Sup. Ct. # 86857

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

VINCENT McFADDEN,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 15
The Honorable John A. Ross, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Vincent McFadden was convicted of first-degree murder, §565.020, and armed criminal action, §571.015.[1] He was sentenced to death. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

[1] All statutory references are to the Missouri Revised Statutes, 2004 edition, unless otherwise noted.

STATEMENT OF FACTS[2]

The State charged Vincent McFadden with first-degree murder and armed criminal action, alleging that on July 3, 2002, McFadden, acting in concert with Michael Douglas, shot Todd Franklin at 6215 Lexington, in Pine Lawn, Missouri (L.F.23-24).

I. Jury Selection

The State exercised five of its nine peremptory challenges to remove African-American jurors Carrie Warford, Christine Nevills, Mary Byas, Virginia Glover, and William Sams from the jury, leaving only one African-American remaining on the panel (V.D.665-66).[3] Defense counsel challenged the strikes under *Batson v. Kentucky*[4] (V.D.666).

The State provided the following reasons for striking these jurors. Ms. Warford's cell phone rang during voir dire, and she would have difficulty being gone from work one week (V.D.669). Ms. Nevills was an employee of the St. Louis City School District; had sequestration issues; was familiar with Pine Lawn; and had lived in high crime area but never heard gunshots (V.D.666-67). Ms.

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[2] The Record on Appeal consists of a pretrial motions transcript (Pre.Tr.), a voir dire transcript (V.D.), a trial transcript (Tr.), a sentencing transcript (Sent.), a legal file (L.F.), and a supplemental legal file (Supp.L.F.).

[3] McFadden too is African-American (V.D.679).

[4] 476 U.S. 79 (1986).

Byas was struck for her acquaintanceship with a relative of a potential witness, problems with the concept of acting in concert, knowledge of Pine Lawn, and views of scientific evidence (V.D.672-73). Virginia Glover was struck because she was elderly and opinionated; lived in a high crime area but denied that it was high crime; was physically infirm; had read about the case; and had family in Pine Lawn who were victims of crime (V.D.669-70). Finally, William Sams was struck because he seemed hostile or agitated; was sleeping at times; was confused about his role as a juror; lived near Pine Lawn; and didn't want to disclose details about his three nephews in law enforcement, for safety reasons (V.D.671).

After the State offered its explanations (V.D.666-73), defense counsel argued that the reasons were pretextual (V.D.673-75,677-78). Defense counsel pointed out similarly situated white jurors who had not been struck (V.D.673-74). The defense also observed that Ms. Warford shut her phone off promptly (V.D.673). Counsel corrected the State's misstatements about Ms. Byas and Mr. Sams (V.D.674-75).

Despite this evidence, Judge Ross found that the State's explanations were sufficiently race-neutral and denied the *Batson* claim (V.D.676-77). Over objection, Judge Ross also granted the State's motion to strike for cause Shelba Townsend based on her belief that she would want to know in her heart of hearts that McFadden was guilty before she could impose a death sentence (V.D.275-76).

II. Guilt Phase Evidence: The State

At trial, the State presented the testimony of three alleged witnesses to the shooting. Because there are differences in their accounts, each will be recapped individually:

Mark Silas

After the shooting, the police immediately brought Mark Silas in for questioning, and they told him that they knew McFadden shot Franklin (Tr.38,204-205). Silas identified McFadden from a picture hanging on the wall of the police station and gave an audiotaped statement (Tr.302)[5].

In the audiotape, Silas stated that he met Franklin earlier that afternoon, and, after Franklin received a call on his pager, he helped Franklin collect a debt in the neighborhood (Ex.78-C).[6] Walking back, they met up with McFadden and another young man and walked with them, chatting amiably (Ex.78-C). As they were crossing a vacant lot, the others asked Franklin if he had a gun (Ex.78-C). When Franklin said no, the unknown man pulled out a gun and shot it twice (Ex.78-C). Franklin and Silas ran, but then looked back and realized that the gun was just a cap gun (Ex.78-C). McFadden and the other man laughed and asked them why they were running (Ex.78-C). When Franklin told the man to quit

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[5] Silas knew McFadden by his nickname, JR (Tr.33).

[6] In penalty phase, the jury would learn that Franklin had 1.08 grams of crack cocaine in his pocket (Tr.720).

playing, the man pulled out a gun and shot Franklin in the head and then twice more as Franklin lay on the ground (Ex.78-C). Silas vouched that McFadden then rolled Franklin over and shot him three times with a different gun (Ex.78-C). Silas fled to a friend's house (Ex.78-C).

At the time he testified, Silas was in custody at the St. Louis County Jail and did not want to testify (Tr.31,206). His testimony differed from his statement to the police, as follows. Silas testified that, on July 3, 2002, he and his friend Franklin went to Franklin's next door neighbor's house to ask his neighbor for work (Tr.33). The neighbor and some construction workers were there (Tr.37). McFadden and another young man came to the neighbor's yard too (Tr.33,40-41). As Silas stood nearby, Franklin spoke with the neighbor, McFadden, and the other man in the yard for about a half hour (Tr.33,36-37,60,200-202). Silas could not hear what they were saying (Tr.38). Silas heard repeated gunshots and ran without seeing who was shooting (Tr.33,38,202).

When he did not remember many of the details he gave to the police, the State was given permission to treat him as a hostile witness (Tr.39-40,48,52). The State elicited that Silas has a two-year-old child and another younger than that (Tr.198). Silas would not state in open court where he lived or worked (Tr.198).

Gregory Hazlett

Gregory Hazlett testified that he lived at 6215 Lexington, and Franklin was his next door neighbor (Tr.76). On July 3, 2002, Hazlett was working on his

house, fixing the roofing and siding; helping him were Glenn Zackary, Kent Rainey, and Gary Lucas (Tr.77).

Hazlett testified that the first thing he saw was Franklin running across the vacant lot across from Hazlett's house (Tr.78). Before that, he heard someone say, "What you running for, you bitch-ass nigger?" (Tr.80). Hazlett testified that he heard two shots, but then testified that he saw Michael Douglas – a young man he knew from the neighborhood – point and shoot at Franklin twice (Tr.80).

Franklin ran down the street but then turned around and came back to Hazlett's house (Tr.81). Franklin had worked for him in the past, and he asked Hazlett about hiring him (Tr.76). McFadden walked up and asked about getting some work too (Tr.83-84). Hazlett spoke and joked with them briefly, but noticed that Douglas was "kind of hiding" behind a bush (Tr.83-84). Having a funny feeling about the situation, Hazlett walked away (Tr.86).

Hazlett heard a shot, turned, and saw Douglas shoot Franklin (Tr.86-87). Franklin fell, and Douglas fled across the street (Tr.87). McFadden followed Douglas to the middle of the street and took the gun from him (Tr.87-88). McFadden came back in the yard, stated that he wanted to make sure Franklin was dead, and shot Franklin two more times (Tr.88). Hazlett knows Mark Silas and vouched that Silas was not present at any time during the incident (Tr.92).

When Hazlett spoke with the police that evening, he stated that he saw four people walking across the street, Franklin, McFadden, and two others he did not know (Tr.407). He told the police he did not know the first person who shot

Franklin (Tr.408). Although he told the police that he heard someone ask Franklin why he was running, he never told the police that he heard McFadden say he wanted to make sure Franklin was dead (Tr.408). Hazlett told the police that only he and Kent Rainey were working at the house that day, leaving out Zackary and Lucas (Tr.412-13). He did not want to be involved because he was afraid of McFadden (Tr.414).

Hazlett admitted that he has a conviction for unlawful use of a weapon (Tr.102). He volunteered that after Franklin's death, he heard a rumor that he was going to be killed, so he started carrying a .9 millimeter pistol (Tr.102-103,106). Defense counsel asked that they be allowed to elicit that Hazlett didn't just use the gun for self-protection but had used it in a rape and had brandished it at a child, but the court refused (Tr.103-109). Hazlett admitted that in July 2002, he was arrested in Pine Lawn on a very serious charge that carried a punishment of up to life imprisonment, but the charge was dismissed before McFadden's trial (Tr.107). He also admitted that in June 2004, he was arrested in Pine Lawn on a charge carrying a potential five year term, but it was dismissed when his girlfriend's daughter did not show up for court (Tr.107-109).

Glenn Zackary

Glenn Zackary is Hazlett's cousin (Tr.116). He fled the scene before the police arrived and did not speak with the police until ten months later (Tr.124,130, 136). In those ten months, he had talked to Hazlett about the shooting, and Hazlett told him that "Michael" and "JR" killed Franklin (Tr.136,146-47). Zackary knew

Franklin from seeing him around the neighborhood but had never before laid eyes on McFadden or Douglas and did not know their names before Hazlett told him (Tr.135,146).

Zackary told the police that he had left the roof to get more nails, when he heard the first set of shots (Tr.138-39,411). He walked around the corner and saw the second set of shots (Tr.409-10). Zackary told the police that he recognized both Douglas and McFadden and had recognized Douglas' voice even before he saw him and even knew that Douglas' mother had died (Tr.136,138,410). He told the police that he saw Douglas fire the first shots while standing over Franklin (Tr.138). Zackary identified McFadden from a photographic lineup comprised of photos taken from the St. Louis Police Department Book 'Em System (Tr.415). He initially could not identify Douglas from a lineup but did at a later time (Tr.125-27,417).

At trial, Zackary testified that he was hammering shingles on the back side of the roof, when he saw Franklin come across the vacant lot and run into Hazlett's yard (Tr.116,118-19). He saw two other young men come across the lot and into the yard (Tr.120). He overheard Franklin, Hazlett and another man talking, but didn't pay attention to what they were saying (Tr.120). One man was standing by the hedges (Tr.121).

Zackary heard what he thought were fireworks (Tr.121). He looked over the edge of the roof and saw Franklin lying on the ground seemingly in pain (Tr.122). Zackary went back to work hammering shingles on the roof but then

looked up again and saw the two men exchange something (Tr.122). One of the men walked into the yard and Zackary "saw two – heard two more loud pops … which I assumed at that point were gunshots" (Tr.122). Zackary came down off the roof and left in his car (Tr.123-24). He did not stay because he worried there would be more shooting (Tr.145-46). Like Hazlett, Zackary denied that Silas was there (Tr.141).

On cross-examination, Zackary again asserted, as he had done at least twice on direct, that he saw the incident from the roof of the house (Tr.130). But he then adopted a version of events that he had given previously, that after hearing the first set of shots, he left the roof and saw the second set of shots while kneeling behind some bushes on the ground (Tr.131-34). Upon further questioning, he stated that he was on the ground for all the shots, but then stated that he was on the ground for just the last set of shots (Tr.139). On re-direct, Zackary testified that:

> I heard two pops which, again, I thought was just Fireworks going off around me. I paid no attention. I looked over. Heard the two pops. Didn't pay any attention. I happened to glance again. The young man was laying on the ground. Then when this other young man came into the yard, I heard a second set of pops. Once again, I thought – I always thought there was just some clowning around going on. And then when I came down off the roof and came around to the southeast side of the house where I had a clear view, I observed this other set, but I had trouble distinguishing Fireworks or what – what is this? – until I saw that final set.

(Tr.144-45).

Other evidence

Franklin had been the victim and sole eyewitness of a crime committed by two brothers, Corey and Lorenzo Smith, and gave a deposition implicating the brothers eight months before the shooting, on November 5, 2001 (Tr.269-70). A few days later, Corey pled guilty and received a seven year prison term, and a month later, Lorenzo pled guilty and received a ten year prison term (Tr.271). McFadden, Corey Smith, and Lorenzo Smith were friends and fellow members of the Six Deuce Bloods, a "criminal street gang" (Tr.233-34,257-58). McFadden's nicknames were JR and Scooby Deuce (Tr.258-59). McFadden was also a friend of Michael Douglas, who lived in the neighborhood (Tr.258).

Eva Addison was McFadden's ex-girlfriend and had a child by him (Tr.257). After the shooting, before it got dark, she picked up McFadden's younger sister from her grandmother's house, several blocks from the shooting (Tr.260,265). She then picked up McFadden about three or four blocks from the scene of the shooting (Tr. 261,265). They drove to McFadden's mother's house at 3223 Magnolia (Tr.261).

Evelyn Carter is Eva's cousin (Tr.279). She vouched that she and McFadden were close friends and spoke every day, from about July 2002 through 2003 (Tr.280,286-87). McFadden never mentioned any problem he had with Franklin or any plan to harm Franklin (Tr.287-88). But the day after the shooting, Carter spoke with McFadden on the phone and asked him if he shot Franklin

(Tr.282). He got quiet and responded that he felt good about it and commented that Franklin was a snitch (Tr.282-84,288). McFadden said that there had been a situation with his "homies" but did not elaborate (Tr.283,288). At the end of the conversation, McFadden stated that he was going to go celebrate and asked her if she wanted to come along (Tr.283,288).

An autopsy revealed that Franklin died from five gunshot wounds to the back of his body – one to top of the head, one to the chest on the right side, and three to his back (Tr.310-12,322-23). Five bullets, collected from the scene or from Franklin's body, were examined; all had similar characteristics and could have been fired from the same gun, but two definitely were (Tr.183,237,240-41). A cigar found on the sidewalk, eight to ten feet from Franklin, had a fingerprint matching McFadden's right thumb print (Tr.155,163,190,213,216).

McFadden moved to California for several months (Tr.354). In May, 2003, he was arrested in St. Charles, Missouri, where he had been staying at a motel under a false name (Tr.253,256).

II. Guilt Phase Evidence: The Defense

McFadden presented an alibi defense through his mother (Theresa Brown), younger sister (Rochelle Brown), and phone records. At the time of the shooting, McFadden was living most of the time at an apartment just several houses away from 6215 Lexington (Tr.363,364). That morning, Theresa saw him coming out of his apartment building and spoke with him briefly (Tr.355,366). McFadden

also had a key to Theresa's house at 3223 Magnolia, which was a 20-27 minute drive from the area of 6215 Lexington (Tr.364,379).

At the time of the shooting, Rochelle and Theresa were at McFadden's grandmother's house at 6209 Dardanella, around the corner from the scene of the shooting (Tr.337-39,362). Rochelle heard the gunshots, then sirens, saw detectives run past the house, and left to see what had happened (Tr.340-43,356,368). She took a cell phone, because Theresa instructed her to call once she knew what had happened (Tr.344). Rochelle walked to the scene in just a few minutes (Tr.344). A crowd had already formed; she saw Franklin's body and the police already there taking pictures (Tr.345,353-54). She spoke with her mother, who had stayed at the house with her cell phone and a cordless phone (a land line) (Tr.346-47,370).

After speaking with Rochelle, Theresa called her own house, at 3223 Magnolia (Tr.372). She used the cordless phone, because she had another caller on her cell phone line (Tr.374). She wanted to know that McFadden was safe, because so many young people had been getting shot (Tr.373). McFadden answered the phone, and Theresa told him to stay where he was (Tr.373).

Thirty to forty minutes after Theresa spoke with McFadden, she left the house (Tr.374). Sometime after that, Eva picked Rochelle up from her grandmother's house and took her to 3223 Magnolia, where they met up with McFadden (Tr.348-50).

The cell phone records indicate that at 6:38 that evening, Theresa and Rochelle spoke for two minutes (Tr.396-99). They spoke again at 6:49 for one minute (Tr.399). A few minutes later, they spoke for another two minutes (Tr.401). The first call made from the cell phones to the Magnolia address was at 8:52 p.m. (Tr.403). The phone company does not maintain record of local calls from land lines such as the cordless phone at McFadden's grandmother's house (D.Ex.F).

III. The Verdict

The jury found McFadden guilty of first degree murder and armed criminal action (Tr.530).

IV. Penalty Phase Evidence: The State

The State presented testimony from Franklin's mother about how her son's death had affected her and other family members (Tr.707-17). It also presented evidence that McFadden had two prior convictions for first-degree assault, two for armed criminal action, and one for unlawful use of a weapon (Tr.561-63). He received a thirty year sentence for those crimes (Tr.564-65). He also had a conviction for tampering second degree (class A misdemeanor); stealing under $150; possession of controlled substances; unlawful use of a weapon; and assault in the third degree (class A misdemeanor) (Tr.565-71).

Defense counsel objected to all evidence of unadjudicated bad acts, namely, evidence regarding the alleged murder of Leslie Addison, witness tampering, and drug trafficking (Tr.536-40). The court overruled the objection (Tr.538-39). The

State presented six witnesses and more than thirty exhibits regarding the murder of Leslie Addison and played a videotape of the crime scene (Tr.648-49). The State presented evidence that on May 15, 2003, McFadden told Eva that she and Leslie were banned from Pine Lawn (Tr.577,690). He left but returned a short while later and repeated that they must leave (Tr.580,691). Leslie said something back to him, and McFadden threatened that she would be going to see her deceased brother that night (Tr.580-81). He drove away and Leslie started walking down the street (Tr.581). Eva ran after her and warned her that McFadden was coming, but Leslie waved her off (Tr.583-84). Eva hid behind some bushes and watched Leslie and McFadden argue (Tr.583-85,598-99,604). McFadden then shot Leslie several times (Tr.585-86). Leslie died from a gunshot to the head (Tr.668-69,676).

About two weeks later, McFadden called his mother's house from jail, with help from his friend Slim, but Eva answered the phone (Tr.696). Slim spoke into the phone, but McFadden was in the background telling him what to say, and in return, Eva responded to McFadden through Slim. McFadden asked Eva to sign papers saying that he hadn't done it and saying that she would not testify against him (Ex.148-C, p.3). He told Eva that he "can't stop nothing while I'm in jail" (Ex.148-C, p.8) and that if others want to get to her, he knows where she is (Ex.148-C, p.20).

After the taped call, Eva gave a friend her phone number to give to McFadden so he could call her (Tr.695). Eva accepted ten calls from McFadden,

and some lasted up to a half hour (Tr.696). Even after the alleged threats, Eva visited McFadden in jail (Tr.696). She would say that she was visiting one inmate, but then actually meet with McFadden (Tr.696). She claimed she only visited him to find out why he had killed her sister and that she stopped visiting once McFadden admitted that he killed Leslie, writing, "I'm sorry for killing your little sister. I still love you and my son and your family" (Tr.697,704).

When McFadden was arrested at the motel, he had a plastic bag containing seventeen smaller bags of crack cocaine in his pants pocket (Tr.628-29). McFadden has a large tattoo on his back of the cartoon character Scooby Doo holding a gun, with the words, "Lawn Life" and "Ride or Die" (Tr.744-46).

V. Penalty Phase: The Defense

For the first three years of his life, McFadden lived with his mother at his grandmother's house, but rarely saw his mother (Tr.854-55,936). He was moved back and forth between other relatives (Tr.854-55,879,890,898, 936-37). His aunt Fay would keep McFadden for days at a time (Tr.890,937). Sometimes, she wouldn't know where his parents were or when they'd be coming back for him (Tr.890). He would stay with his father's mother for months at a time (Tr.899,937).

When McFadden was three, his mother moved out with his two younger sisters but left him behind and he stayed with his mother and sisters only on weekends (Tr.856,878). When McFadden was in third grade, the school district learned that McFadden's grandmother did not have custody, so he was forced to

move in with his mother so he could go to school in that district (Tr.856,858,878-79,962,975).

McFadden's mother worked two jobs, from 7:00 in the morning until 12:30 at night (Tr.858,936). At times, the children were left alone (Tr.891). One time, a neighbor called McFadden's grandmother to report her fear that his sisters (one aged four and the other still in a walker) were left alone and neglected (Tr.881-82). One weekend, when McFadden was still fairly young, he called his grandmother and asked if she would pick them up, because they were alone and hungry; although McFadden could have walked to his grandmother's house, he did not want to leave his sisters alone (Tr.882,937; also 922). McFadden always looked out for his younger sisters (Tr.883).

McFadden rarely saw his father, who was absent for the first six months of McFadden's life, in the military in Germany, and when he returned, had a rocky relationship with McFadden's mother (Tr.854,937,920-21). They split up when McFadden was about eight (Tr.921,937). After the split, McFadden did not have much contact with his father (Tr.892,921). McFadden's father had a bad drinking problem, which upset McFadden (Tr.859-60,898). His father did not make an effort to see McFadden and did not support McFadden financially (Tr.859).

In third grade, McFadden started having problems in the neighborhood (Tr.860). McFadden was a short, skinny child, a "real little guy" and got picked on and beaten up because he was so small (Tr.860-61,892-93,900,913-14). He was very protective of his sisters, and that caused problems too (Tr.893,900).

McFadden started using marijuana and drinking alcohol when he was eleven or twelve (Tr.946,958-59). He was spending a lot of time on the streets and began switching schools due to behavior problems (Tr.845,963-64,967,975). Growing up, McFadden had six friends who were killed in the Pine Lawn area (Tr.867).

McFadden entered the juvenile court system at fourteen, when his mother brought him in, stating that she couldn't control him (Tr.829). She asked for services to help McFadden, such as a Big Brother program, so McFadden would have a good male role model (Tr.842,864). She had first asked Vincent's father for help, but he wouldn't (Tr864). He was placed under supervision (Tr.842).

The problems at home continued until McFadden pointed a shotgun at his mother (Tr.830,42-43). He was placed on probation for six months and was assigned a probation officer (Tr.828, 830,841-42). He had to meet with his probation officer weekly, obey curfew, go to school and obey his mother and probation officer (Tr.833-34). But still, McFadden continued to have problems with his mother, not following her rules or curfew (Tr.974).

As a result, the probation officer tried placing McFadden with his father (Tr.835-36,846,976). McFadden's father spoke as if he were very concerned about his son's welfare, but provided no supervision or discipline (Tr.836,844,850, 923).

McFadden looked up to his uncle Don, and Don tried to spend time with him (Tr.905-906,912,916,918). When Vincent was thirteen, he asked Don if he

could live with his family (Tr.906,914-15). Don agreed, but McFadden's mother refused, because she wanted him to help care for his two younger sisters (Tr.907,915,945).

Yet instead, McFadden was sent to Tarkio, a home for delinquent boys (Tr.837). McFadden stayed there about a year, but was released from the program after budget cuts hit and it didn't seem he was progressing in the program (Tr.838,977).

McFadden returned from Tarkio with a much better attitude and got a job at McDonald's (Tr.840). He worked until late at night but had no way to get home (Tr.840,866). Several times when he was walking home late at night, he was stopped by the police (Tr.840). He did not want to get into trouble, so he had to quit the job (Tr.840). He really tried, because he did not want to be sent back into residential treatment (Tr.851-52,976-77).

After Tarkio, McFadden was sent back to live with his mother, her boyfriend, and McFadden's two sisters (Tr.838). The boyfriend did not want a boy in the house, so McFadden was forced out (Tr.839,865). He went to live with his grandmother or father (Tr.839,866). Because his Aunt Lisa was very sick, his uncle Don could not spend time with him anymore (Tr.908-909,918).

McFadden talked about how much he loved Eva and was very excited when she became pregnant (Tr.724-25). He wanted a better life and wanted to become established (Tr.725). McFadden was a loving, caring father to his young son and

loved to spend time with him (Tr.868,894,902). He supported his son financially (Tr.869).

McFadden started using cocaine and marijuana heavily and found himself in trouble again (Tr.978-79). He was placed on probation but repeatedly tested positive for drugs (Tr.979-80,982). He was placed in a variety of drug treatment programs but could not complete any (Tr.979-81,988).

In August 2001, McFadden was shot in the knee (Tr.868,982). He became depressed and fearful but would not seek psychiatric help (Tr.732-33). McFadden stopped reporting to his probation officer in spring 2002 (Tr.983). In July 2002, at age twenty-two, McFadden was charged with Franklin's murder (Tr.853).

VI. Death Verdict

The jury recommended a death sentence (Supp.L.F.32). It found four aggravators for McFadden's two prior assault and two prior armed criminal action convictions, and it found that the crime involved depravity of mind (Supp.L.F.32-33). It rejected the aggravator that the crime was committed because Franklin was a witness in a prior prosecution (Supp.L.F.32-33). The court imposed death (Sent.Tr.). Notice of appeal was timely filed (L.F.558).

POINT I

The trial court clearly erred in overruling defense counsel's *Batson*-based objections to the State's use of peremptory strikes to remove jurors Carrie Warford, Christine Nevills, Mary Byas, Virginia Glover, and William Sams from the venire panel, in violation of Vincent McFadden's and the stricken jurors' rights to equal protection and McFadden's rights to due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution, because McFadden challenged the strikes, identified the stricken panel members as African-American, and established that the State's proffered reasons for the strikes – such as a cellphone ringing, difficulty missing work, employment with the St. Louis School District, never hearing gunshots while living in a high crime area, familiarity with Pine Lawn, acquaintanceship with a relative of a potential witness, having made unwise investment in property, confidence that physical evidence such as fingerprints will prove guilt, discomfort with revealing private information - were merely pretextual, in that 1) the prosecutor failed to strike similarly situated white jurors; 2) failed to strike white jurors who, logically, seemed less favorable for the State than black jurors who was removed; 3) engaged in disparate questioning depending on the jurors' race; 4) failed to question on the purported area of concern; and

5) adopted justifications that were not logically relevant to the case or that were not supported by the record.

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

Miller-El v. Dretke, 125 S.Ct. 2317 (2005);

State v. Edwards, 116 S.W.3d 511 (Mo.banc 2003);

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

Mo.Const.,Art.I,Secs. 2,10,18(a),21.

POINT II

The trial court erred and clearly abused its discretion in excluding evidence of the nature of the charges that had been pending against Gregory Hazlett but that were dismissed prior to trial, in violation of McFadden's rights to due process, to confront and cross-examine the witnesses against him, to present a defense, to a fair trial, 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, 14, 18(a) and 21 of the Missouri Constitution, because Hazlett opened the door to the testimony and the evidence directly related to his credibility as a crucial State witness, in that Hazlett attempted to explain away his prior conviction by testifying that he only carried a gun because he heard rumors after Franklin's death that he too would be killed, thus implying that he only carried it for self-protection, yet the State had alleged that Hazlett used the gun in a rape and that he had brandished it at a woman. The jury was entitled to learn and consider that information in assessing Hazlett's credibility and bias as a key State witness.

Pointer v. Texas, 380 U.S. 400 (1965):

State v. Lingar, 726 S.W.2d 728 (Mo.banc 1987):

State v. Odom, 353 S.W.2d 708 (Mo.1962);

State v. Weaver, 912 S.W.2d 499 (Mo.banc 1995)

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

Mo.Const.,Art.I,Secs. 10,14,18(a),21.

POINT III

The trial court plainly erred and abused its discretion in admitting evidence and permitting the State to argue in guilt phase that McFadden was a member of a "criminal street gang," that he may have tampered with and threatened witnesses, and that he had other run-ins with the law so as to warrant his photograph and identifying information being posted on the police station wall, his fingerprints on file with the police, and his photograph placed in the "Book 'Em" System, in violation of McFadden's rights to due process, a fair trial, and to be tried only for the crimes with which he was charged, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, because the evidence and argument constituted inadmissible evidence of uncharged crimes or bad character, in that the testimony and exhibits were not legally nor logically relevant; were not strictly necessary to prove the charges against McFadden; and served only to show the jury that McFadden was a bad person and the type of person who would commit the charged crimes.

State v. Collins, 669 S.W.2d 933 (Mo.banc 1984);

State v. Conley, 873 S.W.2d 233 (Mo.banc 1994);

State v. Henderson, 105 S.W.3d 491 (Mo.App.W.D., 2003);

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

Mo.Const.,Art.I,Secs. 10,17,18(a).

POINT IV

The trial court abused its discretion and/or plainly erred during guilt phase closing in overruling defense counsel's objections to certain segments of the State's guilt and penalty phase closing arguments and failing to intercede sua sponte in others, in violation of Mr. McFadden's rights to due process, a trial before a fair and impartial jury, a fair and reliable sentencing, 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, because the State's repeated, improper and excessive comments prejudiced McFadden and resulted in manifest injustice, in that:

A. **In guilt phase, the State (1) urged the jurors to believe that a not guilty verdict meant they were uncaring and that a not guilty verdict would result in the people of Pine Lawn resorting to street justice, and equated a guilty verdict with "doing your job"; (2) used evidence of other crimes and impeachment evidence for an improper purpose; (3) reached beyond the evidence presented at trial to argue that the witnesses feared McFadden; and (4) used scatological language, referring to McFadden's defense as a "B.S. alibi"; and**
B. **In penalty phase, the State expressed the prosecutor's own personal opinion and implied knowledge of additional facts not on the record when it argue that no other case was more suited for a death sentence;**

and reached outside the evidence to arouse the passions and prejudices of the jury by arguing that McFadden would have killed Eva if he had known she was there when he shot Leslie.

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

Shannon v. United States, 512 U.S. 573 (1994);

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999);

United States v. Young, 470 U.S. 1 (1985);

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

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

POINT V

The trial court erred and abused its discretion in overruling McFadden's objections and sustaining the State's motion to strike Mrs. Shelba Townsend (Venireperson 59) for cause, in violation of McFadden's rights to due process, trial by a fair, impartial and fairly selected jury, a fair and reliable sentencing, and freedom 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, because Mrs. Townsend did not express any views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath, in that although Mrs. Townsend initially stated that she would want the State to prove guilt beyond any doubt before she could impose death, she later explained that she merely wanted to know in her heart of hearts that McFadden was guilty but would abide by the court's instructions and the reasonable doubt standard in determining guilt and the existence of statutory aggravating circumstances.

Adams v. Texas, 448 U.S. 38 (1980);

Wainwright v. Witt, 469 U.S. 412 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

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

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

POINT VI

The trial court erred and abused its discretion in admitting evidence of various unadjudicated crimes during the penalty phase, in overruling defense counsel's objections and submitting instruction 19 to the jury, and in accepting the death verdict, in violation of McFadden's rights to due process, a fair and reliable sentencing trial before a properly-instructed jury, and freedom from cruel and unusual punishment under U.S.Const., Amends. 5,6,8,14; Mo.Const.,Art.I,§§10,18(a),21, because the State improperly inundated the jury with details of its allegations that McFadden murdered Eva's sister while Eva watched, that he threatened Eva and tried to coerce her not to testify against him, and that he was dealing crack cocaine, yet the jury did not know how to consider this evidence, in that although Instruction 19 complied with MAI-CR3d 314.44, it nevertheless was improper since it failed to instruct the jury that it could only consider non-statutory aggravating evidence that it found beyond a reasonable doubt, thereby creating the unacceptable risk that this evidence swayed the jury to impose death rather than life without parole, without the jurors finding the evidence beyond a reasonable doubt, resulting in an invalid death verdict.

State v. Debler, 856 S.W.2d 641 (Mo.banc 1993);

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

Jurek v. Texas, 428 U.S. 262 (1976);

Lockett v. Ohio, 438 U.S. 586 (1978);

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

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

POINT VII

The trial court clearly erred and abused its discretion in overruling McFadden's objections and admitting into evidence State's Exhibit 148-B purporting to be the recording of an alleged phone conversation between Eva and McFadden via a third person (Slim), and State's Exhibit 148-C, the transcript of the recording, because the rulings violated McFadden's right to due process, to confrontation and cross-examination, a fair and reliable capital sentencing trial, and freedom 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, in that (1) the State failed to lay a proper foundation for admission of the recording and its transcript, by failing to establish that Eva could hear everything McFadden stated, without it being repeated by Slim, and hence failing to establish (a) the authenticity and correctness of the recording; (b) that no changes, additions, or deletions had been made; (c) the manner of preservation of the recording; and (d) proper identification of the speakers; and (2) the recording contained impermissible hearsay, in that it contained Slim's statements of what McFadden had said, yet Slim did not testify at trial.

State v. Fletcher, 948 S.W.2d 436 (Mo.App. W.D.,1997);

State v. Wahby, 775 S.W.2d 147 (Mo.banc 1989);

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

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

POINT VIII

The trial court (1) erred in sentencing McFadden to death, because the State failed to plead in the indictment those facts that the jury was required to find beyond a reasonable doubt before McFadden could be sentenced to death and thus never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder; and (2) erred in failing to instruct the jury that, to find the "serious assaultive criminal conviction" aggravator, it had to find beyond a reasonable doubt that the crime was both serious and assaultive. The court's errors violated McFadden'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. Because McFadden was sentenced to death by a jury that was incorrectly instructed, on a crime for which he was never charged, his death sentence must be vacated.

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; and

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

POINT IX

The trial court plainly erred in accepting the jury's recommendation of death and sentencing McFadden to death, or in the alternative, in failing to conduct an inquiry to determine whether the jury had made the requisite finding that limits the jury's discretion and is constitutionally mandated, because the court's actions denied McFadden the right to a fair and reliable sentencing trial, due process, jury determination of the elements beyond a reasonable doubt, and freedom from cruel and unusual punishment, U.S.Const. Amends.V,VI,VIII, XIV,Mo.Const.,Art. I,§§10,18(a),19,21, and §565.030, in that although the jurors purported to find the "depravity of mind" aggravator, they failed to make the proper factual finding to allow it to do so. McFadden was prejudiced, because without properly finding the limiting language of the aggravating circumstance, the jury should not have considered this aggravator in determining whether he should live or die.

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

Maynard v. Cartwright, 486 U.S. 356 (1988);

State v. Griffin, 756 S.W.2d 475 (Mo.banc 1988);

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

Mo.Const.,Art.I,Secs. 10,18(a),19,21.

ARGUMENT I

The trial court clearly erred in overruling defense counsel's *Batson*-based objections to the State's use of peremptory strikes to remove jurors Carrie Warford, Christine Nevills, Mary Byas, Virginia Glover, and William Sams from the venire panel, in violation of Vincent McFadden's and the stricken jurors' rights to equal protection and McFadden's rights to due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution, because McFadden challenged the strikes, identified the stricken panel members as African-American, and established that the State's proffered reasons for the strikes – such as a cellphone ringing, difficulty missing work, employment with the St. Louis School District, never hearing gunshots while living in a high crime area, familiarity with Pine Lawn, acquaintanceship with a relative of a potential witness, having made unwise investment in property, confidence that physical evidence such as fingerprints will prove guilt, discomfort with revealing private information - were merely pretextual, in that 1) the prosecutor failed to strike similarly situated white jurors; 2) failed to strike white jurors who, logically, seemed less favorable for the State than black jurors who was removed; 3) engaged in disparate questioning depending on the jurors' race; 4) failed to question on the purported area of concern; and

5) adopted justifications that were not logically relevant to the case or that were not supported by the record.

In his concurring opinion in *Batson v. Kentucky*, 476 U.S. 79, 102-108 (1986), Justice Marshall warned that racial discrimination in jury selection would continue as long as the parties were allowed to make peremptory challenges. He cautioned that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Id.* at 106. A prosecutor could justify a peremptory challenge by alleging that a certain juror seemed "uncommunicative" or "never cracked a smile." *Id.* Justice Marshall warned that, "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Id.*

Judge Teitelman and Judge Wolff have echoed Justice Marshall's concerns. In his concurrence in another St. Louis County case, *State v. Edwards*, 116 S.W.3d 511, 550-51 (Mo.banc 2003), Judge Teitelman stressed the need for careful review of peremptory strikes, especially where the reasons given are the juror's occupation, or his attire, demeanor, and similar attributes. *Id.* at 550. These attributes, he noted, "are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race." *Id.* Judge Wolff, concurring in *Smulls v. State*, 71 S.W.3d 138, 159 (Mo.banc 2002), recognized that "the question of race may be inextricably bound

up in other attributes of a prospective juror," possibly disguising a discriminatory motive.

Regrettably, the concerns expressed by Justice Marshall and Judges Teitelman and Wolff were realized in this case. The State was faced with the prospect of having a jury equally mixed, with six white jurors and six black jurors, to try Vincent McFadden for capital murder. Instead, the State used five of its nine peremptory strikes to remove black jurors, leaving only one to serve on McFadden's jury. An analysis of the State's strikes quickly demonstrates that the prosecutor failed to strike similarly situated white jurors, failed to strike white jurors who, logically, seemed less favorable for the State than black jurors who was removed, engaged in disparate questioning depending on the jurors' race, failed to question on the purported area of concern, and adopted justifications that were not logically relevant to the case or that were not supported by the record. The State's use of racially motivated peremptory strikes to remove jurors Nevills, Warford, Byas, Glover, and Sams denied McFadden and the stricken jurors their right to equal protection, and also denied McFadden his rights to due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution.

Batson procedure in Missouri

In *State v. Parker*, 836 S.W.2d 930 (Mo.banc 1992), this Court set forth the procedure to be followed when a defendant makes a timely objection to the State's peremptory strikes of minority jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986). First, a defendant must make a *Batson* challenge to one or more specific jurors struck by the State and identify the cognizable racial group to which the juror/s belong. *Parker*, 836 S.W.2d at 934,939. Second, the State is required to come forward with a race neutral reason which is more than an unsubstantiated denial of discriminatory purpose. *Id.* Third, the defense must show that the State's explanation was pretexual and the true reason for the strike was racial. *Id.*

At the third step, the trial court must consider whether "(1) the explanation is race-neutral, (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate." *State v. Edwards*, 116 S.W.3d 511,527 (Mo.banc 2003). In determining whether a prosecutor has engaged in purposeful discrimination, the trial court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *Parker*, 826 S.W.2d at 939; *Edwards*, 116 S.W.3d at 527. Second, the court should consider the existence of similarly situated white jurors not struck by the State; third, the "degree of logical relevance" between the explanation and the case to be tried in terms of the nature of the evidence and the potential punishment; fourth, the prosecutor's statements and demeanor during voir dire, and the demeanor of the excluded jurors; fifth, the court's past experiences with the

prosecutor; and sixth, "objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses." *Parker*, 826 S.W.2d at 939-40; *Edwards*, 116 S.W.3d at 527. This Court has stressed that the State's explanation "should not 'sweep so broadly as to attenuate its validity.' If the juror is excluded because of a trait other than race, *the trait must apply to the juror specifically and to the facts of the particular case*." *Edwards*, 116 S.W.3d at 527 (emphasis in original), quoting *State v. Butler*, 731 S.W.2d 265, 269 (Mo.App.W.D., 1987) (internal citation omitted).

The trial court's findings with regard to a *Batson* challenge will not be set aside unless clearly erroneous. *State v. Antwine*, 743 S.W.2d 51, 66 (Mo.banc 1987). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

Defense counsel followed the procedure set forth by *Batson*. They alleged that the State violated *Batson* by using five of its nine peremptories to remove African-Americans (Tr.666). After the State offered its explanations (Tr.666-73), defense counsel provided reasons for why those explanations were pretextual (Tr.673-75,677-78). Defense counsel included the issue in the motion for new trial (L.F.537-38).

Carrie Warford

The State's main reason for striking Ms. Warford was that her phone rang several times while the judge read the penalty phase voir dire instructions and once during the prosecutor's small group questioning (V.D.668). The prosecutor claimed that she didn't turn it off and was fiddling with it, thereby distracting the other members of the venire and suggesting that she did not take the process seriously (V.D.668). Defense counsel agreed that Ms. Warford had a cell phone or pager that went off, but countered that she "immediately started fumbling with it to attempt to turn it off. My impression was she was having trouble getting it turned off, not that she wasn't taking things seriously. She eventually did figure it out and get it turned off" (V.D.673).

The fact that this was the State's primary reason for striking Ms. Warford shows just how pretextual it was. The State made no record of Ms. Warford's phone ringing at the time and failed to ask the court to instruct all jurors to turn off their phones and pagers. Obviously, the jurors would be sequestered at trial and would not have access to their phones.

The State allegedly was so bothered by the phone ringing several times, that it allowed another juror – whom the State had previously attempted to strike for cause – to remain on the panel. The State preferred to strike Ms. Warford because her phone rang, rather than white juror John Black, even though he had repeatedly stated that he would want the State to prove guilt beyond any possible doubt before he could impose a death sentence (V.D.43-47,49). The State

unsuccessfully moved to strike Mr. Black for cause, arguing that he "was quite clear he would require a higher burden for guilt before he would consider the death penalty" (V.D.64). The State's main rationale for striking Ms. Warford is pretextual and must be rejected.

The State's other rationale for striking Ms. Warford was that she would have difficulty being gone from work one week (V.D.669). With regard to her hardship, Ms. Warford told the court:

> I'm a manager for a cleaning company and in our group there is three area managers. One is out of town – I mean one is sick, brain concussion and the other one has his own area, and I don't know if my boss will allow me to be out because I have to handle all buildings in the evening. Make sure all the cleaners are at work on time and any problems that come up.

(V.D.115).

The State's explanation is pretextual, because a white juror, Sharon Ruebel, also expressed that she would have difficulty taking time away from work. Ms. Ruebel worked for a company that was about to undergo an audit (V.D.163). She was "one of the key people" and her employer had even written a letter for her to give to the court explaining the extent of the hardship (V.D.163). She worked in the "back office" and needed "to account for all the transition. The cash coming in and out and stuff" (V.D.163). The audit started in two weeks but they had a lot of work to do in preparing for it (V.D.163-64).

"Crucial to the [*Batson*] analysis is whether similarly situated white venirepersons escaped the state's challenge." *State v. Weaver*, 912 S.W.2d 499, 509 (Mo.banc 1995). Missouri courts have repeatedly overturned the trial court when the State failed to strike similarly situated venirepersons. *See, e.g.*, *State v. Hopkins*, 140 S.W.3d 143 (Mo.App.E.D., 2004) (Judge Ross erred in overruling *Batson* challenge as to three jurors, because State failed to strike similarly situated white jurors); see also *State v. Marlowe*, 89 S.W.3d 464, 469-70 (Mo.banc 2002) (although State justified its strike on ground that black juror was soon to be in class action lawsuit, State failed to strike white jurors also in class action lawsuits); *State v. Smith*, 5 S.W.3d 595, 597-98 (Mo.App.E.D., 1999); *State v. Davis*, 894 S.W.2d 703, 708-11 (Mo.App.W.D., 1995); *State v. Reliford*, 753 S.W.2d 9, 10-11 (Mo.App.W.D., 1988); *State v. Tolliver*, 750 S.W.2d 624, 629-30 (Mo.App.S.D., 1988) (granting plain error relief); *State v. Payton*, 747 S.W.2d 290, 292-94 (Mo.App.E.D., 1988); *State v. Williams*, 746 S.W.2d 148, 149 (Mo.App.E.D., 1988); *State v. Butler*, 731 S.W.2d 265, 272 (Mo.App.W.D., 1987).

Logically, the State would have wanted to strike Ms. Ruebel over Ms. Warford. Although both offered a reason for why it would be hard to be away from work, Ms. Ruebel was much more definite that it would cause her employer difficulty. Whereas Ms. Warford was not sure if her boss would let her be gone for a week, Ms. Ruebel came in with a letter from her employer explaining just how hard it would be to lose Ms. Ruebel for the next week.

Furthermore, Ms. Ruebel gave an additional reason to be struck – she was familiar with Pine Lawn, a reason that the State gave to strike black jurors Nevills, Byas, Glover, and Sams, but which apparently didn't apply to white jurors:

> There has been construction in Pine Lawn that would affect the evidence, specifically there has been construction along the back end of the parking lot of Pine Lawn School. Pine Lawn school sits in between 6209 Dardanella which is where the defendant's family lives at the time of the murder and still does, and the murder scene. They have changed the parking lot in between the time of the murder and now. And also the second murder, if we get to that in the penalty phase occurred on Kienlen and they are completely changing, I guess expanding but it's a huge construction zone on Kienlen. So we want to make sure the jurors go with the witnesses [sic] testimony as opposed to any personal experience they have of the area currently. Because of these changes, I want to make sure I have people who will rely on the evidence.

(Tr.667-68). Ms. Ruebel had both a work hardship and familiarity with Pine Lawn, but was not removed by the State.

The State is likely to argue that its strike of Ms. Warford was acceptable, because there was no white juror remaining on the panel whose phone rang during voir dire. In *Miller-El v. Dretke*, 125 S.Ct. 2317, 2329, n.6 (2005), however, the Supreme Court recognized that "[a] *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson*

inoperable; potential jurors are not products of a set of cookie cutters." The Court granted relief, reasoning that although there were strong similarities as well as some differences between the black and nonblack jurors, "the differences seem[ed] far from significant" in light of the whole voir dire testimony. *Id.* at 2329. The Court concluded that because the stricken black juror "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, … the prosecutors' explanations for the strike cannot reasonably be accepted." *Id.*

Logically, Ms. Warford was a strong juror for the State. Her father had been killed, shot to death (V.D.514-15,643). Additionally, she had a working relationship with the police department in University City (V.D.604). Considering the entirety of her voir dire responses, she would have been a stronger juror for the State than several white jurors – Ms. Ruebel and Mr. Black, to name a few – not struck by the State. The State's removal of Ms. Warford was racially motivated and warrants a new trial.

Christine Nevills

The prosecutor alleged that he struck Ms. Nevills for four reasons. First, he feared that as an employee of the St. Louis City School District, she would be very liberal or at least, not necessarily law enforcement (V.D.666). Second, he stated that she had sequestration issues (V.D.666-67). Third, he complained that Ms. Nevills lived in a high crime area but never heard gunshots (V.D.667). Lastly, he stated that she was familiar with the crime scene area, because her father had lived

in Pine Lawn (V.D.667). Each of these reasons either applied just as well to white jurors whom the State did not strike or had no true logical relevance to the case.

Employee of the St. Louis School District:

In *Edwards*, 116 S.W.3d at 525-28, this Court rejected the notion that a juror's employment as a postal worker is *per se* sufficient reason to justify a peremptory strike. The Court held that, "[i]f the mere incantation of the phrase 'he is a postal worker' were sufficient to overcome any showing of pretext, the third step of the *Batson* test would be illusory." *Id.* at 526. The Court instructed:

> In the future, trial courts should similarly consider strikes based on occupation carefully, assessing them for pretext by looking at whether the occupation and the claimed traits relate to the particular case or juror, whether similarly situated jurors are treated differently, and so forth, considering the factors set out above, and not allow a strike to rest solely on the claim that the juror is "a postal worker."

Id. at 528. The Court held that the trial court had not clearly erred in allowing the strike, because the prosecutor described his prior negative experiences with postal workers as jurors, gave specific reasons why they would not be good jurors, and struck two other jurors who were most similar to the challenged postal worker. *Id.* See also *Edwards*, 511 S.W.3d at 550 (Teitelman, J., concurring) ("in the vast majority of cases, a prospective juror's employment has nothing to do with his or her ability to fairly weigh the evidence and arrive at a just decision"); *Smulls*, 71

S.W.3d at 159 (Wolff, J., concurring) (questioning logic of strikes made against postal workers).

Other courts have required the State to go beyond a bare conclusion that people of certain professions have predetermined characteristics. In *State v. Davis*, 894 S.W.2d 703, 710 (Mo.App.W.D.,1995), the Western District held that striking a black juror because he was "retired military" was not a legitimate race-neutral reason, because the State failed to show why it would be legitimate to strike retired military jurors or how the characteristic related to the case. In *State v. Butler*, 731 S.W.2d 265, 268-69 (Mo.App.W.D., 1987), the Western District rejected the prosecutor's explanation that in his experience, nurses were compassionate and thus inclined to feel sorry for the defendant. The court held that the "prosecutor's prior experience is not a reason 'related to the case to be tried.'" *Id.* at 272, citing *Batson*, 476 U.S. at 98. In *State v. Smith*, 791 S.W.2d 744, 749 (Mo.App.E.D.,1990), the prosecutor justified striking government employees "because he had had bad experiences and results with them." The Eastern District rejected this explanation, because it did "not depend on any observation or assessment of the prospective juror," but rather was merely a "rote neutral explanation," which, although facially legitimate, concealed a discriminatory motive. *Id.* Finally, in *Slappy v. State*, 503 So.2d 350, 355 (Fla.App. 1987), the court rejected the State's explanation that the stricken black jurors, as elementary school teachers, would be overly liberal and sympathetic to people who go astray.

Here, the prosecutor failed to explain the basis for his opinion, or describe what his prior experiences entailed, or give specific reasons for why an employee of the St. Louis School System would be unfavorable for the State. The State's entire reasoning was that "she's an employee of St. Louis City School District, which in my experience have [sic] a disproportionate number of very liberal or not necessarily law enforcement employees" (V.D.666). But the St. Louis City School District employs over forty different categories of employees: teachers, secretaries, administrators, nurses, safety officers, reform officers, information technology specialists, financial officers, and others.[7] To presume that Ms. Nevills must be liberal or not in favor of law enforcement because she is a nurse for the St. Louis Public Schools is a mere pretext for racial discrimination.

Never heard gunshots in high crime area:

The State alleged that it also struck Ms. Nevills because although she had lived in a high crime area, she never heard gunshots:

> She lived in a high crime area, but reported no shots. Never heard any shots fired. This case is about a high crime area. The jurors are going to hear from witnesses from the State and defense that are going to say that they lived in high crime areas, and they heard shots, can identify gunshots and there will be evidence in this case that the murder occurred on July 3rd, the day before

[7] See http://www.slps.org/humanresources/viewjob.asp. (human resources page of the St. Louis Public Schools website).

> the 4th of July and some of the witnesses initially were confused by the initial shots, fireworks or gunshots and I know one defense witness said she could hear from a block and a half away she could recognize what a gunshot was.

(V.D.667).

The State's explanation is pretextual, because (1) the rationale had no true bearing to the case; (2) the State failed to inquire of the entire panel whether they could distinguish gunshots from firecrackers; and (3) a similarly-situated white juror was not stricken. Although some of the witnesses would testify that they initially thought the gunshots were firecrackers, and others concluded from the start that the sounds were gunshots, the issue had no true relevance; it was not a point in contention, just a minor fact of the case. Furthermore, whether venirepersons had ever distinguished the sound of firecrackers from gunshots had no bearing on whether they would be good or bad jurors for the State. If the issue had really been of true import, the State would have asked all jurors if they could distinguish the sound of gunshots from the sound of firecrackers. The State would not have limited its inquiry to people who had once lived in high crime areas. "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El*, 125 S.Ct. at 2328, quoting *Ex Parte Travis*, 776 So.2d 874, 881 (Ala. 2000). Restricting its inquiry to people who had lived in high crime areas was a ploy to remove black

jurors, since a higher proportion of the people living in high crime areas in St. Louis are African-American.

Also, the State failed to strike a white juror, Mary Fitzpatrick (Supp.L.F.4). Ms. Fitzpatrick suggested that she might have lived in a high crime area, but had not heard gunshots:

> VENIREMAN FITZPATRICK: I don't know if this is considered a high crime area. I lived in the Central West End.
>
> MR. BISHOP: Did you hear gun fire at night or anything like that?
>
> VENIREMAN FITZPATRICK: No.

(V.D.532). Although Ms. Fitzpatrick did not know if her past neighborhood was a high crime area, the next juror to respond stated that she had lived in the Central West End and had experienced trafficking and gunshots (V.D.532). The prosecutor, therefore, if truly concerned to strike people who lived in high crime areas but hadn't heard gunshots, would have also struck Ms. Fitzgerald, or at least would have asked her more about when she lived in Central West End.

Hardship and familiarity with Pine Lawn:

The State vouched that it struck Ms. Nevills because, "she has sequestration issues. A full time student which is for a person of her age, she said she is a full time student. She was at the end of the term. I don't want her to worry about missing the last week" (V.D.666-67). Ms. Nevills had suggested that it would be difficult for her to serve, because it would be hard for her employer to replace her

for a week and she was a full-time evening student approaching the end of the term (V.D.112).

The State's explanation is pretextual, because it failed to strike a similarly situated white venire person, Sharon Ruebel. As mentioned above, Ms. Ruebel worked for a company that was about to undergo an audit; she was "one of the key people" and needed to account for "the cash coming in and out;" and her employer had written a letter for her to provide to the court explaining the extent of the hardship (V.D.163-64).

The State also alleged that it struck Ms. Nevills because of her familiarity with Pine Lawn (V.D.667-68). It explained that recent construction projects had changed the area of the two shootings since the crimes were committed (V.D.667-68). "So we want to make sure the jurors go with the witnesses [sic] testimony as opposed to any personal experience they have of the area currently. Because of these changes, I want to make sure I have people who will rely on the evidence. (V.D.668). Thus, the State's concern was that the jurors not have a present knowledge of Pine Lawn that differed from how the neighborhood appeared at the time of the crime (V.D.667-68). Ms. Nevills, however, had no present knowledge of Pine Lawn; her knowledge of the area was from sometime in the past, when her father had lived there (V.D.535).

Furthermore, Ms. Nevills was not the only remaining juror familiar with Pine Lawn. The State failed to strike five white venirepersons familiar with Pine Lawn: Sharon Ruebel (whose aunt and uncle had lived there)(V.D.535-36); John

Swartstrom (whose father and grandparents had lived there)(V.D.534), Louis Smith (who had worked there)(V.D.537), Ronald Kemper (who had done electric utility work there)(V.D.537), and Ellen Dickerson-Capvano (had lived in a nearby community for 30 years and often had shopped in Pine Lawn)(V.D.536).

In sum, the State postulated four reasons for striking Ms. Nevills. Two of the reasons – hardship and familiarity with Pine Lawn – were equally applicable to Ms. Ruebel, a white juror whom the State did not strike. Regarding its explanation that Ms. Nevills was an employee of the St. Louis Public Schools, the prosecutor failed to detail his prior experience with these employees or explain why all members of such a diverse body of employees would be overly liberal or against law enforcement. Finally, the explanation that Ms. Nevills had lived in a high crime area but never heard gunshots was irrelevant to whether she would be a good or bad juror for the State, and the State's limitation of its questioning to people who had lived in high crime areas smacks of pretext.

Mary Byas

In providing its reasoning for striking Ms. Byas, the State mistakenly interspersed the responses of other venire members. The State gave four rationales for the strike. First, it stated that she knew a relative of a potential witness (V.D.671-72). Second, the State mistakenly believed she had problems with the concept of acting in concert (V.D.672). Third, the State mentioned that she had investment property in Pine Lawn, which seemed to be a bad investment

and made her familiar with the area (V.D.672). Lastly, the State claimed that Ms. Byas had an unrealistic view of scientific evidence (V.D.672-73).

Knows relative of potential witness:

The defense endorsed Artez Upchurch as a potential witness (L.F.396). When the prosecutor read the list of potential witnesses to the venire panel, Ms. Byas indicated that she knew a Demetrius Upchurch, because her niece had dated him, but she did not know anyone else in his family (V.D.555). She stated that nothing about her knowledge of Demetrius would affect her in any way if he were a witness (V.D.555).

The prosecutor stated that he removed Ms. Byas because she knew the Upchurch family, and the defense had endorsed a member of that family (V.D.671-72). Her "close involvement" with the family could be a problem (V.D.672). Defense counsel corrected the State, advising that Artez Upchurch was actually a State witness, the relative of a penalty phase victim (V.D.675). Defense counsel reminded the State that the State had also endorsed Maggie Jones, who is Demetrius Upchurch's grandmother (V.D.675). Defense counsel argued that, if anything, Ms. Byas would be favorable to the State (V.D.675). The prosecutor responded that he did not want any relative of any witness to be on the jury (V.D.676).

The problem with the State's argument is that Ms. Byas was not a relative of any witness. She merely knew a relative of a witness – her niece had dated a relative of the witness (V.D.555). She did not know the witness, and she was not

asked how well she knew the man her niece had dated (V.D.555). If the State truly was concerned about this, it would have followed up with further questioning.

Acting in concert:

The prosecutor's proffered explanation that Ms. Byas had difficulty with the concept of acting in concert has no support in the record. She never expressed any difficulty with the concept, even though others did (VD486-90). Upholding a strike unsupported by the record is clearly erroneous.

Investment property in Pine Lawn:

When the State asked if anyone was familiar with Pine Lawn, Ms. Byas answered affirmatively and revealed that she has a piece of investment rental property there (V.D.536-37). The prosecutor explained that it struck Ms. Byas:

> She claimed she owned an investment property in Pine Lawn, and I've spent a number of days in Pine Lawn, or hours I guess, not overnight, dealing with this case and I don't know you can consider any property in Pine Lawn a very good investment property. She is familiar with the area. The same thing we are talking about the other people. It changed over time and I want to make sure the jurors consider only the evidence that is presented in Court.

(V.D.672).

Whether or not Ms. Byas was wise to invest in property in Pine Lawn was completely irrelevant to jury selection and was a pretext for striking her. Although she was familiar with the area, so were a number of other, white jurors, such as

Swartstrom (V.D.534), Ruebel (V.D.535-36), Smith (V.D.537), Kemper (V.D.537), and Dickerson-Capvano (V.D.536). The State failed to ask Ms. Byas or any of these jurors whether they had been in Pine Lawn since the construction started.

Medical lab technologist:

The State urged that it struck Ms. Byas because of her belief that anyone who commits a crime will be caught due to scientific evidence, and in this case, there was little scientific evidence other than a fingerprint (V.D.672-73). The prosecutor believed that Ms. Byas would "expect more because she has unrealistic expectations of crime evidence" and may not be able to set that expectation aside (V.D.673).

Ms. Byas had indicated that she was a medical lab technologist who worked full time for the crime lab in St. Louis County (V.D.612-13). She processed the samples that came in, but didn't test them herself (V.D.613). She did not have much contact with the people who did the testing (V.D.613). She requested training at the crime lab, because it sounded exciting and interesting (V.D.614). Ms. Byas thought that "[i]f you are going to do [a murder], you are going to get caught with the technology that they have today… If you kill somebody the blood or how they do the prints, things like that" (V.D.614). She initially stated that in considering the evidence, she would think about what she knew from her own personal experience at the lab, but then stated that she could

follow the court's instructions and not consider anything the court told her not to (V.D.615-16).

Logically, Ms. Byas would be a strong juror for the State. She thought that if a defendant committed a crime, fingerprint evidence such as the State possessed here would show his guilt (V.D.614). Since McFadden had given notice of an alibi defense, Ms. Byas' strong belief in the accuracy of fingerprint evidence would have served the State well. Also, like Ms. Warford, Ms. Byas had a family member – her half brother – who had been shot to death (V.D.518).

Furthermore, the State failed to strike a similarly situated white juror, Louis Smith, who was familiar with Pine Lawn, since he had worked there (V.D.537); and had some exposure to police lab work (V.D.610-11). Although the questioning of Mr. Smith and his responses were somewhat confusing, it appears that Mr. Smith worked for the State Health Department, and his boss worked with the Missouri State Highway Patrol in creating standards for lab testing and preparing training aids for drug sniffing dogs (V.D.610-11). With his boss, Mr. Smith would meet with police officers for the dogs to test the products (V.D.611). He had discussed with police officers "interesting kind of gruesome stories in the federal lab but not police work in general" (V.D.612). Because of Ms. Byas' certainty that fingerprint evidence would determine guilt, she was a stronger juror for the State than Mr. Smith. The State's removal of Ms. Byas, while leaving Mr. Smith, demonstrates the State's racial motivation.

Virginia Glover

The State gave six reasons for striking Ms. Glover. The reasons were either based on her demeanor, were nonsensical, or applied just as well to white jurors who were not stricken.

First, the State alleged it struck Ms. Glover because "[s]he's elderly, very opinionated, corrected both myself and defense counsel about questions…. She seems very hard-headed and opinionated and may not be good in discussing and considering views of other jurors (V.D.669). As Judge Teitelman recognized, strikes based on vague references to attributes like demeanor "are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race." *Edwards*, 116 S.W.3d at 550 (concurring). This Court must closely scrutinize the State's use of explanations such as these.

Second, the State offered that Ms. Glover "lives in a high crime area but denied that it is high crime" (V.D.669). Ms. Glover stated that she lived in an area that the City of St. Louis considered a high crime area (V.D.531). She did not consider it a high crime area even though she was robbed there once (V.D.531). This Court must consider whether the explanation provided by the State was related to the case to be tried, clear and reasonably specific, and legitimate. *Edwards*, 116 S.W.3d at 527. This explanation fails, because Ms. Glover's assessment of her neighborhood has no bearing on the case or whether she would be a good juror.

Third, the prosecutor alleged that he struck Ms. Glover because she had a problem with her leg, and he didn't want to run out of jurors because of an infirmity (V.D.669). Ms. Glover had a painful ulcer on her leg that was causing her problems (V.D.552). Her doctor wanted to see her one day the following week (V.D.552). Ms. Glover stated that it was doing better but had been very painful the previous day (V.D.566). If she could not see her doctor when it caused her pain, she would have a problem (V.D.567). Her leg has been healing, and her doctor wanted to ensure she continued to heal instead of regressing (V.D.568).

The problem with the State's explanation is that the State failed to strike a similarly situated white juror, Carl Spalinger, who was questioned at length regarding his problem with anxiety attacks (V.D.578-83). Mr. Spalinger informed the court that for fifteen years, he has taken medication to fight anxiety attacks (V.D.578). He did not know how he would handle sequestration (V.D.579). If he felt a panic attack coming on, he could take extra medication, but it would not help right away (V.D.582). If he had a panic attack, he could not listen to the evidence (V.D.582). If the State truly were afraid of losing a jury due to infirmity, it would have struck Mr. Spalinger.

So, too, the State expressed concern that Ms. Glover had read about the case, yet the State did not remove a white juror, Ronald Kemper, who also had read about the case (V.D.670). Ms. Glover indicated that she may have read about the case in the newspaper, since she reads the paper daily, but if she had, she did not remember any of the details (V.D.157). If she recalled something during the

course of the trial, she knew she could set it aside (V.D.157-58). Nothing she read would keep her from being fair and impartial (V.D.158). Mr. Kemper stated that he did read about it, although he did not remember any details (V.D.292). Mr. Kemper, actually, was more certain about reading about the case than Ms. Glover. Logically, he would have been removed before Ms. Glover.

The State removed Ms. Glover due to her familiarity with Pine Lawn (V.D.670). As mentioned above, five white venirepersons were familiar with Pine Lawn yet had not been removed. This explanation is pretextual.

Finally, the State commented that Ms. Glover's sister's house in Pine Lawn was firebombed (V.D.670). Logically, the State would want to have jurors who had been victims of violent crime; here, the fact that Ms. Glover's sister had been victimized in Pine Lawn would have played into the State's theory of the case well. After all, the State alleged that McFadden and his gang terrorized Pine Lawn and urged the jurors to believe that if they cared about the people in Pine Lawn, they would find McFadden guilty (Tr.475). Assessed in the context of the case, the State's explanations for striking Ms. Glover are clearly pretextual.

William Sams

The State justified its strike against Mr. Sams by stating that he seemed to be hostile toward both counsel, or at least, very agitated, as if he did not want to be present, and at times he seemed to be sleeping (V.D.670). The State believed that Mr. Sams was confused about how to resolve any conflict between witnesses' accounts and didn't seem to accept the prosecutor's answer that it was the jurors'

job to resolve the conflict (V.D.670-71). Although he lived very close to Pine Lawn, he stated he wasn't familiar with it (V.D.671). Mr. Sams did not want to share with the panel the details about his nephews who work in law enforcement and was concerned about their safety, which seemed illogical (V.D.671).

Hostile, sleeping, and confused about his role

The State alleged that Mr. Sams was sleeping at times, seemed to be hostile or agitated, and may have been confused about how to resolve discrepancies in witnesses' stories (V.D.670). The allegation that Mr. Sams was confused was based on the following exchange:

> VENIREMAN SAMS: You got aggravation and what do they get, the crime attorney, the defense attorneys, they got an eye witness. How do that work? It's up the jury or who are you going to believe?
>
> MR. BISHOP: Right.
>
> VENIREMAN SAMS: You said only one eye witness.
>
> MR. BISHOP: I'm sorry.
>
> VENIREMAN SAMS: What if there is more than one eye witness? You got one, she got one. How do that work?
>
> MR. BISHOP: I guess I'll ask you. If you are selected as a juror, you have to determine the credibility of the witnesses. That's your job. Can you make that decision? If there are witnesses with competing stores, can you make the decision of who is telling the truth and who is lying?
>
> VENIREMAN SAMS: Yes.

(V.D.494-95).

This Court should carefully evaluate the State's claim that it removed Mr. Sams because he appeared to be hostile, or perhaps agitated, and that he seemed confused about his role. Defense counsel disputed these claims, and the court itself did not express its opinion as to Mr. Sams' demeanor (V.D.674-75). As discussed above regarding the State's removal of Ms. Glover, this Court should evaluate these demeanor justifications very carefully and with consideration to the other non-race-neutral reasons the State has given.

Mr. McFadden recognized that Missouri courts have accepted as race neutral the rationale that a juror was sleeping during voir dire. See, e.g., *State v. Hall*, 95 S.W.2d 158, 205-206 (Mo.banc 1997). This apparently race-neutral reason, however, must be considered in the larger context, wherein the prosecutor also has provided numerous non-race-neutral explanations. *Hopkins*, 140 S.W.3d at 157.

Furthermore, because the State has advanced non-race-neutral reasons for removing this juror and the others discussed herein, a new trial is warranted. "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection." *McCormick v. State*, 803 N.E.2d 1108, 1113 (Ind. 2004). See also *Arizona v. Lucas*, 18 P.3d 160, 163 (Ariz.Ct.App. 2001); *Rector v. Georgia*, 444 S.E.2d 862, 865 (Ga.App. 1994) ("The trial court erred in ruling that other purportedly race neutral

explanations cured the element of the stereotypical reasoning employed by the State's attorney in exercising a peremptory strike"); *South Carolina v. Shuler,* 545 S.E.2d 805, 811 (S.C. 2001) ("[A] racially discriminatory peremptory challenge in violation of *Batson* cannot be saved because the proponent of the strike puts forth a non-discriminatory reason."); *Moore v. Texas,* 811 S.W.2d 197, 200 (Tex.Crim.App. 1991); *Wisconsin v. King*, 572 N.W.2d 530,535 (Wis.App. 1997).

Not Familiar with Pine Lawn

The State faulted Mr. Sams for not responding that he was familiar with Pine Lawn, when his zip code indicated that he lived in Jennings, which was near Pine Lawn (V.D.671). But if the State truly had been concerned, it would have questioned Mr. Sams further to determine if he had recently moved to Jennings or if he avoided Pine Lawn since it was a high crime area. Furthermore, as mentioned above, the State did not strike five white jurors who responded affirmatively that they were familiar with Pine Lawn (V.D.534-37). Indeed, Ms. Dickerson-Capvano, for example, stated that she lived in Jennings over thirty years and used to shop in Pine Lawn all the time (V.D.536). The State removed Mr. Sams on the possibility that he was familiar with Pine Lawn, yet left Ms. Dickerson-Capvano and four other white jurors who definitely were familiar with it (V.D.534-37).

Nephews in Law Enforcement

Last, the State claimed that Mr. Sams, "indicated his sons are in law enforcement. For whatever reason he did not feel comfortable with sharing that with the group and had concerns about their safety, which to me seemed illogical" (V.D.671). When defense counsel asked the panel if anyone had relatives in law enforcement, Mr. Sams responded that he had three nephews in law enforcement (V.D.607). He then asked to approach the bench (V.D.607). The following exchange occurred:

> THE COURT: Mr. Sams, you had indicated that you had three nephews?
>
> VENIREMAN SAMS: Three nephews. One is a police officer. One is in Denver, Colorado, and one Washington, D.C, F.B.I. Agent. We don't discuss their affairs. I don't want to get into that.
>
> THE COURT: Is there anything about your nephews being involved in law enforcement that would affect your ability to be a fair juror in this case?
>
> VENIREMAN SAMS: No, I'm fair and open minded. I am just concerned about their safety.
>
> MS. TURLINGTON: You don't want to disclose their location?
>
> VENIREMAN SAMS: Yes.
>
> THE COURT: It won't affect your ability to listen to police testimony. You can listen to that fairly and impartially?
>
> VENIREMAN SAMS: Yes, I can.

(V.D.607-608).

The State's explanation was a pretext for racial discrimination. Typically, the State would want jurors from families with strong ties to law enforcement. Mr. Sams merely heeded the court's instruction that if any juror needed to discuss something privately at the bench, they could do so (V.D.20). There was nothing illogical about not wanting to disclose the location of his nephew who was a federal agent. The request to speak privately showed his conscientiousness for his nephew's safety.

The Court Must Reverse and Remand for a New Trial

"Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 155 (1994) (Scalia, J., dissenting). Here, there was no appearance of justice, where the State removed five of the six remaining black jurors for reasons that had no logical bearing on the case or for reasons that applied just as well to white jurors who were not removed. As Judge Teitelman recognized in *Edwards*:

> However guilty a defendant may be, the law requires that a conviction only be obtained through a fair trial. The right to sit before a jury of one's peers, chosen not because of race, but because of their standing as citizens doing their civic duty, is essential to a fair trial.

116 S.W.3d at 551 (Teitelman, J., concurring). This Court must not allow Justice Marshall's fears to be realized. It must follow the example given by the United States Supreme Court earlier this year in *Miller-El* and carefully scrutinize the plausibility of each rationale given by the State in light of the circumstances of the

case. After it does so, this Court must find, as the United States Supreme Court found in *Miller-El*, that racial discrimination has occurred and remand for a new trial.

ARGUMENT II

The trial court erred and clearly abused its discretion in excluding evidence of the nature of the charges that had been pending against Gregory Hazlett but that were dismissed prior to trial, in violation of McFadden's rights to due process, to confront and cross-examine the witnesses against him, to present a defense, to a fair trial, 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, 14, 18(a) and 21 of the Missouri Constitution, because Hazlett opened the door to the testimony and the evidence directly related to his credibility as a crucial State witness, in that Hazlett attempted to explain away his prior conviction by testifying that he only carried a gun because he heard rumors after Franklin's death that he too would be killed, thus implying that he only carried it for self-protection, yet the State had alleged that Hazlett used the gun in a rape and that he had brandished it at a woman. The jury was entitled to learn and consider that information in assessing Hazlett's credibility and bias as a key State witness.

The right to confront one's accusers is "essential to a fair trial in a criminal prosecution," *Pointer v. Texas*, 380 U.S. 400, 404 (1965), and, with the right to cross-examine the witnesses, "ensur[es] the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). The right to cross-examine

"includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987). "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). As a result, typically, "a witness may be asked any questions on cross-examination that tend to test accuracy, veracity, or credibility, or shake the witness' credit by injuring his or her character." *Black v. State*, 151 S.W.3d 49, 55 (Mo.banc 2004).

The trial court has broad discretion in determining the scope of cross-examination. *Id.* In exercising its discretion, however, the trial court must remember that the right to cross-examine an adverse witness is not a mere privilege; it is essential, indispensable, and absolute. *Id.* Furthermore, the trial court should allow "great latitude" in the cross-examination of a witness with respect to credibility. *State v. Leisure*, 749 S.W.2d 366, 378 (Mo.banc 1988), citing *State v. Murrell*, 169 S.W.2d 409, 411 (Mo.1943).

The court abuses its discretion when its ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Taylor*, 134 S.W.3d 21, 26 (Mo.banc 2004). The trial court has not abused its discretion "if reasonable persons can differ as to the propriety of the trial court's action." *Id.*

Here, the trial court abused its discretion by limiting defense counsel's cross-examination of State witness Gregory Hazlett. Prior to trial, the State disclosed that in July 2002, Hazlett had been charged with one count of forcible rape and one count of armed criminal action (L.F.436). The charges were later dismissed when the victim would not cooperate with the prosecution (L.F.436). In June 2004, Hazlett was charged with one count of unlawful use of a weapon, but again the charge was dismissed when the victim refused to cooperate with the prosecution (L.F.436). Hazlett also had a conviction for unlawful use of a weapon (Tr.102).

At the start of the trial, defense counsel and the prosecutor agreed that the defense should be allowed to show that Hazlett had picked up several serious charges after Franklin's death, and those charges had been dismissed (Tr.6-7). The prosecutor recognized that such information could be relevant to Hazlett's motivation in testifying, since he might believe that the State would have the power to reinstate the charges if he did not testify favorably for the State (Tr.6). Defense counsel agreed that she would limit her questioning to the fact that Hazlett was charged with serious crimes and state the ranges of punishment; she would not elicit that the charged crimes were rape and armed criminal action; and she would not delve into the facts of the crimes (Tr.6-7). Defense counsel cautioned, however, that if something came up during Hazlett's testimony, they may need to reconsider the limitation (Tr.7).

On cross-examination, Hazlett admitted that he had a conviction for unlawful use of a weapon (Tr.102). He testified that the conviction happened on "July 27th, after I was threatened, that's when I start carrying it" (Tr.102). The following exchange ensued:

Q So you only started carrying guns and using guns when?

A. I've been using guns all my life. I hunt, fish, outdoorsman, but I got caught with a .9 millimeter pistol, and that's what my conviction was for.

Q Okay.

A. After Todd's murder, I got scuttlebutt that I was going to be killed.

Q Okay. Vincent never threatened you, has he?

A. I don't know. Not personally.

Q And you're saying it was only in July when you got threatened about Vincent's case that you started using a gun?

A. Yeah. Yes.

Q Okay. Do you recall being arrested on June 17th of 2004?

(Tr.102-103). The State objected, and, at the bench, the parties discussed what defense counsel should be allowed to elicit regarding the charges that had been dismissed against Hazlett prior to trial (Tr.103-106). Defense counsel argued that Hazlett opened the door to the facts of the dismissed charges by testifying that he only started carrying a gun after his life was threatened, for self-protection (Tr.103). The court commented that although Hazlett stated that he had been

threatened, he did not connect it to McFadden, and thus, his use of a weapon was a collateral matter (Tr.104).

Defense counsel stated that she intended to elicit from Hazlett that on June 17, 2004, he was arrested for possessing a gun, in an incident totally unrelated to McFadden (Tr.104). The Court held that neither the fact of the arrest nor the fact that he brandished it at a woman were relevant (Tr.105). "The only issue that you've identified that's relevant is he said he didn't start carrying a gun until this incident. So you can ask him, Did he have a gun on June 17th, 2004. … He didn't say what year. I'll allow you to ask him if he had a gun on June 17th, 2004, but that's the only question that's relevant" (Tr.105-106).

After questioning Hazlett about the date of his conviction and the first of the two dismissed criminal cases, defense counsel elicited that he was arrested in June of 2004 (Tr.107-108). This exchange ensued:

Q And that charge carried jail time with it. Is that right?

A. Are you still talking about the life sentence, jail-time charge?

Q No. We've moved on to the June charge, June of 2004 charge.

A. Yes.

Q And you know that charge carries jail time.

A. Yes.

Q Up to five years?

A. I'm not sure. I'm not, you know, an attorney or anything like that. I don't know.

Q And St. Louis County charged you with that crime. Is that right?

A. Yes.

Q And then it got dismissed.

A. Yes.

Q And that was in June of 2004.

A. Yes. My girlfriend's daughter didn't show up. There is a reason. It was my girlfriend's daughter. We were having some problems. And my girlfriend's daughter didn't come to court. It was all a bunch of bologna anyway.

MR. BISHOP: I'm going to object at this time.

THE COURT: Sir, listen to the question and answer the question. Pose another question.

Q (By Ms. Kraft) So your girlfriend's daughter was the victim of the case.

A. Yes.

MR. BISHOP: Objection. Irrelevant.

THE COURT: The objection is sustained.

(Tr.108-109). The issue is included in the motion for new trial (L.F.534-35).

McFadden had an express right to reveal to the jurors that Hazlett had a prior conviction for unlawful use of a weapon, so they could consider it in assessing his credibility. §491.050. When Hazlett attempted to explain away the conviction, by implying that he was only carrying the weapon for self-protection,

defense counsel should have been allowed to delve further into the facts of that conviction and elicit that Hazlett had been charged with armed criminal action in connection with a rape and may have also brandished the gun at his girlfriend's daughter. After all, "if an accused makes statements designed to blunt the impact of a prior conviction, … it is within the trial court's discretion to permit the prosecutor to test and challenge such statements by going into the details of the crime leading to a prior conviction." *Taylor v. State*, 173 S.W.3d 359 (Mo.App.S.D., 2005). Where a criminal defendant equivocates, tries to explain, or does not fully and accurately disclose prior convictions, the prosecutor may inquire further. *State v. Bradshaw*, 877 S.W.2d 714, 716 (Mo.App.E.D., 1994). The same must be true of State witnesses. When a witness – either State or defense – makes statements designed to blunt the impact of a prior conviction, the trial court may allow opposing counsel to test and challenge such statements. *State v. Skelton*, 887 S.W.2d 699, 704 (Mo.App.S.D., 1994); §491.050.

Because Hazlett volunteered that he only carried a gun for self-protection and that claim is false, the jury was left with a false impression, and the defense should have been allowed to cure that false impression. In *State v. Odom*, 353 S.W.2d 708, 710-11 (Mo.1962), defense counsel elicited that the State pumped the defendant's stomach and tested its contents. This Court noted that nothing in the State's case required the defendant to reveal that information. *Id.* at 711. But once the defense opened the door "to that transaction it is but common fairness that the State be permitted to show the results obtained when it 'checked' the

stomach contents." *Id.* It held that, "[i]t is a well settled rule ... that, where either party introduces part of an act, occurrence, or transaction, … 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 with reference thereto." *Id.* Otherwise, the jury would have been left with a false belief about the facts, allowing the defendant to obtain an unfair advantage. *Id.*

In *State v. Lingar*, 726 S.W.2d 728, 734 (Mo.banc 1987), the State was allowed to elicit testimony explaining the terms of a State witness' plea agreement after defense counsel showed that the plea agreement gave the witness a motive to fabricate his testimony. This Court held that:

> It is well established that on redirect examination, it is proper to examine a witness on any matter which tends to refute, weaken or remove unfavorable inferences resulting from testimony on cross-examination, notwithstanding that the facts elicited may be prejudicial to the defendant. Furthermore, where the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects.

Id. at 734-35.

This case is similar to *State v. Weaver*, 912 S.W.2d 499, 510 (Mo.banc 1995). During cross-examination, the defense elicited that the police found a

cocked and loaded handgun in the victim's briefcase near his deceased body. Apparently, the defense was attempting to depict the victim as a violent person involved in the drug trade. *Id.* In response, the State presented evidence from two witnesses that the victim had stated that he was carrying a gun out of fear of the defendant because word on the street was that the defendant planned to kill the victim. *Id.* This Court held that although this evidence would not normally be admissible, once the defense injected the issue into the case, the State had the right to counter the defense evidence to rebut the inference that the victim was violent and posed a threat to the defendant. *Id.*, citing *Lingar*, 726 S.W.2d at 734-35.

Missouri caselaw is replete with instances where the State was allowed to present even inadmissible evidence to rebut negative or misleading inferences created by the defense. See *State v. White*, 941 S.W.2d 575, 580-81 (Mo.App.E.D., 1997) (after defendant testified that she fully cooperated with the police, State was allowed to present evidence of defendant's post-arrest silence); *State v. Fenton*, 941 S.W.2d 810, 812-13 (Mo.App.W.D., 1997) (after defendant portrayed State witness as an out-of-control drug user, State was allowed to elicit that defendant had asked that witness to commit robberies and so witness used drugs to make himself useless to defendant in committing robberies); *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App.1995); *State v. Baldwin*, 808 S.W.2d 384, 387-92 (Mo.App.S.D., 1991) (defendant implied police misconduct in keeping the defendant at police station for four hours without food or drink, so State was allowed to present evidence that the defendant had been taking

polygraph examination); *State v. Euge*, 349 S.W.2d 502, 506-507 (Mo.App.St.L., 1961) (when defendant, charged with one count of passing a bad check, elicited testimony regarding another uncharged bad check transaction, State was entitled to elicit further testimony regarding that other uncharged transaction);

Evidence that Hazlett brandished the gun during the charged rape contradicted his testimony that he only carried a gun for self-protection. Thus, it directly related to Hazlett's credibility, and his willingness to slant his testimony. Also, because Hazlett's testimony suggested that McFadden may have been responsible for threats made on Hazlett's life, the jury should have been allowed to see that Hazlett was truly not credible in this regard. A trial court has "no authority to prevent impeachment of the State's witnesses on matters related to a paramount issue or that affected their accuracy, veracity, or credibility had counsel sought to do so. By their nature, such issues are not collateral." *Black*, 151 S.W.3d at 56.

Hazlett's credibility was crucial to the State's case. Although the State presented the testimony of three "eye witnesses," Hazlett was the only one who came forward shortly after the shooting who had not recanted his statement.[8]

[8] Eyewitness testimony, along with snitch testimony, is the leading cause of wrongful conviction of innocent people. See "*Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After*

Hazlett and one other witness – Hazlett's cousin, Glenn Zackary – testified that they saw McFadden shoot Franklin after he had been shot several times by Michael Douglas. Zackary, however, did not speak to the police until ten months after the shooting (Tr.124,130,136) – after he had received information about the shooting from Hazlett (Tr.146-47) – and his account of where he was during the shooting changed during his testimony. Another witness – Mark Silas – claimed at trial that he did not see who shot Franklin, although he had given a prior statement saying that McFadden was the second shooter (Tr.333,38,202;Ex.78-C). Thus, given the weaknesses of the other alleged witnesses, Hazlett was a crucial witness for the State. By denying McFadden the ability to reveal to the jury a solid basis for disbelieving Hazlett, the court denied McFadden a fair trial. This Court must reverse and remand for a new trial.

Trial" (June 1996)(available at http://www.ncjrs.org/txtfiles/dnaevid.txt); Report of the Governor's Commission on Capital Punishment (April 2002).

ARGUMENT III

The trial court plainly erred and abused its discretion in admitting evidence and permitting the State to argue in guilt phase that McFadden was a member of a "criminal street gang," that he may have tampered with and threatened witnesses, and that he had other run-ins with the law so as to warrant his photograph and identifying information being posted on the police station wall, his fingerprints on file with the police, and his photograph placed in the "Book 'Em" System, in violation of McFadden's rights to due process, a fair trial, and to be tried only for the crimes with which he was charged, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, because the evidence and argument constituted inadmissible evidence of uncharged crimes or bad character, in that the testimony and exhibits were not legally nor logically relevant; were not strictly necessary to prove the charges against McFadden; and served only to show the jury that McFadden was a bad person and the type of person who would commit the charged crimes.

To secure a first-degree murder conviction, the State inundated the jury with testimony and evidence of bad character and uncharged bad acts and crimes calculated to make the jury believe that McFadden had a propensity for gangster activity and thus was the type of person who would commit first-degree murder.

The State presented testimony and evidence that McFadden was a member of a "criminal street gang," that he may have threatened witnesses, and that he had other run-in's with the law so as to warrant his photograph and identifying information being posted on the police station wall, his fingerprints placed on file with the police department, and photograph being included in the "Book 'Em" System. The State even urged the jury to believe that McFadden would harm small children to further his agenda. Testimony and exhibits regarding these topics proliferated the guilt phase and were stressed repeatedly in the State's guilt phase closing arguments, causing manifest injustice and violating McFadden's rights to due process, a fair trial, and to be tried only for the crimes with which he was charged, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution.

A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005). Its rulings will not be overturned absent a clear abuse of discretion. *Id.* A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882,883-84 (Mo.banc1997). Reversal is warranted under plain error review when the error was evident, obvious, and clear and resulted in

manifest injustice or a miscarriage of justice. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo.App.W.D., 2000).

Evidence that a criminal defendant engaged in uncharged bad acts is inadmissible unless the evidence is both logically and legally relevant. *State v. Driscoll*, 55 S.W.3d 350 (Mo.banc 2001). To be logically relevant, the evidence must have a legitimate tendency to clearly establish the defendant's guilt of the charged offense, or tend to establish motive, intent, absence of mistake or accident, or common plan or identity. *State v. Conley*, 873 S.W.2d 233, 237 (Mo.banc 1994).

If the trial court finds the evidence to be logically relevant, it must then determine whether it is legally relevant; *i.e.*, does the prejudicial effect to the defendant outweigh the logical relevance of the evidence. *State v. Bernard*, 849 S.W.2d 10, 17 (Mo.banc 1993). Legal relevance must "be resolved in light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Clover*, 924 S.W.2d 853,856 (Mo.banc 1996).

Missouri courts regularly warn that evidence of other crime or bad acts "should be received only when there is strict necessity." *State v. Collins*, 669 S.W.2d 933, 936 (Mo.banc 1984). "[T]he dangerous tendency and misleading probative force of this class of evidence requires that its admission should be subjected by the courts to rigid scrutiny." *State v. Reese*, 274 S.W.2d 304,307 (Mo.banc 1955). It must be admitted only with great caution. *Id.*

Membership in a Criminal Street Gang:

"It is fair to say that when the word 'gang' is used …, one does not have visions of the characters from the 'Our Little Gang' series." *People v. Perez*, 114 Cal.App.3d 470, 479 (Cal.App. 1981)(referring to Los Angeles County). "To most jurors, gang involvement connotes unlawful or antisocial activity." *State v. Beal*, 966 S.W.2d 9, 13 (Mo.App.W.D., 1997). "In today's society, members of gangs are not regarded as model citizens. There is an inherent connotation that a gang member is involved in criminal activity." *State v. Barnes*, 685 So.2d 1148, 1155 (La.App. 1996) (fact that defendant was gang member "could have, and probably did, create an image of a bad person in the eyes of the jury"); see also *People v. Jimenez*, 284 Ill.App.3d 908, 912-13 (Ill. App. 1996) (acknowledging "widespread prejudice against street gangs" by jurors).

In its opening statement, the State commented that McFadden was in "a criminal street gang," the Six Deuce Bloods, with Corey and Lorenzo Smith, and McFadden's nickname was Scooby Deuce (Tr.20). The State elicited that at a prior court hearing, McFadden admitted that he was an "ex-gang member," he had been in the Six Deuce, and his nickname was Scooby Deuce (Tr.233-34). When State witness Eva Addison testified that McFadden and the Smith brothers were friends, the State then elicited that they were "also in the Six Deuce Bloods criminal street gang" and that one of McFadden's nicknames was Scooby Deuce (Tr.257-59). The State elicited from defense witness Rochelle Brown that McFadden had the nickname Scooby Deuce (Tr.353).

In guilt phase closing arguments, the State repeatedly referred to McFadden's membership in the Six Deuce and that one of his nicknames was Scooby Deuce (Tr.452,456,469,475). The State vouched that Franklin and Hazlett lived in the heart of Six Deuce territory (Tr.457,458). The State urged the jury to "rely on the fact that he's in the Six Deuce, that he's not only in the Six Deuce, his name is Scooby Deuce." (Tr.509). It further argued: "I made a big deal about this being Six-Deuce territory. That's because of the fear involved with the law-abiding citizens that are stuck living there. I don't mean to denigrate the whole area. I don't mean to say they are all criminals" (Tr.510-11).

McFadden acknowledges that defense counsel did not object to the State's elicitation of evidence of gang membership. Once the issue was in the case, defense counsel herself elicited that "Six Deuce" would likely refer to the 6200 block of a particular street, unsuccessfully attempted to elicit that gangs usually are based on neighborhoods, and acknowledged in closing that the case involved gang activity (Tr.275-76, 481-82). McFadden therefore requests review for plain error under Rule 30.20.

It is true that evidence of gang membership, in some instances, may be relevant to the defendant's motive in committing the crime. See, e.g., *Beal*, 966 S.W.2d at 13. But, before allowing the evidence, the court should have weighed its probative value against its prejudicial effect. If it had done so, it would have been clear that the evidence was inadmissible.

Evidence that McFadden was in a "criminal street gang" had scant probative value. The State presented evidence that McFadden and the Smith brothers had been in the same criminal street gang (Tr.258), and that eight months earlier, Franklin gave testimony against the Smith brothers (Tr.269-70). Yet the State presented no testimony that Michael Douglas – who allegedly was McFadden's co-perpetrator and allegedly shot Franklin first – was in the gang too. In fact, although the State argued that Douglas must have been in the same gang, since he lived in the 6200 block of Bailey (Tr.457), it denied that Franklin – who lived at 6215 Lexington – was a gang member (Tr.511). The only other evidence was Evelyn Carter's testimony that McFadden stated he was glad that Franklin was dead because he was soft, a snitch, and had some problems with some unspecified "homies," or friends (Tr.282-83).

If this evidence were enough to warrant admission of gang membership to show motive, then any time a defendant was in a gang, his gang membership could be used as motive for the charged crime. There was no evidence that gang signs were exchanged, no evidence that McFadden or Douglas were wearing gang colors, and no evidence that either McFadden or Douglas stated anything gang-related at the time of the shooting. There was no expert testimony about the Six Deuce Bloods to explain that McFadden would have been obligated to shoot Franklin, or would have gained prestige in the gang by doing so. The State simply presented insufficient nexus between gang membership and the crime to support the admission of this highly prejudicial evidence. The State had no foundation to

support its allegation that gang loyalty, as opposed to merely the bonds of a close friendship, motivated the crime. Notably, in penalty phase, the jury rejected the State's proffered aggravating circumstance that Franklin was killed because he was a witness against Corey and Lorenzo Smith (L.F.490; Supp.L.F.32-33).

The fact that McFadden and the Smith brothers were close friends – "homies" – conveyed the same motive to the jury, without the hugely prejudicial bad character evidence of gang membership. As a result, evidence of gang membership was not strictly necessary and should have been excluded. In *State v. Henderson*, 105 S.W.3d 491, 497 (Mo.App.W.D., 2003), the Western District found that the trial court had abused its discretion in allowing evidence of other uncharged misconduct against the defendant. The State alleged that the uncharged misconduct was needed to prove the defendant's identity. *Id.* The Western District held that even if evidence of the uncharged misconduct helped to prove the defendant's identity as the shooter, it was inadmissible because it was not strictly necessary. *Id.* The appellate court held that other, equally probative evidence establishing his identity was presented. *Id.* The fact that he engaged in other misconduct added nothing yet injected considerable prejudice, warranting reversal. *Id.* at 497-98. See also *State v. Griffin*, 336 S.W.2d 364, 367 (Mo. 1960) (reversing, because identity of accused had been established by other evidence, so it was improper to admit evidence of other crimes to prove identity); *State v. Williams*, 804 S.W.2d 408, 410-11 (Mo.App.S.D., 1991) (reversing because other crimes evidence was not strictly necessary to prove identity); *People v. Maestas*,

20 Cal.App.4th 1482, 1495 (Cal.App. 1993) (evidence of gang membership to show bias was cumulative, when other evidence had already established a close relationship between witness and defendant); *People v. Alcala*, 36 Cal.3d 604, 635 (Cal.App. 1984) (prior crimes evidence is properly admitted when "motive of escape is central" to case and "can be shown in no other way," but not when it is speculative on the issue of motive and cumulative).

The highly prejudicial evidence that McFadden was a member of a "criminal street gang" caused manifest injustice. In closing, the State repeatedly referred to McFadden's membership in a "criminal street gang" and urged the jury to find McFadden guilty because of it (Tr.457,509-11). The State argued that even though the crime scene was in the heart of Six Deuce territory, there were other people living there who weren't "criminals" (Tr.511). The jury was prompted to believe that, because he was a gang member, McFadden must have been acting as any gang members would – engaging in various criminal activity, protecting his territory, and participating in revenge killings. This propensity evidence, portraying McFadden as a person of bad character who was likely to commit first degree murder, was unsupported by any lawful evidence presented at trial and hence resulted in manifest injustice.

Threats to witnesses:

In addition to evidence that McFadden belonged to a "criminal street gang," the State repeatedly elicited testimony that McFadden or perhaps others acting on

his behalf had threatened and tampered with witnesses. In closing, the State went so far as to argue that he himself was worried for the safety of the witnesses in this case (Tr.512), and that Silas was worried for the safety of his children (Tr.477).

The State first attempted to elicit this information on direct examination of Mark Silas, asking "[d]idn't you tell my investigator that you didn't want to come in in this case because you didn't want to get killed?" (Tr.56). The objection was sustained and the jury was instructed to disregard (Tr.56-57). Later in the direct examination, the prosecutor followed-up on the line of questioning:

Q Now, when you – last Friday you talked to my investigator, Ed McGee. Is that correct?

A. Yes.

Q And did you tell my investigator why you did not want to testify in this case?

A. I don't remember.

Q You don't remember telling my investigator why?

A. No.

Q Do you have a family, Mr. Silas?

A. Yes.

Q How many children do you have?

A. Two.

Q What's the age of the oldest?

A. Two.

Q Are you working currently?

A. Yes.

Q Where do you work?

A. It don't have anything to do with the case.

Q You don't want to answer that question?

A. No.

Q If I asked you where you lived, would you tell me?

A. No.

(Tr.197-98).

On cross-examination, State witness Gregory Hazlett volunteered that he had been threatened:

Q Mr. Hazlett, you have a conviction for unlawful use of a weapon. Is that correct?

A. Yes.

Q And that happened when?

A. July 27th, after I was threatened, that's when I start carrying it.

Q So you only started carrying guns and using guns when?

A. I've been using guns all my life. I hunt, fish, outdoorsman, but I got caught with a .9 millimeter pistol, and that's what my conviction was for.

Q Okay.

A. After Todd's murder, I got scuttlebutt that I was going to be killed.

Q Okay. Vincent never threatened you, has he?

A. I don't know. Not personally.

(Tr.102-103). Hazlett's volunteered, hearsay testimony that he received word after Franklin's murder that he too would be killed created the impression that McFadden had threatened him (Tr.102-103). Defense counsel's attempt to dispel that impression failed (Tr.103). The jury was left with the unsubstantiated belief that McFadden may very well have threatened to kill Hazlett.[9]

In *State v. Hicks*, 535 S.W.2d 308, 310 (Mo.App.Springfield, 1976), the prosecutor stated in opening that a witness had been threatened not to testify against the defendant and then elicited testimony regarding the threat. The defendant objected that if the threat could not be tied to the defendant, it was inadmissible. *Id.* The State countered that it was permissible to show consciousness of guilt. *Id.* The court sustained the objection and instructed the jury to disregard. *Id.*

The Court of Appeals held that the trial court should have granted a mistrial. It acknowledged that a threat to a witness is admissible to show

[9] Defense counsel attempted to diffuse the prejudice caused by this testimony by showing that Hazlett carried a gun for other reasons, not because he had been threatened, but the court did not allow it (Tr.103-106). See Argument II, supra. To the extent that defense counsel failed to object specifically to Hazlett's volunteered testimony that McFadden or someone acting for McFadden had threatened him, McFadden requests review for plain error under Rule 30.20.

consciousness of guilt, and hence, guilt. *Id.* at 311. But if the State failed to show that the threat was made at the request of the defendant or with his consent and knowledge, evidence of the threat was cause for reversal. *Id.* at 312. The court stressed that:

> The fact that the evidence failed to show that defendant was the culprit would not remove the impression that some one, with enough interest in defendant to make threats upon state's witnesses, had knowledge of defendant's guilt of the robbery charge against him.

Id. at 313. Commenting that, "[i]t is difficult to conceive of a more harmful assertion" than one that a witness' life has been threatened, the Court of Appeals concluded:

> The present appeal presents another example of an unsatisfied prosecutor who comes by an acceptable case, yet unnecessarily tries to decorate it with statements and testimony which can only serve to excite passion and engender prejudice against the accused.

Id.

Here, the prejudice was exacerbated by the State's closing arguments. The State argued that Silas was afraid of McFadden and afraid of what would happen if McFadden got out of custody (Tr.454). Defense counsel objected to the implication that McFadden threatened Silas, but the objection was overruled (Tr.454). The State argued that Franklin was brave for giving a deposition

"knowing how dangerous these people are" (Tr.457). The State argued that Silas feared that McFadden would go so far as to hurt his two-year-old child:

> [The witnesses] know what the stakes were when they came in. Mark Silas didn't have children when he gave that statement the night of the murder. The defendant wasn't in the same room as him when he gave that statement. He has children now, two of them. Young ones. You know why he didn't want to testify about what he did. He doesn't have to say a word. Mark Silas saw it.

(Tr.477). In rebuttal, the State admitted, "I made a big deal about this being Six Deuce territory. That's because of the fear involved with the law-abiding citizens that are stuck living there. I don't mean to denigrate the whole area. I don't mean to say they are all criminals" (Tr.510-11). The prosecutor argued that he would rather have his witnesses in jail, because Hazlett "wouldn't have to worry at night if he gets killed" and the prosecutor himself wouldn't worry as the months and weeks pass and trial approaches (Tr.512).

The State's focus on the witnesses' alleged fear of McFadden far exceeded any permissible purpose. A witness may be cross-examined as to whether he has been influenced or tampered with to show that he had a bias or interest. *State v. Mercer*, 611 S.W.2d 392, 395-96 (Mo.App.S.D., 1981). That evidence is directed exclusively to the witness' state of mind and not to the ultimate issue of guilt, except to the extent that credibility weighs on guilt. *Id.* In *Mercer*, evidence that a

witness was threatened was acceptable, because it was used solely for impeachment of a defense witness and the jury was so instructed. *Id.* at 395.

Here, however, the State used the witnesses' fear of McFadden and his alleged threats, not merely for impeachment, but in an attempt to establish McFadden's guilt. The State argued that the witnesses were afraid because they "knew" that McFadden and his gang kill witnesses, even though no evidence was presented at trial that Silas, Hazlett or Zackary knew why Franklin was shot. The State urged the jury to believe that because McFadden was in a gang and witnesses were afraid or had been threatened, it must be true that McFadden killed Franklin, and that he did so because that's how members of his gang dispose of witnesses. The court did not instruct the jury that it could only consider the evidence to assess the witness' credibility, leaving the jurors free to consider it as substantive evidence of guilt. Because the jury was urged to consider the alleged threats and fear as substantive evidence of guilt, manifest injustice resulted.

Previous Run-In's with the Law:

Twice during the trial, the State elicited that Silas was able to identify McFadden from a photograph that was hanging on the wall of the police station (Tr.301-302,421; Ex.78-C). The photograph was actually a redacted Wanted poster (Tr.296). Below McFadden's photograph was his identifying information – his date of birth, social security number, height, weight, eye color, hair color, build, and tattoos (Ex.75-A). Defense counsel stated she had no objection to the exhibit once it was redacted to remove everything but the photograph and the

identifying information, and the court admitted it into evidence (Tr.296,302; Ex.75-A). The State also elicited that the police had McFadden's known prints "on file" (Tr.213). Finally, a detective explained how he found McFadden's photograph to use in a photographic lineup:

> I used the St. Louis Metropolitan Police Department Book 'Em System. Both St. Louis and St. Louis County use the same Book 'Em System. It's a data base of photographs. And you can pull up however many photographs you need and put them into a photospread.

(Tr.415).[10]

The cumulative effect of these references again depicted McFadden as someone who had numerous run-ins with the law and hence was likely guilty now. Although mugshots alone are neutral and do not constitute inadmissible evidence of prior criminal activity, testimony pertaining to the mugshot carries the potential of tainting the record. See, e.g., *State v. Quinn*, 693 S.W.2d 198, 199 (Mo.App.E.D., 1985) (reversible error for officer to testify that photograph of defendant was within "department" photographs "from my robbery books and my crime books in the Ninth District").

[10] Defense counsel did not object to the matters set forth in this paragraph, so McFadden requests review for plain error under Rule 30.20.

A New Trial is Warranted

When evidence that the defendant committed uncharged crimes is improperly received, admission of the evidence is presumed prejudicial. *State v. Lancaster*, 954 S.W.2d 27, 29 (Mo.App.E.D., 1997); *State v. Brooks*, 810 S.W.2d 627, 34 (Mo.App.E.D., 1991). Other crimes evidence "would inflame the passions of any reasonable juror and instill in them the desire to punish the defendant for the [other crime], an act for which he was not on trial." *State v. Wallace*, 943 S.W.2d 721, 724-25 (Mo.App.W.D., 1997). The most common danger in admitting evidence of other crimes is that "the jury will penalize the defendant for the prior crime even though he may or may not be guilty of the present crime or that the jury will give more weight to the prior crime than it is actually worth." *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992) (Thomas, J. concurring).

Here, the State systematically removed five of the six African-American jurors from the venire panel, leaving just one on the jury. See Argument I, supra. It then inundated the jury with stereotypical beliefs about inner-city black youth, gangs and violence. It urged the jury to find McFadden guilty because he was in a gang, and to believe that the accusations against McFadden must be true because witnesses were afraid of him and had been threatened. As in *Hicks*, 535 S.W.2d at 313, the State inundated the jury with "statements and testimony which can only serve to excite passion and engender prejudice against the accused." As in *Hicks*, this Court must reverse for a new trial.

ARGUMENT IV

The trial court abused its discretion and/or plainly erred during guilt phase closing in overruling defense counsel's objections to certain segments of the State's guilt and penalty phase closing arguments and failing to intercede sua sponte in others, in violation of Mr. McFadden's rights to due process, a trial before a fair and impartial jury, a fair and reliable sentencing, 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, because the State's repeated, improper and excessive comments prejudiced McFadden and resulted in manifest injustice, in that:

A. In guilt phase, the State (1) urged the jurors to believe that a not guilty verdict meant they were uncaring and that a not guilty verdict would result in the people of Pine Lawn resorting to street justice, and equated a guilty verdict with "doing your job"; (2) used evidence of other crimes and impeachment evidence for an improper purpose; (3) reached beyond the evidence presented at trial to argue that the witnesses feared McFadden; and (4) used scatological language, referring to McFadden's defense as a "B.S. alibi"; and

B. In penalty phase, the State expressed the prosecutor's own personal opinion and implied knowledge of additional facts not on the record when it argue that no other case was more suited for a death sentence;

and reached outside the evidence to arouse the passions and prejudices of the jury by arguing that McFadden would have killed Eva if he had known she was there when he shot Leslie.

The trial judge has the responsibility of maintaining 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). The trial court must exercise its 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).

Although trial courts have wide discretion in controlling closing arguments, they abuse that discretion when they allow argument that is plainly unwarranted and that has a decisive effect on the jury. *State v. Newlon*, 627 S.W.2d 606, 616 (Mo.banc 1982). An argument has a decisive effect when it is reasonably probable that, in the absence of the argument, the verdict would have been different. *State v. Kee*, 956 S.W.2d 298, 303 (Mo.App.W.D., 1997). Closing arguments in capital cases must receive a "greater degree of scrutiny" than those in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

"Send a message" and "Do your job"

The State argued as follows:

> Your verdict will send a message to them and to all the people in St. Louis County, and specifically in Six-Deuce territory: That if you come in and you testify and you tell the truth, the police will do their job, the prosecutor will do his job, and the jury will do their job, and you can get justice in Clayton.

(Tr.475). The State continued, "[i]f you just say, I don't care, what you're saying to them -- if you believe [the defense witnesses], what you're saying is, Don't bother us with your problems. Settle it your own way, on your own time in your neighbored [sic]" (Tr.475). The State continued in rebuttal: "The police did their job. I did mine. I ask for you to do your job. Please, I pray, find this man guilty" (Tr.521).

McFadden recognizes that this Court has held that a prosecutor may argue that the jury should "send a message" that criminal conduct will not be tolerated or should be severely punished. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo.banc 1994). But it is improper to inflame the passions or prejudice of the jury by implying that the jury has a role other than as the impartial arbiter of the facts in the case before it. "The purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose." Standards for Criminal Justice, Standard 6-1.1 (A.B.A. 2000). A prosecutor must

"refrain from argument which would divert the jury from its duty to decide the case on the evidence." *Id.*, Standard 3-5.8(d).

In *Shannon v. United States*, 512 U.S. 573, 579 (1994), the Supreme Court held, "the jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged…. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task." *Id.* The Court recognized that considering the consequences of a verdict "invites [the jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id.*

In *Payton v. State*, 785 So.2d 267, 270 (Miss. 1999), the Mississippi Supreme Court reversed based on the State's "send a message" argument, despite the lack of an objection. The jury's role is not to send a message to the community, but to weigh the evidence and determine the facts. *Id.* at 270-71. "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) (reversing). An argument that a guilty verdict would speak to the problems of crime in society should not be the focus of a jury considering the guilt or innocence of an individual defendant, "lest the remediation of society's problems distract jurors from the awesome responsibility with which they are engaged." *People v. Johnson*, 803 N.E.2d 405, 419 (Ill. 2003) (reversing). See also *United States v. Barker*, 553 F.2d 1013, 1024-25 (6th Cir. 1977) (improper for prosecutor to suggest that unless the defendant

was convicted it would be impossible to maintain "law and order" in the jurors' community).

The State also erred by urging the jury to believe that to do its job, it must find McFadden guilty. In *Young*, the Supreme Court forbade the "do your job" argument: "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." 470 U.S. at 18-19, citing ABA Standards for Criminal Justice 3-5.8(c) and 4-7.8(c). See also *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986); *Commonwealth v. Cobb*, 526 N.E.2d 1081, 1084 (Mass. 1988); *Williams v. State*, 789 P.2d 365, 369 (Alaska.App. 1990).

Use of other crimes evidence and evidence relating to credibility

Although there was no evidence presented at trial that the State witnesses knew McFadden's motive in allegedly shooting Franklin, the State argued that witnesses feared McFadden on that ground. "[Silas is] trying to get himself out of being a witness, because he saw what happens when somebody testifies against a Six-Deuce member.… He saw what happens if you come in and you testify" (Tr.452). The State continued, arguing that Silas was so afraid of McFadden that he wouldn't say in open court where he lived or worked (Tr.454). The State argued that Franklin came in to be deposed in the case against the Smith brothers, "knowing how dangerous these people are" (Tr.457). The State persisted:

> Please, please find him guilty, because he is, because he killed this young man in broad daylight in front of all these witnesses because he thought he

was scary enough that no one would dare testify against him after they saw him execute a witness.

(Tr.476). The court overruled McFadden's objection to the inference that McFadden threatened anyone (Tr.476). The State argued that Silas did not want to testify, because he feared for his own safety and that of his small children (Tr.477).

In rebuttal closing, the State continued with its argument that the witnesses had cause to fear McFadden aside from the facts of the shooting. "It's a lot more dangerous for [Hazlett] if [he] is the sole cooperating eyewitness. It's a lot easier to kill one guy, one witness, and get away with it. It's hard if you know there are two coming in." (Tr.509). "I made a big deal about this being Six-Deuce territory. That's because of the fear involved with the law-abiding citizens that are stuck living there. I don't mean to denigrate the whole area. I don't mean to say they are all criminals." (Tr.510-11). "I'd rather have [Hazlett] in custody. That man wouldn't have to worry at night if he gets killed. I won't have to worry as the months and the weeks approach in this case" (Tr.512). Defense counsel objection was overruled (Tr.512).

There were two major problems with these arguments. First, they were based on facts that were never produced as evidence at trial. The State argued that the witnesses feared McFadden, because they saw him shoot Franklin *and* they knew he killed Franklin because he was a witness. The problem is that the State presented no evidence that the witnesses knew what McFadden's alleged motive

was. The witnesses allegedly saw the shooting, but that alone would not warrant fear of a man who was locked in jail. The logical conclusion for the jury to draw from the State's argument was that McFadden or others acting on his behalf had threatened witnesses or taken other actions to make them truly worthy of fear. The problem was exacerbated by Hazlett's testimony that someone had in fact threatened to kill him several weeks after Franklin's shooting (Tr.102-103), and the State's emphasis in closing on McFadden's gang membership (Tr.456,458,469,509-11).

The State's argument violated the principle that closing argument must conform to the evidence and the reasonable inferences fairly drawn from the evidence. *State v. Hill*, 866 S.W.2d 160, 164 (Mo.App.S.D., 1993). This Court has stressed that it is highly prejudicial for a prosecutor to argue facts outside the record, because the jury is likely to give those assertions much weight when they should carry none. *State v. Storey*, 901 S.W.2d 886, 900 (Mo.banc 1995). Argument outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes - properly - that the prosecutor has a duty to serve justice, not merely to win the case." *Id.*

Second, the State used evidence of McFadden's gang membership and testimony elicited regarding credibility for an improper purpose. Even if the State were validly allowed to present evidence of McFadden's gang membership, it would be admissible for the strictly limited purpose of showing motive. The State

could not use evidence of gang membership to show that McFadden had a criminal propensity. So, too evidence that Silas may be afraid to testify might be admissible to show his motivations in testifying. That fear, however, could not be used as substantive evidence of guilt. Yet that was exactly what the State did in its closing argument.

"B.S. alibi"

The State characterized the defense as a "B.S. alibi" (Tr.511). This type of improper and unprofessional argument has been roundly criticized. In *State v. Matthews*, 591 S.E.2d 535, 542 (N.C. 2004), the North Carolina Supreme Court held that the prosecutor's argument that the defense theory was "bull crap" was intolerable. The argument exceeded the proper boundaries of argument by setting forth the prosecutor's personal opinion about the defense theory. *Id.*; see also *Lingle v. Dion*, 776 So.2d 1073, 1078 (Fla.App. 4 Dist.,2001) (calling opponent's claim "real B.S." was clearly improper and highly unprofessional); *Martinez v. State*, 984 P.2d 813 (Okla.Crim.App. 1999) (clearly improper for prosecutor to argue, "that's the biggest bunch of crap I've ever heard"); *State v. Stewart*, 514 N.W.2d 559, 564 (Minn. 1994) (clearly improper for prosecutor to assert a personal opinion of credibility of witness by characterizing witness' testimony as "crap").

"What other case than this?"

In penalty phase, the State argued, "what other case other than this for a cold-blooded killer, an executioner, what other case than this is it appropriate?"

(Tr.1044). Later, the State repeated: "The only just verdict for a cold-blooded killer like him is death. If not him, who?" (Tr.1066). The court overruled defense counsel's objections (Tr.1044,1067). This issue is included in the motion for new trial (L.F.538).[11]

The State's argument was improper, because "expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *ABA Standards for Criminal Justice* 3-5.8 (3d ed. 1993).

In *Shurn v. Delo*, 177 F.3d 662, 665 (8th Cir. 1999), the prosecutor's closing argument contained numerous improper comments, including that "I'm the top law enforcement officer in this county and I'm the one that decides in which cases to ask for the death penalty and which cases we won't. . . . I'm telling you there's no case that could be more obvious. . ." The Eighth Circuit held that it was clearly improper and prejudicial for the prosecutor to emphasize his position of authority and his personal opinion on the propriety of the death sentence. *Id.*, at 667. The Eighth Circuit granted the defendant's writ of habeas corpus and reversed his death sentence. *Id.*; see also *Newlon v. Armontrout*, 885 F.2d 1328, 1335-38 (8th Cir. 1989); *United States v. Skarda*, 845 F.2d 1508, 1510 (8th Cir.

[11] To the extent that the other subsections of this argument are not preserved, McFadden requests review for plain error. Rule 30.20.

1988) (improper for prosecutor to argue "we are doing the best we can to convict someone that obviously we feel in good faith should be prosecuted and convicted"); *State v. Evans*, 820 S.W.2d 545, 547 (Mo.App.E.D., 1991) (improper for the prosecutor "to express his belief of a defendant's guilt to the jury in such a way that it implies knowledge on his part of facts not in evidence pointing to the defendant's guilt").

"McFadden would have killed Eva too"

The prosecutor argued, "[t]he only reason why Eva Addison is alive today, he didn't know she was hiding in the bushes" (Tr.1044). Absolutely no evidence was presented that McFadden wanted to kill Eva. In fact, the State presented evidence that McFadden apologized to Eva and told her that he still loved her and their child (Tr.697,704).

Although counsel has wide latitude in closing argument, the argument must not go beyond the evidence presented, misstate the evidence, or introduce irrelevant and prejudicial matters. *State v. Rush*, 949 S.W.2d 251, 256 (Mo.App.S.D., 1997). A prosecutor's attempts to "inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct." *State v. Burnfin*, 771 S.W.2d 908, 912 (Mo.App.W.D., 1989). The State's argument that McFadden would have killed Eva if he had known she was there, was pure speculation, not

founded on the facts presented at trial, intended to arouse the passion and prejudices of the jury, and was clearly improper.

A New Trial is Warranted

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 argument were intended solely to arouse the passion and prejudices of the jury. 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 State's repeated, intentional violations during closing argument in both phases deprived McFadden of his rights to due process, a trial before a fair and impartial jury, a fair and reliable sentencing, 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 should remand for a new trial based on the State's improper closing arguments; or alternatively, if the Court finds only penalty phase error, order that McFadden be sentenced to life without parole.

ARGUMENT V

The trial court erred and abused its discretion in overruling McFadden's objections and sustaining the State's motion to strike Mrs. Shelba Townsend (Venireperson 59) for cause, in violation of McFadden's rights to due process, trial by a fair, impartial and fairly selected jury, a fair and reliable sentencing, and freedom 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, because Mrs. Townsend did not express any views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath, in that although Mrs. Townsend initially stated that she would want the State to prove guilt beyond any doubt before she could impose death, she later explained that she merely wanted to know in her heart of hearts that McFadden was guilty but would abide by the court's instructions and the reasonable doubt standard in determining guilt and the existence of statutory aggravating circumstances.

Initially, Mrs. Townsend stated that she would want the State to prove guilt beyond any doubt before she could impose a death sentence (Tr.255-56). But later, she clarified that she would abide by the reasonable doubt standard for the guilt-innocence determination and for the existence of aggravating circumstances (Tr.266-67). Mrs. Townsend's answers did not disqualify her from service,

because the overall tenor of her responses clarified that she did not hold views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath. Her view that she would want to know in her heart of hearts that McFadden was guilty was perfectly acceptable, because (1) the Supreme Court has recognized that what amounts to "reasonable" doubt may lessen when death is on the table; and (2) jurors in Missouri are entitled to consider residual doubts in determining whether to impose a death sentence.

A juror may not be removed for cause based on his views about capital punishment "unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980); see also *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). If a juror is excluded on any broader basis, the death sentence cannot be carried out. *Witherspoon v. Illinois*, 391 U.S. 510, 522, n.21 (1968).

Although the trial court has broad discretion in determining the qualifications of a prospective juror, the court's ruling should be disturbed on appeal when it is clearly against the evidence and constitutes a clear abuse of discretion. *State v. Rousan*, 961 S.W.2d 831, 839 (Mo.banc 1998). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to

shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 998 S.W.2d 531, 540 (Mo.banc 1999).

Mrs. Townsend initially indicated that she believed the State should have to prove guilt beyond any doubt before she would consider imposing death (V.D.255-56;Appendix). When questioned by defense counsel, Mrs. Townsend reiterated that she understood that the "beyond a reasonable doubt" standard applied to the guilt-innocence finding, and she would have no problem applying that standard (V.D.266; Appendix). She would also apply that standard in determining the existence of statutory aggravating circumstances (V.D.266; Appendix). But in penalty phase, in making her personal decision on whether to sentence McFadden to death, she would want to know in her "heart of hearts" that McFadden was guilty (V.D.267; Appendix). When the court asked Mrs. Townsend to clarify her position, she stated that if she was going to sentence someone to death, "[i]n my heart of hearts I would want him to have proved that it was an absolute" (V.D.269; Appendix). She stated that she could follow the instructions but would want guilt to be proven (V.D.269-70; Appendix).

The State moved to strike Mrs. Townsend for cause, alleging that she would require additional proof, above and beyond the "reasonable doubt" standard before she could impose a death sentence (V.D.273). Over objection, the court granted the State's motion to strike Ms. Townsend for cause (V.D.275-76). The issue is included in the motion for new trial (L.F.524-25).

The qualifications of a juror are not determined based upon one answer in isolation but upon the entirety of the responses given. *State v. Clayton*, 995 S.W.2d 468, 475 (Mo.banc 1999). Here, the overall tenor of Mrs. Townsend's responses was that she would want to know in her heart of hearts that McFadden was guilty before imposing death, but she would follow the court's instructions and hold the State to the proper burden of proof regarding the guilt-innocence determination and the existence of aggravators (Tr.266-67). Thus, Mrs. Townsend did not hold a view that would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. *Adams*, 448 U.S. at 45; *Witt*, 469 U.S. at 424.

Doubts about the strength of the evidence that may be considered reasonable and tolerable when death is not an option may be considered unreasonable and unacceptable when death is on the table.

In *Adams*, the trial court struck for cause all jurors who could not take an oath that the mandatory penalty of death or life without parole would not affect their deliberations on any issue of fact. 448 U.S. at 40. The Court specifically discussed that what constitutes reasonable doubt may change when death is on the table:

> Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly

> concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law."

Id. at 50 (emphasis added). The Court concluded that it was error to "exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." *Id.* at 50-51.

Mrs. Townsend acknowledged what the Supreme Court itself acknowledged – where death is on the table, the extent to which doubts about the evidence can be considered "reasonable" may be severely curtailed. Doubts that could be tolerated or "reasonable" if a defendant is being sentenced to life without parole may not be "reasonable" or tolerable if the defendant will be put to death. Removal of Mrs. Townsend from the jury, based on her honest recognition that she may be affected by the fact that this was a death case, contravened *Adams* and was a clear abuse of discretion.

Jurors in Missouri may consider residual doubt in deciding whether to impose a death sentence, thereby holding the State to a burden of proof higher than "beyond a reasonable doubt."

Although the Supreme Court has never recognized a constitutional right to jurors' consideration of residual doubt in penalty phase, it has recognized that states nevertheless may allow juries to do so. *Franklin v. Lynaugh*, 487 U.S. 164, 173 (1988); *Lockhart v. McCree*, 476 U.S.162, 180-82 (1986). In Missouri, residual doubt is a permissible penalty phase trial strategy: "Even though the jury had found beyond a reasonable doubt that Williams was legally guilty, counsel was attempting to persuade the jury to impose a life sentence based upon lingering doubt as to his actual guilt." *Williams v. State*, 168 S.W.3d 433, 443 (Mo.banc 2005). So too, this Court noted that "even when guilt has been decided, residual doubt may linger and influence the jury in the penalty phase." *State v. Christeson*, 50 S.W.3d 251, 265 (Mo.banc 2001), citing *State v. Chaney*, 967 S.W.2d 47, 60 (Mo.banc 1998).

Residual doubt may come into play at the final step of Missouri's death penalty procedure, where "the jury is given the constitutionally-required unlimited discretion to exercise mercy and reduce the sentence to life." *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo.banc 1992). Section 565.030.4 mandates that the jury assess a sentence of life without parole if it "decides under all of the circumstances not to assess and declare the punishment at death." One of those circumstances could be the fact that a juror has nagging doubts as to the defendant's guilt. Thus,

although the jury had found the defendant to be guilty beyond a reasonable doubt, a juror may rightfully decline to impose death if he or she feels that, given those doubts, it would be wrong to impose a death sentence.

McFadden acknowledges that this Court has held that in some instances, a juror's inclination to require a higher burden of proof in a capital case may warrant a strike for cause. See, e.g., *State v. Rousan*, 961 S.W.2d 831 (Mo.banc 1998) (where venireperson expressed ambivalence about whether he could impose the death penalty, and he stated that he probably would require a higher burden of proof in capital cases); *State v. Gray*, 887 S.W.2d 369, 382-83 (Mo.banc 1994) (venireperson stated he could not follow the court's instruction regarding the burden of proof).

But here, Mrs. Townsend unequivocally stated that she could consider and impose either a death sentence or life without parole (Tr.254). She stated that she could follow the court's instructions and abide by the reasonable doubt standard in determining whether McFadden was guilty of first-degree murder and if statutory aggravators had been proven (Tr.266-67). Although she would not want to impose death unless she believed in her heart of hearts that McFadden was guilty, that inclination merely acknowledged the serious responsibility to which she would be entrusted. Her acknowledgement that she would not want to sentence a man to death if she had nagging doubts about his innocence was fully compatible with the discretion allowed in the last step of Missouri's death penalty procedure.

Striking Mrs. Townsend for cause improperly tipped the scales in favor of death and violated McFadden's rights to due process, trial by a fair, impartial and fairly selected jury, a fair and reliable sentencing, and freedom 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. The death sentences cannot stand. *Gray v. Mississippi*, 481 U.S. 648, 657-58, 662-68 (1987). This Court must re-sentence McFadden to life imprisonment without parole or, if that relief is denied, remand the cause for a new trial.

ARGUMENT VI

The trial court erred and abused its discretion in admitting evidence of various unadjudicated crimes during the penalty phase, in overruling defense counsel's objections and submitting instruction 19 to the jury, and in accepting the death verdict, in violation of McFadden's rights to due process, a fair and reliable sentencing trial before a properly-instructed jury, and freedom from cruel and unusual punishment under U.S.Const., Amends. 5,6,8,14; Mo.Const.,Art.I,§§10,18(a),21, because the State improperly inundated the jury with details of its allegations that McFadden murdered Eva's sister while Eva watched, that he threatened Eva and tried to coerce her not to testify against him, and that he was dealing crack cocaine, yet the jury did not know how to consider this evidence, in that although Instruction 19 complied with MAI-CR3d 314.44, it nevertheless was improper since it failed to instruct the jury that it could only consider non-statutory aggravating evidence that it found beyond a reasonable doubt, thereby creating the unacceptable risk that this evidence swayed the jury to impose death rather than life without parole, without the jurors finding the evidence beyond a reasonable doubt, resulting in an invalid death verdict.

In a capital sentencing, two separate yet essential interests compete. On one hand, the need for individualized sentencing requires that the jury consider "all possible relevant information about the individual defendant whose fate it

must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976). On the other hand, 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). Although the two interests can coexist, they are often at odds, as the desire that the jury to have a vast amount of information about the offender can result in the jury considering evidence that is unreliable or untrue.

The states are divided on whether the prosecution in the penalty phase of a capital trial should be allowed to present evidence of unadjudicated crimes. Eight states forbid evidence of unadjudicated crimes altogether[12]; ten states require some sort of procedural protections such as a heightened standard of reliability or a limiting instruction[13]; and six others allow the jurors to consider it without any standard at all[14].

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[12] These include Florida, Alabama, Indiana, Maryland, Ohio, Pennsylvania, Tennessee, and Washington. See Steven Paul Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum.L.Rev. 1249, 1277-82 (1993).

[13] Arkansas, California, Georgia, Utah require that the evidence be proven beyond a reasonable doubt before the jury may consider it. *Id.* at 1271-74. Louisiana and Delaware require the judge to decide by clear and convincing evidence that the evidence is reliable before it may be considered. *Id.* at 1274-75.

By allowing evidence of unadjudicated crimes without any standard of proof, Missouri stands at the far end of the continuum with only five other states. But it did not always. In *State v. Debler*, 856 S.W.2d 641, 657 (Mo.banc 1993), this Court recognized that evidence of unadjudicated bad acts lacks the reliability of evidence of prior convictions, yet can be hugely prejudicial. The Court held that, to cure "some of the unreliability," jurors should be instructed that they cannot consider such evidence unless they have found those facts unanimously beyond a reasonable doubt:

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

Id., at 657.

This Court has subsequently retreated from this position, interpreting *Debler* as merely requiring that the State provide notice of any evidence of unadjudicated bad acts. *State v. Strong*, 142 S.W.3d 702, 719-20 (Mo.banc. 2004). McFadden requests, however, that this Court revisit this issue and forbid the use of unadjudicated crimes in penalty phase; or if the Court declines to go that

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Nevada, South Carolina, Nebraska and Illinois require limiting instructions or provide other restrictions on its use. *Id.* at 1275-76.

[14] The six states are Missouri, North Carolina, Oklahoma, Oregon, Texas, and Virginia. *Id.* at 1268-71.

far, that the Court require that the jury be instructed that it cannot consider evidence of unadjudicated crimes in weighing the mitigating and aggravating evidence unless it has found those unadjudicated crimes beyond a reasonable doubt.[15]

A change is warranted for several reasons. First, evidence of unadjudicated bad acts in the penalty phase is inherently unreliable, because no jury has had the chance to fairly and impartially assess guilt or innocence for those charges. A guilt phase jury would rarely, if ever, be given knowledge from the start that the defendant was a murderer and then be asked to fairly and impartially assess his guilt or innocence of an unrelated crime. Yet this is what we expect the jury to do in penalty phase regarding evidence of unadjudicated crimes.

Second, as this Court recognized in *Debler*, this evidence is highly prejudicial:

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[15] This issue is preserved for review (Tr.536-40,1011-15;L.F.512-17,526-27). Trial courts have broad discretion in determining the admissibility of penalty phase evidence. *State v. Storey*, 40 S.W.3d 898, 903 (Mo.banc 2001). The appellate court reviews for an abuse of discretion. *Id.* On a claim of instructional error, "[a]n appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant." *State v. Murray*, 744 S.W.2d 762, 770 (Mo.banc 1988).

> Because no jury or judge has previously determined a defendant's guilt for uncharged criminal activity, such evidence is significantly less reliable than evidence related to prior convictions. To the average juror, however, unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions, and a different species from other character evidence.

Debler, 856 S.W.2d at 657 (internal citations omitted)

Third, allowing defense counsel to cross-examine witnesses regarding the unadjudicated bad acts is not a substitute for a trial on those offenses. Defense counsel's goal in the penalty phase is to avoid a death sentence, not to mount a full defense on all unadjudicated crimes. Defense counsel may decide that it is in the client's best interest not to focus on challenging the unadjudicated bad acts, because it may make the defendant appear unremorseful, or make the jury believe that defense counsel was leading them off on tangents. It may be impractical, or impossible, for defense counsel to mount a full defense for each unadjudicated crime. As a result, the defendant may be impermissibly barred from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death." *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994).

Fourth, and most importantly, the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment require that any fact that increases the maximum penalty for a crime must be

charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243, n.6(1999); *accord, Ring v. Arizona*, 536 U.S. 584, 600 (2002).

The jury could not impose a death sentence unless it found that the evidence in aggravation outweighed the evidence in mitigation. §565.030.4(3). Instruction No. 19 told the jurors that once they found at least one statutory aggravator beyond a reasonable doubt, they should "then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment" (L.F.492). In this weighing, the jurors were free to consider "all of the evidence presented in both the guilt and the punishment stages of trial" even those facts that had not been proven beyond a reasonable doubt (L.F.492). Thus, Instruction 19 improperly allowed the State to utilize facts that increased the punishment to death, yet failed to require that those facts be proven beyond a reasonable doubt.[16]

Here, the State truly needed the evidence of McFadden's alleged and unadjudicated crimes to tilt the scales in the State's favor and seal McFadden's fate. The State presented detailed and lengthy evidence about the crime, as follows:

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[16] McFadden recognizes that Instruction 19 correctly tracked the language of MAI-CR3d 314.44, but argues that it should have been modified, as set forth in Instruction A proposed by defense counsel (L.F.483-84; Appendix).

On the night of May 15, 2003, Eva was at a friend's house at 31 Blakemore (Tr.574). At about 11:00, McFadden drove up, got out of the car and "smacked" Eva (Tr.684-85,690). He told her, "Yo ho's are banned from Pine Lawn" (Tr.577,690). He got back in the car and left (Tr.691).

A little while later, Eva's sister Leslie arrived (Tr.577-78). Eva told Leslie that they had to leave and relayed what had happened with McFadden (Tr.577). Before they could, McFadden came back (Tr.580). He again told Eva that she and Leslie had to leave (Tr.580). Leslie said something back to him, and McFadden threatened that she would be going to see her deceased brother that night (Tr.580-81). McFadden got back in the car and drove off (Tr.581).

Leslie came into the house for a few minutes (Tr.581). She was crying and scared and wanted to leave (Tr.581). She left to walk to a pay phone (Tr.581-82). After Leslie had walked down the street, Eva ran after her (Tr.583). Eva saw the car, warned Leslie that McFadden was approaching, and urged her to come back, but Leslie waved her off (Tr.583-84). Eva hid behind some bushes (Tr.583). McFadden got out of the car, and he and Leslie argued (Tr.584-85,598-99,604). Leslie begged for her life (Tr.702). McFadden pointed a gun at her and made a click sound (Tr.585). When Leslie told him to stop playing, he pointed the gun again and shot her twice (Tr.585). She fell, and he shot her again (Tr.585-86). Leslie died from a gunshot to the head (Tr.668-69,676).

The State also presented detailed testimony about McFadden's alleged witness tampering: About two weeks after Leslie's death, McFadden called his

mother's house from jail, but Eva answered the phone (Tr.696). McFadden asked Eva to sign papers saying that it wasn't him and saying that she would not testify against him (Ex.148-C, p.3). He warned her that he would have to face her when they get older and would have to explain to their son that she testified against his father (Ex.148-C, p.6-7). He told Eva that he "can't stop nothing while I'm in jail;" that he was giving out addresses; that if he didn't get out of jail within a month, he would "let that motherfucker do what the fuck they wanna do"; and that "if the motherfucker really wants to get her, man, tell her I know where she be at" (Ex.148-C, p.8,15,20). The State also elicited that when McFadden was arrested at the motel, he had a plastic bag containing seventeen smaller bags of crack cocaine in his pants pocket (Tr.628-29). The State repeatedly stressed Leslie Addison's murder (Tr.1044,1047-48,1062-63,1065,1067) and the witness tampering (Tr.1041,1064-65) at length in its closing argument.

Because the State used evidence that was inherently unreliable to tip the scales in favor of death, and Instruction 19 failed to set forth the proper standard of proof, the death sentence cannot stand. This Court must vacate the death sentence and impose a sentence of life without parole.

ARGUMENT VII

The trial court clearly erred and abused its discretion in overruling McFadden's objections and admitting into evidence State's Exhibit 148-B purporting to be the recording of an alleged phone conversation between Eva and McFadden via a third person (Slim), and State's Exhibit 148-C, the transcript of the recording, because the rulings violated McFadden's right to due process, to confrontation and cross-examination, a fair and reliable capital sentencing trial, and freedom 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, in that (1) the State failed to lay a proper foundation for admission of the recording and its transcript, by failing to establish that Eva could hear everything McFadden stated, without it being repeated by Slim, and hence failing to establish (a) the authenticity and correctness of the recording; (b) that no changes, additions, or deletions had been made; (c) the manner of preservation of the recording; and (d) proper identification of the speakers; and (2) the recording contained impermissible hearsay, in that it contained Slim's statements of what McFadden had said, yet Slim did not testify at trial.

The State alleged that when McFadden was in jail, he had a friend, Slim, call his mother's house for him (Tr.586). Eva answered the phone and accepted

the collect call (Tr.586; Ex.148-C, p.2). McFadden did not speak into the phone but used Slim as an intermediary (Ex.148-C). When McFadden said something, Slim tried to repeat it into the phone to Eva; when Eva responded, Slim then would repeat that to McFadden, and so on (Ex.148-C). A recording was made of the conversation, proffered as State's Exhibit 148-B.

The State attempted to establish foundation for the recording through Eva's testimony. Eva testified that on May 27, 2003, she received a call from the St. Louis County Jail (Tr.586-87). She recognized one of the two voices on the other end as McFadden's (Tr.586-87). She testified that she reviewed State's Exhibit 148-B and that it was a fair and accurate recording of the conversation she had with McFadden and Slim (Tr.587,679).

When the State sought to play the recording for the jury in penalty phase, defense counsel objected, arguing that it contained hearsay and irrelevant matters, and that the State failed to establish sufficient foundation for admission (Tr.587-95,679-81). The court overruled the objections (Tr.681). The State played the roughly 30-minute recording (Exhibit 148-B) for the jury in penalty phase, and the jury was given a copy of the transcript of the recording to read while it played (Exhibit 148-C) (Tr.682-84). The issue is included in the motion for new trial (L.F.528-29).

A trial court has broad discretion in determining the admissibility of evidence, and its determination will not be disturbed on appeal absent a clear abuse of discretion. *State v. Wahby*, 775 S.W.2d 147, 153 (Mo.banc 1989). The

trial court abuses its discretion when its ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable. *State v. Hall*, 982 S.W.2d 675, 680 (Mo.banc 1998).

A proper foundation for the admission of a sound recording consists of: (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. *Wahby*, 775 S.W.2d at 153; *State v. Spica*, 389 S.W.2d 35,44 (Mo.1965).

Virtually every requirement for foundation is missing here. The competence of the recording operator is typically established through that person's testimony and his experience with such a task. See, e.g., *Wahby*, 775 S.W.2d at 153-54; *State v. Fletcher*, 948 S.W.2d 436,440 (Mo.App. W.D.,1997). Yet here, the State failed to present testimony of the person who made the recording and whether that person was competent to do so. Eva could identify McFadden's voice but had no idea who Slim was, even well into the conversation (Ex 148-C, p.26). The State presented no testimony that the person who made the recording listened while the recording was being made and later checked it to ensure it was accurate. See, e.g., *Fletcher*, 948 S.W.2d at 440. The defense did not have a chance to attack the credibility of whomever made the recording. See, e.g., *id.*

Most importantly, the State did not establish the authenticity and correctness of the recording, or show that changes, additions, or deletions had not been made. McFadden acknowledges that Eva testified that it was a fair and accurate recording of the conversation (Tr.587,679). But Eva was not competent to make that conclusion. Slim would have been the only one of the three able to so state, because he was the only one who heard both Eva and McFadden. Eva spoke to Slim, who then relayed what she had said to McFadden, and vice versa. There may have been times during the conversation when Eva could hear McFadden in the background loudly enough to discern what he was saying, but she primarily relied on Slim to tell her what McFadden was saying. The recording itself demonstrates that Eva could not have heard the entirety of the conversation with enough clarity to vouch for the accuracy of the recording or the transcript. Because Eva could not truly vouch for the accuracy and completeness of the recording, the State did not prove with "reasonable assurance" that the evidence was not tampered with. *State v. Jones*, 877 S.W.2d 156,157 (Mo.App. 1994). Thus, the State failed to demonstrate a proper chain of custody. *Fletcher*, 948 S.W.2d at 440.

Furthermore, the tape should not have been admitted because Slim was not called to testify. Evidence of what Slim stated that McFadden told him were hearsay. A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement

for its value. *Smulls v. State*, 71 S.W.3d 138,148 (Mo.banc 2002). Everything that Slim stated that McFadden told him was hearsay.

Reversal is required when the prejudice from the improper admission of evidence is outcome-determinative. *State v. Black*, 50 S.W.3d 778,786 (Mo.banc 2001). The erroneously admitted evidence must have so influenced the jury that, when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the result would have been different but for the erroneously admitted evidence. *Id.*

Admission of State's Exhibits 148-B and C was extremely prejudicial. In the recording, McFadden threatened Eva and told her to sign papers saying that he hadn't shot Leslie and that she would not testify against him (Ex.148-C,p.3-4,8,10,20,32-33). Eva stated that she had heard that McFadden told a lot of people about killing Leslie and then laughed about it (Ex.148-C,p.26). The State relied heavily upon McFadden's threats and the attitude he displayed in the recording in closing to argue for a death sentence (Tr.1041,1064-65). Admission violated McFadden's right to due process, to confrontation and cross-examination, a fair and reliable capital sentencing trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.Art.I,Secs.10, 18(a),21. This Court must therefore vacate his death sentence and impose a sentence of life without parole.

ARGUMENT VIII

The trial court (1) erred in sentencing McFadden to death, because the State failed to plead in the indictment those facts that the jury was required to find beyond a reasonable doubt before McFadden could be sentenced to death and thus never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder; and (2) erred in failing to instruct the jury that, to find the "serious assaultive criminal conviction" aggravator, it had to find beyond a reasonable doubt that the crime was both serious and assaultive. The court's errors violated McFadden'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. Because McFadden was sentenced to death by a jury that was incorrectly instructed, on a crime for which he was never charged, his death sentence must be vacated.[17]

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

[17] McFadden recognizes that this Court has rejected these arguments previously but raises them here to preserve them for federal review.

any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id.* at 476,490; *Ring v. Arizona*, 536 U.S. 584,609 (2002); *United States v. Booker*, 125 S.Ct. 738,775 (2005).

I. Not Pled in Charging Documents

Missouri has expressly provided by statute 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 that the State has proven certain facts beyond a 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; and must prove that the evidence in aggravation outweighs the evidence in mitigation. § 565.030.4(2),(3); *Whitfield*, 107 S.W.3d at 258-61.

Thus, 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 "effect" of the statute is quite different. In reality, there exist 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 and two of Missouri's death penalty procedure are, in function and effect, elements of the greater offense of aggravated first-degree murder. For

that reason, 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 indictment (L.F. 23-25) or in the subsequent information in lieu of indictment (L.F.420-25) those facts that the jury must find beyond a reasonable doubt before McFadden could be sentenced to death and 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.5-7; L.F.237-66,544-45). This Court must therefore vacate his death sentence and impose a sentence of life without parole.

II. Serious and Assaultive Aggravator

The trial court plainly erred in giving the jury Instruction 18 and not requiring the jury to determine the facts necessary for the "serious assaultive" statutory aggravator: conviction of at least one alleged offense which was both "serious" and "assaultive." Under *Apprendi* and progeny, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." But under Instruction 18, the jury did not find the requisite facts – that at least one alleged conviction existed that was both "serious" and assaultive." Further, instead of the jury deciding whether a conviction existed and was "serious" and "assaultive," Instruction 18 irrebuttably presumed the convictions existed, were "serious" and

"assaultive" (L.F.489-90;Appendix) These errors substantially prejudiced McFadden and were manifestly unjust.

The State's closing argument exacerbated the situation. The State argued that these "four" statutory aggravating circumstances were proven beyond a reasonable doubt because McFadden had those convictions (Tr.1036-37). The State omitted that the jurors themselves must determine whether those convictions were both serious and assaultive.

The failure to allow the jury to determine if McFadden had been convicted of the offenses listed in Instruction 18, and whether those offenses were "serious" and "assaultive" violated his rights to due process, fundamental fairness, jury trial, and reliable sentencing and was manifestly unjust. U.S.Const.,Amends.V,VI, VIII,XIV. Counsel fully preserved this issue (Tr.1008-1009; L.F.273-83,539-41). This Court must therefore vacate his death sentence and impose a sentence of life without parole.

ARGUMENT IX

The trial court plainly erred in accepting the jury's recommendation of death and sentencing McFadden to death, or in the alternative, in failing to conduct an inquiry to determine whether the jury had made the requisite finding that limits the jury's discretion and is constitutionally mandated, because the court's actions denied McFadden the right to a fair and reliable sentencing trial, due process, jury determination of the elements beyond a reasonable doubt, and freedom from cruel and unusual punishment, U.S.Const. Amends.V,VI,VIII, XIV,Mo.Const.,Art. I,§§10,18(a),19,21, and §565.030, in that although the jurors purported to find the "depravity of mind" aggravator, they failed to make the proper factual finding to allow it to do so. McFadden was prejudiced, because without properly finding the limiting language of the aggravating circumstance, the jury should not have considered this aggravator in determining whether he should live or die.[18]

The jury must have a principled means to distinguish those cases in which the death penalty is appropriate from those in which it is not. *Maynard v. Cartwright*, 486 U.S. 356,365 (1988); *Godfrey v. Georgia*, 446 U.S. 420,428-29

[18] McFadden recognizes that this Court has recently denied this claim in *State v. Zink*, 2005 WL 3112152, *5 (Mo.banc, Nov.12, 2005)(not yet final), but raises it here to preserve the claim for federal review.

(1980). If the jury is not adequately informed as to what it must find to impose the death penalty, it has too much discretion. *Furman v. Georgia*, 408 U.S. 238,310 (1972). The discretion of the jury in giving the death penalty must be limited and channeled to sufficiently lessen the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153,189 (1976).

In *State v. Griffin*, 756 S.W.2d 475, 489-90 (Mo.banc 1988), this Court held that for the jury to find the "depravity of mind" aggravator, it must also find one of several other limiting factors, to survive constitutional review. The limiting construction of the depravity of mind aggravator is essential to provide a principled means to distinguish cases in which the death penalty is imposed from those in which it is not. *Id.*

The jury was instructed to consider the depravity of mind aggravator, with the following limiting language:

> You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

(L.F.490;MAI-Cr3d 313.40). Instruction 21 told the jurors, that if they assessed a death verdict, they must complete the verdict form and write on it the statutory aggravating circumstances they found beyond a reasonable doubt (L.F.494). The State also so instructed the jury in closing (Tr.1046).

The verdict form submitted by the jury stated merely: "The murder of Todd Franklin involved depravity of mind and, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman" (Supp.L.F.33). The verdict form did not include the required limiting language that "the defendant killed Todd Franklin after he was bound or otherwise rendered helpless by defendant or another acting with or aiding the defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life."[19]

The trial court has a duty to examine the verdict for any defects, ambiguities, and inconsistencies, and its failure to do so can result in reversible error. *State v. Thompson*, 85 S.W.3d 635,639 (Mo.banc 2002). This Court has recognized that "[i]n any case upon the appearance of any uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt, for '[t]here is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination.'" *Id.*

This Court must grant McFadden a new penalty trial, because without the limiting language, the "depravity of mind" aggravator is unconstitutionally vague and therefore invalid. Too great a risk exists that although the jury did not properly find the "depravity of mind" aggravator unanimously beyond a

[19] McFadden acknowledges that counsel did not object; hence, the issue was not preserved for review. He requests review under the plain error standard. Rule 30.20.

reasonable doubt, the jurors considered it in determining whether McFadden should live or die. The court's actions denied McFadden the right to a fair and reliable sentencing trial, due process, jury determination of the elements beyond a reasonable doubt, and freedom from cruel and unusual punishment. U.S.Const.Amends.V,VI,VIII,XIV, Mo.Const., Art.I,§§10,18(a),19,21;§565.030. This Court must reverse for a new penalty trial.

CONCLUSION

Based on Arguments I, II, and III, Mr. McFadden respectfully requests that the Court remand for a new trial. Based on Argument IV, he requests that the Court grant him a new trial based on guilt phase error, or alternatively, resentence him to life without parole for penalty phase error. Based on Argument V, McFadden requests that the Court re-sentence him to life without parole, or, if that relief is denied, remand for a new trial. Based on Arguments VI, VII, and VIII, he requests that the Court resentence him to life without parole. Finally, based on Argument IX, McFadden requests that the Court remand for a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, to: The Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 5th day of December, 2005.

_____

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, 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 30,973 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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