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 REPLY BRIEF

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

INDEX

TABLE OF AUTHORITIES

CASELAW:

U.S. CONSTITUTIONAL AMENDMENTS:

MISSOURI CONSTITUTION:

REVISED MISSOURI STATUTES:

SUPREME COURT RULES:

MISCELLANEOUS:

JURISDICTIONAL STATEMENT

Appellant, Michael Tisius, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Appellant, Michael Tisius, incorporates the statement of facts from his original brief.

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.

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

North Carolina v. Alford, 400 U.S. 25 (1970);

Giles v. California, 554 U.S. 353 (2008);

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

Mo. Const., Art. I, Secs. 10, 18(a), 21;

Mo. S. Ct. Rules 22.01, 22.02, 22.09, 23.01, 23.03, 30.20.

Bowers, Sandys & Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497 (2004);

Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?,* 98 Colum. L. Rev. 1538 (1998).

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. Presberry, 128 S.W.3d 80 (Mo.App., E.D. 2003);

State v. Robinson, 196 S.W.3d 567 (Mo.App., S.D. 2006);

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

Mo. Const., Art. I, Secs.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).

POINT III

Appellant, Michael Tisius, incorporates Point III from his original brief.

POINT IV

Appellant, Michael Tisius, incorporates Point IV from his original brief.

POINT V

Appellant, Michael Tisius, incorporates Point V from his original brief.

POINT VI

Appellant, Michael Tisius, incorporates Point VI from his original brief.

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

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

Mo. Const., Art. I, Secs. 10, 18(a), 21; and

Section 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.

In its brief, the State argued that while appellant preserved for appeal the claim that the specific facts alleged in the Felony Complaint were hearsay, appellant did not

object that admission of the details contained within the Felony Complaint violated his confrontation rights or that the details were irrelevant (Resp. Br. 18).

Undersigned counsel acknowledges that this Court has previously held that a hearsay objection does not preserve constitutional claims related to the same testimony. *State v. Parker*, 886 S.W.2d 908, 924 (Mo. banc 1994). While defense counsel did not specifically use the word "confrontation" during his objection, he did provide notice to the trial court and the prosecutor that the State needed to bring in a witness if it desired to prove to the jury the specifics of Michael's conviction for possession of a prohibited article:

> … Judge, it's hearsay, and *the State, in a penalty phase, I think would be free to bring in a witness maybe to describe the conduct*, in particular, if the shank was attempted to be used or something like that. I think they could do that in … a death penalty phase, *but to introduce it through a document ... is hearsay.* I think the charge, the charge that he pled guilty to is what they can do through this document.

(Tr. 887-888, italics added). Defense counsel specifically complained that the State could not adduce details of the conviction through a document but rather had to call a witness to the event. In addition, defense counsel included in the motion for new trial that the admission of the hearsay violated his confrontation rights (L.F. 218). The problem with hearsay evidence is that it limits the adverse party's ability to cross-examine a witness regarding the out-of-court statement, as well as the credibility of the witness. *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981). Hearsay evidence has

been excluded in large part because it was unconfronted. *Giles v. California*, 554 U.S. 353, 364 (2008). "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots." *Id., quoting Dutton v. Evans*, 400 U.S. 74, 86 (1970).

The trial court, therefore, was on sufficient notice of the confrontation problem that is now being raised on appeal. A point on appeal must be based on the theory voiced in the objection at trial, so that the trial court can make a reasoned and informed ruling. *State v. Goins*, 306 S.W.3d 639, 647 (Mo.App., S.D. 2010). Undersigned counsel asserts that the violation of Michael's confrontation rights was voiced in defense counsel's objection, and this Court should deem this claim to be properly preserved for appeal.

Defense counsel also did not specifically use the word "irrelevant" during his objection. However, he provided notice to the trial court and the prosecutor that he was also objecting to "the additional information, *particularly in the felony Complaint – this isn't even the Information – where it states the Defendant knowingly possessed a metal object known as a boot shank...* " (Tr. 886, italics added). Defense counsel was of course aware that the trial court and prosecutor understood the following: A felony complaint begins felony proceedings and is filed in the Associate Circuit Judge Division. Missouri Supreme Court Rules 22.01, 22.02. After the felony complaint is filed, a preliminary hearing is held. Missouri Supreme Court Rule 22.09. If the trial court finds probable cause to believe that "a felony" has been committed and that the defendant committed it, the case is bound over to Circuit Judge Division and a felony information is required to be filed. Missouri Supreme Court Rules 22.09, 23.03.

When defense counsel objected to the details set forth in the Complaint and argued that "this isn't even the Information," he was obviously objecting to the relevance of the Felony Complaint, which had been superseded by the Felony Information. The trial court, therefore, was on sufficient notice of the relevance issue that is now being raised on appeal. This Court should also deem this claim to be properly preserved for appeal.

If this Court determines that Michael's claims (that admission of the details in the Felony Complaint violated his confrontation rights and were irrelevant) are not preserved for appeal, then Michael respectfully requests plain error review of the claims. Missouri Supreme Court Rule 30.20. To prevail on a plain error review, Michael 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. *State v. Clayton*, 995 S.W.2d 468, 478 (Mo. banc 1999).

In its brief, the State argued that "the specific acts of conduct stated in the complaint (and read to the jury) were admissible as admissions of the defendant" (Resp. Br. 20). Undersigned counsel respectfully disagrees. "*Alford"* pleas involve a plea of guilty without an admission of actual guilt. *North Carolina v. Alford*, 400 U.S. 25 (1970). "The essence of the *Alford* plea is that the defendant does not admit to having committed the offense." *State v. Creamer*, 161 S.W.3d 420, 426 (Mo.App., W.D. 2005). While most guilty pleas consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. *North Carolina v. Alford*, 400 U.S. at 37. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison

sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. *Id.* As such, Michael was not required to admit possessing a boot shank in order for the plea court to accept his *Alford* plea, and the Felony Complaint was therefore not admissible as an admission of the defendant.

In addition, the State did not seek to introduce the guilty plea transcript, which would have accurately demonstrated what statements were made by Michael during the plea.

Further, as set forth above, a criminal defendant, who pleads guilty to a felony, does not plead guilty to facts alleged in the complaint, as the complaint is superseded by the charging document (either an Information or Indictment) filed in the Circuit Judge Division. Missouri Supreme Court Rules 22.01, 22.02, 22.09, 23.01, 23.03.

In its brief, the State argued that Michael suffered no prejudice because evidence similar to evidence of the boot shank was otherwise admitted without objection through the testimony of the defense expert witness, Dr. Shirley Taylor (Resp. Br. 21-22). Undersigned counsel respectfully disagrees.

First, the prosecutor asked Dr. Taylor if she had been to prisons to conduct evaluations and knew what a "shank" was (Tr. 1150). The prosecutor then asked her if a shank was an item that prison inmates "sharpen up so they can use them as weapons against inmates, guards, whatever" (Tr. 1150). Those questions did not include any information about Michael possessing a shank (Tr. 1150).

The prosecutor then went on to ask Dr. Taylor whether she had been made aware that Michael was convicted of possessing a boot shank (Tr. 1151). Dr. Taylor responded

that Michael told her that he was holding a piece of metal for someone else (Tr. 1151). Dr. Taylor's testimony did *not* provide evidence to the jury that Michael possessed a boot shank, or "sharpened instrument used to harm someone" or that the prohibited item actually belonged to Michael (Tr. 1150-1151).

The prejudice in this case, where the jury was to decide between life without parole or death, stemmed from the hearsay evidence that Michael specifically possessed a "boot shank" (as opposed to a piece of metal or prohibited item). The use of the term "boot shank" was highly inflammatory and portrayed Michael as someone who carried a weapon in his sock or boot, ready to use.

In its brief, the State argued that the Felony Complaint was not testimonial, as defined by *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny (Resp. Br. 24-26). Undersigned counsel respectfully disagrees.

In attesting to the contents of the Felony Complaint, the Washington County prosecutor would have reviewed a report or statement, which was written or taken by a prison guard in anticipation of a criminal prosecution and a prison disciplinary proceeding.[1] As such, the basis for the allegations in the Felony Complaint, i.e., a prison violation report containing a witness statement, was a testimonial statement. *See Crawford, supra,* 541 U.S. at 38-39, 68 (Out-of-court statement of Crawford's wife to the

[1] There is no information in the underlying trial record of this, but undersigned counsel assumes that the prosecutor reviewed a report or reports by an employee of Potosi Correctional Center and based the complaint on his review of the report(s).

police was a testimonial statement.) The fact that the Washington County prosecutor re-wrote the testimonial statement into the Felony Complaint cannot then exempt the statement from being testimonial. The portion of the Felony Complaint being challenged herein is the testimonial statement contained within the Complaint, i.e. that Michael possessed a "boot shank."

In addition, the testimonial statement contained within the Felony Complaint, i.e. that Michael possessed a "boot shank," was used in this case to replace in-court testimony from a witness, who was present during the seizure of the prohibited item at Potosi Correctional Center.

The State argued in its brief that Michael could have confronted the witnesses against him by requesting a trial in the Possession of a Prohibited Item case (Resp. Br. 26). However, Michael was entitled to his confrontation and other constitutional rights at this trial, whether he exercised or waived them in an unrelated case. The Sixth Amendment to the United States Constitution provides that "[i]n *all* criminal prosecutions," the accused shall have the right to confront the witnesses against him. *See also In re Neff*, 206 F.2d 149, 152 (3d Cir. 1953) (A person who has waived his privilege of silence in one trial is not stopped to assert it as to the same matter in a subsequent trial or proceeding).

Last, the admission of evidence that Michael specifically possessed a "boot shank" created manifest injustice in this case. In arguing to the jury that the jury should choose death for Michael, the prosecutor argued that Michael had a boot shank and the jurors had an obligation to protect guards and other inmates (Tr. 1189-1190). As such, the

admission and use of the "boot shank" evidence in this case was especially harmful. Social science studies have confirmed that the defendant's future dangerousness is a crucial aspect of capital sentencing deliberations. *See* Bowers, Sandys &Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497, 1503 (2004) (Jurors in multi-state Capital Jury Project study reported that a "great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness"); Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?,* 98 Colum. L. Rev. 1538, 1560 (1998) (analyzing South Carolina Capital Jury Project data and concluding "[f]uture dangerousness appears to be one of the primary determinants of capital-sentencing outcomes"). "[P]robably the *bulk* of what most sentencing is all about" is a determination of the defendant's "acceptance of responsibility, repentance, character, and future dangerousness." *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting). In *Jurek v. Texas*, 428 U.S. 262, 275 (1976), Justice Stevens recognized that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

Given the highly inflammatory nature of the hearsay evidence in this case and the need for reliability in capital sentencing, the admission of the hearsay evidence resulted in manifest injustice. This Court 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.

In its brief, the State argued that Dr. Taylor's testimony opened the door to evidence that Michael did not plead guilty to the two charges of first degree murder (Resp. Br. 35). However, a review of Dr. Taylor's testimony indicates otherwise:

Q. [by prosecutor:] But [Michael] gives two different versions about whether it was a suicide attempt and who saved him from committing suicide, correct?

A. [by Dr. Taylor:] I don't know if I read that in that paragraph, but that may be so. I think there was more than one person with him at the time, his mother and a girlfriend, I believe.

Q. … it's fair to say he's describing the same suicide attempt two different ways.

A. I see.

Q. Is that correct?

Would you like to read it again?

A. Yes.

***

Q. …basically what Dr. Peterson is saying there is that Mr. Tisius told him at two different times about the same suicide attempt in two different ways?

A. I don't know if that's so or if it was just a continuation of the description.

…

Q. …the bottom line is that he described the same suicide attempt two different ways to Dr. Peterson?

A. I see that that's what Dr. Peterson is reporting, yes.

Q. And one explanation is maybe Michael didn't accurately reflect what was going on …?

A. …yes.

Q. But another explanation would be that he's lying to Dr. Peterson?

A. I wouldn't see what the motivation for lying about something like this would be.

Q. Okay.

A. People lie to get themselves out of trouble.

Q. You don't think he has a motivation to lie?

A. About a suicide attempt?

Q. Well, if it affects Dr. Peterson's opinion or your opinion, don't you think he has a motive to lie in this case?

A. I think that's the least of the indicators that we have --- well, it is not the least of. It is only another indicator that we have of the depression that he's had for many years.

Q. …Do you believe he does not have a motivation to lie?

A. Do I believe he doesn't have a motivation to lie? Here is something interesting. I—

> Q. …it's a simple question. 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.

(Tr. 1137-1140).

"Opening the door" occurs when either party introduces part of an act, occurrence, or transaction. *State v. Robinson*, 196 S.W.3d 567, 573 (Mo.App., S.D. 2006). Then, the opposing party is entitled to introduce or to inquire into other parts of the whole thereof in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary, or prove his version of the incident. *Id.*

In the case at bar, Dr. Taylor's testimony, as set forth above, did not open the door to the prosecutor's representation to the jury that Michael did not plead guilty to the crimes. Even if Dr. Taylor attempted to dodge the question as to whether Michael had a motivation to lie, the prosecutor still had no basis to emphasize to the jury that Michael did not enter guilty pleas in court. That Michael could have entered guilty pleas in the pre-trial proceedings (but did not) was completely irrelevant. Whether a defendant

pleads guilty in a capital case turns on a number of factors, which can include a defense attorney's strategy to seek a plea offer for life without parole and, absent such offer, to proceed to trial (which is what occurred here) (PCR Tr. 662-665). Further, a criminal defendant does not have a constitutional right to plead guilty, and a trial court can reject a guilty plea or a plea bargain. *State v. Creamer*, 161 S.W.3d 420, 424 (Mo.App., W.D. 2005). As such, there was no justification for the prosecutor's representation to the jury that Michael did not plead guilty (Tr. 1140-1141).

In its brief, the State argued that Appellant waived any foundational objection to the prosecutor's use of the Rosenhan Study and "A Child Called It" (Resp. Br. 36-38). The State cited cases where Missouri courts held that a foundational claim raised for the first time on appeal would not be reviewed for plain error (Resp. Br. 36). "This is because a proper foundational objection identifies the specific deficiency for the trial court in order to give the State an opportunity to remedy the deficiency" (Resp. Br. 36).

Nevertheless, undersigned counsel asserts that this Court should exercise its discretion and review this claim for plain error. Missouri Supreme Court Rule 30.20.

Missouri Courts have conducted plain error review in cases where the defendant asserted a foundational deficiency for the first time on appeal. *See State v. Presberry*, 128 S.W.3d 80, 89 (Mo.App., E.D. 2003) (Because there was no testimony that the police officers knew or had met the defendant before his arrest, the Court of Appeals determined that the trial court plainly erred in admitting the police officers' opinion that the suspect in videotapes and photographs was the defendant); *State v. Love*, 963 S.W.2d 236, 245-246 (Mo.App., W.D. 1997) (Court of Appeals determined that manifest injustice did not

result from the State's use of a journal article, which was not demonstrated to be an authoritative text); *State v. Beaver*, 784 S.W.2d 871, 872-873 (Mo.App., E.D. 1990) (Defendant asserted on appeal that the trial court plainly erred in admitting hearsay testimony of a telephone conversation for which there was an insufficient identification foundation, and Court of Appeals determined that the defendant failed to show plain error where the evidence of guilt was strong); *State v. Watling*, 211 S.W.3d 202, 207-208 (Mo.App., S.D. 2007) (The defendant objected at trial to relevance of a police officer's expertise, and the Court of Appeals reviewed the foundational objection, raised for the first time on appeal, for plain error).

Based on the above, this Court should exercise its discretion and review this claim for plain error.

With regard to the Rosenhan Study, the State argued in its brief that "there is no way of knowing whether or not the study identified by appellant is the study the prosecutor and Dr. Taylor were talking about" (Resp. Br. 38). The Office of the Attorney General represented the State at trial and brought up the Rosenhan Study (Tr.1129-1130). The Office of the Attorney General now represents the State on appeal. As such, the Office of the Attorney General would know the Rosenhan Study that that Office referred to at trial. If the Office of the Attorney General is aware of a study (different from the one cited in Appellant's brief), which proved what the Office of the Attorney General represented to the jury, then it would make sense for that Office to provide the citation for that study.

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

ARGUMENT III

Appellant, Michael Tisius, incorporates Argument III from his original brief.

ARGUMENT IV

Appellant, Michael Tisius, incorporates Argument IV from his original brief.

ARGUMENT V

Appellant, Michael Tisius, incorporates Argument V from his original brief.

ARGUMENT VI

Appellant, Michael Tisius, incorporates Argument VI from his original brief.

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.

In its brief, the State argued that Appellant's application of *State v. McIlvoy*, 629 S.W.2d 333 (Mo. 1982) was not warranted in this case, for several reasons, including (but not limited to) the following: the psychological evidence presented by the defense was primarily based on appellant's own biased and unconfronted self-reporting; and Appellant's description overstates Roy Vance's influence and understates Appellant's own desire for involvement (Resp. Br. 59-61).

First, the psychological evidence stemmed from a number of sources and was not based primarily on Michael's "own biased and unconfronted self-reporting" (Resp. Br. 60). There was extensive evidence adduced at trial that Michael had suffered psychologically since the third grade and that, as a child, he tried repeatedly to tell adults

that his older brother was abusing him, that no one cared about him, and that he needed help.

In elementary school, Michael began writing notes for his mom to find, "… Nobody loves me. … I'm not worth a cent" (Tr. 952-956). In the sixth grade, Michael wrote, "…I have no friends at all. My mom hates me. Joey hates me. My dad don't give a crap about me…" (Tr. 960).

The Hillsboro School District noticed that Michael had issues and directed Michael's mom to take him to self-esteem classes (Tr. 953, 963). The Comtrea counseling discharge summary included that Michael *reported being beaten by an older brother* and found that *Michael and his family were in need of further counseling and help* (Tr. 977-980).

During Michael's second year in the sixth grade, a court report completed when Michael's father sought custody indicated: "*Michael says Joey beats him up a lot*;" "Michael is quoted, "Things will be better living with his dad;'" and Michael's primary motivation for living with his father appears to be "a fantasy that the degree to which his father had neglected him over the years will somehow be magically compensated" (Tr. 982-5).

After Michael lived with his dad and his dad then did not want him, the sixth grade teacher, Ms. Page, warned the class not to ask Michael about what had happened (since Michael was returning to the class after having moved away for a couple of months to live with his dad) and noticed that Michael seemed very sad (Tr. 1022-1023).

Others outside the family saw Joey bully and punch Michael (Tr. 1006-1009, 1062). A family friend noticed that Michael was depressed, and Michael told her that he felt like nobody loved him (Tr. 1064-1065).

Michael was diagnosed with major depression as a child and was medicated with anti-depressants (Tr. 992; PCR Tr. 236, 248, 251).[2] Defense expert, Dr. Peterson, reviewed records of two doctors, who treated Michael for depression and prescribed anti-depressants in 1996, when Michael was fifteen years old (Tr. 917-918; PCR Tr. 251-252).

There was substantial evidence (from sources other than Michael) that Michael suffered from serious psychological difficulties, as a result of his brother's beatings and a lack of love and acceptance.

Second, Roy Vance's influence on Michael in the time period leading up to the crimes cannot be overstated.

The escape plan was Roy Vance's idea. Roy brought it up as a joke to Michael, but then it became serious (Tr. 831). After it became serious, Roy then wanted Tracie and Michael to sneak a gun into the jail and give the gun to Roy (so Roy would be the one who would pull the gun on the guards) (Tr. 842). Later, however, the plan changed

[2] Defense counsel read a portion of Dr. Peterson's previous post-conviction hearing testimony to the jury, and the parties have entered into a Stipulation and attached the transcript of Dr. Peterson's testimony. Undersigned counsel cites herein to the particular page of Dr. Peterson's post-conviction testimony.

to *Michael* pulling the gun on the guards, locking them in a cell, and then giving the gun to Roy (Tr. 843).

Roy told Tracie to get the gun (Tr. 767, 809-810). As such, Roy (through Tracie) put the gun in Michael's hands (Tr. 749-751, 773-774). Michael was unable to obtain a gun (Tr. 775-776).

Roy directed Tracie to "never let Mike out of your sight" (Tr. 811).

Roy, through Tracie, also arranged for Michael to get to the jail (Tr. 769-770, 785, 790-791). Michael did not have a car or money and was staying with Tracie at her friend's house (Tr. 736-737, 746-747, 769-770).

On the day of the murders, Roy called and spoke to Tracie and "it was going to be a go at that point in time" (Tr. 831).

After the murders, Michael repeated to himself "I'm sorry, Roy, I'm sorry, Roy" (Tr. 817).

Roy and Tracie were twenty-seven years old, and Michael was nineteen (Tr. 809, 841, 917-918).

Clearly, the evidence, as set forth above and in Appellant's brief, demonstrated that Michael was a follower in the plan hatched by Roy Vance. As such, the application of *McIlvoy, supra,* (as argued in Appellant's brief) is warranted in this case.

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,

/s/ Jeannie Willibey
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 Compliance and Service

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. The brief contains 6,044 words, which does not exceed the 7,750 words allowed for an appellant's brief.

A true and correct copy of the attached brief was sent through the eFiling system, on this 22nd day of December, 2011, to: Mr. Richard Starnes, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

/s/ Jeannie Willibey
Jeannie Willibey
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