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 REPLY BRIEF

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[1] Vincent McFadden maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

TABLE OF AUTHORITIES

CASELAW:

MISSOURI SUPREME COURT RULE:

JURISDICTIONAL STATEMENT

McFadden incorporates the Jurisdictional Statement from page 12 of his Opening Brief.

STATEMENT OF FACTS

McFadden incorporates the Statement of Facts from pages 13-30 of his Opening Brief. Corrections to the State's rendition of facts are set forth *infra* at pages 29-30.

ARGUMENT I

The State's failure even to mention *Miller-El v. Dretke,* 125 S.Ct. 2317 (2005), is a telling recognition of the weakness of its case. *Miller-El* rejected the same argument set forth by the State here that jurors cannot be considered similarly situated unless their circumstances are identical in all respects. While the State urges consideration of each instance of racial discrimination separate and distinct from the others, *Miller-El* instructed that the trial court must view the totality of the evidence, including the State's patterns of questioning and other practices designed to garner excuses for removing black people from the judicial process. Finally, *Miller-El* refuted the State's argument that the defendant waives his challenge to the State's strikes if he remains silent at step three of the procedure mandated by *Batson v. Kentucky,* 476 U.S. 79 (1986). The Supreme Court held that the trial court must evaluate the strikes based on the record before it, even when the defendant did not point out similarly situated jurors, etc; furthermore, under *Johnson v. California,* 125 S.Ct. 2410 (2005), Missouri may not impose an evidentiary burden not anticipated by *Batson*.

The Supreme Court rejected the State's argument that to be similarly situated, jurors must be alike in all regards.

In *Miller-El v. Dretke*, 125 S.Ct. 2317, 2329 (2005), the Supreme Court instructed that when analyzing whether jurors are similarly situated, the trial court must look at the entirety of voir dire. The court must consider whether the State excluded black jurors for

reasons that were not applied to white jurors. *Id.* at 2325-26. When the State has given more than one justification for its strike, the court also should consider whether, given the entirety of voir dire, the excluded black juror logically would have been a strong juror for the State. *Id.* at 2329. The Court rejected the dissent's view – raised by the State here – that to be similarly situated, the jurors had to be identical on every point. *Id.*, fn.6. "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." *Id.*

From the ten peremptory strikes challenged by the defense, the Supreme Court chose to analyze two, those of Billy Jean Fields and Joe Warren. *Id.* at 2326-31. The State gave two reasons for removing Fields: (1) he believed that the possibility of rehabilitation was relevant to the likelihood of future dangerousness; and (2) he had a brother who had been convicted of crimes. *Id.* at 2326-27.

The Court held that the State had not removed similarly situated white jurors. It found that three nonblack jurors – Hearn, Witt, and Gutierrez – gave similar (or stauncher) answers as Fields, yet were not removed by the State. *Id.* at 2327-28. The Court rejected the dissent's view that, since none of those three jurors also had a brother who had been convicted, they were not similarly situated. *Id.* at 2329, fn.6. The Court stressed that when comparing the jurors, it found "strong similarities as well as some differences," but "the differences seem far from significant." *Id.* at 2329. The Court found that the difference here – that Fields had a convicted brother – was a mere afterthought. *Id.* at 2328. If the State truly were concerned about Fields' relationship to a

convicted felon, it would have asked Fields more about it. *Id.* Considering voir dire in its entirety, the Court concluded that Fields should have been an ideal juror for the State. *Id.* The State's strike therefore revealed racial discrimination. *Id.*

The Court also criticized the State's reasons for striking juror Joe Warren. *Id.* at 2329-31. The State offered that it struck Warren because (1) he equivocated on whether the death penalty was easier on the defendant than life without parole; and (2) his brother-in-law had been convicted of a crime. *Id.* at 2329-30.

The Court rejected the State's explanations on basically the same grounds as it had with the State's strike of Fields. *Id.* at 2329-31. Three white jurors – Duke, Jenkins, and Girard – stated that a death sentence was an easier punishment than life without parole, yet were not removed by the State. *Id.* at 2329-30. The State never questioned Fields about his brother-in-law, thereby negating the persuasiveness of that alleged concern. *Id.* at 2320, fn.7. Also, three white jurors – Davis, Nix and Vickery – had relatives who had been convicted yet were not removed. *Id.* The fact that the State's reasons also applied to these other, white jurors who were not struck was evidence of pretext. *Id.* at 2330.

In the instant case, jurors Carrie Warford and Christine Nevills present the strongest examples of the State's failure to remove similarly situated white jurors.

A. Carrie Warford

The goal of the following chart is to clarify the comparison between black juror Carrie Warford and white juror Sharon Ruebel (who served on the jury). In the chart, the State's rationalizations for its peremptory strike are underlined. The segments in bold are

the reasons that the State believed were very important when striking black jurors but apparently were not so important when the juror was white.

Carrie Warford (black juror excluded)	Sharon Ruebel (white juror not excluded)
• Hardship: manager of short-staffed cleaning company; employer may not want her to be gone (115)	•**Hardship: "one of the key people" for company's upcoming audit, and needed to account for all the cash coming in and out; employer wrote letter to court** (163-64)
• Cell phone rang and she had difficulty turning it off	
• Not familiar with Pine Lawn	•**Familiar with Pine Lawn: aunt and uncle had lived there** (536)
• Father was murdered in his shoe shop in 1979; crime was unsolved (514)	
• Served on civil and criminal juries (588)	
• Relation to police officers: serves on University City Civil Service Board: hears complaints and grievances by police officers and other city employees (603-604)	•Relation to police officer: has brother who is federal agent in Florida, but only sees him twice a year (606)

The State fails in its attempts to distinguish Ms. Warford from Ms. Ruebel (Resp.Br.18-19). The State argues that Ms. Warford's difficulty in taking off work was so much more extreme than Ms. Ruebel's (Resp.Br.18-19). But there was no real difference. While Ms. Warford was an area manager of a short-staffed cleaning company who made sure the cleaners showed up at night (V.D.115), Ms. Ruebel was a "cashier or an operations person" for a securities company, "one of the key people" involved in an upcoming audit, who had to account for all the cash coming in and out of the brokerage firm (V.D.163). The State argues it was reasonable for the prosecutors to worry that, due to her work responsibilities, Ms. Warford might be distracted during the trial, but that Ms. Ruebel would not be (Resp.Br.18). The record simply does not support the leap by the State that Ms. Warford's duties were any more serious or distracting than Ms. Ruebel's, or that Ms. Warford was less replaceable than Ms. Ruebel. The record actually shows that Ms. Ruebel was more concerned and would have been more distracted, since she took the effort to get a letter from her employer to try to get out of jury duty (Tr.163).

Ms. Warford differed from Ms. Ruebel in that Ms. Warford had trouble with her cell phone ringing. But is this really a valid justification, or is it an excuse for discrimination? The prosecutor argued that the fact that Ms. Warford's cell phone rang while the court read instructions and again in small group questioning and that she "was fiddling with it" indicated she did not take the process seriously (V.D.668). Yet the prosecutor never said anything to Ms. Warford, the court, or defense counsel at the time; he never asked the court to instruct Ms. Warford to shut off the phone; and never asked Ms. Warford if she needed help in shutting it off. Tellingly, the prosecutor never

questioned Ms. Warford to clarify whether, by "fiddling" with the phone, she was showing disrespect for the proceedings, or whether she was merely trying to shut the phone off. As the Supreme Court recognized, "the 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, citing *Ex Parte Travis*, 776 So.2d 874, 881 (Ala. 2000). Furthermore, the prosecutor knew that Ms. Warford had served on both civil and criminal juries in the past and also conducted grievance hearings, so she logically would be someone who would take judicial proceedings seriously (V.D.603-604). The prosecutor knew that Ms. Warford would not have her phone during the actual trial, since the jury would be sequestered.

The State argues that because Ms. Ruebel's phone never rang, she and Ms. Warford were not similarly situated (Resp.Br.19). But although the State fails to acknowledge it, this argument has been rejected. *Miller-El*, 125 S.Ct. at 2329, fn.6. Ms. Warford and Ms. Ruebel were similarly situated, because they both expressed difficulty with missing work, and so the analysis next turns to whether Ms. Warford logically would have been a good juror for the State. *Id.* at 2329.

The State argues that Ms. Warford would not have been a good juror for the State – even though her father had been shot to death and in this case the victim was shot to death – because the police did not solve the crime (Resp.Br.21). When asked if she thought the police did a good or a bad job in that case, Ms. Warford commented that it would have been a good job if they had solved that crime (V.D.514). The State omits to

mention that when she was questioned further, Ms. Warford stated that there was nothing about her father's case that would make her think that police officers were less credible than other witnesses (V.D.643). She stated that she could consider all the evidence and argument; her personal experiences would not cause her any difficulty (V.D.642-43). In light of Ms. Warford's assurances and the fact that the State – in a case where the victim was shot to death – typically would want a juror whose close relative was shot to death, Ms. Warford would have been a strong juror for the State, and her exclusion is highly suspect.

The State denies that Ms. Warford would have been a stronger juror for the State than John Black, who served on the jury (Resp.Br.20-21), even though the State previously argued that Black was not even qualified to serve (V.D.64). The State previously argued that Mr. Black should be struck for cause, because he "was quite clear he would require a higher burden for guilt before he would consider the death penalty" (V.D.43-46,49,64).

Yet now the State argues that Mr. Black was actually a good juror for the State, or at least better than Ms. Warford (Resp.Br.21). It speculates that the prosecutors just changed their mind, from believing that he was not fit to serve, to believing he would "scrupulously" follow the court's instructions (Resp.Br.21). It argues that Mr. Black's experience as a police commissioner made him a good juror for the State, but Ms. Warford's experience on the Civil Service Board made her a bad juror (Resp.Br.21-22).

A comparison of the job descriptions given by Mr. Black and Ms. Warford, however, show that their duties were very similar:

Mr. Black: "Primarily we do the hiring process of the police officers, firing, or any action that, you know, that we have to take against the police officers" (V.D.596).

Ms. Warford: "[W]e hear complaints and grievances of police officers and city employees.… [If police officers] get reprimanded and they disagree with the reprimand, they come to us" (V.D.603-604).

Thus, Mr. Black's past position as a police commissioner does not make him a stronger juror for the State than Ms. Warford, a member of the University City Civil Service Board.

Finally, the State argues that Mr. Black was a good juror because, when he was arrested for drunk driving in 2002, the police were fair to him (Resp.Br.21). In contrast, the State argues, Ms. Warford would not have been a good juror for the State, because the police did not solve her father's murder, despite the similarities between her father's case and the one being tried (Resp.Br.21). This blinks reality. Typically, the State would seek out a juror whose close relative was killed so similarly to the victim in the case being tried. The fact that her father's murder was never solved logically made Ms. Warford more favorable to the State, since she would want to see justice done here and thus may have been more conviction prone.

B. Christine Nevills

The next example of how the State failed to strike similarly situated jurors is a comparison between black juror Christine Nevills and, again, white juror Sharon Ruebel. As with the first chart, the State's rationalizations for its peremptory strike of Ms. Nevills

are underlined. The segments in bold are reasons that the State gave for striking black jurors but which did not apply to this white juror.

Christine Nevills (black juror excluded)	Sharon Ruebel (white juror not excluded)
• Hardship: would be difficult to be gone from work for a week; full-time evening student nearing end of term (112)	•**Hardship: "one of the key people" for company's upcoming audit; must account for all cash coming in and out; employer wrote letter to court** (163-64)
• Selected by prosecutor for discussion of hypothetical re: reasonable doubt (500-502)	• Not asked
• Had lived in high crime area; never heard shootings (530)	• Didn't live in high crime area; never asked if she ever heard gunshots
• Questioned by State re: how she knew it was high crime (530)	
• Father had lived in Pine Lawn (535)	• **Aunt, uncle had lived in Pine Lawn** (536)
• Asked if she ever lived in Pine Lawn (535)	• Not asked
	• Brother is federal agent in Florida, but only sees him twice a year (606)
• Nurse for St. Louis City school district	• Cashier for Wachovia Security

The State concedes that the prosecutor's justification that Ms. Nevills' father had lived in Pine Lawn was not valid (Resp.Br.26). The prosecutor explained that he did not want any jurors with present knowledge of Pine Lawn, given the construction that had occurred since the time of the shooting (V.D.667-68,672). But, as the State concedes, there was no evidence that Ms. Nevills had any current knowledge of Pine Lawn (Resp.Br.26). Although the State urges that the prosecutor probably just made an honest mistake (Resp.Br.26), the fact that the State removed a black juror for this reason but did not remove any of five white jurors who also revealed past familiarity with Pine Lawn, is probative of racial discrimination.

The prosecutor alleged he removed Ms. Nevills because she had lived in a high crime area yet never heard gunshots (V.D.667). The State futilely attempts to explain the logical relevance: "the prosecutor apparently thought it was better to have people on the jury who had actually heard gunshots, and who would better understand what the witnesses were describing" (Resp.Br.24). But if the State truly wished to seat jurors who had heard gunshots, it would not have restricted its inquiry to jurors who had lived in a high crime area. Certainly, jurors from more rural areas of St. Louis County had also heard gunshots. Other jurors may be hunters, may have attended scout camps, or may have tried target practice. Whether or not a juror lived in a high crime area was immaterial to whether he or she had ever heard gunshots; the only purpose of this highly circumscribed inquiry was to find an excuse to remove black jurors.

The State incorrectly urges the Court to address each instance of the State's discrimination separate and apart from the others, instead of considering each *in light of* the other instances, as *Miller-El* instructs.

In *Miller-El*, the Court found that the State had failed to strike similarly situated jurors and used illegitimate justifications for its strikes against black jurors. 125 S.Ct. at 2327-31. It considered the entirety of voir dire in determining whether the black jurors logically would have been good jurors for the State. *Id.* at 2329, 2331, 2339. It considered practices the State engaged in at trial, such as selective questioning and jury shuffling, which aided the State in removing blacks from the jury. *Id.* at 2332-38. Finally, it considered the history of racially discriminatory jury selection by the prosecutor's office. *Id.* at 2338-39.

The Supreme Court instructed that the trial court must evaluate each of the State's justifications in light of all pertinent evidence in the record. "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El*, 125 S.Ct. at 2332. The trial court should consider "[t]he whole of the voir dire testimony subject to consideration." *Id.* See also *State v. Marlowe*, 89 S.W.3d 464, 470 (Mo.banc 1992) ("in determining pretext, the judge should consider the totality of the facts and circumstances surrounding the case"). The trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93, citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

The State, in contrast, seeks to have this Court evaluate each instance of discrimination apart from the others. For instance, the State posits that because there were two permissible views regarding Ms. Warford's actions when her cell phone rang (*i.e.*, the State's view that by "fiddling" with the phone she was showing disrespect for the proceedings, or the defense view, that she was trying to shut the phone off), the court did not clearly err in accepting the State's view (Resp.Br.17-18). The State seems to suggest that since the court accepted a "permissible" interpretation of Ms. Warford's conduct, the analysis is complete, and there is no need to look to the remainder of voir dire for clues to the prosecutor's intentions, to determine which interpretation is more likely. The State wants the Court to look at each piece of the puzzle separately, without regard to the other pieces, apparently realizing that if the Court were to see the entire picture, the State's racial discrimination would be obvious.

The other pieces of the puzzle become clear when examining all five of the challenged strikes. In addition to failing to strike similarly situated white jurors, the State engaged in patterns of questioning designed to elicit reasons to strike black jurors. First, the State engaged in disparate questioning depending on the jurors' race. For example, the prosecutor limited its questioning of whether jurors had heard gunshots, to those people who had lived in high crime areas (V.D.530-32). Realistically, most of the people who had lived in a high crime area would be black, given the socio-economic conditions in St. Louis County. The State thus was targeting black jurors. If the State's concern was to locate jurors who had ever heard gunshots, it would have questioned the entire panel. Instead, the State struck Ms. Nevills because she had not heard gunshots, but – because

the State had not questioned the entire panel on the topic of gunshots – the State did not know how many white jurors had not heard gunshots. Hence, even though many others on the panel had probably not heard gunshots, the State only struck Ms. Nevills.

Second, the State engaged in patterns of failing to question sufficiently on certain topics and then using the resulting ambiguity to strike black, but not white, jurors. For example, the State asked the venire panel whether anyone was familiar with Pine Lawn (V.D.533-40). Fourteen jurors responded affirmatively (V.D.533-40). Of those fourteen, the State questioned only one (Allean Jones, struck for cause) as to whether she was aware of the recent construction in Pine Lawn (V.D.540). Of the fourteen, eight remained on the panel at the time of the State's peremptory strikes (V.D.666,680; Supp.L.F. 2-19).[2] Of these eight, three were black and five were white (V.D.534-37, 666). The State struck the three black people based on their familiarity with Pine Lawn but did not strike any of the five white jurors familiar with Pine Lawn (V.D.667-72). Thus, although the State alleged that it did not want any jurors currently familiar with Pine Lawn (V.D.667-68,672), it failed to ask the jurors about their current knowledge of Pine Lawn, and it struck only the black jurors.

The State also failed to inquire adequately on the following issues, yet then exploited the ambiguity to strike the jurors: whether Ms. Nevills' employment for the St. Louis City School District really made her a bad State juror; whether Ms. Warford's

[2] These were jurors Swartstrom, Nevills, Glover, Ruebel, Dickerson-Capvano, Byas, Smith, and Kemper (V.D. 666, 680; Supp.L.F. 2-19).

"fiddling" with her cell phone really showed that she would not take the proceedings seriously; whether Mr. Sams had truly neglected to respond regarding familiarity with Pine Lawn, or instead, was really just not familiar with that neighborhood; and whether Ms. Byas would require the State to present additional scientific evidence, and whether she knew the current condition of Pine Lawn. As explained previously, the State's failure to question on purported areas of concern "is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El*, 125 S.Ct. at 2328, citing *Travis*, 776 So.2d at 881.

The State adopted justifications that were not supported by the record. The most egregious example was striking Ms. Nevills and Ms. Glover for their present familiarity with Pine Lawn (V.D.667-68,672), although the State neither asked, nor did the jurors volunteer that they were familiar with Pine Lawn, post-construction. The State struck Ms. Glover because her sister's house was firebombed and the crime was unsolved; this misstated Ms. Glover's statement – she never stated that the crime was unsolved (V.D.535,670). The State struck Ms. Byas because of her trouble with joint liability, but Ms. Byas did not express any difficulty with the topic, as the State now concedes (Resp.Br.28).

The State also adopted justifications contrary to those typically taken by the State. Although the State typically seeks out jurors with strong law enforcement ties, the prosecutors struck Mr. Sams, who had three nephews in law enforcement, because they thought it was odd that Mr. Sams would be so concerned about his nephews' safety that he did not want to disclose information about them in front of the panel (V.D.671).

Although the State typically seeks out jurors who are crime victims or closely related to crime victims, the prosecutors removed Ms. Warford and Ms. Byas, both of whom had relatives shot to death (V.D.514,518-19), and Ms. Glover, whose sister's house in Pine Lawn had been firebombed (V.D.535).

This Court must consider all these instances of discrimination in determining whether the State was racially motivated in exercising its peremptory strikes. In another St. Louis County case presided over by Judge Ross, the Court of Appeals analyzed not only the State's justifications for three strikes challenged by the defense, but also two strikes that the defendant had not challenged. *State v. Hopkins*, 140 S.W.3d 143 (Mo.App., E.D. 2004). After analyzing the State's justifications for the three challenged strikes, it reviewed the State's justifications for the two other, unchallenged strikes, to shed light on the prosecutor's demeanor and credibility. *Id.* at 155-57. It found probative (1) the State's failed attempt to strike another minority juror; and (2) that the State had given an invalid reason along with a valid reason for another of the unchallenged strikes. *Id.* at 156-57. The Court of Appeals concluded that Judge Ross had clearly erred in allowing the three challenged strikes and remanded for a new trial. *Id.*

<u>The trial court has the obligation to evaluate the persuasiveness of the State's reasons, even if the defendant remains silent at Step 3.</u>

The State argues that the *Batson* claims regarding Christine Nevills and Virginia Glover are waived, because counsel did not specifically rebut the State's reasons for striking those jurors, when discussing why the State's reasons for striking other jurors

were pretextual (Resp.Br.22,32-33). In *Miller-El*, the Supreme Court rejected the same argument that the State now asserts.

A. The court must evaluate the claims based on the record even when the defendant has offered no evidence or argument at Step 3.

At Miller-El's trial, the State used peremptory strikes to remove ten of the eleven black venirepersons. *Id.* at 2325. Defense counsel objected that the strikes were racially motivated and were not legitimate given the history of discrimination by the Dallas County District Attorney's Office. *Id.* at 2322. The defense presented the juror questionnaires of the ten excluded black jurors, newspaper articles on racial bias in jury selection, and a manual on jury selection by a former Dallas County prosecutor. *Id.* at 2345 (Scalia, J., dissenting). It also presented the testimony of nine witnesses. *Id.*

While on appeal, *Batson* was decided, so the case was remanded for a *Batson* hearing. *Id.* at 2322-23. The defense reintroduced some of the evidence from the prior hearing. *Id.* at 2346 (Scalia, J., dissenting). At the court's direction, the State explained its strikes. *Id.* The defense then stood on the evidence presented at the first hearing. *Id.* at 2347. As Justice Scalia recognized, "Miller-El did not even attempt to rebut the State's racially neutral reasons at the hearing," presenting no evidence and making no argument. *Id.* at 2347. The trial court denied the *Batson* claim; the Texas appellate court affirmed; and the Court of Appeals for the Fifth Circuit rejected the claim when raised in a federal habeas petition. *Id.* at 2323.

Yet the United States Supreme Court reversed. *Id.* at 2340. It based its holding in part on the comparison of black and nonblack jurors and Miller-El's argument that black

and nonblack jurors were questioned differently – even though the comparison and the argument were not made by Miller-El at the time of the *Batson* hearing. *Id.* at 2348 (Scalia, J., dissenting). The Court rejected the dissent's argument – set forth by the State here – that Miller-El could not argue matters evident from the record if he did not argue them at the proper time during the *Batson* hearing. *Id.* at 2326, fn.2; cf. *id.* at 2347 (Scalia, J, dissenting). The Court stressed that "[t]here can be no question that the transcript of voir dire, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts." *Id.* at 2326, fn.2. The Court even relied on documents such as the remaining juror questionnaires, which had not been presented at the *Batson* hearing. *Id.* at 2326, fn.2, 2349-50. So, too, this Court must consider all evidence of discrimination evident from the record.

B. Missouri's requirement that the defendant present evidence to rebut the State's justifications before the trial court may assess those justifications adds an additional, unauthorized and improper step to the *Batson* procedure.

In *Batson*, the Supreme Court set forth a three step procedure for the trial court's constitutional review of peremptory strikes. At the first step, the defendant must make out a prima facie case by showing that the totality of the facts gives rise to an inference of discriminatory purpose. 476 U.S. at 93-94. The burden then shifts to the State to provide permissible race-neutral justifications for the strike. *Id.* at 94. Then, at the third step, the trial court "will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98; *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

The Supreme Court has characterized the first two steps of Batson as "govern[ing] the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim." *Johnson v. California*, 125 S.Ct. 2410, 2417-18 (2005). Steps one and two are the burden-of-production steps, and step three is the credibility-assessment step. *Id.* at 2417-18, and 2418, fn.7. Admittedly, the defendant ultimately carries the burden of persuasion to prove purposeful discrimination, *Batson*, 476 U.S. at 93. But *Batson* does not impose an evidentiary burden on the defendant at step three as a prerequisite of consideration of the claim; instead, step three describes the duty of the court to consider whether the strike was pretextual. *Id.* at 98.

In *Johnson*, the Supreme Court considered whether California could require the defendant, at the first step of *Batson*, to prove it was more likely than not that the State's strikes were based impermissibly on race. 125 S.Ct. 2410, 2413 (2005). While recognizing that states may formulate appropriate procedures to comply with *Batson*, the Court held that California could not heighten the defendant's burden at step one. *Id.* at 2414, 2416, 2419.

So, too, Missouri cannot heighten the defendant's burden at step three. This Court has recognized that "*Batson*, *Purkett*, and their progeny clearly state that once the prosecutor offers a facially valid reason for a strike, then the defense has an *opportunity* to show that the reason given is pretextual." *State v. Edwards*, 116 S.W.3d 511, 526 (Mo.banc. 2003)(emphasis added). Yet the Court has also held that failure to take advantage of that opportunity amounts to abandonment of the claim. *State v. Taylor*, 944 S.W.2d 925, 934 (Mo.banc 1997). This violates *Batson* by adding a step between Step 2

and Step 3 to require the defendant to present further evidence before the court assesses the credibility of the State's justifications for its strikes.

The Court should not find that the claims as to jurors Nevills and Byas are waived by counsel's failure to make further argument at Step 3 regarding those jurors. As in *Miller-El*, this Court must review the entire record available to the court and make its own assessment of the State's justifications regarding these jurors. Defense counsel's silence does not obviate the trial court's duty to assess the State's justifications; so too, it should not obviate this Court's duty to review the trial court's action. Otherwise, a prosecutor could strike a black juror for an answer that thirty white jurors also gave, and if defense counsel did not say anything, the defendant could not challenge the trial court's failure to disallow the strike. Furthermore, the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community…. [It] undermine[s] public confidence in the fairness of our system of justice." *Johnson*, 125 S.Ct. at 2418, citing *Batson*, 476 U.S. at 87. Because the very integrity of the judicial system is threatened when racism infects jury selection, this Court should not lightly disallow *Batson* challenges.

This Court must find that the trial court clearly erred in upholding the State's strikes of five of the six remaining black jurors, allowing only one to have her voice heard on the vital decisions of guilt or innocence and life or death. This Court must remand for a new trial.

ARGUMENT II

Despite the State's assertions, defense counsel did in fact attempt to question Hazlett about the prior weapons charges, *i.e.*, rape, armed criminal action, and unlawful use of a weapon, but was shut down when the court ruled that the only relevant factor was the date Hazlett had been caught with a gun. By testifying that he only carried a gun for self-protection, Hazlett opened the door to questioning about his arrests for other crimes involving guns. The issue is properly set forth in the Point Relied On and is preserved for review.

Rebuttal to State's B.2

The State incorrectly alleges that defense counsel did not attempt to question Hazlett regarding the rape and armed criminal action charges (Resp.Br. 44-45). When defense counsel questioned Hazlett about his conviction for unlawful use of a weapon, Hazlett volunteered that he only started carrying a gun after he was threatened sometime after the shooting in 2002 (Tr.102-103). The State objected and the following exchange took place at the bench:

> Mr. Bishop (prosecutor): I just want to make sure we're all on the same page. She's just planning to get into the charges and that they were later dismissed. It seemed like the question was going towards dealing with his use of weapons.
>
> Ms. Kraft (defense counsel): It is now because I think he's opened the door by saying the only reason he got a weapon is because my client has made threats toward him.

(Tr.103). Although defense counsel did not specifically mention "rape and armed criminal action" charges, she argued that the State had opened the door to discussion of Hazlett's use of weapons in regard to the charges. Those charges were for rape, armed criminal action, and unlawful use of a weapon (Tr.6,102-108).

The court then held that the only relevant detail about the charges was the date that he had been caught carrying a gun (Tr.104-106). It rejected defense counsel's request that she be allowed to elicit facts about the 2004 arrest (Tr.104-106). It ruled, "I'll allow you to ask him if he had a gun on June 17, 2004, but that's the only question that's relevant" (Tr.106). Counsel reasonably believed that since the court rejected the relevance of details of the 2004 weapons charge, it also would reject the details of the 2002 weapons charges, offered for the same purpose.

Rebuttal to State's B.3

The State concedes that the defense would have been allowed to impeach Hazlett with a prior arrest if Hazlett opened the door, as when the witness opens the door to a prior arrest by alleging that he had never before been in trouble (Resp.Br.46, citing *State v. Campbell*, 868 S.W.2d 537, 539-40 (Mo.App., E.D. 1993)). But Hazlett's situation is directly akin to that set forth in *Campbell*. There, the defendant explained his actions regarding the charged crime by stating that he panicked since he had never been in trouble before. *Id.* The State was allowed to elicit that the defendant had been arrested four times, including three arrests for weapons violations. *Id.* at 539. The Court of Appeals held:

> The prior arrests legitimately rebutted defendant's direct assertion he had never been in trouble with the police before. Furthermore, it is within the trial court's discretion to allow inquiry into instances of unconvicted conduct during cross examination if it is relevant for impeaching the defendant's veracity.

Id.

In *State v. Parson*, 815 S.W.2d 106, 109-10 (Mo.App., E.D. 1991), the defendant testified on direct that he neither used weapons nor carried them. On cross, the State questioned him about his prior arrests for assault and unlawful use of a weapon, and he admitted the arrests. *Id.* at 109. The Court of Appeals, Eastern District, approved the State's cross-examination. *Id.* at 109-10. It held that the State may attack the defendant's credibility through evidence of a mere arrest not resulting in conviction if a defendant has "opened up" the issue of prior arrests, such as by disavowing the prior misconduct. *Id.*, at 109. By disavowing bad conduct, the defendant has opened up the issue of his good character and "may be impeached with prior arrests to test (1) whether he truthfully is a person of good character; and (2) his trustworthiness and credibility as a witness in his own behalf." *Id.*

In *State v. Whitt*, 592 S.W.2d 316, 317 (Mo.App., E.D. 1979), the defendant denied robbing the victim, or anyone else. On cross-examination, the State asked the defendant whether it was true that he robbed another woman, a crime for which the defendant had not been convicted. *Id.* The Court of Appeals held that the State's question was proper. *Id.* "To hold otherwise would give the defendant an opportunity to

deny previous robberies without providing the state an opportunity to challenge such denials." *Id.*

Hazlett opened the door by trying to explain away his conviction by suggesting that the only reason he carried a gun was self-protection (Tr.102-103; App.Br.75-85). Thus, Hazlett opened the door to cross-examination to expose that he was not credible – while he testified he only carried the gun for self-protection, in truth, he had used it to commit crimes, crimes against women.

Without citing any authority, the State argues that if a witness disavows a prior conviction, the other party may delve into the details of that conviction, but may not elicit details of other arrests or misconduct that show that the disavowal is not believable (Resp.Br.47-48). The State is incorrect. Hazlett presented himself to the jury as a law-abiding citizen who was convicted of unlawful use of a weapon only because he needed to carry a gun for self-protection (Tr.102-103). Thus, Hazlett brought his character and credibility into evidence. As explained in *Campbell*, *Parson*, and *Whitt*, once Hazlett testified that he carried the gun for self-protection, the defense was entitled to show he was not truthful, by eliciting details about his other arrests for weapons crimes.

Rebuttal to State's C

The State argues that the Point Relied On does not include the claim that defense counsel should have been allowed to elicit evidence of the arrests to impeach Hazlett regarding his testimony that he only started carrying a gun in July 2002, after hearing rumors that he was going to be killed (Resp.Br.48). This simply is not accurate. The relevant portions of the Point Relied On are as follows:

> 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, … 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.

(App.Br.33,75)(emphasis added). The Court should reject the State's claim that, as a result, this claim is not preserved for review and its demand that review be for plain error (Resp.Br.48).

Hazlett's arrests for rape, armed criminal action, and unlawful use of a weapon had impeachment value, because they would have refuted Hazlett's claim that he only carried the gun for self-protection. The defense should have been allowed to ask Hazlett about the arrests so that the jurors themselves could assess his credibility. The trial court's refusal to allow the jury to assess the credibility of this key witness, after he had opened the door, warrants a new trial.

ARGUMENT III

Defense counsel did not affirmatively waive this claim. Respondent's argument demonstrates the State's reliance – here and at trial – on inaccuracies, speculation, and stereotypes rather than evidence.

The State argues that defense counsel, by her actions, affirmatively waived any challenge to the State's admission of evidence of McFadden's gang membership (Resp.Br.52-53). It points to an exchange that took place at the bench prior to the testimony of a court reporter, who would read portions of McFadden's testimony when he pled guilty to another charge (Tr.229). Defense counsel's concern was that the court reporter not reveal that the testimony was from a prior guilty plea hearing (Tr.229). The prosecutor told defense counsel what questions he would ask, and what the answers would be (Tr.229). Defense counsel then asked, "So you're just merely portraying it as a prior court hearing?" (Tr.229). When the prosecutor responded affirmatively, and the court asked if she had an objection, defense counsel stated, "I think he probably can get into it" (Tr.230). But defense counsel then alerted the court the issue had just arisen, and they had not had the chance to research it (Tr.230). Defense counsel objected to the State using McFadden's testimony from a prior criminal trial (Tr.230). From the record, it is clear that defense counsel was concentrated solely on whether the State could introduce McFadden's statement from a prior guilty plea hearing (Tr.229-32). The issue is not waived.

In arguing that the State presented sufficient nexus between the crime and McFadden's gang membership, the State relies on factual inaccuracies. The State says

that McFadden "told his girlfriend, Evelyn Carter, that he felt good about killing the victim because the victim was a snitch who had gotten his 'homies' (the Smith brothers) in trouble'" (Resp.Br.57;also 12,54). The State's account is misleading. Carter was not McFadden's girlfriend, but rather the cousin of McFadden's ex-girlfriend (Tr.279). McFadden never told Carter he killed Franklin; rather, when Carter asked McFadden if he shot Franklin, he stated that he felt good about it, *i.e.*, the shooting (Tr.282-83,289). Carter inferred that McFadden did the shooting, but McFadden never told her, "I did it" (Tr.289). Carter "guessed" that when McFadden talked about his "homies," he was referring to Lorenzo and Corey, but McFadden never mentioned any names (Tr.283).

The State argues that evidence of gang membership was admissible to provide a complete and coherent picture of the crime, explaining why McFadden believed he could act with impunity in shooting Franklin (Resp.Br.55). The State presented evidence that McFadden was an ex-gang member and had been in the Six-Deuce Bloods (Tr.233-34,258). But there was no evidence presented that McFadden was relying on fellow gang members to provide him protection. There was no evidence presented regarding the characteristics of this gang. Instead of relying on evidence, the State relies on speculation and stereotypes of gangs to prove its case (Resp.Br.55-56). Reversal is warranted.

ARGUMENT IV

The State's closing arguments warrant a new trial.

Although the State makes a passing reference to *United States v. Young*, 470 U.S. 1, 18 (1985) (Resp.Br.79), the State fails to address the Supreme Court's mandate that the "do your job" argument exerts undue pressure on the jury and "has no place in the administration of criminal justice." The State continued its improper "do your duty" argument in penalty phase.[3] There, it compared the jurors to WWII soldiers fighting and killing Nazis (Tr.1066). The soldiers had a duty to do and they did what they had to do, without feeling bad about it (Tr.1066). So, too the jurors didn't volunteer for this, but they had to do their duty and must reach a just verdict, i.e., death (Tr.1066). This argument was improper, because it was "calculated to remove reason and responsibility from the sentencing process." *Newlon v. Armontrout*, 885 F.2d 328, 1338 (8th Cir. 1989). Soldiers, unlike jurors, do not have discretion. They must follow orders, so responsibility for their actions lies elsewhere. Thus, urging the jurors to believe they are like soldiers diminishes their sense of responsibility and destroys the concept of discretion afforded to them as required under the Eighth Amendment. *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

[3] Counsel acknowledges that counsel did not object to this argument at trial and that this claim was not included in Appellant's initial brief, but requests that the Court review it for plain error under Rule 30.20.

The State contends that the prosecutor was merely relying on the evidence and not his position as prosecutor when he argued, "what other case than this is [death] appropriate?" (Tr. 1044-45) (Resp.Br.94-95). Really, the argument urged the jurors to defer to the prosecutor's opinion that death was appropriate, instead of forming their own decision. *Newlon*, 885 F.2d at 1335-38. It urged the jurors not to undertake their own inquiry of the character and record of this individual defendant and the circumstances of the crime. *Jones v. United States*, 527 U.S. 373, 381 (1999); *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987).

The State's arguments in guilt and penalty phase "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The Court must remand for a new trial.

CONCLUSION

For the foregoing reasons and those set forth in his initial brief, Vincent McFadden affirms the Conclusion set forth on page 142 of his initial brief.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on February 27, 2006, two copies of the foregoing and a disk containing the foregoing were delivered to Shaun Mackelprang, Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

_____
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 Office Word XP, 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 7,693 words, which does not exceed the 7,750 words allowed for a reply 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 Enterprise program, which was updated on December 26, 2005. According to that program, the disk is virus-free.

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