors and the relative weight of the aggravating factors to the mitigating circumstances must be equally heard and considered." *Id.* at 61-62.

Because the jury is "uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand," *Ring*, 536 U.S. at 616 (Breyer, J, concurring), concerns about reliability demand that "the decision to impose the death penalty is made by a jury rather than by a single governmental official." *Spaziano v. Florida*, 468 U.S. 447, 469 (1984), overruled by *Hurst I*, (Stevens, J., concurring in part, dissenting in part). Where, as here, a death penalty scheme is contrary to the national consensus, fails to adequately implement Supreme Court precedent, and undermines rather than promotes the reliability of capital sentencing proceedings, that practice is necessarily invalid under the Eighth Amendment. *See Hall*, 134 S.Ct. at 2001; *Hurst II, supra*. Because the jury failed to unanimously agree that death was the appropriate punishment, this Court must impose a life without parole sentence as to Count I. See, Section 565.040.1 ("In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor….").

## VII.

**The trial court erred in overruling Marvin's motions regarding the unconstitutionality of Missouri's death penalty scheme and in sentencing Marvin to death, because §§565.030 and 565.032, violated Marvin's constitutionally protected rights to be free from cruel and unusual punishment, as guaranteed by the 8th and 14th Amendments to the U.S. Constitution, Article I, §21 of the Missouri Constitution, in that Missouri's death penalty scheme fails to adequately narrow the class of death-eligible homicides as constitutionally required by Supreme Court precedent, resulting in a significant risk that death sentences are being imposed arbitrarily; as a result, prosecutorial discretion defines which defendants face the death penalty, and because prosecutors apply their discretion in vastly different ways, this has resulted in large geographic disparities in the rates of death penalty prosecutions and convictions in Missouri.**

"An aggravating circumstance 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)

### Facts and Preservation:

Prior to trial, Marvin filed a Motion to Quash the Indictment and Dismiss Due to the Unconstitutionality of Missouri's Statutory Scheme for Imposition of the Death Penalty (Doc.60). It alleged that the standards set forth in §565.032 were too broad because some of the aggravating circumstances could be involved in any offense. *Id*. at pg.3. The motion was denied (Tr.179-80). The denial of the motion was raised in Marvin's Motion for New Trial (Doc.32,pgs.1-2).

Marvin also filed a Motion to Declare the Death Penalty Unconstitutional, which noted that Missouri's death penalty statues enumerates 17 aggravating circumstances, many of which are so broadly drafted as to qualify virtually any

intentional homicide as a death penalty case. (Doc.73,pgs.23-24). The motion was denied (Tr.169, 180-81). The denial of the motion was raised in Marvin's Motion for New Trial (Doc.32,pgs.40-41).

**Standard of Review:**

Constitutional challenges to statutes are issues of law that are reviewed *de novo*. *State v. S.F.*, 483 S.W.3d 385, 387 (Mo.banc 2016).

**Analysis:**

Capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). States must comply with requirements for each decision. See *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006).

In respect to the first, the "eligibility decision," the Supreme Court imposes what is commonly known as the "narrowing" requirement. "To pass constitutional muster, a capital sentencing scheme 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.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). Also see, *Tuilaepa*, 512 U.S. at 971 ("[T]he aggravating circumstance … may not apply to every defendant convicted of a murder;").

To satisfy the "narrowing requirement," a state legislature must adopt "statutory factors which determine death eligibility" and thereby "limit the class of murderers to which the death penalty may be applied." *Brown v. Sanders*, 546 U.S. 212, 216, and n.2 (2006); see also *Lowenfield*, *supra*, at 246 (specifying that the legislature may provide for the "narrowing function" by statute); *Zant*, *supra*, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

For instance, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Supreme Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. The Court concluded that the aggravating circumstance ("outrageously or wantonly vile, horrible or inhuman"), as construed by the Georgia Supreme Court, failed to create any "inherent restraint on the arbitrary and capricious infliction of the death sentence," because a person of ordinary sensibility could find that almost every murder fit the stated criteria. *Id.*at 428–29.

Missouri has failed to satisfy the narrowing requirement for the eligibility decision. Missouri has sought to comply with the narrowing requirement by setting forth statutory "aggravating circumstances" designed to permit the "jury ... at the penalty phase" to make "findings" that will narrow the legislature's broad definition of the capital offense. *Lowenfield, supra*, at 246. Missouri has set forth a list of 17 enumerated statutory aggravating factors that the jury must find beyond a reasonable doubt before it can determine whether to impose a sentence of death. §565.032.2. Under Missouri law, a person convicted of first-degree murder may be sentenced to death only if at least one of these aggravating factors is present. §§565.030 and 565.032.

Although there are 17 enumerated statutory aggravating factors, there are really more because some enumerated aggravating factors can be satisfied in multiple ways. For instance, the fifth aggravating circumstance actually encompasses 14 separate factors because that circumstance provides that it is an aggravating circumstance for the offender to murder 14 different classification of persons (e.g., judicial officer, former judicial officer, prosecuting attorney, former prosecuting attorney, etc.). §565.032.2(5). The seventh aggravating factor, "[t]he murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind," allows the depravity of mind aggravating circumstance to be satisfied in 10 different ways, the so-called "*Preston* factors" (e.g., the defendant inflicted physical pain or emotional

suffering on the victim, the defendant committed repeated and excessive acts of physical abuse upon the victim, etc.). See MAI-CR 4th 414.40, Note on Use 8; *State v. Preston*, 673 S.W.2d 1, 11 (Mo.banc 1984); *State v. Griffin*, 756 S.W.2d 475, 489-90 (Mo.banc 1988). There are several other enumerated aggravating circumstances that can be satisfied in multiple ways. Thus, the 17 aggravating circumstances are actually more than twice that number.

One study, Barnes, Sloss, & Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision–Making in Death–Eligible Cases*, 51 Ariz. L. Rev. 305, 360 (2009) ("*Barnes*"), concluded that Missouri fails to narrow the class of death-eligible homicides as required under *Zant*. The Missouri aggravating circumstance statute, §565.032, eliminates fewer than 10% of first-degree-murder-eligible homicides, which corresponds to fewer than 25% of all intentional homicides (first-degree murder, second-degree murder, voluntary manslaughter). *Barnes* at 360. As a result, prosecutorial discretion defines which defendants face the death penalty. *Id*. And because prosecutors apply their discretion in vastly different ways, this has resulted in large geographic disparities in the rates of death penalty prosecutions and convictions. *Id*.

Similarly, the A.B.A. Death Penalty Moratorium Implementation Project studied the death penalty in Missouri and issued a report: *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report* (The Missouri Report). The Missouri Report noted that Missouri's death penalty statute enumerates 17 aggravating circumstances, many of which are so broadly drafted as to qualify virtually any intentional homicide as a death penalty case. *Id*.at *v*, 141-43.

The Missouri Report cited to one study that found that the "wantonly vile" aggravating circumstance, which can be found by the jury if one of eleven conditions is met, was applicable *to more than 90% of Missouri cases that could have been charged as an intentional homicide*. *Id*. The Missouri Report also noted that other aggravating circumstances are so broadly written that they are

applicable to an overwhelming proportion of first-degree murder cases, citing the *Barnes* study, which found that in cases in which the defendant could have been charged with an intentional homicide, the "murder for the purpose of receiving money" aggravator would apply to 45% of the sampled cases; and, the "engaged in a felony" aggravator would apply to more than 50% of the cases. *The Missouri Report, supra* at 141, 233, *Barnes, supra* at 323. Further, two other statutory aggravating circumstances — murder "committed for the purpose of avoiding, interfering with, or preventing a lawful arrest" and murder of a victim who "was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as … a witness"— have been broadly interpreted by this Court to encompass any case in which the victim could have identified his/her assailant. *The Missouri Report*, at 142.

"As a result, the aggravating circumstances provide little guidance and little restraint to prosecutors with respect to capital charging. Because Missouri's numerous aggravating circumstances fail to differentiate death penalty-eligible cases from non-death penalty-eligible cases in the 'objective, evenhanded, and substantively rational way' the U.S. Supreme Court requires, there is a significant risk that death sentences will be imposed arbitrarily." *Id*.at *v* (citation omitted). "[A] Missouri prosecutor is able to pursue the death penalty in virtually any case where there is probable cause to believe the defendant committed intentional homicide." *Id*.

The Missouri Report noted that that statute's many aggravating circumstances grant nearly unfettered charging discretion to Missouri prosecutors, and this has led to dramatically disparate charging practices by Missouri prosecutors. *Id*.at 143, 147. As a result, studies show that a homicide defendant in Missouri who is charged in a rural or suburban county may be more than ten times likely to receive a death sentence than a similar defendant charged in Kansas City or St. Louis City. *Id*. at 147, citing *Barnes, supra* at 344.

When a Missouri prosecutor "is free to pursue the death penalty in virtually any murder case, the General Assembly's prescribed aggravating circumstances do not serve to limit capital punishment to the 'narrow category' of the most culpable murderers from whom the death penalty is reserved." *The Missouri Report*, *supra* at 233, citing, *Atkins*, 536 U.S. at 319.

Another recent study, done by Professor Frank Baumgartner, found that Missouri's use of the death penalty in the modern era has been marked by substantial disparities by the race and gender of the victim of the crime, and by geography. F. Baumgartner, *The Impact of Race, Gender, and Geography on Missouri Executions*, July 16, 2015. A majority of Missouri's executions occurring between 1976 and 2014 came from just 2.6% of Missouri's counties. *Id.*

Where there is broad discretion, the Supreme Court has explained, "there is a unique opportunity for racial prejudice to operate." *Turner v. Murray*, 476 U.S. 28, 35 (1986). The pernicious influence of race in capital sentencing is by now well-known and documented. *See Buck v. Davis*, 137 S.Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction poisons public confidence in the judicial process.") (internal quotation omitted); *Glossip v. Gross*, 135 S.Ct. 2726, 2760-62 (2015) (Breyer, J., dissenting). As documented above, Missouri, unfortunately, has not escaped the racial disparities that a failure to narrow allows.

Missouri has given prosecutors and juries no legislative guidance as to how they should determine which subclass of offenders merits the death penalty. As a result, in Missouri, the death penalty is imposed upon a capriciously selected population of defendants. This violates the Supreme Court's core holding - repeatedly emphasized in many cases - that only objective and narrowing legislative rules, rather than unfettered prosecutorial discretion, can avoid "the wanton and freakish imposition of the death penalty." *Zant*, 462 U.S. at 876.

Missouri has failed to do this. As a result, this Court should declare that the Missouri death penalty scheme is unconstitutional, vacate Marvin's death sentence and impose a sentence of life without parole as to Count I. See, §565.040.1 ("In

the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor….").

## CONCLUSION

For the reasons presented in Points I, II, and III, Marvin is entitled to a new trial. For the reasons presented in Point IV, this Court should reverse and remand for a new trial as to Count II, and Marvin is entitled to a new penalty phase as to Count I. For the reasons presented in Points V, VI, and VII, this Court must impose a life without parole sentence as to Count I.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,992 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 2nd day of October, 2018, electronic copies of Appellant's Brief and Appellant's Brief Appendix were delivered through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at shaun.mackelprang@ago.mo.gov.

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