Sup. Ct. # 91209

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MICHAEL ANDREW TISIUS,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Boone County, Missouri,
13th Judicial Circuit, Division II
The Honorable Gary M. Oxenhandler, Judge

APPELLANT'S BRIEF AND APPENDIX

JEANNIE WILLIBEY, #40997
Assistant Public Defender
920 Main Street, Suite 500
Kansas City, Missouri 64105-2017
Tel: (816)889-7699
Fax: (816)889-2001
Jeannie.willibey@mspd.mo.gov

Counsel for Appellant

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JURISDICTIONAL STATEMENT

In 2000, the State charged Appellant, Michael Tisuis, with two counts of first-degree murder, §565.020, RSMo 2000, for killing Jason Acton and Leon Egley. In the direct appeal, this Court affirmed Michael's convictions for first degree murder and sentences of death. *State v. Tisius*, 92 S.W.3d 751 (Mo.banc 2002). Subsequently in the Rule 29.15 post-conviction case, the Circuit Court affirmed the convictions but set aside the sentences and ordered a new sentencing trial. The Circuit Court's denial of post-conviction claims related to the guilt phase was affirmed by this Court. *Tisius v. State*, 183 S.W.3d 207 (Mo.banc 2006). In 2010, the Circuit Court held a new sentencing trial. After the retrial, the jury again recommended death for both convictions, and Judge Gary Oxenhandler imposed two death sentences. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo. Const., Art. V, Section 3.

STATEMENT OF FACTS[1]

In June 2000, twenty-seven year old Roy Vance was incarcerated at the Randolph County Jail in Huntsville, Missouri, and was facing the possibility of life imprisonment (Tr.629,763). Roy talked with his girlfriend, Tracie Bulington, about trying to get a plea bargain in his case or, if that did not work out, trying to escape (Tr.7673,807,809).[2] Roy wanted Tracie to help him (Tr.809).

Roy was manipulative and had a way of convincing people to do things for him (Tr.630,809,851). One of his cellmates was Appellant, Michael Tisius, who was 19 years old, smaller than Roy, and would soon be released (Tr.628,631,813,851). Roy talked with Michael about escaping (Tr.831 836). At first, Michael thought it was a joke but then it became serious (Tr.831). Initially, Roy wanted Tracie and Michael to sneak a gun into the jail and give the gun to Roy (Tr.842). Later, the plan involved Michael pulling a gun on the guards, locking the guards in a cell, and then giving the gun to Roy (Tr.843).

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[1] The Record on Appeal consists of a transcript (Tr.) and a legal file (L.F.). This Court has taken judicial notice of the record on appeal from the prior direct appeal (SC#84036) and the prior post-conviction appeal (SC#86534). Michael will request that the State file State's Exhibit 53. Michael will prepare and file a Stipulation to the testimony of Dr. Peterson and Dr. Daniel, which were not transcribed into the trial transcript.

[2] Tracie Bulington testified pursuant to an agreement with the State (Tr. 762). In exchange for her cooperation, she pleaded guilty to two counts of second degree murder and was sentenced to two concurrent sentences of life imprisonment (Tr. 762).

After Roy's escape, they would stay in campgrounds and eventually get to Mexico (Tr.843). Because they had no money, Roy told Michael that they would commit robberies along the way for money to survive (Tr 844).

Another inmate heard some of the conversations between Roy and Michael (Tr.623). Roy said that he had a lot of charges and was facing life imprisonment (Tr.629). Michael talked about getting an early release and then getting Roy out (Tr.623).

Roy told Tracie that she needed to locate a gun and that Michael, once released, would provide her with the details of the escape plan (Tr.767,810).

Michael got out of jail and called Tracie on or about June 17, 2000 (Tr.734,768-9). Tracie and her friend, Heather Douglas, picked up Michael at a QT in Columbia, Missouri (Tr.734,770). On the drive from the QT to Heather Douglas' home, Heather heard Tracie and Michael discussing how to break Roy out of the jail (Tr.735). They discussed a "switcheroo" where Roy would switch clothes with an officer (Tr.735,742). They also discussed locking the officers into a cell and then taking Roy out of the jail (Tr.735,742). They never mentioned shooting anyone (Tr.742).

Tracie and Michael remained together from the time that Tracie picked up Michael until the date of the crimes (Tr.771-2). Roy directed Tracie, "never let Mike out of your sight," and she followed Roy's directive (Tr.811). Michael looked up to Roy and seemed to want to impress Roy (Tr.810). Michael was real quiet and, to some extent, had a timid appearance (Tr.812).

Michael told Tracie that he and Roy had discussed that in order to break Roy out of jail, Tracie and Michael needed to use a gun to intimidate the guards into a cell, get the cell keys, and then get Roy out (Tr.771). Subsequently, Tracie and Michael had the same discussion about the escape plan (Tr.771). No one ever mentioned shooting or killing anyone (Tr.772,813,815).

Two or three days before the crimes, Tracie and Michael went to Tracie's mom's house (Tr.749-50,773). After Tracie's mom left and while Michael was passed out, Tracie took her parents' revolver and ammunition (Tr.749-51,773-4). Tracie later showed Michael the gun (Tr.774). Michael did not have a reaction to the gun; later, however, he stated that the gun was not big enough (Tr.774-5). Tracie took him places to find a bigger gun, but he was unable to obtain a gun (Tr.775-6)

Tracie kept the gun in her car (Tr.739-40,774). At one point, Michael fired the gun out the window (Tr.776-7).

Michael and Tracie went into the jail on the two nights before the crimes (Tr.755-6). When they went to the jail, they arrived in the late night or early morning hours (Tr.781). The Randolph County Jail in Huntsville was then an old two-story house that had been redesigned over the years to accommodate prisoners (Tr.579-80). The "house" portion of the structure contained the dispatch area, and the rear contained an addition for the jail cells (Tr.580). The entrance to the dispatch area was locked, so the officers inside "buzzed in" Michael and Tracie (Tr.582,784,785). The jail cells were beyond the dispatch area (Tr.585). A counter separated the dispatch area from any persons coming

into the jail (Tr.583). The two jailers, who worked in the dispatch area and were the only persons to prevent an intruder into the area of the jail cells, were unarmed (Tr.593).

According to Tracie, Michael was looking for a particular deputy, Jason, to be on duty, as he did not believe that Jason would fight back if he pulled a gun (Tr.779-80). Tracie was not certain whether Michael took the gun into the jail during their first two visits (Tr.782). They did not follow through with the escape plan on those two nights (Tr.781). Rather, they left items for Roy, which were supposed to signal to Roy that the plan was going to happen or not happen; at trial, Tracie could not recall what the items meant but understood the "code" at the time (Tr.782-3).

The first night they came to the jail, Jason was not there (Tr.755-6,781,783). Michael shook his head "no" at Tracie, and she left a pack of cigarettes for Roy (Tr. 755-6, 781, 784).

The next night, Jason was not there (Tr.781). They asked about Roy's court date, and Deputy Whisenand went back to ask Roy his court date (Tr.756). Roy was sleeping, so other inmates told the deputy that they believed it to be a certain date (Tr.756). Deputy Whisenand relayed that information to Michael and Tracie, and they insisted on getting the information from Roy (Tr.757). Deputy Whisenand told them he was not going back again (Tr.757). Michael shook his head "no" at Tracie, and she left a pair of socks for Roy (Tr.756-7,785).

After they left, Deputy Shill asked Deputy Whisenand to go outside to see if they were driving (Tr.757). Deputy Shill believed that they were under the influence of

alcohol or drugs and should not be driving, but the two left the area on foot (Tr.757,758-9).

On the night of the crimes, according to Tracie, Michael played the same "rap" song over and over (Tr.786,789). Michael slouched down in his seat, had his hands together, and "kind of his face in his hands" (Tr.786-7). Tracie recalled some of the lyrics, which included "mo' murder" and something about a shotgun (Tr.790). Tracie testified that she did not remember the name of the song or any of the other lyrics to the song (Tr.790,815-6). She also did not remember what songs were being played the two previous nights (Tr.790,816).

At trial, Tracie also did not remember Michael making statements to her as they approached the jail (Tr.803). The prosecutor then asked her to review her testimony from the first trial, and she testified that Michael said he was going to go in with a blaze of glory and do what he had to do (Tr.804, 1st Tr.1031-2). Tracie testified that with respect to the "blaze of glory" statement, she also testified years ago that that was discussed at certain times when it was also being discussed what would happen if things went wrong (Tr.806-7). She had had discussions with Roy that they would have to do what they would have to do if things went wrong (Tr.807).

Jason Acton and Leon Egley were the deputies on duty during the early morning hours of June 22, 2000 (Tr.791-2). Tracie and Michael arrived at the jail, and Tracie parked her car around the side of the jail (Tr.790). After Tracie and Michael were let into the jail, Michael conversed with Jason, who was sitting down behind the counter (Tr.791-2, 794). According to Tracie, she turned to tell Michael that she was leaving and then

saw that Michael had the gun down by the side of his leg (Tr.793-4). When she saw the gun, she froze (Tr.795).

Michael raised his arm, brought the gun over the counter, and fired one shot at Jason (Tr.795-6). Leon yelled, "you son of a bitch," ran around the counter, and ran at Tracie (Tr.796). Michael began yelling, "get him" to Tracie and shot at Leon (Tr.599, 796-7). After Leon was shot, he went back to the other side of the counter, was shot a couple more times, and fell to the floor (Tr.796-7).

Michael reached over the counter, grabbed some keys, and ran back to Roy's cell (Tr. 625,798). Michael had a revolver in one hand and the keys in the other (Tr.625). Michael was pale, shaking, and appeared to be out of it (Tr.632). He was not able to open the cell door (Tr.626). Roy remained on his bed and did nothing (Tr.626). After Michael tried to open it, he went back to the front area (Tr.627).

Tracie had moved to the opening in the counter, and Leon crawled towards her (Tr.799). Tracie moved a chair, and Leon grabbed her (Tr.799). Michael shot Leon again, and Michael and Tracie ran out of the jail (Tr.799-801).

During the shooting, at approximately 12:45 a.m., Randolph County Deputy Wilburt White approached the jail and, through the entrance, saw Michael shoot a gun over the counter of the dispatch area (Tr.579,592,597-8). He heard approximately four shots (Tr.597). Deputy White backed away and sought help (Tr.600-2,613-14).

When Deputy White and other officers arrived back at the jail, Jason Acton was dead, and Leon Egley was gasping for air (Tr.603,616,639). Leon later died from multiple gunshot wounds to his head, including a wound above his left eyebrow, a wound

in the upper forehead, and a wound to the right side of the forehead (Tr.692-4,696). Leon also suffered a tangential wound to his right cheek and a wound on top of his right shoulder, which may have come from the same gunshot (Tr.696). Jason died from a single gunshot wound to the head (Tr.688-9). There was no evidence of tattooing or stippling found on the victims, so that Michael would have been at least two or three feet from them when he fired the shots (Tr.700,702-3).

Tracie and Michael drove along Highway 36 towards Kansas and were not talking (Tr.801). Michael was repeating, "Don't be mad, Roy. I'm sorry, Roy" (Tr.801-2). Michael gave Tracie the gun, which he had wrapped in a bandana (Tr.802). She threw the gun out the window (Tr.802-3). They were in the car for a couple of hours, when Tracie's car broke down in Kansas (Tr.803,816-17). They began walking along the side of the highway (Tr.818).

Elwood, Kansas Police Officer Vincent saw them walking along Highway 36 behind the Pizza Hut at approximately 7 a.m. on June 22, 2000 (Tr.704-5,712). He later learned that the two matched the description of subjects who were wanted (Tr.706-7). He went back to Elwood and approached the two, who were still in the Pizza Hut parking lot (Tr.707,712,818). They provided their names to the police and were cooperative (Tr. 707-8,712,714-15,717,817-18). Michael told the officer, "I think I did something bad last night" (Tr.710,716). The two were transported to the county jail (Tr.710).

Missouri State Highway Patrol Lieutenant Michael Platte interviewed Michael at the Doniphan County, Kansas Jail at approximately 2:30 p.m. on June 22, 2000 (Tr.826,850). Michael appeared nervous (Tr.852). Michael said that he had recently met

Roy and Tracie (Tr.828). He met Roy when they were both incarcerated at the Randolph County Jail from early May to mid-June 2000 (Tr.829).

Initially, Michael said that he could not recall the shootings, but he quickly admitted remembering the crimes (Tr.829-830).

Michael stated that when he and Roy were in jail together, they talked about Roy escaping several times (Tr.831,836). Roy initiated the escape plan (Tr.836). Tracie got the gun used in the attempted escape, and Michael fired the gun earlier in the day on June 21 (Tr.836,844). At approximately 2 p.m. on June 21, Tracie spoke with Roy over the phone to discuss the plan one more time (Tr.831). It was a "go" at that time (Tr.831).

Michael and Tracie arrived at the jail at approximately 12:15 a.m. (Tr.831). They went in the jail, and he talked with the two jailers (Tr.831,837). Michael reached in, pulled out his gun, but could not say anything (Tr.831,837). He looked towards Tracie hoping that she would stop him, and then shot Jason (Tr.831,837). After Leon began to move, he shot Leon (Tr.831,838). He ran back to try to get Roy out, but he had the wrong keys (Tr.831,838). He ran back to the front, and Leon reached up and grabbed Tracie's legs (Tr.831-2,838). Tracie screamed, and he shot Leon two or three more times (Tr.832,838).

When the police asked him why he started shooting, Michael said, "I don't know why. I don't know why I did it. I know why I went in there. I didn't tell them to do nothing" (Tr.852-3).

He and Tracie left, and Michael did not know exactly where they were going (Tr.832,841). Shortly after they left, he threw the jail keys out of the car (Tr.833-4,840).

Tracie drove back roads and then drove west on Highway 36 (Tr.833,839). They wrapped the gun in a blue handkerchief, and Tracie threw it out along Highway 36 (Tr.833,840). Tracie said that they would be better off killing themselves, and Michael told her not to do it (Tr.845-6).

The car broke down in Kansas at approximately 4 a.m., and they walked west (Tr.833,841). After walking for four hours, they decided to walk back to turn themselves in (Tr.841,853).

Michael said that the escape plan was supposed to involve him pulling out the weapon, locking the guards in a cell, giving the gun to Roy, and leaving (Tr.832). Michael said that the guards did not deserve to die and that if he could go back, he would beg his mom to let him go home or kill himself (Tr.839,846,854).

The police then asked Michael to give a written statement, and he wrote the following:

> The planning was originally just a joke and somewhere along the lines it got serious. Roy Vance said to just tell the guards to come back to the cell and he would have the rest under control. Well, I got out of jail and looked up his girlfriend and she wanted to go through with getting him out. Around 12:15 we went to the jail and Tracie pulled out a gun from a green Army bag behind the driver's seat. I took the gun (not aware of what was going to happen).
>
> We then went to the jail and Tracie acted like she wanted to drop off some cigarettes. And I pulled out the gun, and before I knew it "1" was

already dead when I pulled the trigger, got scared and shot the other guard, ran back to the cells and had the wrong key. When I went back up, we can't find no keys … One guard grabbed Tracie and she screamed, so I shot again and again. (I don't know why, why, why.)

As we left we ran to the car, and I threw the keys out the car window. When we got further, I gave Tracie the gun and she tossed it in a blue rag out the window. We kept driving to Kansas, and we ditched the car and started walking. We finally decided to turn ourselves in.

I know what I have done was wrong and will never be fixed. No, I don't believe they deserved it. An officer asked me if I could go back and do it all over what would I do. I said I would kill myself to save the lives. I know I deserve whatever I get and got coming to me.

(Tr.848-9).

A spot on the right pocket of the jeans that Michael was wearing at the time of the crimes contained DNA that matched the DNA profile of Jason Acton (Tr.720-1,733,842).

Pieces of the revolver, along with the blue bandana, were found along Highway 36 (Tr.659-60,669-77).

Michael was charged with two counts of first-degree murder (L.F.36-7). Michael wanted to plead guilty to two counts of first degree murder in exchange for two sentences of life without parole (PCR Tr.662-3). Michael's defense attorney sought such an offer, but the State was not willing to make an offer for anything less than death (PCR Tr.664-5). Therefore, Michael did not plead guilty (PCR Tr.663-5).

Michael was tried in 2001, convicted, and sentenced to death (1st L.F.261-2). This Court affirmed Michael's convictions and sentences. *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002). Subsequently, in the Rule 29.15 case, the Circuit Court affirmed the convictions but set aside the death sentences and ordered a new penalty phase. The Circuit Court's denial of post-conviction claims related to the guilt phase was affirmed by this Court. *Tisius v. State*, 183 S.W.3d 207 (Mo. banc 2006).

On retrial in 2010, Michael was again sentenced to death (Tr. 1242). Evidence presented at the retrial was as set forth above. The State also presented victim impact testimony from Leon Egley's brothers and Jason Acton's father, sister, and fiancée (Tr. 855-60,861-5,866-7,868-870,871-5).

In addition, the State presented the testimony of Donna Harmon, a Chariton County Deputy (Tr.898). She testified that on July 2, 2000, Michael was incarcerated at the Chariton County Jail (Tr.899). All the cells have solid doors, and there is bullet proof glass on the doors with metal that runs through the glass (Tr.901,904). Because the cells are almost sound proof, the inmates communicate with inmates in other cells through hand gestures (Tr.902). The lights go off at 11 p.m., and that affects what a person can see (Tr.904). After midnight on July 2, 2000, she was in the dispatch area and saw movement in Michael's cell (Tr.900). She looked up and saw that Michael had his hands raised, as if he were holding a pistol, and was making motions with his mouth, as if he were shooting at her (Tr.900).

The State also called former Boone County Deputy Jacqueline Petri (Tr.906). She testified that had contact with Michael at the Boone County Jail in April 2001 (Tr.907).

Michael was anxious to be be moved out of the jail and told her that he had a court order to be moved (Tr.908-9). She told him to fill out a request form and that the jail was transporting females that evening (Tr.908-9). Michael replied, "Don't you know who I am?" (Tr.909). She said, "not particularly," and Michael told her that was the one that killed the two jailers in Randolph County (Tr.909-10).

During a recess at the trial, the State indicated its intention to admit and read to the jury Michael's conviction and sentence for possession of a prohibited article, a docket entry indicating that Michael entered an Alford plea of guilty to possession of a prohibited article, and the complaint filed in that case (Tr.884-5).

Defense counsel objected to the State's planned use for State's Exhibit 53 (Tr.885-6). Defense counsel acknowledged that the State, through the use of the certified judgment and sentence, could adduce evidence that Michael had pleaded guilty to a particular charge and what the sentence was (Tr.888). But defense counsel objected to the following:

> What I do object to is the additional information, particularly in the Complaint—this is not even the Information [that he would have pleaded guilty to]---where it states the Defendant knowingly possessed a metal object known as a boot shank, a weapon or item or personal property that could be used in such a manner … as to endanger the safety or security of a correctional officer or endanger the life or limb of an offender or employee of a correctional center, to wit, Potosi Correctional Center.

(Tr.886). Defense objected on several grounds, including that the additional information contained in the Complaint was hearsay (Tr.887). While the State would be free to bring in a witness to describe the alleged shank or conduct, it would be hearsay to adduce evidence of it through a document (Tr.887).

With respect to defense counsel's hearsay objection, the prosecutor argued that "a prior certified copy solves that problem" (Tr. 888).

The Court then ruled that the State could read the following from the Complaint:

> With the understanding that State's Exhibit 53 is not going back to the jury, I will let you read, 'The Defendant, in violation of Section 217.360 of the Revised Statutes of Missouri, committed the class B felony of Possession of a Prohibited Article in the Department of Corrections, … in that on or about June 6, 2006, in the County of Washington, State of Missouri, the Defendant knowingly possessed a metal object, commonly known as a boot shank…'

(Tr.888-9).

When court resumed before the jury, the State offered State's Exhibit 53, and defense counsel again objected (Tr.895). The Court overruled the objections and admitted State's Exhibit 53 into evidence (Tr.895-6). The State then read to the jury the docket entry, which set forth that Michael entered an Alford plea of guilty to Possession of Prohibited Article in the Department of Corrections and the Court accepted the guilty plea and sentenced Michael to five years to run concurrently with his present prison sentence (Tr.896). The prosecutor then read the Complaint to the jury:

> Comes now the prosecuting attorney of the County of Washington, State of Missouri, being duly sworn upon oath and information and belief and states that there is probable cause to believe that on or about June 6, 2006, the Defendant…committed the class B felony of Possession of a Prohibited Article in the Department of Corrections, …., in that on or about June 6, 2006…, the Defendant knowingly possessed a metal object commonly known as a boot shank.

(Tr.897).

Evidence in Mitigation

Defense counsel presented the testimony of Michael's mother (Tr.917), Michael's brother (Tr.1082), family friends (Tr.1003,1060), Michael's elementary school teachers (Tr.1012,1093), a case manager for St. Louis Youth Programs (Tr.1031), Michael's friends (Tr.1050,1054,1068,1072), a pastor (Tr.1077), and three doctors (Tr.1067,1077, 1101). The following evidence was elicited:

Michael was born in February 1981 to Patty (Lambert) and Chuck Tisius (Tr.917-18). At that time, Patty had a son, Joey Mertens, who was 2 ½ years older than Michael (Tr.918,923). Chuck was disappointed at Michael's birth, because he wanted a girl (Tr. 920). When Michael was approximately 17 months old, Chuck left Patty and the boys and sought a divorce (Tr.922,982).

From 1984 through 1988, Patty and the boys lived in St. Louis with Patty's boyfriend, Mark Keck (Tr.926-7). When they lived in St. Louis, Chuck did not have a lot of contact with Michael (Tr.932). Chuck would call and say that he would pick up

Michael but would not show up (Tr.932). Michael would be excited, sit out on the front porch, and wait (Tr.932). When Chuck did not show up, Patty and Michael would try to call Chuck, but he would not answer the phone (Tr.932). Michael would run into his room and cry (Tr.932). Michael wanted a relationship with his dad (Tr.933). He saw that Joey's dad was active in Joey's life and would take Joey places on the weekends (Tr.923, 933).

When Michael was in kindergarten, Chuck re-married, and Chuck and his new wife had two daughters (Tr.942-3). Chuck's visitation with Michael decreased even more (Tr.943).

Michael initially did well in school (Tr.936-7). Although Michael wanted his real father, he called Mark Keck "daddy Mark" (Tr.940-1). Up to 1988, when Michael was 7 years old, Michael was a good kid, quiet, happy, kept to himself, stayed in the house a lot, and liked to draw (Tr.927-8,1062).

In 1988, Patty split with Mark Keck, and Patty, Joey, and Michael moved from St. Louis to Hillsboro (Tr.937). After they moved to Hillsboro, Michael's relationship with Joey, which had always been strained, worsened (Tr.934,963). Michael had the opposite personality of Joey—Joey was athletic, outgoing, and had a lot of friends, and Michael liked music, drawing, dance, and had a few friends (Tr.931-2,1083). Joey testified at trial that he had hated Michael, and the two had always fought (Tr.933-4,1082).

As they got older, the fights became more frequent and more violent (Tr.963, 1084). Because Joey was bigger, the fights turned into beatings, and Michael would ball up to protect himself from the beatings (Tr.1084). Even when Patty was there, she could

not stop the beatings (Tr.1067,1091, PCR Tr.245). Joey recalled one beating, where three or four of Joey's friends finally pulled him off of Michael, because Michael was covered up and screaming (Tr.1085). This occurred when Michael was approximately ten or twelve years old (Tr.1085). According to Joey, he beat Michael on a frequent basis, once a day or once a week (Tr.1086). Joey also told Michael, "nobody wants you, not even your father wants you" (Tr.1090).

In third grade, Michael began exhibiting signs of depression (Tr.952). Michael also began exhibiting self-hate and wrote self-deprecating notes, some of which he left for his mom to find (Tr.954-5). Michael wrote, "I'm weird. I'm stupid….Nobody loves me…. I'm not worth a cent. I'm a dork…" (Tr.955).

When in the sixth grade, Michael wrote: "…I'm boring kid because everyone says I have no friends at all. My mom hates me. Joey hates me. My dad don't give a crap about me. He's always saying I'm stupid. … I'm scared of the ball when someone throws it to me…..I'll probably flunk sixth grade" (Tr.960). During that year, Patty took Michael to a doctor for depression, and he was prescribed Prozac and Paxil (Tr.961-2).

The Hillsboro School District also noticed that Michael had issues and instructed Patty to take Michael to classes for self-esteem (Tr.953,963). Michael attended counseling at Comtrea (Tr.977). The discharge summary indicated that although Mike was polite and cooperative, he was immature, did not interact well with his peers, and did not appear to communicate well with his mom (Tr.977-9). This discharge summary also indicated that Mike reported being beaten by an older brother, and that Michael and his family were in need of further counseling and help (Tr.977-980).

Michael was held back in the sixth grade (Tr.975,1014). During his second year of sixth grade (in the 1993-1994 school year), he began doing well (Tr.976,1014,1016-19). He had an excellent teacher, Ms. Page, and began to thrive (Tr.976). Michael adored art and volunteered to submit pictures and do other work for the class newspaper (Tr.1017-18). Michael was pleasant with the other kids and handed every assignment in on time (Tr.1021). Michael had a positive attitude, and his grades began to rise (Tr. 1021,1024-6).

The art teacher also liked working with Michael (Tr.1093-5). Michael came to her room to do artwork, help clean out paint containers, or do any task she needed to be done (Tr.1095). Michael was diligent in his artwork and also helped other students in her class (Tr.1096).

During that sixth grade school year, though, Chuck pursued custody of Michael (Tr.976). A report completed for the custody case set forth as follows:

> …Michael is not doing well in the present setting. He failed the sixth grade. He seems quite unhappy. He doesn't get along with his half-brother Joey who is quite a bit bigger than Michael and three years older. Michael says Joey beats him up a lot.
>
> …Michael is quoted, Things will be better living with his dad.
>
> …Michael's age of twelve years gives his desire to live with his father some weight. Patty claims that this is a manipulation by him to get her to relax the rules. This does not seem to be Michael's primary motivation for wanting to live with his father. His primary motivation

> appears to be a fantasy he has that the degree to which his father has neglected him over the years will somehow be magically compensated. I predict a good deal of disappointment of Michael's expectations. Chuck does not strike me as highly motivated to play a significant role in his son's life. … Chuck's lack of apparent sincerity is disturbing.
>
> …I would like to see Michael given the chances he so desperately wants to get a new start in life and establish a relationship with his father that he has longed for. I am just not certain that this is what is waiting for him at Chuck and Leslie's.

(Tr.982-5).

Michael went to live with Chuck, but Chuck brought him back to Patty after a couple of months (Tr.985). Late one night, Patty heard a knock, and Chuck and Mike were at the door (Tr.985). Chuck told Patty, "I don't want the son of a bitch. You can have the mother fucker" (Tr.985). Michael was crying (Tr.985-6).

Michael returned to Ms. Page's sixth grade class after the Christmas break, but he was not the same (Tr.1022-3). Ms. Page warned the class not to ask Michael about what had happened, and she noticed a dramatic change in Michael (Tr.1022-3). Ms. Page recalled that Michael seemed very subdued and sad (Tr.1023).

During that period of time, Patty began working and often worked long hours (Tr. 944,946). While she was at work, Patty received phone calls from neighbors on a regular basis that Joey was beating on Michael (Tr.964). One neighbor, Patty Gray, observed that Joey would push Michael around (Tr.1006). On one occasion, Patty Gray saw Joey

punch Michael in the stomach and Michael doubled over in pain (Tr.1006-7). Patty Gray had to keep Michael in her house, until Patty got home from work, because Joey continued to go after Michael (Tr.1007). Joey tried to force himself into Patty Gray's house to go after Michael, but she told Joey to go home (Tr.1007-9). At times, Michael would run away and seek help from Joey's beatings (Tr.964).

Michael continued to have problems with at home and school (Tr.988,999-1000). Patty continued to observe that Michael was depressed, and Michael would run away and threaten to harm himself (Tr.956,957,989,994). The self-hate continued as he got older, and he continued to say that nobody loved him (Tr.956). The neighbors called Patty on one occasion when Michael tried to cut his wrists (Tr.956-7). They brought him home, and he was upset and crying (Tr.957).

A family friend, Dana Rivera, also observed that Michael was depressed at times, and Michael told her that he felt like nobody loved him (Tr.1064-5). Dana also lived with the family in approximately 1996 and 1997 (Tr.1062). She observed Joey bully Michael (Tr.1062). Joey would say things like "if you don't get me that…, I'm going to kick your ass" (Tr.1062).

Despite Michael's problems, Dana and Patty Gray observed that Michael played with their children well and was good to their kids (Tr.1005-6,1009,1065-6).

In 1996, when Michael was in the seventh grade, Patty and the boys moved back to St. Louis (Tr.991). Patty and Mark Keck got back together, and the two married (Tr. 940).

Michael attended the first year of high school in the St. Louis area but dropped out in the ninth grade when he was sixteen (Tr.991-2,1108). Michael continued to suffer from depression and was medicated at times with Prozac and Paxil (Tr.992).

When Michael was 17 years old, he attended a G.E.D. program and sought assistance from John Reichle, case manager with the St. Louis youth programs (Tr.1031-2). Michael's relationship with his mom was strained, and Joey continued to beat him (Tr.1033,1038). Michael was temporarily placed in a residential facility, "Youth In Need," and he received help from social service agencies in St. Louis (Tr.995,1035, 1067, PCR Tr.258). The social workers from those agencies described Michael as a desperate child, who was very helpless, very needy, very immature and not equipped to be out on his own (Tr.1067, PCR Tr.258).

In 1997 or 1998, when Michael was approximately 17 years old, he stopped living with his mom, and Patty did not have much contact with him after that (Tr.998).

In 1999, Michael dated Lisa Esry Bunch's daughter (Tr.1068). Michael drew with Lisa's grandson and was very good with her grandkids (Tr.1069). He seemed like a really, really nice kid (Tr.1069). Her daughter broke up with Michael, and Michael moved in with Lisa Bunch's family for two or three months (Tr.1069-70). Michael was a shy person, who was scared of his own shadow (Tr.1070). Michael did not like to fight or argue (Tr.1070,1074). Michael did not have a mean bone in his body (Tr. 1074).

In 1999 and 2000, Michael went out with Emmy Moore's sister, and they took him in (Tr.1051,1055). Michael lived with them for six months (Tr.1051). Emmy saw

Michael every day (Tr.1051). Michael was quiet, shy, and liked to draw (Tr.1052). He was kind to her and to others (Tr.1052-3).

Emmy's mom, Tina Moore, met Michael, because her daughters would bring Michael with them when they visited her (Tr.1055). Michael was a shy person and did not do much talking (Tr.1056). He was always pleasant and liked to draw (Tr.1057).

At trial, the defense also presented the testimony of Dr. Stephen Peterson and Dr. Shirley Taylor regarding the impact of Michael's childhood.

Dr. Peterson, Psychiatrist, evaluated Michael in 2003 (Tr.1067, PCR Tr.227). Dr. Peterson found that at the time of his evaluation, Michael suffered from: major depressive disorder; childhood onset post-traumatic stress disorder; dysthymic disorder; a history of alcohol and marijuana abuse; and problematic personality traits (Tr.1067, PCR Tr.235). Michael had the reasoning ability of a young teenager and was quite immature for his age in his cognitive ability (Tr.1067, PCR Tr.260).

Michael began to suffer from major depression in childhood and was treated by a psychiatrist, who prescribed anti-depressants (Tr.1067, PCR Tr.236,251). The fact that the psychiatrist prescribed medications to Michael, as a juvenile, meant that Michael was severely impaired by his depressive symptoms and developmentally at risk not to make normal maturational steps because of the depression (Tr.1067, PCR Tr.252).

The abuse that Michael suffered at the hands of his brother was extremely traumatic and led to the formation of Michael's desire for other people to rescue him (Tr. 1067, PCR Tr.246). Michael's personality included traits of passive dependence, which meant that he tended to align with other people even if it meant that he would be taken

advantage of (Tr.1067, PCR Tr.270). Michael was "likely to want to please other people and promise them things he can't deliver because he knows if he promises things to people then they will like him" (Tr.1067, PCR Tr.270).

Dr. Shirley Taylor evaluated Michael in 2001 and 2010 (Tr.1106-7,1112). She opined that Michael suffered from depression, anxiety, post-traumatic stress disorder, and avoidant and dependent personality styles (Tr.1115). The type of person to demonstrate an avoidant, dependant personality style is someone who is very needy, scared and is looking for someone to fill the emptiness (Tr.1116).

She determined that Michael was neglected as a child, mostly in an emotional way (Tr.1107-8). Michael was a passive boy trying to get his needs met, trying to befriend people, and trying to get people to like him (Tr.1108). Michael was in a desperate situation at his home with Patty and Joey, and he was searching for someone to rescue him (Tr.1111). Although Patty made attempts to have Michael attend school and sought health care, Michael did not believe that his mother cared for him enough to intervene when Joey was beating him (Tr.1117).

Michael's childhood and dependant personality traits affected him at the time of the offenses, because it caused him to idolize and want to please Roy (Tr.1121).

When Dr. Taylor saw Michael in 2010, Michael had matured, grown taller, and had gained greater insight and perspective (Tr. 1113-1114, 1120).

Since her first meeting with Michael, Michael was extremely remorseful about the shootings (Tr.1118-9). He had some Catholic upbringing and said that he prayed for the victims' souls (Tr.1118).

During the State's cross-examination of Dr. Taylor, the prosecutor asked her if she had heard of the Rosenhan study, and she testified that she had not (Tr.1129-30). Over defense counsel's objection, the prosecutor cross-examined Dr. Taylor about the study and stated that the study "demonstrated 100 percent error rate in your profession" (Tr. 1129-30). Also, over defense counsel's objections, the prosecutor questioned Dr. Taylor about the content of an autobiography by David Pelzer, *A Child Called "It"* (Tr.1154-8). Over defense counsel's objection, the prosecutor also cross-examined Dr. Taylor that Michael did not plead guilty to the crimes (Tr.1140-1).

Additional Issues

Instructions 9 and 15 were patterned on MAI-CR3d 313.44A and related to the third step of Missouri's death penalty procedure, where the jury must weigh mitigating and aggravating circumstances. *See* §565.030.4(3), RSMo 2000. The instructions stated, in pertinent part:

> …[Y]ou must … determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment....
>
> …If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life....

(L.F.154,163,187,195). *See* A20, A21. Michael objected to these instructions (Tr.49-50,882; L.F.90-97) and included his objections in the motion for new trial (L.F.214).

Although defense counsel did not object, the sentencing verdict directors, Instructions 11 and 17, failed to include language instructing the jurors that if they "decide[d] that the facts or circumstances in mitigation of punishment outweigh[ed] the facts and circumstances in aggravation of punishment," the verdict must be life imprisonment (L.F.156-8,165-6,189-90,197-8). MAI-CR3d 313.48A. *See* A13, A16.

During the State's closing argument, the prosecutor argued that Michael forfeited his right to ask for mercy when he committed the crimes (Tr.1176-7). The prosecutor also implied to the jury that the victims' families wanted Michael to be killed (Tr.1184-5, 1219). And the prosecutor suggested to the jurors that they had an obligation to impose death to protect others who may be harmed by Michael in the future (Tr.1190,1192,1212, 1219).

The jury returned verdicts recommending death (Tr.1229-31). The court overruled the motion for new trial and imposed death (Tr.1238,1242). Notice of Appeal was timely filed (L.F.230-1).

POINT I

The trial court abused its discretion in overruling Michael's objection to State's Exhibit No. 53, which included a Complaint filed in a prior felony case wherein the State alleged that on June 6, 2006, Michael specifically possessed a "boot shank," because the Complaint was not admissible pursuant to Section 565.030, RSMo, and its admission violated Michael's rights to due process, a fair trial, cross-examination, confrontation, and to be free from cruel and unusual punishment, as guaranteed by Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that (1) the allegation in the Complaint was inadmissible hearsay; (2) Michael was unable to confront and cross-examine the witness who determined the item to be a "boot shank" because no witnesses were presented in his trial concerning that allegation; and (3) the Complaint was not legally relevant because the charge within the Complaint did not prove the specific conduct that Michael committed but merely showed the specific allegation made by the prosecutor in associate court. Michael was prejudiced because the prosecutor emphasized to the jury, in arguing that a death sentence would prevent Michael from harming a guard or inmate, that Michael "has a boot shank," which would have caused the jury to give the death penalty instead of life without parole.

State v. Berry, 168 S.W.3d 527 (Mo. App. W.D. 2005);

Crawford v. Washington, 541 U.S. 36 (2004);

State v. Fassero, 256 S.W.3d 109 (Mo. banc 2008);

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

Mo.Const.,Art.I,§§10,18(a),21;

Section 217.360, RSMo 2004;

Section 490.130, RSMo Cum. Supp. 2001;

Section 557.036, RSMo Cum. Supp. 2004;

Section 565.030, RSMo 2000;

Black's Law Dictionary (8th ed. 2004);

Webster's American Dictionary of the English Language, at 45;

4 Blackstone, Commentaries on the Laws of England (1769);

Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development (1951).*

POINT II

The trial court abused its discretion and plainly erred in overruling Michael's objections to the prosecutor's cross-examination of the defense expert, psychologist Dr. Shirley Taylor, in violation of Michael's rights to due process, trial by a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, because the prosecutor referred to irrelevant and prejudicial information and did not lay a foundation for his questions, in that: a) the prosecutor asked about the Rosenhan study, without demonstrating that it was an authoritative scientific text, and misstated that the "study demonstrated 100 percent error rate in [the psychological] profession;" b) the prosecutor asked about facts contained in *A Child Called "It,"* an autobiography by David Pelzer, without demonstrating that the book was an authoritative scientific text; and c) the prosecutor told the jury that Michael "did not plead guilty" (where Michael had tried to get a plea offer for sentences of life without parole and wanted to plead guilty). Michael was prejudiced and suffered manifest injustice, because the prosecutor's statements unfairly prejudiced the jury's consideration of the mitigation evidence and misled the jury to believe that Michael's psychological diagnoses were unreliable, Michael should have overcome his issues through determination, and Michael chose not to plead guilty.

State v. Love, 963 S.W.2d 236 (Mo.App., W.D. 1997);

State v. Roper, 136 S.W.3d 891 (Mo.App., W.D. 2004);

State v. Winfrey, 469 337 S.W.3d 1 (Mo. banc 2001);

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

Mo.Const.,Art.I,§§10,18(a),21;

Mo.S.Ct. Rule 30.20;

Pelzer, David, *A Child Called "It"* (1992);

Rosenhan, David, "On Being Sane in Insane Places," Science Vol. 179 (Jan. 1973);

Wigmore, Evidence (3d ed.), Vol. VI.

POINT III

The trial court plainly erred in failing to intercede *sua sponte* when the prosecutor suggested in closing that: a) Michael forfeited his right to ask for mercy; b) the victims' families wanted death and directed a question to Michael "[t]ell me who [the victim's children] get to kill;" and c) the jurors had an obligation to impose death in order to protect prison employees and inmates from future harm, in violation of Michael's rights to due process, a trial before a fair and impartial jury, and a fair and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo. Const.,Art.I,§§10,18(a),21, because the prosecutor's arguments were improper and resulted in manifest injustice, in that the prosecutor undermined mercy as a valid sentencing consideration, implied that the victims' families wanted death and appealed to the jurors' emotions; and misinformed the jurors that they had an obligation, by their verdict, to protect others in prison with Michael from harm.

Mitchell v. United States, 526 U.S. 314 (1999);

Payne v. Tennessee, 501 U.S. 808 (1991);

Schoels v. State, 966 P.2d 735 (Nev. 1998);

Section 217.462, RSMo 2000;

Section 595.209, RSMo Cum. Supp. 2009;

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

Mo.Const.,Art.I,§§10,18(a),21; and

Rule 30.20.

POINT IV

The trial court plainly erred in giving Instructions No. 11 and 17, sentencing verdict directors MAI-CR3d-313.48A, because Instruction 11 and 17's omission of language concerning the mitigating evidence prevented the jury from using and giving effect to the mitigating evidence in determining Michael's sentence thereby violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amends. V, VI, VIII, and XIV; Mo. Const. Art. I, §§ 10, 18(a), and21; §565.030.4(3); MAI-CR3d 313.48A, in that the sentencing verdict directors erroneously failed to include required language instructing the jury that if it "decide[d] that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment" the verdict must be life imprisonment which prejudiced Michael by excluding consideration of evidence crucial to his defense against a death sentence.

State v. Anderson, 306 S.W.3d 529 (Mo.banc 2010);

State v. McClure, 632 S.W.2d 314 (Mo.App.S.D.1982);

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

Mo.Const.,Art.I,§§10,14,18(a),21;

Section 565.030, RSMo;

MAI-CR3d 313.44A, 313.48A; and

Rule 28.02;

Rule 30.20.

POINT V

By requiring that the jury unanimously find the evidence in mitigation outweighs the evidence in aggravation, Section 565.030.4(3) prevents the jury from giving meaningful consideration and effect to mitigating evidence, thereby violating *Mills v. Maryland*, 486 U.S. 367 (1988), *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and the Sixth, Eighth and Fourteenth Amendments; and the trial court erred in submitting Instructions 9 and 15, patterned on MAI-CR3d-313.44A, and denied Michael due process, a fair jury trial, and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I., Secs.10, 18(a),21, because the instructions failed to tell the jurors the State's proper burden of proof regarding the third step of the death penalty procedure, in that they failed to inform the jury that the State must prove, beyond a reasonable doubt, that aggravation outweighs mitigation or mitigation weighs less than aggravation; they prevented the jury from giving meaningful consideration and effect to mitigating evidence; and by instructing that Michael must prove to a unanimous jury that mitigation outweighs aggravation, they erroneously required Michael to establish eligibility for a life sentence and relieved the State of its burden.

Kansas v. Marsh, 548 U.S. 163 (2006);

Mills v. Maryland, 486 U.S. 367 (1988);

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

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

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

Mo.Const.,Art.I,§§10,18(a),21;

Section 565.030; and

MAI-CR3d-313.44A.

POINT VI

The trial court erred in sentencing Michael to death for a crime never pled in the information, thereby violating his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, because the State never charged Michael with the only offense punishable by death in Missouri – *aggravated* first degree murder – in that the State failed to plead in the information those facts the jury had to find beyond a reasonable doubt before Michael could be sentenced to death.

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

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

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.030, RSMo 2000.

POINT VII

The trial court erred in accepting the jury's death penalty verdicts and in sentencing Michael to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21; §565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Michael's sentences to life imprisonment without parole, based on the substantial evidence in mitigation, the nature of the crimes, and the number of similar cases where death was not imposed.

State v. Anderson, 306 S.W.3d 529 (Mo. banc 2010);

State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982);

State v. Vance, 111 S.W.3d 553 (Mo.App., W.D. 2003);

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

Mo.Const.,Art.I,§§10,18(a),21; and

§565.035, RSMo 2000.

ARGUMENT I

The trial court abused its discretion in overruling Michael's objection to State's Exhibit No. 53, which included a Complaint filed in a prior felony case wherein the State alleged that on June 6, 2006, Michael specifically possessed a "boot shank," because the Complaint was not admissible pursuant to Section 565.030, RSMo, and its admission violated Michael's rights to due process, a fair trial, cross-examination, confrontation, and to be free from cruel and unusual punishment, as guaranteed by Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that (1) the allegation in the Complaint was inadmissible hearsay; (2) Michael was unable to confront and cross-examine the witness who determined the item to be a "boot shank" because no witnesses were presented in his trial concerning that allegation; and (3) the Complaint was not legally relevant because the charge within the Complaint did not prove the specific conduct that Michael committed but merely showed the specific allegation made by the prosecutor in associate court. Michael was prejudiced because the prosecutor emphasized to the jury, in arguing that a death sentence would prevent Michael from harming a guard or inmate, that Michael "has a boot shank," which would have caused the jury to give the death penalty instead of life without parole.

The evidence of the "boot shank" at trial

During a recess at trial, the State indicated its intention to admit and read to the jury State's Exhibit 53 (A4), Michael's conviction and sentence for possession of a

prohibited article, a docket entry indicating that Michael entered an Alford[3] plea of guilty to possession of a prohibited article, and the complaint filed in that case (Tr. 884-5).

Defense counsel objected to the State's planned use for State's Exhibit 53 (Tr. 885-6). Defense counsel acknowledged that it would be appropriate under the law for the State, through the use of the certified judgment and sentence, to adduce evidence that Michael had pleaded guilty to a particular charge and what the sentence was. But defense counsel objected to the following:

> What I do object to is the additional information, particularly in the Complaint—this is not even the Information [that he would have pleaded guilty to]---where it states the Defendant knowingly possessed a metal object known as a boot shank, a weapon or item or personal property that could be used in such a manner … as to endanger the safety or security of a correctional officer or endanger the life or limb of an offender or employee of a correctional center, to wit, Potosi Correctional Center.

(Tr. 886, St. Ex. 53). Defense objected on several grounds, including that the additional information contained in the Complaint was hearsay (Tr. 887). While the State would be free to bring in a witness to describe the alleged shank or conduct, it would be hearsay to

[3] *North Carolina v. Alford*, 400 U.S. 25 (1970) held that it was not constitutional error to accept a guilty plea from a defendant who, although professing innocence, faced strong evidence of guilt and could limit the penalty he might otherwise receive if he went to trial.

adduce evidence of it through a document (Tr. 887). Defense counsel argued that what the State could do through the document was to prove the charge that Michael pleaded guilty to and his sentence (Tr. 888).

With respect to defense counsel's hearsay objection, the prosecutor argued that "a prior certified copy solves that problem" (Tr. 888).

The Court then ruled that the State could read the following from the Complaint:

> With the understanding that State's Exhibit 53 is not going back to the jury, I will let you read, 'The Defendant, in violation of Section 217.360 of the Revised Statutes of Missouri, committed the class B felony of Possession of a Prohibited Article in the Department of Corrections, … in that on or about June 6, 2006, in the County of Washington, State of Missouri, the Defendant knowingly possessed a metal object, commonly known as a boot shank…

(Tr. 888-9, St. Ex. 53).

When court resumed before the jury, the State offered State's Exhibit 53, and defense counsel again objected (Tr. 895). The Court overruled the objections and admitted State's Exhibit 53 into evidence (Tr. 895-6). The State then read to the jury the docket entry, which set forth that Michael entered an Alford plea of guilty to Possession of a Prohibited Article in the Department of Corrections and the Court accepted the guilty plea and sentenced Michael to five years to run concurrently with his present prison sentence (Tr. 896). The prosecutor then read the Complaint to the jury:

> Comes now the prosecuting attorney of the County of Washington, State of Missouri, being duly sworn upon oath and information and belief and states that there is probable cause to believe that on or about June 6, 2006, the Defendant…committed the class B felony of Possession of a Prohibited Article in the Department of Corrections, …., in that on or about June 6, 2006…, the Defendant knowingly possessed a metal object commonly known as a boot shank.

(Tr. 897).

Preservation and Standard of Review

Review of a trial court's decision to admit hearsay testimony is for an abuse of discretion. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). An abuse of discretion is found where the ruling is "clearly against the logic of the circumstances" and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration. *State v. Gardner*, 8 S.W.3d 66, 73 (Mo. banc 1999). However, "[w]hether a defendant's constitutional rights were violated is a question of law reviewed *de novo*." *State v. March*, 216 S.W.3d 663, 664-665 (Mo. banc 2007); *State v. Nunnery*, 129 S.W.3d 13, 17 (Mo.App., S.D. 2004). The admission of improper evidence "should not be declared harmless unless it can be said to be harmless without question and the record demonstrates the evidence did not influence the jury or the jury disregarded it." *State v. Russell*, 872 S.W.2d 866, 869 (Mo.App., S.D. 1994). Further, evidentiary decisions of the trial court are reviewed, in the context of the whole trial, to ascertain

whether the defendant received a fair trial. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007).

Michael asserts this issue is preserved for appellate review, because defense counsel objected before the admission of State's Exhibit 53 and before the prosecutor read the allegations in the Complaint to the jury (Tr. 887-8, 895). Counsel also included the issue in the timely-filed motion for new trial (L.F. 218).

1—The specific allegation in the Complaint, that the object possessed was a boot shank, was inadmissible hearsay.

Michael does not dispute that the State, by virtue of a certified copy of the judgment and sentence, could adduce evidence that Michael had entered an Alford plea of guilty to the class B felony of Possession of a Prohibited Article. Section 217.360, RSMo 2004;[4] Section 490.130, RSMo Cum. Supp. 2001.

Michael also does not dispute that the State could have brought in a witness, who seized or was present during the seizure of the prohibited article, to testify regarding the seizure of the prohibited article and describe the article. *See State v. Smulls*, 935 S.W.2d 9, 22-3 (Mo. banc 1996) (The State was permitted to present evidence concerning a prior

[4] A person commits the crime of the class B felony of Possession of a Prohibited Article when he possesses, delivers, attempts to deliver, deposits, or conceals in a correctional center any gun, knife, weapon, or other article or item of personal property that may be used in such a manner as to endanger the safety or security of the correctional center or as to endanger the life or limb of any offender or employee. Section 217.360.1(4), RSMo.

conviction through the testimony of the victim, the victim's neighbor, and a police officer.)

What Michael takes issue with is the manner of the State's proof that the prohibited article possessed was a metal object commonly known as a "boot shank" (Tr. 897, St. Ex. 53). In the manner that it was used by the State, the term "boot shank" was highly inflammatory and portrayed Michael as carrying a weapon in his sock or boot, ready to use (Tr. 1150-1, 1163, 1190). Once the prosecutor adduced evidence, through the Complaint, that Michael possessed a "boot shank," he then cross-examined the defense expert and adduced evidence that a shank was a homemade tool that was sharpened up "so they can use them as weapons against inmates, guards…" (Tr. 1150-1, 1163). The prosecutor also used the allegation in the Complaint that the prohibited article was a "boot shank" to argue in closing that Michael should be sentenced to death (Tr. 1189-90).

Yet the evidence that Michael possessed a metal object commonly known as a "boot shank" was hearsay. Michael acknowledges that, pursuant to Section 490.130, a certified copy of a court document "shall be received as evidence of the acts or proceedings of such court…" Section 490.130, RSMo Cum. Supp. 2001. However, Michael asserts that the content of the Felony Complaint nevertheless contained inadmissible hearsay, and the trial court therefore should have precluded the admission of the Felony Complaint or the inadmissible portions of the Complaint. *See State v. Clevenger*, 289 S.W.3d 626, 630 (Mo.App., W.D. 2009) (Circuit court erred in overruling Clevenger's objection to portions of a certified court record that contained inadmissible

and prejudicial hearsay.) *See also State v. Sutherland*, 939 S.W.2d 373, 377 (Mo. banc 1997) (Even if a document falls under the business record exception to the hearsay rule, it will not be admissible if the underlying statement is inadmissible hearsay.)

In addition, Section 565.030, RSMo permits the admission of evidence in aggravation of punishment at the penalty phase "*subject to the rules of evidence at criminal trials*." Section 565.030, RSMo 2000 (italics added). Hearsay is generally barred from admission at trial unless it falls within a recognized exception to the hearsay rule. *Martin v. State*, 291 S.W.3d 846, (Mo.App., W.D. 2009), *citing State v. Berry*, 168 S.W.3d 527, 540 (Mo.App., W.D. 2005). "A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted." *State v. Mozee*, 112 S.W.3d 102, 107 (Mo.App., W.D. 2003), *quoting State v. Shaw*, 14 S.W.3d 77, 81 (Mo.App., E.D. 1999).

In *Berry*, *supra*, the Western District held that in the second stage of a non-capital bifurcated jury trial under Section 557.036, RSMo Cum. Supp. 2004, "hearsay that does not qualify under an exception to the rule should be excluded, as it would be in any other jury proceeding." *Berry*, 168 S.W.3d at 539-40. The court noted that although traditionally, in cases of judge sentencing as opposed to jury sentencing, hearsay is routinely permitted in the form of pre-sentencing investigations and in other ways, juries have more difficulty than judges in recognizing the danger of relying on hearsay statements. *Id.* Although the *Berry* court found trial court error in the admission of hearsay evidence indicating that the defendant had previously assaulted the murder

victim, it did not find the error prejudicial because abundant similar evidence of the defendant's "temperament" had been introduced. *Id*. at 540-41.

In the case at bar, the prosecutor read the content of the Felony Complaint to the jury, including that the prosecuting attorney of Washington County swore that there was probable cause to believe that on June 6, 2006, Michael specifically possessed a metal object commonly known as a "boot shank" in prison (St. Ex. 53, Tr. 897). The sworn statement by the Washington County prosecutor was an out-of-court statement. In fact, the statement by the Washington County prosecutor would have been based on information supplied to the prosecutor by a third party—so the specific allegation in the Complaint that Michael possessed a "boot shank" was double hearsay. "A hearsay statement contained within other hearsay evidence is admissible only where both the statement and the original hearsay evidence are within exceptions to the hearsay rule." *Sutherland, supra,* 939 S.W.2d at 377. The allegation that Michael specifically possessed an object commonly known as a boot shank, contained within the Felony Complaint, did not fit within any exception to the rule prohibiting the admission of hearsay evidence.

The Washington County prosecutor's out-of-court statement was offered in the case at bar to prove the truth of the matter asserted, i.e. that Michael in fact possessed a "boot shank" in prison and would continue to be a danger to others if given a sentence of life without parole (Tr. 1190).

2—In addition to the above, the admission of the hearsay evidence that Michael possessed a "boot shank" violated Michael's right to confront and cross-examine the witnesses against him.

"Hearsay evidence is objectionable because the person who makes the offered statement is not under oath and is not subject to cross-examination." *State v. Bowens*, 964 S.W.2d 232, 240 (Mo.App., E.D. 1998). The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42 (2004); U.S. Const., Amend. VI. The right to confront one's accusers is "an essential and fundamental requirement for a fair trial" and a bedrock procedural guarantee that applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 404, 406 (1965); U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, Sec. 18(a).

> There are few subjects upon which [the United States Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Barber v. Page, 390 U.S. 719, 721 (1968), *quoting Pointer v. Texas*, 380 U.S. at 405.

The right to confrontation "include[s] both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witnesses." *Barber*, 390 U.S. at 725. *See also*, *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974) (The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-

examination); *State v. Schaal*, 806 S.W.2d 659, 662-663 (Mo. banc 1991). The absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), quoting *Berger v. California*, 393 U.S. 314, 315 (1969).

In *Crawford*, 514 U.S. at 60, the United States Supreme Court held that the Sixth Amendment forbids the admission of "testimonial evidence" of a non-testifying witness, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *See also, State v. Justus*, 205 S.W.3d at 878. The *Crawford* Court made an historical examination and stated:

> The historical record. . .supports a. . .proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.

Crawford, 541 U.S. at 53-54; *see also, Id.*, at 59.

The United States Supreme Court chose not to define "testimonial evidence." *Id.*, at 42. The Court did state, however, that "testimonial" statements are not a casual remark to an acquaintance but generally are those statements that were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Id.*, at 51-52. In particular, the *Crawford* Court was concerned with governmental officials producing testimony with an eye toward trial. *Id.*, at 56, fn. 7.

In *State v. v. March*, 216 S.W.3d at 667, the Missouri Supreme Court reversed a conviction and remanded for a new trial because the trial court allowed the custodian of records, rather than the forensic analyst who prepared the report, to testify regarding the conclusions in a lab report. The Missouri Supreme Court held that such laboratory reports are testimonial because their "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 666, citing *Davis v. Washington*, 547 U.S. 813, 822 (2006).

In *State v. Davidson*, 242 S.W.3d 409, 417 (Mo.App., E.D. 2007), the Missouri Court of Appeals, Eastern district found an autopsy report to be testimonial. The Court stated:

> One medical examiner prepared the autopsy report at the request of law enforcement in anticipation of a murder prosecution, and the report was offered to prove the victim's cause of death. The State sought to use the report and the testimony of another medical examiner in lieu of the testimony of the medical examiner who prepared the report. When an autopsy report is prepared for purposes of criminal prosecution, as this one was, the report is testimonial. *See* [*State v.*] *March*, 216 S.W.3d at 667. The court may not admit the report without the testimony of its preparer unless he or she is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* Those requirements were not met here. Admission of the report and another medical examiner's testimony in lieu of the

testimony of the medical examiner who prepared the report violated the defendant's Confrontation Clause rights.

Davidson, 242 S.W.3d at 417; *See also Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2710, 2717 (2011)(Report of blood alcohol analysis was testimonial, and the Confrontation Clause required the analyst's in-court testimony, absent a showing that the analyst was unavailable and the defendant had a prior opportunity for cross-examination.)

Applying this analysis, the out-of-court statement contained in the Felony Complaint (that Michael possessed a boot shank in prison) was testimonial. The allegations in the Felony Complaint were made as part of the criminal case and in preparation for the later trial. *Crawford*, 541 U.S. at 51-52. The prosecutor, in filing the Felony Complaint, relied on the statement(s) of witness(es), who would have seized the alleged "boot shank" and made a statement describing the circumstances and the prohibited article, to bring the charge.

In addition, the underlying record does not demonstrate that the witness(es), who seized the prohibited article, testified and that Michael had a prior opportunity to cross-examine them. *Crawford*, 51 U.S. at 60. Nor does the record demonstrate the unavailability of these witness(es). *Id.* As such, under *Crawford*, Michael's right to confront and cross-examine the witnesses against him, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated.

Although in *Berry*, *supra*, the Court of Appeals, Western District found a hearsay violation, it did not find a confrontation violation because it held that the hearsay evidence was not testimonial (police officers testified about what the victim had

previously told them). *Id*. at 538-39. Because the *Berry* court believed it was necessary to determine whether the hearsay statements were testimonial in order to decide whether the defendant's confrontation rights were violated, that opinion at least implicitly indicates that the Confrontation Clause applies to the second stage of a bifurcated jury trial. Otherwise, there would have been no need to determine whether the statements were testimonial – the sole issue would have been whether or not the statements fell under an exception to the hearsay rule.

Michael acknowledges that some courts in other jurisdictions that have addressed the issue have held that the Confrontation Clause does not apply to the punishment phase, including the aggravation/mitigation phase of a capital sentencing hearing. See cases collected in *Summers v. State*, 148 P.3d 778 (Nev. 2006) and *People v. Banks*, 934 N.E.2d 435, 461 (Ill. 2010).[5]

Those cases are based upon the United States Supreme Court's 1949 opinion of *Williams v. New York*, 337 U.S. 241 (1949). *Williams* rejected the contention that a death sentence based on information from witnesses whom the defendant had not been permitted to confront violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Williams, supra*. But the continued viability of *Williams* is highly questionable for several reasons.

[5] But even the *Summers* and *Banks'* courts noted that evidence must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh its probative value. *Summers*, 148 P.3d at 783 n. 17; *Banks*, 934 N.E.2d at 462.

First, *Williams* was not a Confrontation Clause case. It was a due process case that was decided before the Supreme Court recognized in *Pointer v. Texas*, *supra*, that the Confrontation Clause applied to the States. Since *Williams*, the United States Supreme Court's Sixth Amendment jurisprudence has changed dramatically. E.g., *Crawford*, *supra*. Thus *Williams* is not controlling on the issue.

Second, *Williams* involved the use of a pre-sentence investigation by a judge at sentencing, and thus the court reasoned that adversarial testing of such evidence was unnecessary because sentencing was not an adversarial proceeding and the relationship between probation officers and the defendant was not one of antagonists because probation officers "have not been trained to prosecute but to aid offenders." *Williams*, 337 U.S. at 249-50. In stark contrast, the second stage of a bifurcated trial in Missouri is adversarial, and thus the reasoning used by *Williams* to reach its conclusion that due process did not require confrontation at a judge sentencing hearing is inapplicable to bifurcated jury trial in Missouri.

The United States Supreme Court has yet to address whether the Sixth Amendment right to confront witnesses applies to the punishment phase of a bifurcated trial. *But see*, *Bullington v. Missouri*, 451 U.S. 430, 436-37 (1981) ("many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing … [citation includes] right to confront witnesses…"). But many courts have questioned the continuing validity of applying *Williams* to confrontation challenges in sentencing hearings has been called into question by some courts. *E.g. United States v. Mills*, 446 F.Supp.2d 1115 (2006) (admission of testimonial statements in presentence

and postsentence investigation reports and grand jury testimony violated confrontation clause); *Rodriguez v. State*, 753 So.2d 29, 43 (Fla. 2000) (confrontation clause applies to all three phases of a capital trial); *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005) (county jail "incident reports" and prison "disciplinary reports," which contained statements written by corrections officers detailing defendant's disciplinary offenses while incarcerated, contained testimonial statements that were inadmissible under the confrontation clause; the statements in the reports amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the confrontation clause was intended to prohibit); *State v. Bell*, 603 S.E.2d 93 (N.C. 2004) (Admission of out-of-court statements made to police officer by victim of prior robbery committed by defendant, for purposes of proving prior crime of violence aggravating circumstance during penalty phase violated defendant's constitutional right to confrontation); *Rodgers v. State*, 948 So.2d 655 (Fla. 2006) (witness' statements to police officer regarding prior shooting death of defendant's prior girlfriend was testimonial in nature, and thus, admission of officer's testimony regarding witness' statements violated defendant's right of confrontation under *Crawford*, in sentencing for capital murder, where State did not establish that witness was unavailable to testify); *United States v. Corley*, 348 F.Supp.2d 970 (N.D. Ind. 2004) (summary, hearsay testimony from officers was inadequate to permit the court to determine whether the evidence of the defendant's unadjudicated criminal conduct was sufficiently reliable for the jury to consider during penalty phase of capital trial; consideration of such hearsay statements would run the risk of violating a defendant's confrontation clause rights, especially where government had not even

attempted to show, as further required by *Crawford*, that the witnesses to the unadjudicated criminal conduct would be "unavailable" for the reliability hearing); *Commonwealth v. Green*, 581 A.2d 544, 564 (Pa. 1990) (vacating death sentence and remanding for resentencing because defendant could not cross-examine state's rebuttal witness during mitigation).

Such cases that hold that a defendant has the right of confrontation during a punishment phase are supported by a plain reading of the texts of both the United States Constitution and the Missouri Constitution.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right "to be confronted with the witnesses against him." Similarly, Article I, Section 18(a) of the Missouri Constitution provides, "in all criminal prosecutions the accused shall have the right … to meet the witnesses against him face to face." The right to confront witnesses is guaranteed at every stage in the prosecution by the very terms of these constitutional provisions. Thus, if the penalty phase of a capital jury trial is part of the "criminal prosecution," then Michael had the right to be confronted "face to face" with all the witnesses against him.

It is difficult to characterize the penalty phase of a capital trial as anything other than part of a "criminal prosecution." The plain meaning of the words "criminal prosecution" suggests it includes the penalty phase of a capital jury trial. *See Black's Law Dictionary* 1258 (8th ed. 2004) defining criminal prosecution as a "criminal proceeding in which an accused person is tried" and Section 565.030.2, RSMo ("Where murder in the first degree is submitted to the trier without a waiver of the death penalty,

the trial shall proceed in two stages before the same trier."). Also, the same dictionary that Justice Scalia used to formulate his definition of "witness" in *Crawford* provides that a "prosecution" is the "institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal and *pursing them to final judgment*." *Webster's American Dictionary of the English Language*, at 45 (Emphasis added).

These definitions show that the term "criminal prosecution" is properly recognized to include all aspects of the criminal proceeding, from charge to incarceration or acquittal. Further, when the Sixth Amendment was adopted, the sentencing decision was "collpas[ed] … into the proceeding for determining guilt." *4 Blackstone, Commentaries on the Laws of England, 368 (1769)*. And Blackstone wrote, "[T]he next stage of *criminal prosecution*, after trial and conviction are past, in such crimes and misdemeanors, … is that of judgment." *Id*. at 368 (emphasis added). *Also see, Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (declaring that parole revocation hearings are outside the ambit of the Sixth Amendment because "[p]arole arises after the end of the criminal prosecution, *including imposition of sentence*.") (emphasis added); *Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development (1951)* at 54 ("The 'criminal prosecution' begins with the arraignment of the accused *and ends when sentence had been pronounced* on the convicted or a verdict of '[n]ot guilty' has cleared the defendant of the charge.")

The entire text of the Sixth Amendment also supports that confrontation should apply to both stages of a bifurcated jury trial. The Sixth Amendment sets forth a list of

rights guaranteed "[i]n all criminal prosecutions," including the right to counsel. The United States Supreme Court has held that the right to counsel applies to sentencing proceedings. *Mempa v. Rhay*, 389 U.S. 128 (1967). And since the Sixth Amendment extends both the right to counsel and to confrontation in "all criminal prosecutions," this suggests that where one right applies that the other one does too.

The exercise of the right to counsel would be futile or severely restricted if counsel is not allowed to confront and cross-examine the evidence presented at the second stage or sentencing phase of trial. And without the right to counsel, the right of cross-examination might also be futile. Thus, there is a link between the two rights. As noted by the United States Supreme Court when it ruled that the Sixth Amendment right to confrontation was applicable to the states:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. … right of cross-examination is 'one of the safeguards essential to a fair trial.'

Pointer, supra, 380 U.S. at 404. There is no reason apparent from the plain text of the Sixth Amendment for limiting the right of confrontation to the guilt phase of trial, while extending the right to counsel through all critical stages of a criminal prosecution, including sentencing.

Similarly, the United States Supreme Court has extended the right to effective assistance of counsel to sentencing phases. In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the United States Supreme Court noted that a capital sentencing proceeding is sufficiently like a trial in "its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Later, the United States Supreme Court extended the right to effective assistance of counsel to non-capital sentencing as well. *Glover v. United States*, 531 U.S. 198 (2001). It is difficult to see how counsel can be truly effective if he or she is denied the right to confront and cross-examine the witnesses against the accused.

Further, the decisions in other cases demonstrate that constitutional rights apply to a defendant in the penalty phase of a capital trial. In *Bullington*, *supra*, 451 U.S. at 436-37, this Court considered whether the defendant's right to be free from double jeopardy was violated when the State, in a retrial, sought a death sentence after a prior jury had imposed a sentence of life without parole. The Court recognized that, like the guilt-innocence phase of the trial, a capital penalty phase in Missouri includes counsel's opening statements, the presentation of testimony and evidence, instructions to the jury, and closing arguments. *Id*. at 438 n.10. The rules of discovery and procedure apply. *Id.* at 434, 435 n.4. The jury's discretion is guided by providing only two options – life without parole or death – and standards are given to guide that choice. *Id*. at 438. The

jury deliberates and then returns a formal punishment verdict, which must be unanimous. *Id*. at 434-35.

Most importantly, the State bears the burden of proving at least one aggravating circumstance beyond a reasonable doubt – the same standard used in the guilt phase – before the death penalty may be imposed. *Id*. at 441. The Court stressed that, by using this standard, the State recognizes that the defendant's interests are just as great in the penalty phase as in the guilt phase. *Id*.

The Court concluded that a capital penalty phase in Missouri "resemble[s] and, indeed, in all relevant respects [i]s like the immediately preceding trial on the issue of guilt or innocence. It [i]s itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id*. at 438. *See also Monge v. California*, 524 U.S. 721, 731-32 (1998) ("The penalty phase of a capital trial is … in many respects a continuation of the trial on guilt or innocence of capital murder."); *Caspari v. Bohlen*, 510 U.S. 383, 393 (1994), quoting *Strickland, supra*, 466 U.S. at 686-87. ("A capital sentencing proceeding ... is … like a trial in its adversarial format and in the existence of standards for decision."). By enacting a procedure that so closely "resembles a trial on the issue of guilt or innocence, … Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id*. at 444 (emphasis in original). Because the defendant had been "acquitted" of the death penalty at his first trial, he could not face the death penalty upon his retrial. *Id*. at 446.

In *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984), the Court extended *Bullington* to a case in which the trial court, rather than a jury, had made a finding that the State failed

to establish the death-eligibility factors beyond a reasonable doubt. The Court held that the "initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment." *Id*. at 211. Of course, when no finding has been made that is tantamount to an acquittal, double jeopardy is not offended by a penalty retrial. That was the situation in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), involving a hung jury. *Sattazahn* reaffirmed *Bullington*'s holding that if a capital jury returns a verdict refusing to find any aggravating circumstance beyond a reasonable doubt in a jurisdiction where this is a precondition of death-eligibility, the verdict would constitute an acquittal barring retrial. Drawing together the teachings of *Bullington* and of *Ring v. Arizona*, 536 U.S. 584 (2002), Justice Scalia's *Sattazahn* opinion expresses the parallelism of a guilt-innocence trial and of a penalty trial under procedures like Missouri's by describing the two trials combined as a trial of the "offense of murder plus one or more aggravating circumstances." 537 U.S. at 111.

The requirement that the State must prove an aggravating circumstance beyond a reasonable doubt also implies that the defendant is presumed to be "innocent" of those circumstances until the State has proved one or more of them by evidence presented in open court. The Court has held that the presumption of innocence and the principle that the State must establish each element of a crime beyond a reasonable doubt are not logically separate and distinct. *Taylor v. Kentucky*, 436 U.S. 478 (1978). Instead, the presumption of innocence is implicit within the principle, and serves as a reminder, that the State must prove the elements beyond a reasonable doubt. *Id*. at 483, 483 n.12.

And other constitutional protections follow as well. In *Specht v. Patterson*, 386 U.S. 605, 609-11 (1967), the Court confirmed that procedural safeguards attach to any hearing at which a harsher sentence may be imposed based upon "a new finding of fact … that was not an ingredient of the offense charged." Those safeguards include the right to be present with counsel, the right to confront witnesses, the right to cross-examine, and the right to present favorable evidence. *Id*. at 610.

The defendant is entitled to be present at his capital sentencing trial. *See, e.g.*, *Stincer*, 482 U.S. at 745 (a defendant is entitled to "be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"); *Davis v. Woodford***,** 384 F.3d 628, 646 (9th Cir. 2004) (a defendant has a Sixth Amendment right to be competent at the penalty phase). As in the guilt phase, the defendant's presence is essential to allow him to communicate with counsel, assist in his defense, and have the jury observe his demeanor. *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring).

As in the guilt phase, a capital defendant has a due process right to rebut any information that the jury considers and upon which it may rely in its penalty phase deliberations. In *Gardner v. Florida*, 430 U.S. 349 (1977), the trial court sentenced the defendant to death based on the contents of a presentence investigation report, portions of which were not disclosed to defense counsel. In a plurality opinion, Justice Stevens warned of the danger that erroneous or misinterpreted information could form the basis for a death sentence. *Id*. at 359. He concluded – and a majority of the Court agreed – that the defendant was denied due process because "the death sentence was imposed, at

least in part, on the basis of information which he had no opportunity to deny or explain." *Id*. at 362. This rationale for the *Gardner* decision was explicitly endorsed by Justice White, 430 U.S. at 362, 364, and Justice Brennan, *id*. at 364, as well as by the plurality opinion speaking for Justices Stevens, Stewart and Powell. *And see Tuggle v. Netherland*, 516 U.S. 10, 13 (1995) (per curiam) ("The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation. As a result, the Commonwealth's psychiatric evidence went unchallenged, which may have unfairly increased its persuasiveness in the eyes of the jury."); *Skipper v. South Carolina*, 476 U.S. 1, 9-11 (1986) (Powell, J., concurring) (defendant's right to due process was violated when he was denied the ability to present evidence that he behaved well in jail awaiting trial).

So, too, in *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994), the Court held that the defendant had been denied due process when the trial court refused to advise the jury that he would never be eligible for parole, after the State had argued his future dangerousness as the basis for a death sentence. The *Simmons* plurality opinion stressed that the defendant was prevented from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death." *Id*. at 165. And the concurring Justices observed that by refusing the defendant the "ability to meet the State's case against him," the State had denied Simmons "one of the hallmarks of due process in our adversary system." *Id*. at 175 (O'Connor, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.); *see also Kelly v. South Carolina*, 534 U.S. 246 (2002);

Shafer v. South Carolina, 532 U.S. 36 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 179 (2000) (O'Connor, J., concurring).

In addition to the above, the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972), held that in the context of parole violations, minimal due process entails, among other things, the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation). *In accord*, *State ex rel Mack v. Purkett*, 825 S.W.2d 851 (Mo. banc 1992) (parolee was denied right to due process to extent that no live witnesses were presented and he was denied opportunity to confront and cross-examine even one officer). If a parolee is generally entitled the right to confront and cross-examine witnesses, it should follow that a criminal defendant should have that same right during a jury sentencing hearing.

Michael recognizes that it is important that the sentencer receive as much information as possible in making its sentencing determination. But the quantity of evidence is not more important than the quality of evidence. The Confrontation Clause's ultimate goal is to ensure reliability of evidence. *Crawford*, 541 U.S. at 61. Also, the confrontation clause commands that reliability be assessed in a particular manner; by testing in the crucible of cross-examination. *Id*. "The Clause thus reflects a judgment, not only about the desirability of reliable evidence … but about how reliability can best be determined." *Id*. In order to ensure reliable sentencing, the confrontation clause should apply to the penalty phase of a capital jury trial. The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

The United States Constitution guarantees Michael the right "to be confronted with the witnesses against him," U.S. Const. 6th Amend., and the Missouri Constitution guarantees him the right "to meet the witnesses against him face to face." Article I, Section 18(a) of the Missouri Constitution. Yet Michael was not afforded the right to cross-examine and confront the witness(es), who alleged that he specifically possessed a "boot shank."

3—The allegations of Michael's conduct, as set forth in the Complaint, were irrelevant.

In *State v. Fassero,* 256 S.W.3d 109 (Mo. banc 2008), *Fassero* appealed his conviction for child molestation. *Id.* During the penalty phase of Fassero's trial, the State presented evidence of a 2003 Illinois indictment for criminal sexual abuse against a child. *Id.* at 118. On appeal, Fassero argued that the evidence of the Illinois indictment during the penalty phase was not legally relevant and was, therefore, inadmissible. *Id.* This Court wrote that the State could have introduced evidence from witnesses to prove that Fassero had committed the acts alleged in the indictment. *Id.* at 119. But the indictment itself was not relevant to show the jury that Fassero had committed the acts alleged in the indictment. *Id.* As such, this Court held that the indictment was not "history and character evidence" authorized by Section 557.036.3 and was inadmissible. *Id.*

The *Fassero* Court next considered whether there was a reasonable probability that the jury would have imposed a lesser sentence but for the erroneously admitted Illinois indictment. *Id.* The Court held that given the nature of the charges described in the indictment and the severity of the sentence imposed, the risk that the admission of the

indictment resulted in prejudice was high. *Id.* This Court therefore vacated Fassero's sentence and remanded for a new penalty phase. *Id.*

As stated in the *Fassero* case, the State here could have presented witnesses at the penalty phase to testify about the seizure of the prohibited article in an attempt to demonstrate to the jury that the prohibited article was a metal object commonly known as a "boot shank." But, according to *Fassero,* what the State should *not* have been allowed to do was to read the jury a Felony Complaint to establish the allegations presented in that Complaint (St. Ex. 53, Tr. 897). Although the acts underlying the Complaint are relevant to Michael's conviction for possession of a prohibited article, if shown in a legally proper manner, the mere allegations in the Complaint are not relevant. The Complaint was merely the statement of the Washington County prosecutor, who set forth what he had probable cause to believe, in anticipation of a preliminary hearing or grand jury proceeding (St. Ex. 53, Tr. 897). It did not prove anything. It did not prove Michael's actual conduct underlying the criminal conviction for possession of a prohibited article. Pursuant to this Court's decision in *Fassero*, it was not legally relevant and was not admissible.

Parts 1 – 3

The admission and use of the allegation that Michael possessed a boot shank prejudiced Michael and violated Michael's rights to due process, a fair trial, cross-examination, confrontation, and to be free from cruel and unusual punishment, as guaranteed by Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. The

Court permitted the evidence that Michael specifically possessed a "boot shank" over objection by the defense and without any cautionary instruction to the jury (Tr. 886-9, 897). The prosecutor adduced evidence, through cross-examination of the defense expert, that a shank was a homemade tool that "they sharpen … up so they can use them as weapons against inmates, guards…" (Tr. 1150-1, 1163). The use of the term "boot shank" was highly inflammatory and portrayed Michael as carrying a weapon in his sock or boot, ready to use (Tr. 1150-1, 1163, 1190). The prosecutor argued in closing:

> … but even though he's in the Department of Corrections for at least the rest of his life, what is he doing? He's committing more crimes. **He has a boot shank. He's got a boot shank.** Because, you know what he knows? There is nothing worse we can do to him. He got five years for that, and they just ran it concurrent with his life sentence. …
>
> He's going to … continue to be a danger to our society, and we have an obligation … to protect those jailers in those Departments of Corrections, those staff members, those doctors, those nurses. …

(Tr. 1189-90).

The evidence of the "boot shank" was coupled with the argument that if the jury gave Michael a life sentence, he would have nothing to lose and would harm others in prison (Tr. 1190). The jury therefore would have necessarily felt an obligation to sentence Michael to death, especially in light of the evidence concerning Michael's possession of a "boot shank" (Tr. 1190).

Given the severity of the sentence (death), the highly inflammatory nature of the allegation that Michael had a "boot shank" in prison, and the State's use of the allegation to argue for a death sentence, the risk that the admission of the allegations of the Felony Complaint resulted in prejudice was high. As in *Fassero*, *supra*, this Court, therefore, should vacate Michael's death sentences and remand the case for a new penalty phase.

ARGUMENT II

The trial court abused its discretion and plainly erred in overruling Michael's objections to the prosecutor's cross-examination of the defense expert, psychologist Dr. Shirley Taylor, in violation of Michael's rights to due process, trial by a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, because the prosecutor referred to irrelevant and prejudicial information and did not lay a foundation for his questions, in that: a) the prosecutor asked about the Rosenhan study, without demonstrating that it was an authoritative scientific text, and misstated that the "study demonstrated 100 percent error rate in [the psychological] profession;" b) the prosecutor asked about facts contained in *A Child Called "It,"* an autobiography by David Pelzer, without demonstrating that the book was an authoritative scientific text; and c) the prosecutor told the jury that Michael "did not plead guilty" (where Michael had tried to get a plea offer for sentences of life without parole and wanted to plead guilty). Michael was prejudiced and suffered manifest injustice, because the prosecutor's statements unfairly prejudiced the jury's consideration of the mitigation evidence and misled the jury to believe that Michael's psychological diagnoses were unreliable, Michael should have overcome his issues through determination, and Michael chose not to plead guilty.

The State engaged in three improper lines of attack in cross-examining defense expert Dr. Shirley Taylor. These included the State's questioning regarding a 1973

experiment called the Rosenhan study, questioning about an autobiography entitled, *A Child Called "It,"* and questions eliciting that Michael did not plead guilty.

The 1973 Rosenhan Study

During the prosecutor's cross-examination of the defense expert, Dr. Shirley Taylor, the following occurred:

> Q. …is there a test you can give me to figure out what my problems are?
>
> A. Yes. It would probably be the Milan Clinical Multiaxial Inventory or the Personality Assessment Inventory… if you answered it truthfully.
>
> Q. Bingo. You are relying on me to self-report truthfully…?
>
> A. Yes.
>
> Q. …even then, there is some error rate in your profession?
>
> A. … yes.
>
> Q. …are you familiar with the Rosenhan study?
>
> A. The Rosenhan study? Never heard of it.
>
> Q. The Rosenhan study, let me help you. It was a study where thirty people that were completely normal were asked to go to various doctors –
>
> MR. MCBRIDE: Judge, I'm going to object to the relevance of this line of questioning.
>
> MR. ZOELLNER: Judge, I'm asking her if she's familiar with it.

She's an expert.

THE COURT: It's cross-examination. The objection will be overruled.

Q. The Rosenhan study, thirty people, as part of a study at a psychological department, were asked to …report to doctors about various problems they were having. All of those thirty people came back with diagnoses. All of those were wrong. It was a study that demonstrated 100 percent error rate in your profession.

You're not familiar with that study?

A. Well, I am familiar with that. I didn't know what it was called.

Q. … So you are familiar with that study?

A. I'm familiar that there have been a number of studies like that, and that just shows you that we can all be fooled.

(Tr. 1129-1130).

The Rosenhan study was an experiment conducted in 1973 in which eight sane persons applied for admission to twelve different mental hospitals. Rosenhan, "On Being Sane in Insane Places," Science Vol. 179 (Jan. 1973), 250-8; 13 Santa Clara L.Rev. 379. After calling for an appointment, the pseudo-patient arrived at the hospital complaining that he had been hearing voices. *Id.* Immediately upon admission into the psychiatric ward, the patient ceased simulating any symptoms of abnormality. *Id.* Despite their sanity, the patients were never detected. *Id.* All were admitted, except in one case, with a diagnosis of schizophrenia, and those patients were discharged with a diagnosis of

schizophrenia in remission. *Id.* The experiment showed that once labeled schizophrenic, the patient was stuck with that label. *Id.* The experiment also showed that once a person was designated abnormal, all of his other behaviors were colored by that label. *Id.* One example given was that all of the patients took notes during their hospitalization. *Id.* But nursing records for three of the patients indicate that the writing was seen as part of their pathological behavior. *Id.* The study also noted the depersonalization of patients and other concerns with the treatment of patients in mental hospitals. *Id.* Rosenhan concluded that "we cannot distinguish the sane from the insane in psychiatric hospitals." *Id.*

A Child Called "It" by David Pelzer

During the prosecutor's cross-examination of Dr. Taylor, the following occurred:

Q. …there have been occasions, some of those good kids from those good environments grow up to commit murder, don't they?

A. Yes.

Q. And some kids that have it just like Michael, even worse, can grow up to be productive members of society, correct?

A. Yes.

Q. Are you familiar, ever heard of *A Child Called "It"?*

A. Yes.

Q. David Pelz [sic] is a child called "It," isn't he?

A. Yes.

…

MR. MCBRIDE: Objection. Relevance, Your Honor.

…

MR. ZOELLNER: … Dave Pelz [sic] is an author. He came from deplorable circumstances …[and] became a hero.

This defense has been about explaining this behavior. They can call it explaining, but what they are trying to do is say, You grow up bad, this is what happens to you. I want to give another concrete example that this woman is familiar with as an expert to show that you can have it bad and you can still make something of your life. I believe through this entire defense they've opened up this line of questioning.

MR. MCBRIDE: Well, I disagree. I object to the relevance of the use of a book from this author…. I believe that, yes, we've talked about his life because that's what we're supposed to talk about here today, but then to bring in an outside resource like that from an author I just think is irrelevant and immaterial and should be excluded.

MR. ZOELLNER: …she's an expert witness. … When you call a witness, I get to cross-examine them. I get to test their theories and knowledge.

THE COURT: I'm going to overrule the objection.

Q. Ma'am, I believe I'd asked you if you are familiar with David Pelz's [sic] *A Child Called "It"?*

A. Yes.

Q. …it's a book he wrote about his life?

A. Right.

Q. …I'm going to ask you a question at the end of this.

"A Child Called 'It' is the unforgettable account of one of the most severe child abuse cases in California history. It is the story of David Pelzer…, who was brutally beaten and starved by his emotionally unstable, alcoholic mother, a mother who played torturous, unpredictable games, games that left him nearly dead. He had to learn how to play his mother's games in order to survive because she no longer considered him a son, but a slave; and not longer a boy, but an 'it.'

Dave's bed was an old army cot in the base--"

MR. MCBRIDE: Judge, I believe we've –

THE COURT: I'm going to sustain the objection…Ask a question, Mr. Zoellner.

[BY MR. ZOELLNER:]

Q. Are you familiar with … Dave Pelzer's background?

A. Yes.

Q. …would you agree it was much, much worse than what you know about Mr. Tisius's background?

A. I don't know if it was worse.

…

Q. How many people has Dave Pelzer killed?

A. None yet that I know of.

Q. …Do you remember what became of Dave Pelzer?

A. He became an author.

Q. He became a captain in the United States Air Force, played major roles in Just Cause, Desert Storm and Desert Shield. … Does that help to refresh your memory?

A. Uh-huh.

Q. While serving in the Air Force, he worked … with youth at risk programs throughout the State of California. Do you remember that now?

A. Yes.

Q. He---

MR. MCBRIDE: Again, Your Honor, I'm going to object to this questioning.

THE COURT: Let's get to it, Mr. Zoellner.

[BY MR. ZOELLNER:]

Q. …Dave Pelzer grew up to be the type of guy every one of us should want to be despite a horrible childhood?

A. Yes.

Q. And he did it through hard work and determination.

A. Yes.

(Tr. 1154-1158).

The prosecutor's statement that Michael did not plead guilty

During the prosecutor's cross-examination of Dr. Taylor, the following occurred:

> Q. …When you were first hired, the issues confronting this man was whether he was going to be found guilty of murder and, if so, the punishment?
>
> A. He didn't care if he was found guilty of murder. He knew he was guilty of murder.
>
> Q. Okay. That may be.
>
> A. Yes.
>
> Q. But did he plead guilty? No. Right? He didn't plead guilty.
>
> …
>
> MR. MCBRIDE: I'm going to object [to] relevance… He was never offered that chance to plead guilty, and I think that's improper and highly prejudicial to bring forth …
>
> MR. ZOELLNER: He can plead guilty on his own volition, Judge, at any time.
>
> THE COURT: …the question was whether or not he had a motivation to lie, and your witness didn't answer … and that prompted the additional questions… I don't want to get too far into this.
>
> …I'm overruling the objection with the understanding that I'm going to hear a different question now.

(Tr. 1140-1141).

Preservation and Standard of Review

Trial courts have substantial discretionary latitude in controlling cross-examination. *State v. Roper*, 136 S.W.3d 891, 900 (Mo.App., W.D. 2004). On appeal, the Court reviews the trial court's rulings on the scope and extent of cross-examination for an abuse of discretion. *Embree v. Norfolk and Western Ry. Co.*, 907 S.W.2d 319, 325 (Mo.App., E.D. 1995). An abuse of discretion only exists "if a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *State v. Allison*, 326 S.W.3d 81, 89 (Mo.App., W.D. 2010). Where issues concerning cross-examination have been properly preserved, the court on appeal will only reverse upon a showing that the trial court abused its discretion and the defendant was prejudiced as a result. *Roper, supra,* 136 S.W.3d at 900.

Similarly, whether evidence is relevant and whether its probative value outweighs its prejudicial effect are matters for the trial court to decide, and the trial court's determination will only be reviewed on appeal for an abuse of discretion. *State v. Wayman*, 926 S.W.2d 900, 905 (Mo.App., W.D. 1996), *citing State v. Franklin*, 854 S.W.2d 55, 58 (Mo.App., W.D. 1993).

In the case at bar, trial counsel raised relevancy objections to the prosecutor's cross-examination regarding the Rosenhan study, *A Child Called "It,"* and the fact that Michael had not pleaded guilty (Tr. 1129, 1140, 1155-6). Trial counsel also included the issue regarding *A Child Called "It"* in his timely-filed motion for new trial (L.F. 218).

Michael's trial attorney did not include in the motion for new trial the issues regarding the Rosenhan study and whether Michael pleaded guilty. As such, Michael

respectfully requests plain error review of those issues. Missouri Supreme Court Rule 30.20.

The trial attorney also did not specifically object to the prosecutor's use of the Rosenhan study or *A Child Called "It"* by asserting that there was an insufficient foundation for the prosecutor's inquiry of the study and the book. If this Court deems that the lack of foundation objection (to the study and the book) was not preserved for appeal, counsel respectfully requests that this Court review that ground for plain error. Missouri Supreme Court Rule 30.20.

Allegedly improper comments made by the prosecutor that are not preserved for review will be reviewed only for manifest injustice under rule 30.20. *Roper, supra*, 136 S.W.3d at 900*; State v. Cole*, 71 S.W.3d 163, 170 (Mo. banc 2002). "To prevail on a plain error review, [Appellant] must show that the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice results if the error is not corrected." *Id., quoting State v. Clayton*, 995 S.W.2d 468, 478 (Mo. banc 1999). *The Rosenhan study, A Child Called "It," and the fact that Michael had not pleaded guilty were irrevelant.*

Evidence is relevant if it tends to prove a fact in issue or corroborates other relevant evidence which bears on a principal issue in the case. *State v. Wayman*, *supra*, 926 S.W.2d at 905. Even if the evidence is relevant, it should be excluded if the prejudicial effect on the jury is wholly disproportionate to its probative value, *State v. Thompson*, 856 S.W.2d 109, 111 (Mo.App., E.D. 1993), or if the prejudicial effect of the

evidence outweighs the considerations that make the evidence useful to prove an issue in the case. *State v. Meder*, 870 S.W.2d 824, 831 (Mo.App., W.D. 1993).

Relevance is commonly said to have two aspects. *State v. Freeman*, 269 S.W.3d 422, 427 (Mo. banc 2008). Logical relevance refers to the tendency "to make the existence of a material fact more or less probable." *Id.* Legal relevance refers to the weighing of the evidence's probative value against the dangers to the opposing party of "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id., quoting State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002); *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo.App., W.D. 2004).

In *State v. Winfrey*, 337 S.W.3d 1 (Mo. banc 2011), the defendant appealed a murder conviction. *Id.* at 3. During the trial, the prosecutor elicited evidence that the defendant's car was broken into at the towing lot while it was impounded. *Id.* at 11-12. No evidence was presented that the defendant was involved in the incident. *Id.* at 12. The Court held that evidence that the defendant's vehicle was broken into had no logical relevance to the case because it did not tend to prove or disprove any fact at issue in the case. *Id.* Because the evidence had the potential to mislead the jury into believing that the defendant broke into his own car despite no evidence tying him to the crime, such evidence was unfairly prejudicial to the defendant. *Id.*

Similarly, in the case at bar, the Rosenhan study had no logical relevance to the case, because it did not tend to prove or disprove any fact in issue. The Rosenhan study was conducted in 1973—28 years before Dr. Taylor initially evaluated Michael in 2001 and 37 years before Dr. Taylor testified at the most recent penalty phase trial in 2010.

Rosenhan, "On Being Sane in Insane Places," Science Vol. 179 (Jan. 1973), 250; 13 Santa Clara L.Rev. 379. The prosecutor told the jury that the study involved "thirty people… [who] were asked to … report to doctors about various problems they were having. All of those thirty people came back with diagnoses. All of those were wrong. It was a study that demonstrated a 100 percent error rate in your profession" (Tr. 1130). But actually the study consisted of eight persons and examined diagnoses and treatment that those pseudo-patients received from mental hospitals. The Rosenhan study may have cast doubt on the practices within mental institutions in 1973, but it had no logical relevance to the case at bar.

Undersigned counsel could only find two cases on the Rosenhan study, both from the state of California. In both cases, the court held that it was improper for the prosecutor to cross-examine a defense expert regarding the Rosenhan study. *See People v. Criscione*, 177 Cal.Rptr. 899, 903-4 (Cal. App., 1st Dist. 1981) (The California Court of Appeals held that the trial court erred in overruling the defense counsel's objections to the prosecutor's cross-examination of the defense psychiatrist regarding the Rosenhan study, because the prosecutor insinuated by his questions that "half of all mental illness is feigned…".) *See also People v. Visciotti*, 825 P.2d 388, 434-5 (Cal. 1992)(The Supreme Court of California held that it was improper for prosecutor to cross-examine the defense expert about the Rosenhan study, where the expert was not acquainted with the study and the prosecutor asked questions that were assertions of fact or conclusions reached in that study.)

Even assuming, *arguendo* that the Rosenhan study had some legitimate tendency to impeach the credibility or findings of the defense psychological experts, any limited probative value was outweighed by its unfair prejudicial impact.

The prosecutor's cross-examination regarding the Rosenhan study was prejudicial, because the prosecutor made untrue assertions regarding the study and thereby misled the jury (Tr. 1130). The Rosenhan study did not involve thirty people, who met with doctors, but rather involved eight people who went to mental hospitals and reported hearing voices. Rosenhan, "On Being Sane in Insane Places," Science Vol. 179 (Jan. 1973), 250-8; 13 Santa Clara L.Rev. 379. The study was of twelve mental institutions in 1973, and was not any reliable demonstration of a "100 percent error rate" in the psychological profession.

Similarly, *A Child Called "It"* is an autobiographical account of abuse that Mr. Pelzer suffered as a child. It is a single, anecdotal account that bears no relevance to Michael's childhood or how Michael's childhood issues affected him. It is not a scientific text, is not subject to the same scrutiny or peer review, and is not vested with the same trustworthiness. http://www.davepelzer.com; http://barnesandnoble.com/w/child-called-it-dave-pelzer/1100623090; http://www.goodreads.com/book/show/60748.A_Child_Called_It_.

Even assuming that David Pelzer's childhood and adult accomplishments were somehow relevant to Michael's experiences and life leading up to the crimes, the prejudicial impact of this evidence outweighed any probative value. The jury heard that David Pelzer was able to overcome severe abuse through determination. However, this

information was pulled from David Pelzer's self account of his own history and accomplishments. Certain important factors are unknown (i.e., it is not known whether David Pelzer had other support systems in his life that enabled him to become a hero, when the abuse began, if he had a positive male role model, if he also suffered from mental illness), and asking the jury to compare Michael to the "hero," David Pelzer, unfairly prejudiced the mitigation case and added confusion to the jury's assessment of the mitigation evidence. The jury was to consider Michael's life, not compare it to the life of a hero as depicted in an autobiography, in determining what weight to give the childhood abuse, neglect, and mental health issues suffered by Michael.

It was also not relevant to any issue in the case that Michael did not plead guilty.[6] The purpose of this trial was to determine whether Michael should be sentenced to life without parole or death. This trial was not an inquiry into whether or not defendant had at an earlier time pleaded guilty. *See State v. Hoopes*, 534 S.W.2d 26, 37 (Mo. banc 1976) (This Court held that the prosecutor improperly cross-examined the defendant about his confession made as part of an agreement later withdrawn by the State. The

[6] Evidence of plea negotiations or related to guilty pleas is not admissible in any criminal proceeding against the person who made the plea or offer. Missouri Supreme Court Rule 24.02. The use in trial of a withdrawn guilty plea and statements made in connection with it constitutes reversible error. *State v. Danneman*, 708 S.W.2d 741(Mo.App., E.D. 1986).

Court wrote that: "This trial was not an inquiry into whether defendant had agreed at some earlier date to plead guilty…")

In addition, the prosecutor's statement that "Michael did not plead guilty" was also misleading, especially in light of other evidence and argument presented by the State that Michael was not remorseful (Tr. 898-900, 906-10, 1140). The jury would necessarily believe from this statement that Michael had the opportunity to plead guilty but did not, in spite of the fact that he was guilty (Tr. 1140). But the truth was that Michael had, from the beginning of his case, sought an offer from the State to plead guilty in exchange for sentences of life imprisonment without parole (PCR Tr. 662-3). Michael wanted to plead guilty, but the State would not make any offer less than death (PCR Tr. 664-5). As such, it was misleading for the prosecutor to tell the jury that Michael did not plead guilty (Tr. 1140).

In addition, the Rosenhan Study and A Child Called "It" were not demonstrated to be authoritative scientific texts.

Scientific texts can be used is the examination of an expert witness only if they are authoritative. *State v. Love*, 963 S.W.2d 236, 245 (Mo.App., W.D. 1997), *citing Grippe v. Momtazee*, 705 S.W.2d 551, 556 (Mo.App., E.D. 1986). To be established as authoritative, there must be evidence that the text is generally accepted and accredited in the profession; the witness's mere familiarity with the text is not sufficient. *Id.* Particularly with regard to articles in journals, there must be a showing that the article is generally accepted and accredited because articles do not carry the same level of reliability as a standard text. *Id.*

In *Love*, Love argued that the trial court plainly erred in allowing the State to cross-examine the defense expert, Dr. Lavett, by reading portions of a journal article that criticized her work. *Id.* at 246. Love asserted that there was no foundation for the impeachment because no witness adopted the letter as being authoritative and the letter was hearsay. *Id.*

The Court of Appeals held that it was improper for the State to try to impeach Dr. Lavett's credibility with text that was not first shown to be authoritative. *Id.* The Court of Appeals did not find that manifest injustice had occurred, because the defense had brought out the issue on direct examination. *Id.*

In the case at bar, the prosecutor used the Rosenhan study and *A Child Called "It"* to question Dr. Taylor's findings that the abuse, neglect, and depression Michael suffered as a child affected his actions as an adult. Specifically, the prosecutor used the book to argue that child abuse and neglect can be overcome by will and determination and that Michael's childhood did not matter (Tr. 1154-8, 1186). And the prosecutor used the Rosenhan study to argue that it demonstrated a 100 percent error rate in the diagnoses of psychologists (Tr. 1130). These were attacks on Dr. Taylor's credibility and findings. Yet, the memoir by David Pelzer of his childhood and the Rosenhan study were not demonstrated to be authoritative. While Dr. Taylor was familiar with the book and studies similar to the Rosenhan study, that did not demonstrate that either was authoritative.

Mere familiarity of a witness with a publication or periodical does not render it authoritative. Rather, there must be some evidence of general acceptance and

accreditation of the text or the treatise within the profession. This may be conceded by the witness himself or it may be established by other experts in the field. *Gridley v. Johnson*, 476 S.W.2d 475, 481 (Mo. 1972); *Kansas City v. Dugan*, 524 S.W.2d 194, 197 (Mo.App., K.C.D. 1975). The *Dugan* case points out the problem inherent in the use of scientific periodicals in the absence of such evidence:

> No claim of clairvoyance is required to observe that the world abounds with self-appointed and self-proclaimed experts on virtually every subject that concerns or affects mankind. For this reason, and, as well, adherence to requirements which obtain to the exceptions to the hearsay rule, a party seeking to cross-examine a witness by means of an article or treatise must lay a foundation as to its authoritativeness. An article or treatise is not self-declaratory as being authoritative and, therefore, may not be indiscriminately used. *See:* Wigmore, Evidence (3rd Ed.), Vol. VI, Sec. 1694, pp. 8-9.

524 S.W.2d at 196-7.

The underlying reason for the restricted use of scientific articles applies to the case at bar and the prosecutor's use of the Rosenhan study and *A Child Called "It."* The underlying reason for the restricted use of scientific periodicals is that articles published in periodicals and journals are not vested with the same trustworthiness and reliability as that possessed by standard texts used in the practice of teaching various professions. *Grippe v. Momtazee*, 705 S.W2d at 556-7. Many published articles relate to experimentation and speculation based upon preliminary studies and are intended to

invoke comment and criticism. *Id.* at 557. Mere inclusion of an article in a journal, no matter how prestigious the journal may be, does not confer acceptance and accreditation of the opinions expressed by the author. *Id.*

In the case at bar, the Rosenhan study and *A Child Called "It"* were not demonstrated to possess trustworthiness and reliability. As in *Love, supra,* it was improper for the State to try to impeach Dr. Taylor's credibility and findings with a study and an autobiography that were not first shown to be authoritative. The prosecutor had a responsibility to use the proper procedure to cross-examine from written material. *See Barker v. Schisler*, 329 S.W.3d 726, 731-2 (Mo.App., S.D. 2011) (No expert witness testified that the American Thoracic Society ("ATS") guidelines were authoritative, so the trial court's ruling sustaining objections to the use of the ATS guidelines during cross-examination was correct.) *See also Kansas City v. Dugan, supra*, 524 S.W.2d at 197 (A one-column squib in the International Comment of the Journal of the American Medical Association lacked any foundation establishing it to be authoritative, and the trial court did not err in refusing defense counsel's permission to utilize it as a basis for cross-examination.) *See also Foster v. Barnes-Jewish Hospital*, 44 S.W.3d 432, 439 (Mo.App., E.D. 2001) (During cross-examination, counsel did not identify the text that he was reading from, paraphrased the text, and did not demonstrate that the text was authoritative; as such, trial court's rulings sustaining objections to the improper procedure were upheld).

Michael was prejudiced and suffered manifest injustice.

The trial court's rulings, which permitted the prosecutor carte blanche cross-examination, unfairly prejudiced the jury's consideration of the mitigation evidence and resulted in manifest injustice.

The mitigation case included that Michael was diagnosed with depression during his childhood and that he continued to suffer from mental problems as a young adult and in the period of time leading up to the crime (Tr. 952, 955-7, 960-2, 989, 992, 994, 1023, 1067, 1077, 1115, PCR Tr. 235-6, 246, 251-2, 270). In addition, one of the statutory mitigators submitted and argued to the jury was that at the time of the crimes, Michael acted under substantial domination of another person (L.F. 187, 195). And a critical part of the mitigation case was to show how Michael (due to beatings by his older brother, rejection by his father, and his mental health issues) was susceptible to the influence and domination of the older Roy Vance, who manipulated Michael into engaging in an ill-fated escape plan that would only benefit Roy (Tr. 630, 809-11, 851, 963, 976-7, 985-7, 1062, 1067, 1084, 1109-1111, 1115-6, 1121, PCR Tr. 235-6, 246, 251-2, 270). Another part of the mitigation evidence included that Michael was remorseful, had matured since the crimes, which occurred when he was nineteen years old, and had sought spiritual guidance and prayed for the victims (Tr. 848-9, 1078-81, 1118-9).

The prosecutor's cross-examination (including that the Rosenhan study showed a "100 percent error rate" in the psychological profession, asking the jury to compare Michael to a hero, and informing the jury that Michael did not plead guilty) misled the jury, confused the jury's assessment of the mitigation evidence, and unfairly prejudiced

the defense case for life without parole. The jury was thereby told that the diagnoses given to Michael were unreliable, Michael was capable of overcoming his childhood issues through determination, and Michael chose not to plead guilty. Because the credibility of the defense case was undermined by the prosecutor's untrue and misleading assertions, the improper cross-examination created manifest injustice and violated Michael's rights to due process, trial by a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution.

In the capital context, the need for reliable sentencing is paramount. The Eighth Amendment "requires provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.'" *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994, Souter and Stevens, J.J., concurring), *quoting Gregg v. Georgia,* 428 U.S. 153, 190 (1976). "Because the death penalty is unique 'in both its severity and its finality,' . . . we have recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. at 732. The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Michael respectfully requests that this Court reverse his sentences of death and remand the case for a new penalty phase.

ARGUMENT III

The trial court plainly erred in failing to intercede *sua sponte* when the prosecutor suggested in closing that: a) Michael forfeited his right to ask for mercy; b) the victims' families wanted death and directed a question to Michael "[t]ell me who [the victim's children] get to kill;" and c) the jurors had an obligation to impose death in order to protect prison employees and inmates from future harm, in violation of Michael's rights to due process, a trial before a fair and impartial jury, and a fair and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo. Const.,Art.I,§§10,18(a),21, because the prosecutor's arguments were improper and resulted in manifest injustice, in that the prosecutor undermined mercy as a valid sentencing consideration, implied that the victims' families wanted death and appealed to the jurors' emotions; and misinformed the jurors that they had an obligation, by their verdict, to protect others in prison with Michael from harm.

The State's closing argument

During the State's closing argument, the prosecutor: misstated the law by telling the jury that Michael forfeited the right to ask for mercy when he committed the two homicides (Tr. 1176-7); improperly implied to the jury that the death penalty for Michael was the desire of the victims' families and made an inflammatory appeal to the jurors' emotions (Tr. 1184-5, 1219); and improperly suggested to the jury that it had an obligation to impose death to protect others who may be harmed in the future (Tr. 1190, 1192, 1212, 1219).

These arguments were plainly unwarranted, must have had a decisive effect on the jury, and resulted in manifest injustice. They deprived Michael of due process, a fair sentencing trial, and to be free from cruel and unusual punishment. U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§10, 18(a), 21.

Preservation and standard of review

Counsel did not object to the arguments challenged herein, so Michael respectfully requests plain error review. Rule 30.20.

The trial court maintains broad discretion in controlling the scope of closing arguments. *State v. Edwards*, 116 S.W.3d 511, 537 (Mo.banc 2003). It abuses its discretion if it allows argument that is plainly unwarranted and has a decisive effect on the jury, that is, "when it is reasonably probable that, absent the argument, the verdict would have been different." *State v. Baumruk*, 280 S.W.3d 600, 618 (Mo.banc 2009); *State v. Newlon*, 627 S.W.2d 606, 616 (Mo.banc 1982). If counsel fails to object, the conviction will be reversed if the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. *Baumruk*, 280 S.W.3d at 618.

"Relief should rarely be granted on assertions of plain error as to closing argument because, in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." *State v. Jackson*, 155 S.W.3d 849, 853 (Mo.App., W.D. 2005), *quoting State v. Silvey*, 894 S.W.2d 662, 670 (Mo. banc 1995). Nonetheless, there is a threshold at which intentional misstatements made by a prosecutor during closing argument will amount to plain error. *Jackson*, 155 S.W.3d at 854, *citing State v.*

Baldridge, 857 S.W.2d 243, 248 n. 2 (Mo.App., W.D. 1993) (intentionally and materially misleading argument by prosecution may be grounds for reversal, even if reviewed only as plain error).

The trial judge must maintain decorum in the courtroom. *United States v. Young*, 470 U.S. 1, 10 (1985). He is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States*, 289 U.S. 466, 469 (1933). He must exercise his discretion to control prosecutorial misconduct *sua sponte*, if need be, to ensure that every defendant receives a fair trial. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App.E.D.1992).

Closing arguments in capital cases must receive a "greater degree of scrutiny" than in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). They are "particularly important in capital cases, where there are unique threats to life and liberty." *State v. Barton*, 936 S.W.2d 781,783 (Mo.banc 1996).

State's argument that Michael forfeited the right to ask for mercy

During the opening portion of the prosecutor's closing, he argued that Michael did not have a right to ask for mercy and that Michael had forfeited the right to ask for mercy when he committed the two homicides (Tr. 1176-7). This argument misstated the law, as the defense could ask for mercy on Michael's behalf. The Missouri death penalty statute provides that the jury is never compelled to impose death, such that mercy can be a legitimate reason for the jury to spare a defendant's life. Section 565.030.4, RSMo 2000. As such, no matter how horrific the crime, a defendant can ask for and a jury can give mercy.

Misstatements of law are impermissible during closing argument, and a positive and absolute duty rests upon the trial judge to restrain such arguments. *State v. White*, 247 S.W.3d 557, 563 (Mo.App., E.D. 2007), *citing State v. Blakeburn*, 859 S.W.2d 170, 174 (Mo.App., W.D. 1993). Courts should exclude those statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury. *State v. Rush*, 949 S.W.2d 251, 256 (Mo.App., S.D. 1997). The prosecutor should not undermine mercy as a valid sentencing consideration. *Wilson v. Kemp*, 777 F.2d 621, 626 (11th Cir. 1986).

In *Wilson v. Kemp*, the prosecutor read in closing a quote from *Eberhart v. State*, 47 Ga. 598, 609-10 (1873), which included the following:

> … Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. … It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor victim …

Id. at 623. The *Wilson* Court held that the argument was improper and wrote that "the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases." *Id.* at 624, *citing Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The *Wilson* Court concluded that the *Eberhart* quote was not a correct representation of the law that controls capital sentencing and its use by the prosecutor was improper. *Id.*

Likewise, in the case at bar, the prosecutor's argument that Michael forfeited his right to ask for mercy was not a correct representation of the law that controls capital sentencing and was improper.

State's argument that jury had an obligation to impose death to prevent Michael from killing again

During the opening portion of the State's closing argument, the prosecutor argued that Michael is going to continue to be a danger and "*we all have an obligation to protect jailers…, those staff members, those doctors, those nurses"* (Tr. 1190, italics added). The prosecutor also argued, "I have another request though. I'm asking you on behalf of the entire law enforcement community, *I'm asking you to protect us, protect them from people like Michael*… Michael Tisius is a wolf" (Tr. 1192, italics added). Therefore, the prosecutor argued to the jury, that the death penalty was necessary to protect others from being harmed by Michael (Tr. 1192). During the rebuttal portion of the State's closing argument, the prosecutor argued as follows:

> … Maybe [Michael] will die in prison. I think *our goal* is to make sure he's the only one that does and that no other guard, no other nurse, no other person that works there with him, no other inmate that's in that facility is going to be vulnerable to the same type of decision-making that these two officers suffered from.

(Tr. 1212-3). The prosecutor repeated again that the death penalty could stop Michael from killing again (Tr. 1219).

Michael asserts that the prosecutors' comments, considered together, improperly suggested to the jury that it had an obligation to impose death in order to protect the prison guards, inmates, and prison employees (Tr. 1190, 1192, 1212, 1219).

A prosecutor is prohibited from arguing that it is necessary to execute the defendant to protect innocent victims from death at the defendant's hands in the future. *Schoels v. State*, 966 P.2d 735, 740 (Nev. 1998); *Blake v. State*, 121 P.3d 567, 579 (Nev. 2005). A prosecutor may still argue that the defendant, if not executed, will pose a threat to the lives of others in the future or that he will kill again. *Id.* What are prohibited are arguments which, directly or by implication, place responsibility on the jury for the deaths of unknown future victims. *Id.*

In *Schoels*, the prosecutor argued that it was necessary to put Schoels to death in order to prevent him from killing others in the future. *Id.* at 739-40. The Nevada Supreme Court held that the argument was improper but declared the error to be harmless since the argument was only stated once and Schoels was not assessed the death penalty. *Id.* at 740.

Similarly, in the case at bar, the prosecutor's comments went beyond arguing that Michael would pose a danger to others if given life without parole. Instead, the prosecutor's arguments improperly suggested to the jury that it had an obligation to impose death to protect others who may be harmed in the future (Tr. 1190, 1192, 1212, 1219).

State's argument that implied that the victims' families wanted death and appealed to the jurors' emotions

During the trial, the State presented victim impact evidence from Lori Miller, who was Jason Acton's fiancé at the time of his death (Tr. 872). Her testimony included that Jason lived with her and four of her children and was a good father to her children (Tr. 872-875). During the opening portion of the State's closing argument, the State directed the following argument, concerning Lori Miller's children, at Michael:

> …Do those Miller kids … get to go kill somebody because their dad, their father figure is gone? If so, Mr. Tisius, write down the name. Tell me who they get to kill, because I bet your name would be on that piece of paper.

(Tr. 1184-5). Later, at the very end of the rebuttal portion of State's closing argument, the prosecutor told the jury that the death penalty was "an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case" (Tr. 1219).

The arguments informed the jury that the death penalty for Michael was the desire of the victims' families (Tr. 1184-5, 1219). Admission of a victim's family members' characterizations and opinions about the appropriate sentence are inadmissible under *Payne v. Tennessee*, and Sections 217.462.4, 565.030.4, and 595.209.1(4). *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997), *citing Payne v. Tennessee*, 501 U.S. 808, 830 n. 2, 833 (O'Conner, J., concurring), 501 U.S. at 835, n. 1 (Souter, J., concurring), 501 U.S. at 824-6 (1991). "[T]he jury's decision must be based solely on the evidence

presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *State v. Boyd*, 319 N.E.2d 189, 197 (N.C.1984).

In addition, the prosecutor's manner in addressing Mr. Tisius during the closing, asking him to write down who the Miller children should get to kill, and then telling him the Miller children should get to kill him was highly inflammatory (Tr. 1184-5). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." *State v. Hall*, 955 S.W.2d 198, 208 (Mo. banc 1997), *quoting Gardner v. Florida*, 430 U.S. 349, 358 (1977).

The argument improperly asked the jury to consider, in determining the appropriate sentences, that the victims' families wanted death (Tr. 1184-5, 1219). The argument directed at Michael was also an improper appeal to the jurors' emotions (Tr. 1184-5). Prosecutors must "refrain from argument which would divert the jury from its duty to decide the case on the evidence." Standards for Criminal Justice, Standard 3-5.8(d) (A.B.A.2000). Arguments for the death penalty designed to cause the jury to abandon reason in favor of passion are improper. *State v. Rhodes*, 988 S.W.2d 521, 528 (Mo. banc 1999)

The improper arguments had a decisive effect on the jurors' verdicts, violated Michael's constitutional rights, and resulted in manifest injustice.

Penalty phase is intended to provide the jury with accurate information so it can make an individualized sentencing determination based on the defendant's character and

record and the circumstances of the offense. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Here, the prosecutor infused the jurors' deliberations with a misstatement of the law and fear and emotion rather than reason. The prosecutor's misstatement of law that Michael had forfeited the right to ask for mercy undermined mercy as a valid sentencing consideration (Tr. 1176-7). The prosecutor's comments telling the jury that "we have an obligation to protect jailers, staff members, the doctors, and the nurses" suggested to the jurors that they had an obligation to impose death in order to protect others from future harm (Tr. 1190, 1192, 1212-3, 1219). Last, the prosecutor's comments that implied that the victims' families wanted death and that the Miller children should be able to kill Michael, was an improper appeal to the juror's emotions (Tr. 1184-5, 1219). Further, the arguments suggested to the jury that they were accountable to the victims' families (Tr. 1184-5, 1219).

The issue of future dangerousness is a vitally important concern for capital sentencing juries. *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting); *Jurek v. Texas*, 428 U.S. 262, 275 (1976)(Stevens, J.). The prosecutor's repeated arguments that Michael would harm a prison employee or inmate, if given life without parole, unfairly tipped the scales toward death.

By its arguments, the State violated its sacred obligation "not merely to win a case, but to see that justice is done, that guilt shall not escape nor innocence suffer." *Burnfin*, 771 S.W.2d at 914, *citing Berger v. United States*, 295 U.S. 78, 88 (1935); see also *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995). The State's repeated arguments were intended solely to arouse the jury's passion and prejudices. This was especially

detrimental in this capital case, "where there are unique threats to life and liberty." *State v. Barton*, 936 S.W.2d 781, 783 (Mo.banc 1996).

The Fifth Amendment mandates that no person shall be deprived of life, liberty or property without due process of law. Under the Sixth Amendment, the defendant is entitled to an impartial jury and to confront the witnesses against him. These rights are applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (Fifth Amendment); *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment); *see also* Mo.Const.,Art.I,Secs.10,18(a). Improper closing arguments can affect a trial's fairness, *United States v. Young*, 470 U.S. 1, 20 (1985), and thus deny the defendant due process. A prosecutor playing upon the jurors' fears and emotions during penalty phase arguments can constitute misconduct to the extent of denying the defendant a fundamentally fair sentencing hearing. *Brooks v. Francis*, 716 F.2d 780, 789 (11th Cir. 1983), *citing Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983).

Based on the above, the improper arguments had a decisive effect on the jurors' verdicts, violated Michael's constitutional rights, and resulted in manifest injustice. Michael respectfully requests that this Court vacate the death sentences and remand for a new penalty phase.

ARGUMENT IV

The trial court plainly erred in giving Instructions No. 11 and 17, sentencing verdict directors MAI-CR3d-313.48A, because Instruction 11 and 17's omission of language concerning the mitigating evidence prevented the jury from using and giving effect to the mitigating evidence in determining Michael's sentence thereby violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amends. V, VI, VIII, and XIV; Mo. Const. Art. I, §§ 10, 18(a), and21; §565.030.4(3); MAI-CR3d 313.48A, in that the sentencing verdict directors erroneously failed to include required language instructing the jury that if it "decide[d] that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment" the verdict must be life imprisonment which prejudiced Michael by excluding consideration

In a capital case, the penalty phase sentencing verdict director, MAI-CR3d 313.48A,[7] provides the jury with directions regarding the use of aggravating and mitigating evidence in returning a sentencing verdict. *See* A18. MAI-CR3d 313.48A directs the jury that if it determines the mitigating circumstances outweigh the aggravating circumstances, the jury "must" return a verdict of life imprisonment. *Id*. It further directs the jury what to do if it does not find that the mitigation outweighs the aggravation but is unable to agree on punishment: the jury is not told to return a verdict

[7] This version applies because the offense charged occurred prior to August 28, 2001. *See* Note 1, Notes on Use to MAI-CR3d 313.48A.

of death; instead, the instruction directs the jury to return a verdict stating it is unable to determine punishment and list the statutory aggravators found. *Id*.

In the present case, however, Instructions 11 and 17 omitted all mention of mitigating circumstances (L.F. 156-8, 165-6, 189-90, 197-8). *See* A13, A16, and A18 (The given instructions are included at A13 and A16, and undersigned counsel has underlined the omitted portions on a print-out of MAI-CR3d 313.48A, which is included at A18.) As it had done at the first trial, the trial court again failed to follow this Court's required pattern jury instructions. This effectively eliminated all mention of the penalty phase defense: the evidence mitigating the State's case for death. Submitting this erroneous sentencing verdict-director to the jury created manifest injustice, and the judgment of the trial court must be reversed.

Trial counsel did not object to Instructions No. 11 and 17 at the instruction conference (Tr. 879, 881). As such, Michael respectfully requests plain error review of this issue and asserts that the error created manifest injustice. Missouri Supreme Court Rule 30.20. For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict. *State v. Deck*, 994 S.W.2d 527, 540 (Mo. banc 1999), *citing State v. Doolittle*, 896 S.W.2d 27, 29 (Mo. banc 1995).

Michael acknowledges that the same error was made at Michael's first trial in 2001, and the issue was raised on appeal. *State v. Tisius*, 92 S.W.3d 751, 770 (Mo. banc 2002). This Court found no error, stressing that the issue had been rejected in *State v. Cole*, 71 S.W.3d 163, 175-6 (Mo. banc 2002), and declined to offer an extended opinion

on the issue. *Id.*

Later, in *State v. Anderson*, 306 S.W.3d 529, 534-6 (Mo. banc 2010), the issue was raised again. *Id.* A majority of this Court held that the trial court erred in failing to give the current version of MAI-CR 3d 313 but did not find reversible error. *Id.* at 536.

But Judge Wolff, joined by Judges Stith and Teitelman, dissented. *Id.* at 548. Judge Wolff wrote that clear error occurred by the use of the outdated version of MAI-CR3d 313.48A. *Id.* "The purpose of the verdict-directing instructions is to make clear to the jury the essential fact issues they are to decide." *Id*. at 549. Judge Wolff wrote the following, which is equally applicable to the case at bar:

> In this case, the verdict mechanics instruction acted like a verdict-directing instruction, setting out each possible alternative that the jury could find and the corresponding punishment. There were other instructions provided to the jury that referenced how the jury was to apply the mitigating evidence. But leaving out the alternatives that related to mitigation essentially amounted to leaving out one of the defendant's defenses during the punishment phase, which this Court has held to be prejudicial error in a verdict-directing instruction.

Id. at 549.[8]

The Court should reconsider its prior holdings and find that this error warrants

[8] Although the Court has rejected this issue, Michael raises it now given the dissent in *Anderson* and to preserve the issue for federal review.

relief. "In every criminal case, it is the trial court's duty to instruct the jury in writing 'upon all questions of law arising in the case that are necessary for their information in giving the verdict.'" *State v. Langston*, 229 S.W.3d 289, 295 (Mo.App.S.D. 2007) quoting Rule 28.02(a). "[A]n instruction that purports to cover the whole case but ignores a defense supported by the evidence is erroneous and constitutes reversible error." *State v. Foster*, 631 S.W.2d 672, 675 (Mo.App.E.D. 1982). "[T]he error is not cured by a separate instruction covering the defense. *State v. McClure*, 632 S.W.2d 314, 317 (Mo.App.S.D. 1982).

Trial court error in failing to "instruct the jury in compliance with MAI-CR instructions and applicable notes ... creates a presumption of prejudice." *State v. Davenport*, 174 S.W.3d 666, 668 (Mo.App., S.D. 2005) (failure to submit requested converse was reversible error). "Prejudice, as that term is used in connection with erroneous jury instructions, is defined as the potential for misleading or confusing the jury." *State v. Green*, 812 S.W.2d 779, 787 (Mo.App., W.D. 1991) citing *State v. Livingston*, 801 S.W.2d 344, 349 (Mo.banc 1990). Submission of incorrect MAI-CR3d instructions to a jury is "error" with "the error's prejudicial effect to be judicially determined...." Rules 28.02(c) and (f). Instructions 11 and 17 not only violated Rules 28.02(c) and (f), they violated the Eighth Amendment by eliminating directions for the jury's use of mitigating evidence.

At the penalty phase of a capital case, mitigation evidence is often a primary defense to the State's case for death. In the present case, it was the only defense. In a capital case, the "qualitative difference between death and other penalties" calls for "a

greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

It is a fair assumption that the language of §565.030.4 – rather than simply a reference to other instructions – was included in MAI-CR3d 313.48A because each of the steps in the sentencing verdict director is critical and, as *McClure* explained, putting the language of the step right into the sentencing verdict-director was the only way to insure that a jury would not overlook it. If an instruction omitting a cross-reference to a defense instruction is reversible error in a non-capital felony case, as it was in *McClure*, 632 S.W.2d at 317, then it is surely reversible error in a capital case to omit from the sentencing verdict-director language expressly setting out the defense.

Insuring that the jurors will not overlook the need to consider whether the mitigation outweighs the aggravation is precisely the kind of heightened reliability that the Eighth Amendment requires when a sentence of death is involved. There is nothing to show that omission of the requisite language concerning weighing the mitigation against the aggravation did not prejudice Michael in this case. Further, the instructions (by omitting the step that required the jury to consider and weigh the mitigation evidence) so misdirected to instruct the jury that the instructional error would have necessarily affected the verdict. The purpose of the verdict-directing instructions was to make clear to the jury the essential fact issues they were to decide. *Anderson*, 306 S.W.3d at 549 (dissent).

Omission of the defense of mitigation from the sentencing verdict-director violated the Eighth Amendment's requirement that a jury *must* consider all "relevant

mitigating evidence." *Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989). Errors preventing a jury "from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence," violate the Eighth Amendment. *Brewer v. Quarterman*, 550 U.S. 286, 288-89 (2007). Instructions 11 and 17 were prejudicially and improperly weighted toward death because they contained only directions for the use of aggravating evidence.

A similar error involving omission of language directing the jurors in the consideration and use of mitigating evidence in a capital case was before the Court in *Deck v. State*, 68 S.W.3d 418 (Mo.banc 2002). In *Deck*, language required by MAI-CR3d 313.44A was omitted. *Id*. at 423

This Court reversed. The legislature channeled the jury's discretion by requiring consideration of both aggravating and mitigating circumstances. *Id*. "[A] series of jury instructions [was] promulgated that guide the jury through these critical determinations." *Id*. The proper use of the MAI instructions was "particularly important," the Court said, when "the issue is the consideration of mitigating circumstances in a death penalty case, for the jury is never required to impose the death penalty, no matter how egregious the crime." *Id*.

In determining the prejudicial effect of the omission, the *Deck* Court noted that "the penalty of death cannot be imposed in an arbitrary and capricious manner." *Id*, citing *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The correct use of the MAI instructions is also critical because the "significant constitutional difference between the death penalty and lesser punishments'" mandates greater "need for reliability in the determination that

death is the appropriate punishment in a specific case." *Id*. citing *Beck v. Alabama*, 447 U.S. 625, 637-38, n.13 (1980).

Instructions 11 and 17 prevented the jury from giving meaningful effect to mitigating evidence. In fact, Instructions 11 and17 entirely cut out Michael's defense – the mitigation – to the State's case for death. In mentioning only aggravating evidence, and omitting all reference to mitigating evidence, Instructions 11 and 17 tilted the sentencing proceedings in favor of death. Thus, the error in Instructions 11 and 17 created manifest injustice and violated Michael's rights to due process, fair jury trial, and reliable sentencing, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution.

The sentences of death must be reversed and the case remanded for a new penalty phase trial.

ARGUMENT V[9]

By requiring that the jury unanimously find the evidence in mitigation outweighs the evidence in aggravation, Section 565.030.4(3) prevents the jury from giving meaningful consideration and effect to mitigating evidence, thereby violating *Mills v. Maryland*, 486 U.S. 367 (1988), *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and the Sixth, Eighth and Fourteenth Amendments; and the trial court erred in submitting Instructions 9 and 15, patterned on MAI-CR3d-313.44A, and denied Michael due process, a fair jury trial, and reliable sentencing, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I., Secs.10, 18(a),21, because the instructions failed to tell the jurors the State's proper burden of proof regarding the third step of the death penalty procedure, in that they failed to inform the jury that the State must prove, beyond a reasonable doubt, that aggravation outweighs mitigation or mitigation weighs less than aggravation; they prevented the jury from giving meaningful consideration and effect to mitigating evidence; and by instructing that Michael must prove to a unanimous jury that mitigation outweighs aggravation, they erroneously required Michael to establish eligibility for a life sentence and relieved the State of its burden.

[9] Michael recognizes that this Court has rejected similar claims, *e.g.*, *State v. Zink*, 181 S.W.3d 66, 74 (Mo.banc 2005), but raises it here to preserve for federal review.

Instructions 9 and 15 were patterned on MAI-CR3d 313.44A and relate to the third step of Missouri's death penalty procedure, where the jury must weigh mitigating and aggravating circumstances. *See* §565.030.4(3). The instructions stated, in pertinent part:

> …[Y]ou must … determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment....
>
> …If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life....

(L.F. 154, 163, 187, 195). *See* A20, A21. Michael objected to these instructions (Tr. 49-50, 882; L.F. 90-97) and included his objections in the motion for new trial (L.F. 214).

Reversal is warranted when an instruction is erroneously submitted and prejudice results. *State v. Taylor*, 944 S.W.2d 925, 936 (Mo.banc 1997). Prejudice results when the jury may have been adversely influenced, as when there exists the potential for misleading or confusing the jury. *State v. Caldwell*, 956 S.W.2d 265, 267 (Mo.banc 1997); *State v. Green*, 812 S.W.2d 779, 787 (Mo.App.W.D.1991).

These instructions unconstitutionally shifted the burden of proof from the State to the defense. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that any factors that the State must prove in order to enhance punishment are the equivalent of separate elements and must be proven to the jury unanimously, beyond a reasonable doubt. This Court, in applying the principles announced in *Ring*, concluded that the first

three steps of Missouri's death penalty procedure are factual findings to be "determined against defendant before a death sentence can be imposed." *State v. Whitfield*, 107 S.W.3d 253, 258 (Mo.banc 2003). The State bears the burden of proving step three beyond a reasonable doubt.

The instructions should have told the jurors that the State must prove aggravation outweighs mitigation or mitigation weighs less than aggravation. By instructing that Michael must prove to a unanimous jury that mitigation outweighs aggravation, they erroneously required Michael to establish eligibility for a life sentence and relieved the State of its burden. *Kansas v. Marsh*, 548 U.S. 163, 178-79 (2006). They eliminated the defendant's existing sentence of life imprisonment – established by the jury having convicted him of first-degree murder – and, instead, imposed on him the burden of proving his eligibility for a life sentence.

The statute and instructions violate *Mills v. Maryland*, 486 U.S. 367 (1988), *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and the Sixth, Eighth and Fourteenth Amendments. By requiring that the jury unanimously find the evidence in mitigation outweighs the evidence in aggravation, Section 565.030.4(3) prevents the jury from giving meaningful consideration and effect to mitigating evidence. This problem is carried over to Instructions 9 and 15 – they lead a reasonable juror to conclude that the only way to impose life is if the jury unanimously finds the aggravators do not outweigh the mitigators. They prevent the jury from giving meaningful consideration and effect to mitigating evidence.

This Court must vacate the sentences, since "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Boyde v. Calif*ornia, 494 U.S. 370, 380 (1990).

ARGUMENT VI

The trial court erred in sentencing Michael to death for a crime never pled in the information, thereby violating his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21, because the State never charged Michael with the only offense punishable by death in Missouri – *aggravated* first degree murder – in that the State failed to plead in the information those facts the jury had to find beyond a reasonable doubt before Michael could be sentenced to death.[10]

In *Apprendi v. New Jersey*, 530 U.S. 466,484 (2000), the Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. The Fifth, Sixth, and Fourteenth Amendments demand that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment or information, submitted to a jury, and proven beyond a reasonable doubt. *Id.* at 476,490; *Ring v. Arizona*, 536 U.S. 584,609 (2002); *United States v. Booker*, 543 U.S. 232 (2005).

Missouri's Legislature has expressly provided that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds the State has proven certain facts beyond a

[10]Michael recognizes that this Court has rejected this argument previously but raises it here to preserve for federal review.

reasonable doubt. §565.030.4(2),(3); *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo. banc 2003). To make the defendant "death-eligible," the State must plead and prove at least one statutory aggravating circumstance; prove that the evidence in aggravation warrants a death sentence; and prove that the evidence in aggravation outweighs the evidence in mitigation. § 565.030.4(2),(3); *Whitfield*, 107 S.W.3d at 258-61.

While the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime – first-degree murder punishable by either LWOP or death – the statute's "effect" is quite different. In reality, there exists in Missouri both the offense of "unaggravated" first-degree murder, for which the only authorized punishment is LWOP; and the offense of "aggravated" first-degree murder, for which the authorized punishments include both LWOP and death.

Steps one, two, and three of Missouri's death penalty procedure are, in function and effect, elements of the greater offense of aggravated first-degree murder. Thus, to pass constitutional muster, these facts must be pled in the charging document and proven beyond a reasonable doubt. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005); *State v. Fortin*, 843 A.2d 974 (N.J. 2004). The State failed to plead in the information those facts that the jury must find beyond a reasonable doubt before Michael could be sentenced to death (L.F. 36-8). It thus never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978). Counsel fully preserved this issue (Tr.87-88; L.F.334-56,704-705). The trial court's error in sentencing Michael to death for a crime never pled in the information violated Michael's rights to

jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. This Court must vacate the death sentences and impose sentences of life without parole. Alternatively, Michael requests that this Court vacate his death sentences and remand for a new penalty phase trial.

ARGUMENT VII

The trial court erred in accepting the jury's death penalty verdicts and in sentencing Michael to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21; §565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Michael's sentences to life imprisonment without parole, based on the substantial evidence in mitigation, the nature of the crimes, and the number of similar cases where death was not imposed.

Section 565.035.3, RSMo 2000, allows this Court to set aside a death sentence when it believes that (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) the evidence does not support the aggravating factors; or (3) the sentence is disproportionate to the sentences imposed in similar cases, considering the crime, the strength of the evidence, and the defendant. The purpose of proportionality review is to provide "an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences." *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo.banc 1993). It safeguards against "freakish and wanton application of the death penalty." *Id.*

In capital cases, the Eighth Amendment requires comparative proportionality review that will consider similar cases with "similar" determined by the facts of the case – regardless of sentence – including but not limited to the circumstances of the crime, the defendant, the mitigating evidence, and the aggravating evidence. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (Court did not look at whether a particular sentence was "proportionate" with regard to "a particular crime or category of crime" but instead considered whether the death sentence was excessive with regard to a particular defendant).

This Court must "compare[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978).

Presently, in Missouri, this Court has held that to determine whether a sentence of death is excessive or disproportionate in comparison to the penalty imposed in similar cases, "[s]ection 565.035.3 requires consideration of all factually similar cases… including those resulting in a sentence of life imprisonment without the possibility of probation or parole." *State v. Davis*, 318 S.W.3d 618, 643 (Mo. banc 2010), *quoting State v. Anderson*, 306 S.W.3d 529, 545 (Mo. banc 2010).

The death sentences were the result of passion, prejudice, and other arbitrary factors.

As set forth in Points I, II, and III of the brief, the prosecutor: adduced hearsay evidence that Michael possessed a "boot shank" and then emphasized that to the jury in

arguing Michael's future dangerousness; misstated the Rosenhan study and mistakenly told the jury that it demonstrated "100 percent error rate" in the psychological profession; improperly used David Pelzer's memoir, *A Child Called 'It,'* thereby asking the jury to compare Michael to a hero in a book; told the jury that Michael did not plead guilty when he knew he was guilty; argued to the jurors that they had an obligation to impose death to prevent future harm to others; suggested to the jury that the victims' families wanted Michael to be killed; and suggested to the jury that Michael had forfeited his right to ask for mercy (Tr. 897, 1129-30, 1140-1, 1154-8, 1176-7, 1184-5, 1189-90, 1192, 1212, 1219, St. Ex. 53). The combined impact of these errors resulted in the death sentences being imposed under the influence of passion, prejudice, and other arbitrary factors.

The facts of the crime support that the death sentences are excessive and disproportionate.

Michael received the death penalty when the driving force behind the escape plan did not. Roy Vance was charged with the same crime, and he received life without parole. *State v. Vance*, 111 S.W.3d 553 (Mo.App., W.D. 2003).

The evidence presented by the State and the defense demonstrated that Michael, nineteen years old, was encouraged by twenty-seven year old Roy Vance, to participate in an ill-fated escape plan that would only benefit Roy (Tr. 630, 809, 848-9, 851). Anyone with any amount of maturity would have seen through Roy Vance. Unfortunately, Michael was a very lost and misguided teenager, who could be easily taken advantage of by a con man (Tr. 991-2, 995, 1035, 1115, 1116, PCR Tr. 235, 248-9, 251-2, 258, 260, 270).

Even though Roy did not pull the trigger, he is the most culpable of the three involved in the escape plan. He directed his girlfriend to get a gun and "never let Mike out of your sight" (Tr. 749-51, 773-4, 811). He encouraged Michael, *a teenager* who others described as "shy," "scared," and "scared of his own shadow," to go into a jail and pull a gun on two law enforcement officers (Tr. 1052, 1056, 1070, 1074). He had to know that that there was a very strong likelihood that Michael would panic or that it would not end well. But he was willing to put them all at risk for his own purposes, and he is the one most responsible for the deaths of the two officers, for Tracie Bulington serving life in prison, and for Michael having been sentenced to death.

As in *State v. McIlvoy*, 629 S.W.2d 333 (Mo. 1982), the facts of the case at bar, including that Michael was naïve and a follower in executing the escape plan hatched by Roy Vance, favor this Court setting aside Michael's death sentences and remanding the case with instructions that Michael be sentenced to life without parole. In *McIlvoy*, McIlvoy was convicted of capital murder and sentenced to death. *Id.* at 334. In a separate case, Vicky Williams was tried for the same crime, found guilty of capital murder, and was sentenced by the jury to life without parole for fifty years. *Id.* at 335, *citing State v. Williams*, 611 S.W.2d 26 (Mo. banc 1981).

Vicky Williams began soliciting various young men to help her kill her husband. *Id.* Finally, in February 1979, she successfully recruited five men, including McIlvoy to travel to the St. Louis Airport, where her husband worked as a security guard, to kill him. *Id.* McIlvoy was armed with a .22 caliber rifle, and another man had a club. *Id.* When the victim stopped his truck, McIlvoy fired several rounds into the driver's side window.

Id. The other man smashed out the window with the club, and McIlvoy shot a few more times through the opening. *Id.* The victim was shot five times and was killed. *Id.*

On the night of the killing, McIlvoy had consumed a large quantity of alcohol before departing to kill the victim. *Id.* There was testimony that McIlvoy was a chronic alcoholic, had an IQ of 81, and that large amounts of alcohol and drugs would further impair his intellect. *Id.*

The morning after the murder, McIlvoy woke up and realized what he had done. *Id.* at 336. He told his wife about the killing, and they fled. *Id.* Three days later, McIlvoy telephoned the authorities and surrendered. *Id.*

This Court held McIlvoy's death sentence to be excessive and disproportionate to the penalty imposed in similar cases for the following reasons:

> …The "crime" is the same crime charged in Williams, wherein Vicky Williams was sentenced to life without eligibility for probation or parole for fifty years. The "defendant" in this case appears to be a person with only minimal juvenile criminal record, limited education (9th grade) and limited intelligence (81 IQ), substantial alcohol problems, and a person who appears to be but a weakling and follower in executing the murder scheme perpetrated by Vicky Williams. The promptness with which he telephoned St. Louis police from Dallas, Texas, and voluntarily waited for the St. Louis police to come to Dallas to pick him up, all tend to support our evaluation of defendant as a weakling and a follower.

Id. at 341-2.

Similarly, in the case at bar, Michael was a follower, had an 8th grade education, and had mental issues stemming from childhood, including depression, post-traumatic stress disorder, a history of alcohol and marijuana abuse, and dependent personality traits (Tr. 991-2, 1115, PCR Tr. 235, 248-9, 251, 270). Just two years before the crimes, when Michael was seventeen years old, he was homeless, and described by those who worked with him in social service agencies as "a desperate child, who was very helpless, very needy, very immature, not equipped to be out on his own" (Tr. 995, 1035, PCR Tr. 258). When Dr. Taylor evaluated Michael in 2001 and 2010, she found that he had an avoidant, dependant personality style which is indicative of someone "who is very needy, scared, and is looking for someone to fill the emptiness inside" (Tr. 1116). When Dr. Peterson evaluated Michael in 2003, he found that "his reasoning ability was that of a young teenager. He was quite immature…" (PCR Tr. 231-2, 260). Dr. Peterson also found that Michael had passive dependent personality traits that caused him to want to please people and align with people even if it meant that he would be taken advantage of (PCR Tr. 270).

Also similar to the facts of the *McIlvoy* case is that the mastermind of the plan received life without parole. *State v. Vance*, *surpa.*

Further, Michael confessed immediately to the police (Tr. 829-30, 848-9). And prior to the first trial of the case and thereafter, Michael wanted to plead guilty for sentences of life without parole (PCR Tr. 663-5).

Following this Court's holding in *McIlvoy*, this Court should vacate Michael's sentences and remand the case with directions that Michael be re-sentenced to life without parole.

In addition, a comparison of Michael's case to the following cases which involved more than one homicide demonstrates that the death sentences are disproportionate.

The following cases include cases where the defendant committed more than one murder and yet did not receive a death sentence:

State v. Adkins, 867 S.W.2d 262 (Mo.App., E.D. 1993) (The defendant killed his ex-wife's two children, and he was sentenced to life without parole.)

State v. Allen, 710 S.W.2d 912 (Mo.App., W.D. 1986) (The defendant killed an elderly couple, and he was sentenced to life and life without parole for fifty years.)

State v. Anderson, 862 S.W.2d 425 (Mo.App., E.D. 1993) (The defendant killed a couple while robbing them, and he was sentenced to life without parole.)

State v. Barriner, 210 S.W.2d 285 (Mo.App., W.D. 2006) (The defendant sexually attacked and killed a nineteen-year-old girl and killed the girl's grandmother, and he received life without parole.)

State v. Baskerville, 616 S.W.2d 839 (Mo. 1981) (The defendant killed a man and his sister and also killed a small child. The jury assessed life without parole for the murder of the two adults but hung on the murder of the child. The trial court sentenced the defendant to life without parole for the murder of the child.)

State v. Beck, 687 S.W.2d 155 (Mo. banc 1985) (The defendant killed his girlfriend's grandparents, and he was to two consecutive terms of life imprisonment.)

State v. Beishline, 926 S.W.2d 501 (Mo.App, W.D. 1996) (The defendant convicted of murder of elderly woman, and evidence at penalty phase included murders of two others. The defendant was sentenced to life without parole.)

State v. Buchanan, 115 S.W.3d 841 (Mo. banc 2003) (The defendant shot and killed his stepfather, aunt, and girlfriend. Pursuant to *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), his death sentences were set aside, and he was re-sentenced to life without parole.)

State v. Clark, 711 S.W.2d 928 (Mo.App., E.D. 1986) (The defendant was convicted of killing a man, Gary Decker. Evidence included that the defendant and co-defendant also killed Gary Decker's wife. The defendant was sentenced to life without parole for fifty years.)

State v. Dunn, 731 S.W.2d 297 (Mo.App., W.D. 1987) (The defendant was convicted of killing a couple, and he also tried to kill the woman's young son and daughter. He was sentenced to two consecutive terms of life without parole for fifty years.)

State v. Fleer, 851 S.W.2d 582 (Mo.App., E.D. 1993) (The defendant was convicted of killing a fifteen-year-old girl and a three-year-old boy. He was sentenced to life without parole.) *See also* "2 Life Terms in Murders of Children," *St. Louis Post-Dispatch*, Nov. 16, 1991, at 3A, available at 1991 WLNR 542710.

State v. Futo, 990 S.W.2d 7 (Mo.App., E.D. 1999) (The defendant stabbed his father, bludgeoned his mother, and shot his two brothers, and he was sentenced to life

without parole.) *See also* "Futo's Wife Tells Jury about Son, Pleads for Spouse," *St. Louis Post-Dispatch*, Mar. 14, 1993 at 6A, available at 1993 WLNR 604264.

State v. Holcomb, 956 S.W.2d 286 (Mo.App., W.D. 1997) (The defendant convicted of the murder of his girlfriend and her unborn child. He was sentenced to two consecutive sentence of life without parole.)

State v. Kelley, 953 S.W.2d 73 (Mo.App., S.D. 1997) (The defendant convicted of the murder of two of his wives, and he was sentenced to life without parole.) *See also* "Man Received 2 Life Terms for Killing Wives," *St. Louis Post-Dispatch*, Dec. 13, 1994, at 3B, available at 1994 WLNR 660600.

State v. Little, 861 S.W.2d 729 (Mo.App., E.D. 1993) (The defendant convicted of three counts of first degree murder, one count of second degree murder, as well as rape, robbery, and attempted rape. He was sentenced to nine sentences of life imprisonment, three of which were consecutive and without parole.)

State ex rel. Mayes v. Wiggins, 150 S.W3d 290 (Mo. banc 2004); *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2001) (The defendant killed his ex-wife and her fourteen-year-old daughter.)

State v. Nettles, 10 S.W.3d 521 (Mo.App., E.D. 1999) (The defendant was convicted of killing a fifteen-year-old girl and her unborn child. Evidence included that defendant was hired to do so. The defendant was not sentenced to death.)

State v. Robertson, 964 S.W.2d 883 (Mo.App., E.D. 1998) (The defendant was convicted of two counts of first degree murder and was sentenced to two consecutive

terms of life without parole.) *See also* "Judge Sentences Killer to Two Life Terms," *St. Louis Post-Dispatch*, Nov. 23, 1996, at 17, available at 1996 WLNR 798903.

State v. Rush, 872 S.W.2d 127 (Mo.App., E.D. 1994) (The defendant assaulted a woman and killed and her six and eight-year-old children. The defendant said that he killed the children to eliminate any eye witness testimony to the assault. He was sentenced to life without parole.) *See also* "Jury Backs Life Terms for Murders," *St. Louis Post-Dispatch*, Dec. 18, 1991, at 12A, available at 1991 WLNR 507020.

State v. Smith, 944 S.W.2d 901 (Mo. banc 1997) and Case No. SC77337 (The defendant killed a Reverend and his housekeeper, and he was sentenced to life without parole, pursuant to *State v. Whitfield, supra.*)

State v. Smith, 684 S.W.2d 519 (Mo.App., E.D. 1984) (The defendant was convicted of killing his landlords, and he was sentenced to two consecutive terms of life without parole for fifty years.)

State v. Thompson, 134 S.W.3d 32 (Mo. banc 2004) (The defendant killed his wife's parents, and he was ultimately sentenced to life without parole, pursuant to *State v. Whitfield*, *supra.*)

State v. Wolfe, --- S.W.3d --- (Mo.App., S.D. 2011), 2011 WL 2135637 (The defendant killed a man and his wife for their money, and he was sentenced to life without parole.)

Richard DeLong suffocated a mother, her unborn baby, and three children, and he was sentenced to life without probation or parole. Greene County Case No. 31199CF0001 (docket entries of July 3, 2001 and August 2, 2001).

In August 2011, Ryan Patterson was found guilty of three counts of first degree murder for the deaths of a pregnant woman and a fifteen-year-old boy. The jury sentenced Patterson to life without parole. Cape Girardeau County Case No. 09G9-CR02082 (docket entry of August 4, 2001).

Conclusion

The Eighth Amendment guarantees against the arbitrary and capricious imposition of a death sentence. *Gregg*, *supra*. Further, when a state statute includes "language of an unmistakable mandatory character," the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting). Under the Due Process Clause, a state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

Upholding a death sentence under these circumstances violates the Eighth Amendment's requirement of heightened scrutiny of a capital sentence. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). It also violates Michael's rights to due process, fundamental fairness, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court must set aside the death sentences previously imposed and resentence Michael to life without parole.

CONCLUSION

Based on Arguments VI and VII, Appellant respectfully requests that the Court vacate the sentences and resentence him to life without parole or remand to the Circuit Court with directions that he be resentenced to life without parole. Based on Arguments I through VI, Appellant respectfully requests that this Court vacate the sentences and remand the case for a new penalty phase trial.

Respectfully submitted,

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Jeannie Willibey, #40997
Assistant Public Defender
Office of the State Public Defender
920 Main Street, Suite 500
Kansas City, Missouri 64105-2017
Tel: (816) 889-7699
Fax: (816) 889-2001
e-mail: jeannie.willibey@mspd.mo.gov
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing, along with a disk containing the foregoing, were delivered to: Mr. Shaun Mackelprang, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 12th day of August, 2011.

_____
Jeannie Willibey

Certificate of Compliance

I, Jeannie Willibey, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,377 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using the Symantec Endpoint Protection Program. According to that program, this disk and the disk provided to the Attorney General are virus-free.

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Jeannie Willibey, #40997
Assistant Public Defender
Office of the State Public Defender
920 Main Street, Suite 500
Kansas City, MO 64105-2017
Tel: (816) 889-7699
Fax: (816) 889-2001
e-mail: jeannie.willibey@mspd.mo.gov
Counsel for Appellant

APPENDIX