Sup. Ct. # 92720

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER L. COLLINGS,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Phelps County, Missouri
25th Judicial Circuit, Division 2
The Honorable Mary Sheffield, Judge

APPELLANT'S BRIEF

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INDEX

Page

Table of Authorities 2

Jurisdictional Statement 9

Statement of Facts 10

Points	Argument	
I	Suppression	35/48
II	Suppression Hearing Evidentiary Rulings	36/69
III	No Evidence of Cool Deliberation	38/85
IV	Exhibits and Evidence Lacking Probative Value	39/90
V	Excessive Photographs	41/99
VI	Improper Closing Arguments	42/108
VII	Prosecutorial Misconduct	44/117
VIII	Instruction 17 Shifted the Burden of Proof	45/126
IX	Crime Not Charged in Information	46/129
X	Proportionality Review	47/132

Conclusion 139

Certificate of Compliance 139

TABLE OF AUTHORITIES

CASELAW:

Apprendi v. New Jersey, 530 U.S. 466 (2000) 46,129-30

Arizona v. Fulminate, 499 U.S. 279 (1991) 60

Baumruk v. State, 364 S.W.3d 518 (Mo.banc 2012) 100

Berger v. United States, 295 U.S. 78 (1935) 115

Bullington v. Missouri, 451 U.S. 430 (1981) 45,128

Caldwell v. Mississippi, 472 U.S. 320 (1985) 138

Coday v. State, 179 S.W.3d 343 (Mo.App.S.D.2005).....136-37

Colorado v. Connelly, 479 U.S. 157 (1986).....37,51-52,79,81

Darden v. Wainwright, 477 U.S. 168 (1986) 109

Deck v. Missouri, 544 U.S. 622 (2005) 107

Donnelly v. DeChristoforo, 416 U.S. 637 (1974)..... 109

Estelle v. Williams, 425 U.S. 501 (1976) 40,98

Gardner v. Florida, 430 U.S. 349 (1977)..... 115

Giglio v. United States, 405 U.S. 150 (1972)..... 40,94

Greathouse v. State, 83 S.W.3d 554 (Mo.App.W.D.2002)..... 47,136

Hawkins v. United States, 358 U.S. 74 (1958) 71

Hildreth v. Key, 341 S.W.2d 601 (Mo.App.1960) 123

Howes v. Fields, 132 S.Ct. 1181 (2012)..... 63

In re Winship, 397 U.S. 358 (1970)..... 38,86

J.N.C.B. v. Juvenile Officer, 403 S.W.3d 120 (Mo.App.W.D.2013) 38,86,88

Jackson v. Denno, 378 U.S. 368 (1964) 37,51,71

Jackson v. Virginia, 443 U.S. 307 (1979) 38,86,130

Leyra v. Denno, 347 U.S. 556 (1954) 68

Lockett v. Ohio, 438 U.S. 586 (1978) 42,96,114

Malloy v. Hogan, 378 U.S. 1, 8 (1964). 51

Miller v. Fenton, 474 U.S. 104 (1985) 50

Mills v. Maryland, 486 U.S. 367 (1988) 114

Miranda v. Arizona, 384 U.S. 436 (1966) 35,37,48,51,61-62,74

Missouri v. Seibert, 542 U.S. 600 (2004) 35,51,61-62

Monge v. California, 524 U.S. 721 (1998) 107

Napue v. Illinois, 360 U.S. 264 (1959) 40,94

Payne v. Arkansas, 356 U.S. 560 (1958) 61

People v. Adams, 143 Cal.App.3d 970 (Cal.App.1983) 53

Presnell v. Georgia, 439 U.S. 14 (1978) 130

Ring v. Arizona, 536 U.S. 584 (2002) 45-46,127,129-30

Skipper v. South Carolina, 476 U.S. 1 (1987) 114

Spano v. New York, 360 U.S. 315 (1959) 35,37,48,52-53,67,81

Spears v. Mullin, 343 F.3d 1215 (10th Cir.2003) 41,101,107

<u>*State v.:*</u>

Banks, 215 S.W.3d 118 (Mo.banc 2007) 42,44,47,109,119,123-25,133

Barton, 936 S.W.2d 781 (Mo.banc 1996) 113,115,123

Baumruk, 280 S.W.3d 600 (Mo.banc 2009) 70,92

Black, 50 S.W.3d 778 (Mo.banc 2001) 87-88

Bowman, 337 S.W.3d 679 (Mo.banc 2011) 96

Brandon, 17 S.W.3d 565 (Mo.App.E.D.2000) 137

Brown, 939 S.W.2d 882 (Mo.banc 1997) 92

Bucklew, 973 S.W.2d 83 (Mo.banc 1998) 50

Burnfin, 771 S.W.2d 908 (Mo.App.W.D.1989) 44,109,115,119

Cain, 287 S.W.3d 699 (Mo.App.S.D.2009) 50

Carollo, 172 S.W.3d 872 (Mo.App.S.D.2005) 66

Davis, 963 S.W.2d 317 (Mo.App.W.D.1997) 47,137

Dees, 639 S.W.2d 149 (Mo.App.S.D.1982) 71

Dixon, 70 S.W.3d 540 (Mo.App.W.D.2002) 122

Dorsey, 318 S.W.3d 648 (Mo.banc 2010) 100

Driscoll, 55 S.W.3d 350 (Mo.banc 2001) 40,94

Edwards, 116 S.W.3d 511 (Mo.banc 2003) 109-10

Floyd, 360 S.W.2d 630 (Mo.1962) 41,101

Fortin, 843 A.2d 974 (N.J. 2004) 130

Franklin, 841 S.W.2d 639 (Mo.banc 1992) 50

Galazin, 58 S.W.3d 500 (Mo.banc 2001) 50

Glass, 136 S.W.3d 496 (Mo.banc 2004) 86

Gower, 418 S.W.2d 10 (Mo.1967) 71

Green, 603 S.W.2d 50 (Mo.App.E.D.1980) 101

Grim, 854 S.W.2d 403 (Mo.banc 1993) 85

Hall, 955 S.W.2d 198 (Mo.banc 1997) 82

Isa, 850 S.W.2d 876 (Mo. banc 1993) 97

Jaco, 156 S.W.3d 775 (Mo.banc 2005) 100

Jerry Brandon, City of St. Louis Case No. 22971-00382-01 137

Johnson, 207 S.W.3d 24 (Mo.banc 2006) 50

Johnson, 328 S.W.3d 385 (Mo.App.E.D.2010) 138

Kee, 956 S.W.2d 298 (Mo.App.W.D.1997) 109

Lapsy, 298 S.W.2d 357 (Mo.1957) 41,101

Little, 861 S.W.2d 729 (Mo.App.E.D.1993) 138

Madorie, 156 S.W.3d 351 (Mo.banc 2005) 91

McFadden, 391 S.W.3d 408 (Mo.banc 2013) 136

McIlvoy, 629 S.W.2d 333 (Mo.1982) 47,133

Murray, 744 S.W.2d 762 (Mo.banc 1988) 41,100

Nickens, 403 S.W.2d 582 (Mo.1966) 121

O'Brien, 857 S.W.2d 212 (Mo.banc 1993) 38,86,88

O'Neil, 718 S.W.2d 498 (Mo.banc 1986) 71

Pike, 162 S.W.3d 464 (Mo.banc 2005) 50

Raspberry, 452 S.W.2d 169 (Mo.banc 1970) 112

Reichert, 854 S.W.2d 584 (Mo.App.S.D.1993) 101

Rettenberger, 984 P.2d 1009 (Utah 1999) 35,52-53

Rhodes, 988 S.W.2d 521 (Mo.banc 1999) 42,86,109,112-13,119

Roberts, 838 S.W.2d 126 (Mo.App.E.D.1992) 108

Roll, 942 S.W.2d 370 (Mo.banc 1997) 121

Rousan, 961 S.W.2d 831 (Mo.banc 1998) 51,71

Shaw, 569 S.W.2d 375 (Mo.App.St.L.1978) 86

Simmons, 955 S.W.2d 729 (Mo.banc 1997) 111

Smith, 944 S.W.2d 901 (Mo.banc 1997) 120

Smith, 966 S.W.2d 1 (Mo.App.W.D.1997) 88,120

Spencer, 307 S.W.2d 440 (Mo.1957) 122

Storey, 901 S.W.2d 886 (Mo.banc 1995) 42,44,109,112-13,119

Sumowski, 794 S.W.2d 643 (Mo.banc 1990) 85

Taylor, 134 S.W.3d 21 (Mo.banc 2004) 70,120

Taylor, 298 S.W.3d 482 (Mo.banc 2009) 51

Taylor, 382 S.W.3d 251 (Mo.App.W.D.2012) 95

Taylor, 944 S.W.2d 925 (Mo.banc 1997) 44,113,121

Tiedt, 206 S.W.2d 524 (Mo.banc 1947) 108,119

Tokar, 918 S.W.2d 753 (Mo.banc 1996) 100

Wahby, 775 S.W.2d 147 (Mo.banc 1989) 70,119

Waller, 163 S.W.3d 593 (Mo. App.W.D.2005) 88

Ward, 242 S.W.3d 698 (Mo.banc 2008) 110

Werner, 9 S.W.3d 590 (Mo. banc 2000) 63

Whitfield, 107 S.W.3d 253 (Mo.banc 2003) 46,130

Whitfield, 837 S.W.2d 503 (Mo.banc 1992) 45,127

Wood, 128 S.W.3d 913 (Mo.App.W.D.2004) 53

Wright, 515 S.W.2d 421 (Mo.banc 1974) 68

Thompson v. Keohane, 516 U.S. 99 (1995) 62

United States v.:

Allen, 406 F.3d 940 (8th Cir. 2005) 130

Booker, 543 U.S. 232 (2005) 46,129

Havens, 446 U.S. 620 (1980) 71

Henry, 447 U.S. 264 (1980) 75

McCullah, 76 F.3d 1087 (10th Cir.1996) 61

Wong Sun v. United States, 371 U.S. 471 (1963) 68

Woodson v. North Carolina, 428 U.S. 280 (1976) 114

U.S. CONSTITUTIONAL AMENDMENTS:

IV 35,48,50,68

V 35-36,38-40,42,44-45,47-48,50-51,69,84-86,89-91,108-109, 117,119,126,129,131-32,138

VI 36,38-42,44-45,47,69,75,84-86,89-91,99,108-109, 117,119,126-27,129,131-32

VIII 35-36,38,41-42,44-45,47-48,50,69,84-85,89,99, 108-109,117,119,126-27,129,131-32,138

XIV 35-36,38-42,44-45,47-48,50-51,68-69,84-86,89-91,99, 108-109,117,119,126-27,129,131-32,138

MISSOURI CONSTITUTION:

Art.I,§10 35-36,38-40,42-45,47-48,50-51,69,84-86,89-91,
108-109,117,119,126-27,129,131-32,138

Art.I,§15 35,48,50,68

Art.I,§18(a) 36,38-45,47,69,84-85,89-91,99,108-109,117,119,126-27,129-32

Art.I,§19 35,48,50-51

Art.I,§21 35-36,38,41-45,47-48,50,69,84-85,89,99,108-109,
117,119,126-27,129,131-32,138

Art.V,§3 9

REVISED MISSOURI STATUTES:

§565.002 38,86

§565.020 38,86,130

§565.030 45,126,130

§565.035 47,132

SUPREME COURT RULES:

30.20 37,40,70,91,110

MISSOURI APPROVED INSTRUCTIONS:

313.44 126

JURISDICTIONAL STATEMENT

Christopher L. Collings was convicted of one count of first-degree murder, §565.020[1], and received a death sentence. 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, 2000 edition, unless otherwise noted.

STATEMENT OF FACTS[2]

On November 2, 2007, nine-year-old Rowan Ford lived with her mother, Colleen Munson, and her step-father, David Spears, at 777 Grove Street, in Stella, Newton County, Missouri. (Tr.3621,4514). Spears was friends with Christopher Collings and Nathan Mahurin. (Tr.3702-04,3931,4530). Collings lived in a camper in Wheaton, in Barry County. (Tr.3643,4511).

Friday, November 2nd

At about 6:00 p.m., Mahurin drove Collings and Spears to Spears' house. (Tr.3716-18,3747). On the way, they bought two or three six-packs of Smirnoff Ice. (Tr.3716-18). At Spears' house, they drank and played pool in the basement. (Tr.3720). At 8:30 p.m., Colleen went to work, leaving Spears to babysit Rowan. (Tr.3647,3649). Later, Collings and Mahurin left to buy more alcohol. (Tr.3721-23).

Collings asked Mahurin to drive him home. (Tr.3724). They talked Spears into coming along and leaving Rowan by herself. (Tr.3724,3754-55). On the way, they stopped to buy another six-pack of Smirnoff Ice. (Tr.3725-26). They arrived at Collings' camper at about 11:00 p.m. and talked, drank, and smoked marijuana. (Tr.3726, 3752).

After 30-60 minutes, Mahurin needed to get home. (Tr.3727,3752). Because they were drunk, he and Spears drove back roads slowly. (Tr.3728-29,3734). Mahurin left

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

Collings' camper at about 11:00 or 11:30 p.m. and dropped Spears off at 777 Grove. (Tr.3734). The drive took 10-20 minutes. (Tr.3734).

Saturday, November 3rd

At about 9:00 a.m., Colleen came home and could not find Rowan. (Tr.3649-50). Spears told her that Rowan was at a friend's house but could not say which friend. (Tr.3650,3652). Colleen walked around Stella looking for her daughter and then drove around with Spears. (Tr.3652-53). She wanted Spears to call the police, but he would not, insisting that Rowan was at a friend's house. (Tr.3653,3695).

Finally, at about 5:00 or 6:00 p.m., Spears called the Newton County Sheriff's Department to report Rowan missing. (Tr.3618,3654-55,3763). Patrolmen searched for Rowan, and the Highway Patrol tried to locate her friends. (Tr.3763-64). Sheriff deputies interviewed Spears and Mahurin for several hours. (Tr.3764-65). Spears, Mahurin, and Collings were considered suspects or "persons of interest," since they were the last ones to have seen Rowan. (Supp.Tr.40,56-57,174-75;Tr.3840,3845-46).

Sunday, November 4th

On Sunday, law enforcement teams searched the area (Tr.3765-66). Newton County deputies spoke with Collings, who was concerned, cooperative, and polite. (Supp.Tr.32-36;Tr.3772-73,3859;3873). He stated that he, Spears, and Mahurin were drinking and playing pool at Spears' house. (Supp.Tr.35;Tr.3772). At about 10:30 p.m., they left Rowan, bought more alcohol, and went to Collings' camper. (Supp.Tr.35-36,128;Tr. 3772). They had been drinking heavily all evening. (Tr.3772,3843). Spears

and Mahurin left sometime after midnight, and Collings went to bed. (Supp.Tr.35-36;Tr.3772).

Later, Collings visited Munson. (Tr.3660). Collings had lived at 777 Grove Street with Munson, Spears, and Rowan Ford for several months, but had recently moved out. (Tr.3627-28,5812). He asked Munson how the search was going, and he offered to help find Rowan. (Tr.3664-65). Collings visited Munson again the next day. (Tr.3700).

Monday, November 5th

The F.B.I. joined the investigation on November 5th. (Tr.3783). They set up a command post, with phone lines so people could call in tips. (Tr.3784). Searches were conducted in and around Stella. (Tr.3785).

Two Newton County deputies went to Collings' workplace and asked him to answer more questions. (Supp.Tr.38,135;Tr.3844,3874-75). Collings agreed, drove to the Sheriff's Department, and relayed largely the same account as the day before. (Supp.Tr.137-38,141177-78;Tr.3876-81).

Collings agreed to take a Computer Voice Stress Analyzer (CVSA) test. (Supp.Tr.154).[3] An officer asked Collings about Spears and the events of Friday night. (Supp.Tr.188-91). He then read Collings his rights; Collings understood and signed the form. (Supp.Tr.192,200;Supp.Ex.D).

[3] Testimony about the CVSA and a polygraph test was admitted at the suppression hearing but not at trial. (Supp.Tr.151-54,767).

After the test, Collings again spoke with the two deputies. (Supp.Tr.158). He insisted he knew nothing about Rowan's disappearance. (Supp.Tr.158). He agreed to answer questions again if needed and offered to help in the search. (Supp.Tr.159).

Collings had a long-standing, close relationship with the Wheaton Chief of Police, Clinton Clark. (Tr.4642). Collings had known Clark since he was a young boy. (Tr.4609). Clark was a good friend of Collings' adoptive mother, Betty, and also knew his adoptive father, Clarence.[4] (Tr.4513,4609,4614; Supp.Tr.544,885,898). Collings came to Clark for help and advice, and for solace when Betty died. (Supp.Tr.897-98;Tr.4614-15). After Collings moved to Arkansas, he made sure to come visit Clark each time he came back home. (Tr.4615). Collings trusted Clark. (Supp.Tr.578).

Late Monday afternoon, Clark was on patrol when Collings flagged him down. (Supp.Tr.549). Collings told Clark that Rowan was missing and that he had been at the Sheriff's Office all day helping find her. (Supp.Tr.549). Collings was not acting normal and seemed excited. (Supp.Tr.551). Clark encouraged him to continue to help the investigation. (Supp.Tr.552).

Afterwards, Clark called the Newton County Sheriff's Office and the F.B.I. to inform them that Collings had contacted him. (Supp.Tr.70,554,912). He told them he and Collings were long-standing friends and had good rapport. (Supp.Tr.72-73,76). He believed Collings knew something about Rowan's disappearance, and he offered his help in the investigation. (Supp.Tr.912,932). Deputy Jennings encouraged Clark to keep

[4] Clarence is also referred to by his nickname Poncho. (Tr.4614).

working with Collings, and in turn, Clark called Jennings throughout the week to relay the contacts he had with Collings. (Supp.Tr.71-72).

Meanwhile, Deputy Jennings had been interviewing David Spears with the help of Mark Bridges, the Newton County coroner. (Supp.Tr.40,95). Bridges had been Spears' past employer. (Supp.Tr.96). They had known each other quite awhile and had good rapport. (Supp.Tr.96).

On Monday evening, two F.B.I. agents went to 777 Grove. (Supp.Tr.175,976, 1052;Tr.3925). Collings spoke with one of the agents and gave an account consistent with what he had already told investigators. (Supp.Tr.981-989;Tr.3934-41). Collings suggested places to search for Rowan (Tr.3945).

Tuesday, November 6th

On Tuesday, F.B.I. agents Ramana and Tarpley came to Clark's office. (Supp.Tr.580-81,912-13;Tr.4628-29). They encouraged Clark to help in the investigation. (Supp.Tr.581; Tr.4629). Clark considered this a request for mutual aid from one law enforcement agency to another. (Tr.4629).

Late that afternoon, Collings visited Clark. (Supp.Tr.555-56;Tr.4520, 4631,4640). He told Clark that when he was at work, F.B.I. agents took him to Newton County to answer more questions, and he spent most of the day there. (Supp.Tr.558;Tr.4520-21,4638). Collings could not make eye contact and kept his head down. (Tr.4639). They spoke just a few minutes. (Supp.Tr.729;Tr.4523). Clark believed Collings had something on his mind. (Supp.Tr.559;Tr.4640-41).

Wednesday, November 7th

At 9:15 a.m., officers again went to Collings' workplace, and Collings agreed to answer more questions. (Supp.Tr.1143,1145; Tr.3967,3969). He agreed to DNA testing, allowed officers to search a safe found in the basement of 777 Grove, and consented to a search of his property and buildings. (Supp.Tr.789,1018, 1147-51,1184-864458;Tr.3948-50,3970-71).

Collings discussed the same matters previously discussed. (Tr.3951). Additionally, the officers asked about information they had received that Spears was trying to establish an alibi for Friday evening. (Tr.3979,3985). Collings refuted the alibi, denying that he had run out of gas on Friday night. (Tr.3951-52,3979). He admitted that he, Spears, and Mahurin smoked a "hog's leg," a really large marijuana cigarette, at his camper on Friday evening. (Tr.3953). He told the officers that he could not have beaten Spears and Mahurin back to Spears' house on Friday evening. (Tr.3980).

Collings took a polygraph test. (Supp.Tr.758). At the end of the test, he refused to speak to the examiner further. (Supp.Tr.765-66).

Two agents questioned Collings from 2:45 to 5:12 p.m. (Supp.Tr.997,1155,1172; Tr. 3976). Collings told them that if they insinuated he was involved in Rowan's disappearance, he would stop talking to them. (Supp.Tr.1012-13,1192;Tr.3958). Collings left soon afterwards, at 5:18 p.m. (Supp.Tr.998,1018,1192).

Very upset, Collings visited Clark. (Supp.Tr.561-62,581;Tr.4644-45). He stated that the officers needed to back off and that, if they continued to accuse him, he would not speak with them and would get an attorney. (Tr.568,4645-46;Supp.Tr.579-80,936).

Collings said he told them that if he had anything to say, he would say it to Clark. (Supp.Tr.577;Tr.4646). Clark told Collings it was his constitutional right to get an attorney, but he also urged Collings to keep helping find Rowan. (Supp.Tr.569). He told Collings it would not be in his best interest to stop cooperating with law enforcement. (Supp.Tr.937;Tr.4646). Collings said he thought he should get a lawyer. (Supp.Tr.935).

Clark then read Collings his rights. (Supp.Tr.566,570,578;Tr.4647-48). Collings agreed to speak and signed the form at 6:18 p.m. Wednesday evening. (Supp.Tr.572-74:Tr.4648-49). Collings started crying and stated he had always loved Rowan and would not hurt her. (Supp.Tr.574-75;Tr.4656,4679). At that point, someone came into the office. (Supp.Tr.574;Tr.4655). Collings abruptly left, stating he needed to give his father his medication. (Supp.Tr.574;Tr.4657).

Afterwards, Clark called the F.B.I. (Supp.Tr.580,582,909-10;Tr.4657). He reported that Collings was near a breaking point and suggested that the agents give Collings a day off from questioning. (Supp.Tr.580;Tr. 4658). He would try to talk to Collings and get him to disclose what happened. (Supp.Tr.1201).

Meanwhile, a field search was conducted on Collings' property. (Tr.4072). The two-acre property contained abandoned vehicles, junk, and trailers. (Tr.4072). No evidence was seized. (Tr.4180).

Thursday, November 8th

On Thursday, Clark met with F.B.I. agents Stinnett and Tarpley. (Supp.Tr.582,914-15,1033-34;Tr.3960-61,4659). They talked about Clark's unique relationship with Collings and the dynamics of Collings' family. (Supp.Tr.1037-

39;Tr.4659). Clark thought Collings knew something about Rowan's disappearance. (Supp.Tr.1067,3962). The missing piece of the puzzle was locating Rowan's body. (Supp.Tr.1040). Once they found the body, the agents wanted Clark to speak with Collings. (Supp.Tr.1041;Tr.3963). If Collings was going to confess, it would be to Clark. (Supp.Tr.1035;Tr.3961-62,4659).

Friday, November 9th

Rowan's body was finally found in a sinkhole/cave called Fox Cave. (Tr.4050, 4077). The cave was 20-30 feet from the road in a wooded area. (Tr.4050,4188). It was 10-15 feet deep. (Tr.4082,4230). Rowan was naked except for a shirt and a sock. (Tr.4101,4238-39). There appeared to be blood at her vaginal area and ligature marks on her neck. (Tr.4231,4238-39).

Clark heard on the news that Rowan's body had been found. (Supp.Tr.584). He learned that Collings had come into his office looking for him. (Supp.Tr.584-86;Tr.4661). At 1:30 p.m., he went looking for Collings. (Supp.Tr.586;Tr.4661).

At 2:08 p.m., Collings called Clark and asked if law enforcement officers were following him in a gray van. (Supp.Tr.588-89663;Tr.4541,4662,4667). Clark told him he had not heard of any such surveillance. (Supp.Tr.589;Tr.4541). Collings was shaken and feared for his safety. (Supp.Tr.589-90;Tr.4542). He had driven all over trying to lose the van and was finally able to do so. (Supp.Tr.589). Clark told him to go directly to his office. (Supp.Tr.589-90). But instead, Collings suggested Clark stay where he was, and he would join him. (Supp.Tr.590-91). Clark hung up and immediately called

F.B.I. Agent Tarpley to advise that he had contacted Collings. (Supp.Tr.662-63;Tr.4665).

When Collings arrived a few minutes later, he and Clark spoke about the gray van. (Supp.Tr.592;Tr.4542). Clark told Collings they needed to talk, and he should come to Clark's office. (Supp.Tr.592;Tr.4543). Collings agreed, and they drove together in Clark's police car. (Supp.Tr.592-93;Tr.4543). On the way, they discussed the van. (Supp.Tr.595). Collings was worried that people might take matters into their own hands. (Supp.Tr.899). Knowing that Collings was upset, Clark told him that he did not work 24 hours a day and could not guarantee his safety all the time. (Supp.Tr.595-96). He told him that he would protect him to the extent he could. (Supp.Tr.596,899).

At the office, Clark read Collings his rights. (Supp.Tr.596-97;Tr.4545;St.Ex.92).[5] Collings was worried about the fact he had been followed. (Supp.Tr.602). He signed a waiver form, noting the time as 3:00 p.m. (Supp.Tr.599,603;Supp.Ex.L;Tr.4545-46). Collings cried and started to talk, but someone came into the office. (Supp.Tr.606; Tr.4547-48,4979). Collings would not speak with so many people around. (Supp.Tr.606;

[5] The evidence and testimony is conflicting as to whether Clark read Collings his rights before going to the Muncie Bridge or not until returning to Clark's office, and whether Clark merely reminded Collings of his rights after they returned to his office, or instead whether he fully advised him of his rights upon returning. (Supp.Tr.666-67,672,837,840, 900-901).

Tr. 4549). Clark asked if Collings wanted to go somewhere else. (Tr.4549). Collings agreed to go to the Muncie Bridge, a few miles out of town. (Supp.Tr.607;Tr.4549).

Clark drove to the Muncie Bridge with Collings in the front passenger seat. (Supp.Tr.608;Tr.4680). Collings was not under arrest. (Supp.Tr.608). On the way, at 2:30 p.m., Clark phoned the Newton and Barry County Sheriff Departments to advise that he would be speaking to Collings at the Muncie Bridge. (Supp.Tr.609-10,664-65;Tr.4550-51,4691).

Clark and Collings sat on a slope near the bridge. (Supp.Tr.611;Tr.4555). Collings relayed largely the same story he had previously told law enforcement, up to the point when Spears and Mahurin left his camper. (Supp.Tr.613-23;Tr.4555-60). From that point onward, however, Collings relayed a different story. Crying, Collings confessed to raping and killing Rowan. (Tr.4555-74).

At 2:25 p.m., driving back to his office, Clark called to tell the city clerk to empty the building. (Supp.Tr.656-57,668;Tr.4574). He called other law enforcement officers to tell them to meet him and Collings at his office. (Supp.Tr.668-70;Tr.4573). There, Collings recounted his statement in front of six law enforcement officers. (Supp.Tr.673; Tr.3787-88,4574). He was very upset. (Tr.3855).

Collings was handcuffed and taken to the Barry County Sheriff's Department. (Supp.Tr.674;Tr.4575). At 5:29 p.m., he was read his *Miranda* rights and gave a videotaped statement. (Supp.Tr.676;Supp.Ex.H-1;Tr.4575). He acknowledged that his rights had been read to him several times. (Supp.Ex.H-1,p.5-6).

The Confession[6]

Collings explained that, before they left his camper, Mahurin and Spears stated they were going to take back roads home so they could smoke more marijuana and finish the alcohol, while also avoiding the police. (Tr.4560-61;S.Ex.94,p.18). Collings probably had five six-packs of Smirnoff Ice, and Spears and Mahurin also drank whiskey and tequila. (S.Ex.94,p.17).

Collings knew that if he hurried, he could beat Spears home. (Tr.4561;S.Ex.94, p.18). He felt strange. (Supp.Ex.H-1,p.33). He did not know why he drove to Spears' house. (Supp.Ex.H-1,p.34). He was "really, really fucked up" and did not intend to take Rowan. (Supp.Ex.H-1,p.38,47-48).

Collings drove the direct route to Spears' house. (Tr.4561;Supp.Ex.H-1,p.18). He walked through the house, looking in a few rooms. (Tr.4562;Supp.Ex.H-1,p.19,36-37). He went into Rowan's room and saw her on the floor under a blanket. (Tr.4562;Supp. Ex.H-1, p.19). He picked her up and carried her to the truck. (Tr.4562-63;Supp.Ex.H-

[6] This is a summary of Collings' statements at the Muncie Bridge, Clark's office, and the 5:29 p.m. videotaped statement at the Barry County Sheriff's Department. State's exhibit H-1, the un-redacted transcript of the 5:29 p.m. statement, was admitted at the suppression hearing. (Supp.Tr.293). Exhibit 94, the redacted videotape/CD itself, was admitted at trial. (Tr.4825).

1,p.19,38).[7] Collings probably started to think about having sex with Rowan on the way home. (Supp.Ex.H-1,p.55). At his camper, he carried Rowan, still sleeping, inside and put her on the bed. (Tr.4563,4690-91;Supp.Ex.H-1,p.20,39). He "used his finger on her a little" and then had vaginal intercourse with her for a few minutes, possibly ejaculating. (Tr.4563-64;Supp.Ex.H-1,p.20-21,41). Rowan awoke when Collings penetrated her, and she struggled. (Tr.4564,4690-91;Supp.Ex.H-1,p.21,40). Intercourse lasted possibly four of five minutes. (Supp.Ex.H-1,p.21).

Collings intended to return Rowan to her bed. (Tr.4574-75). He led Rowan outside, facing away from him so that she could not see his face. (Tr.4564;Supp.Ex.H-1 p.22). He had made sure to keep the lights off in the camper and did not speak so Rowan would not recognize his voice. (Tr.4691;Supp.Ex.H-1,p.42). But outside, in the light of the moon, Rowan looked back and saw Collings. (Tr.4565;Supp.Ex.H-1,p.22). Collings knew that she had recognized him, and he "freaked out." (Tr.4565,4572;Supp.Ex.H-1,p.22). He saw a coil of cord in the bed of the old pickup truck next to him. (Tr.4565;Supp.Ex.H-1,p.22-23). He took the cord, looped it around Rowan's neck, and pulled it tight for a few minutes. (Tr.4565;Supp.Ex.H-1,p.22-23,43). She struggled a little and fell to the ground. (Tr.4566;Supp.Ex.H-1,p.44). Collings went to the ground with her and held tight until she stopped moving. (Tr.4566;Supp.Ex.H-1,p.44).

[7] Here, Collings had to stop to compose himself during his videotaped confession. (Supp.Ex.H-1,p.19).

Collings knew he needed to hide Rowan's body. (Tr.4566;Supp.Ex.H-1,p.23). He put her in the pickup truck's bed. (Tr.4566;Supp.Ex.H-1,p.23). Initially, he planned to put her in a creek, but he did not want her to be discovered quickly, so he left her in Fox Cave. (Tr.4566-70;Supp.Ex.H-1,p.25,49).

Back at his camper, Collings turned on the light and discovered blood on his mattress and clothes. (Tr.4570;S.Ex.94,p.28). In a woodstove, he burned Rowan's pants, underpants, his clothes, and the rope. (Tr.4570;S.Ex.94, p.28). He took the mattress outside, rolled it up, and put it in a 55-gallon drum with some old carpet to help it burn. (S.Ex.94,p.28-29;Tr.4571). He moved the drum into the calf barn so the fire would not be so noticeable. (S.Ex.94,p.28;Tr.4571).

Collings denied that Spears or anyone else was involved in Rowan's death. (St.Ex.94;Supp.Ex.H-1,p.31-32,52-53). He vouched that he gave his statement of his own free will, without threats or promises. (S.Ex.94;Supp.Ex.H-1,p.45-47,83). Collings noted that he had been "bawling like a baby all afternoon." (S.Ex.94;Supp.Ex.H-1,p.47). He felt guilty and remorseful. (St.Ex.94;Supp.Ex.H-1,p.47,70).

Second Videotaped Statement

While Collings was giving his first videotaped statement on Friday afternoon, Deputy Jennings was re-interviewing Spears with Mark Bridges at the Newton County Sheriff Department. (Tr.3789-90,3856,3858). Because of statements Spears made, the officers questioned Collings again at 8:02 p.m. (Supp.Tr.844;D.Ex.748;Tr.4576).

Collings was told that Spears confessed to also having sex with Rowan, being there when Collings killed her, and helping dispose of the body. (D.Ex.748,p.13, 16).

Spears stated that after Mahurin took him home, he called his mother, had her bring her Suburban to the house, and he took the Suburban over to Collings' camper. (D.Ex.748,p.27). But Collings repeatedly insisted that Spears had nothing to do with Rowan's death. (D.Ex.748,p.13,15-20,22,32,39,46-48,53,56,72-74,77,79,84, 86-89,91,101,104,109,116).

November 9th Search

Collings' property was searched for a second time that evening. (Tr.4099). In the camper, officers found a twin box spring but no mattress. (Tr.4191). Outside the camper was a silver pick-up truck, and in the bed was a rusted, empty metal spool. (Tr.4269, 4490;St.Ex.127,128,129). A piece of string or twine was found on the driver's side floor. (Tr.4272,4490;St.Ex.41,103). In the calf barn was a 55-gallon drum, and in the yard was a 55-gallon drum converted into a woodstove. (Tr.4295,4298,4326). A burn pile off into the trees contained an item appearing to be cord, but which, upon testing, was determined not to be. (Tr.4299-4301,5356,5411, 5415).

Collings' white pickup truck was thoroughly searched. (Tr.5000-5001,5024-35). A light-to-medium brown Caucasian head hair, about seven inches long, was found in the truck bed. (Tr.5404-05,5407). A partial DNA profile was developed and found to be consistent with Rowan's DNA profile. (Tr.5435,5437-39). The frequency of the partial profile in the Caucasian population was 1 in 328,700. (Tr.5443).

The Autopsy

The cause of Rowan Ford's death was ligature strangulation. (Tr.5222). Rowan was conscious roughly ten seconds. (Tr.5222-23). She quit breathing after two or three minutes, and her brain was dead within twelve minutes. (Tr.5224).

A scrape on Rowan's neck was consistent with ligature strangulation. (Tr.5225). She also had scrapes and a bruise on her left forearm, which would have been pre-death injuries, and a post-mortem scrape on her neck and injury to a thumbnail. (Tr.5202-03,5212, 5225). Part of her upper jawbone and four front teeth were pushed out and upward, an injury which could have happened pre-death or could have been from the fall into the cave. (Tr.5197-99). Her teeth were not found. (Tr.5197).

Rowan had a laceration slightly more than ¾ inch long from the back of her vagina toward her anus. (Tr.5209-10). The wound was consistent with blunt force trauma caused by a penis. (Tr.5210-11). This injury caused bleeding, was inflicted while Rowan was alive, and would have been very painful. (Tr.5211-12).

At the autopsy, hinge lifts were taken from Rowan's body (Tr.4884). Swabs were taken from Rowan's vagina and anus. (Tr.4882,5244). The swabs initially indicated the presence of sperm or semen, so a differential extraction was performed. (Tr.5425-26). However, there was insufficient DNA for further analysis. (Tr.5425-27).

Two foreign hairs were lifted from Rowan's pubic area. (Tr.5509-10). The hairs were of limited value for comparison purposes because they were not pubic hairs, but rather, pubic region hairs, meaning that they came from stomach or leg areas. (Tr.5511, 5513). They were compared to known samples of Collings' pubic hair. (Tr.5521). Over

objection, the examiner testified that Collings' hairs were microscopically similar to the hairs found on Rowan's pubic area. (Tr.5526,5538). The hairs were Caucasian and were similar in color, diameter variation, and medulla, but the examiner could not say they were consistent. (Tr.5527,5535).

Procedural History

On December 21, 2007, Collings was charged with one count of first-degree murder, one count of forcible rape, and one count of statutory rape. (L.F.61). Venue was changed to Phelps County, and a jury was selected from Platte County. (Pre.Tr.1188-89;Supp.L.F.16). The court severed the murder count from the rape counts. (Pre.Tr.1079).

Collings moved to suppress his statements and all evidence gained from the November 9th search of his property. (L.F.290-98). Collings moved to admit the videotape of a November 14, 2007, conversation between Collings and Clark at the jail five days after Collings' arrest. (Supp.Tr.847-57). He argued that the videotape showed the nature of his relationship with Clark and how Clark pressured him to forego his constitutional rights. (Supp.Tr.849, 853). The court refused to consider the videotape and denied the motion to suppress. (Supp.Tr.857;L.F.532-71).

At trial, Collings objected to testimony and evidence regarding the string seized taken from the burn pile; ashes/debris taken from the wood stove; the partial DNA profile; and the hair analysis, on the ground that they lacked true probative value, but the court overruled the objections. (Tr.4341-45,4927,5349-51,5435-36,5518-195524,5529-34). Over objection, the State presented multiple gory photographs. (Tr.4196,4201-

02,4204,4207, 4211,4213-15,4220,4245-50,5190-01,5196, 5200,5206,5208-09,5216,5217-22,5266-67,5269). During closing argument, defense counsel objected that the State was personalizing its argument by acting out the strangulation. (Tr. 5626-30). The jury found Collings guilty of first-degree murder. (Tr.5664).

Penalty Phase: State's Evidence

Colleen Munson testified that Rowan was a typical little girl who loved school, church, and biking. (Tr.5731-32). The last time Munson saw Rowan, Rowan ran down the steps to give her a hug and a kiss before Munson left for work. (Tr.5735).

While Rowan was missing, Munson sat outside every day awaiting her return. (Tr.5734). Rowan's death devastated Munson. (Tr.5735). Since Rowan's death, Munson has been suicidal, was hospitalized several times, and remains under psychiatric care. (Tr. 5736-37). She thinks of Rowan all the time. (Tr.5738).

Ariane Parsons, Rowan's older sister by ten years, testified that Rowan was a bundle of love who cared about everybody, had beautiful brown eyes, and loved to ride her bike. (Tr.5810,5820). Because Munson worked nights and slept during the day, Parsons took care of Rowan like a mother. (Tr.5819). They did everything together. (Tr.5817). Parsons moved out the month after she turned eighteen, about five weeks before Rowan disappeared. (Tr.5820-21). She felt responsible for Rowan's death because she was not there to protect her. (Tr.5832-33).

From the time Parsons was fifteen, Collings sometimes acted inappropriately toward her. (Tr.5813-14,5816). Once, when Munson and Spears were at work, Collings called Parsons into the room to look at pornography. (Tr.5814). Other times, he rubbed

against her, grabbed her butt, or touched her breasts. (Tr.5815-16). Collings would jokingly say something sexual and then say he was waiting for her to be a certain age. (Tr.5815). Parsons repeatedly told Munson and Spears, but they said he was just joking. (Tr.5816-17,5838). She never saw Collings do anything inappropriate toward Rowan. (Tr.5817).

Two teachers testified that Rowan was very sweet, always willing to do what she was told, and never in trouble. (Tr. 5751,5767,5781). She loved school, worked hard, and read avidly (Tr.5750,5774-78,5781-82).

Rowan came from a poor family, and her home conditions were not good. (Tr. 5752,5777). She sometimes came to school in the winter with no socks. (Tr.5766). Rowan's hair was always matted and ratty, and she sometimes had lice. (Tr. 5766,5773,5779). The teachers believed she was the victim of parental neglect and reported it to DFS, but nothing changed. (Tr.5766,5788).

When Rowan was missing, class was very difficult. (Tr.5754,5783). The kids wrote poems and made cards for Rowan. (Tr.5754). Even now, the teachers missed Rowan and thought of her every day. (Tr.5763-64,5781, 5785). One teacher became so depressed after her death he sought counseling. (Tr.5784-85).

The morning of Rowan's funeral, the students planted a pink dogwood tree in her memory and under the tree, placed a memorial marker and a small angel kneeling in prayer. (Tr.5756-57;St.Ex.217). The children wrote notes to Rowan and attached them to purple balloons which they released. (Tr.5756,5759-60,5780;St.Ex.214). A bench with a plaque in Rowan's memory was placed in the school library. (Tr.5761-

62;St.Ex.215,216).

A neighbor testified that Rowan was quiet, kind, and sweet-natured. (Tr.5799). Rowan was best friend to her son Tyler. (Tr.5791,5793-94). After Rowan's death, Tyler insisted on sleeping with his mother. (Tr.5799). Another neighbor testified that Rowan was "a beautiful little girl" whom she would have liked to have had as a granddaughter. (Tr.5805).

Penalty Phase: Defense Evidence

Collings' biological parents were Dale Pickett and Barbara DiBello. (Tr.5935). Starting at age fourteen, Barbara had eleven arrests for robbery, stealing, and assault and had issues with alcohol and drug abuse. (Tr.6156).

Barbara was married three times and had six children before she married Dale. (Tr.5889-91). Collings was their only child together. (Tr.5991). Collings was born with a large red knot on the left side of his head. (Tr.5937, 5992). Barbara massaged it, and it went away within a few weeks or months. (Tr.5937, 5992). They never knew what caused it. (Tr.5938).

Both Dale and Barbara liked to drink. (Tr.5939). Dale typically got drunk every day. (Tr.5939,5986,5994). Barbara used drugs and alcohol, but stopped when she was pregnant with Collings, only to start again after his birth. (Tr.6154-55). She often got drunk and fought with Dale. (Tr.5993).

Collings lived with Dale and Barbara for the first six months of his life. (Tr.5967). Dale spent time with Collings and loved him. (Tr.5967,6003). But most of the care

Collings received came from his half-brother Greg, age twelve, who was the only one responsible enough to take care of him. (Tr.5940,5963,5967-68,5992-95).

In August, 1975, Dale shot a man in Arkansas and was charged with assault with intent to kill. (Tr.5941). He pled guilty and received a 21-year prison sentence. (Tr.5943).

With Dale in prison, Barbara worked several jobs and was not home much. (Tr.5994). When Collings was around six months old, Barbara instructed Greg to clean the house and then left. (Tr.5996,6004). She returned drunk and beat Greg repeatedly. (Tr.5995-96,6001). When she realized what she had done, she got a butcher knife from the kitchen and went after the man who had gotten her drunk. (Tr.5996). Barbara was arrested for drunk driving and making threats. (Tr.5996,6157-58,6382). Around this time, she was diagnosed with explosive personality disorder. (Tr.6156). The children were sent to a shelter home for a few days and then later to different foster homes. (Tr.5997,6004,6158).

In September, 1975, Collings, then seven months old, was sent to live with Clarence and Betty Collings and their children Debbie, Robin, and Randy. (Tr.6017-20,6023-24,6041;D.Ex.901,p.2). In February, 1976, when Collings was one, Debbie died in a car accident. (Tr.6162,6317;D.Ex.901,p.3).

Collings' difficulties started when he was very young. (Tr.6044). He got high fevers that caused him to have seizures. (Tr.6022,6042). He was very hyperactive, impulsive, and had trouble dealing with other children. (Tr.6025-26,6043-6045). He could not control his temper. (Tr.6076). He was placed in special education classes

because he needed improvement in self-confidence, logical sequencing, listening, creativity and imagination, grammar, and following directions. (Tr.6171;D.Ex.901,p.4).

Throughout Collings' childhood and adolescence, his birth parents were in and out of jail and prison, and in and out of his life. (D.Ex.901,p.2-4; 5949,5970,6174). Collings had supervised visits with his mother, until she was returned to custody on a parole violation. (D.Ex.901,p.3-4;Tr.5956,6168). When Dale was paroled, he arranged a visit with Collings, then six years old. (Tr.5948-49,5953,5969; D.Ex.903A,p.12). Around this time, Collings was molested by his baby-sitter's 13-year-old son. (Tr.6170;D.Ex.901, p.4). At age seven, he attempted suicide (Tr.6180).

When Collings was eight, Clarence and Betty adopted him. (Tr.6176, 6179-80;D.Ex.901,p.7). Clarence was ambivalent about the adoption and worried that Dale would cause problems. (Tr.6175-76). But Betty thought that since Collings had been with them seven years, it would only be right to adopt him. (Tr.6175). She also thought the adoption would strengthen her marriage with Clarence. (Tr.6182-83).

When Collings was nine, Betty and Clarence separated, then divorced two years later. (Tr.6186;D.Ex.901,p.8). Although custody was awarded to Betty, Collings was often shuttled back and forth between his parents. (Tr.6049-50,6187). Collings would get out of control and tear things up. (Tr.6050-51,6072). He snuck out and stayed out late. (Tr.6072).

At age fourteen or fifteen, Collings started using drugs and alcohol. (Tr.6067). He was placed on house arrest for forging checks. (D.Ex.103,p.9). He was failing his

classes, got suspended for six weeks for disruptive behavior, and had to repeat ninth grade. (D.Ex.901,p.9-10).

At fifteen, Collings returned to his biological mother, Barbara, for two months. (Tr.6060,6240;D.Ex.901, p.10). But the reunion was ill-fated, and eventually Barbara told Collings he could never come back. (Tr.6240). During this time, Barbara's new husband sodomized Collings. (Tr.6241).

Collings was getting increasingly destructive, and his adoptive parents did not know what to do. (Tr.6244). He was admitted to a psychiatric hospital for almost two months. (Tr.6051,6243). Collings was given the Axis I diagnoses of intermittent explosive disorder; dysthymia, major depression, recurrent; parent child problems; academic problems; and conduct disorder; solitary aggressive type. (Tr.6248-50). His global assessment of functioning was 35 on a scale of 100, indicating major impairment. (Tr.6248). He still wet his bed. (Tr.6184,6193,6246). Collings was prescribed medication, but he stopped taking them soon after leaving the hospital. (Tr.6252; D.Ex.901,p.11). Although he was supposed to attend psychotherapy sessions, he only went to two. (Tr.6252-53). A psychologist recommended that Collings not re-enter school until he was more stable emotionally, so Collings was schooled at home. (Tr.6254).

At sixteen, Collings lived with Clarence, his adoptive father, but Clarence had re-married, and Collings did not get along with the new wife, Diane. (Tr.6255). He physically assaulted Diane and his step-sister Julie. (Tr.6255). He also assaulted an 11-year-old boy. (Tr.6341).

Collings admitted the assaults and was given probation and house arrest. (Tr.6256). He tried Job Corps but was discharged for disciplinary reasons. (Tr.6256). Collings was stuck at the maturity level of a fourteen or fifteen year old. (Tr.6257). He violated his probation, was committed to DYS, and was sent to live in a juvenile detention center. (Tr.6258-59). There, it was determined that Collings was not succeeding in school; was under-socialized; did not know how to get along with others; seemed lonely, scared, and confused; and had poor hygiene. (Tr.6259).

At seventeen, still under DYS jurisdiction, Collings improved. (Tr.6261). His reading level improved to an eighth grade level (Tr.6261). It was recommended that he receive special education and one-on-one help. (Tr.6261). In the next few years, he was placed in special education classes and a group home. (Tr.6262).

When Collings was eighteen, he lived with Dale, his biological father. (Tr.6262).[8] Thereafter, Collings moved back and forth between Dale and his adoptive parents, Clarence and Betty. (Tr.5959). He admitted to sexually fondling his step-sister Julie when she was 11, and then again at 14 and 16. (Tr.6263). This behavior was consistent with someone who was sexually abused himself when younger. (Tr.6264).

At eighteen, Collings had his first child, Sarah. (Tr.6268). He would have three more children before having a vasectomy at age 28. (Tr.6271;D.Ex.901,p.16-17).

[8] Over defense objection, the State asked Dale whether he believed in the death penalty and elicited that when Dale's brother was murdered, Dale wanted to kill the person who murdered him. (Tr.5979-80).

For most of his adult life, Collings has had an alcohol problem. (Tr.6268,6270). At times, he awoke in a ditch or someone's yard without knowing how he got there. (Tr.6270). At age 22, he obtained his GED and got a job. (Tr.6268,6271).

Collings also cared for Clarence in his ill health. (Tr.6271-72). Clarence had a blood disorder that required him to get a shot once a week. (Tr.6030). Collings and his adoptive brother took turns giving Clarence his shots. (Tr.6030,6272). His adoptive mother, Betty, died two weeks before Rowan's death. (Tr.6061).

Dr. Wanda Draper, an expert in the field of human development, explained that Collings was handicapped developmentally by the lack of attachment with parental figures in the first six months of his life and beyond. (Tr.6134-35,6154-57,6160). Collings did not meet developmental expectations growing up. (Tr.6164,6193). His attachment problems continued when his adoptive family went through the trauma of losing a child, and then Collings suffered through his adoptive parents' separation and divorce. (Tr.6162,6186). Making matters worse, Collings was left wondering whether he would be adopted or, instead, returned to one of his birth parents. (Tr.6174,6177, 6179,6181). His birth parents were abruptly in and out of his life for years. (D.Ex.901,p.3-4;Tr.5948-49,5955,6168,6174,6179, 6181). Even within the adoptive family, Collings was shuttled from one parent to the other. (Tr.6049-50,6187).

Dr. Draper concluded to a reasonable degree of developmental certainty that Collings suffered emotional neglect. (Tr.6274). He suffered confusion in his connections with others, which brought about severe disorganized dissociative attachment. (Tr.6274).

As further mitigation, the defense presented evidence regarding David Spears' possible involvement in Rowan's death. Myrna Spears, David Spears' mother, testified that on the night Rowan disappeared, her son David called her at about midnight, and in response, she drove her Suburban to his house. (Tr.5887-88). David left in his pickup, returned a short while later, and took the Suburban, while she stayed at the house. (Tr.5888-89). David returned by 7:00 a.m. (Tr.5889).

Two dogs trained to alert at the scent of human remains alerted at the Suburban. (Tr.5905,5913). Both dogs separately alerted at the driver's side door and the left rear quadrant. (Tr.5913-14). Inside the Suburban, they alerted at the driver's seat and rear cargo area. (Tr.5917-18).

Verdict and Sentence

The jury recommended death. (Tr.6510). It found that the murder involved torture and, as a result, was outrageously and wantonly vile, horrible and inhuman, and that Rowan was killed as a result of her status as a potential witness. (Tr.6510). The court imposed death. (Sent.Tr.38). Notice of appeal was timely filed. (L.F.773-75).

POINT I

The trial court erred in overruling Collings' motion to suppress his November 9, 2007 statements and motion to suppress physical evidence and in admitting the statements and evidence, in violation of Collings' rights to due process, to be free from self-incrimination and unreasonable search and seizure, and to reliable sentencing. U.S.Const.,Amends.IV,V,VIII,XIV;Mo.Const.Art.I,Secs.10, 15,19,21. The totality of the circumstances show that Collings did not confess voluntarily and with full understanding of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that Collings' ensuing statements and consent to search were the direct product of the initial impermissible statement. Law enforcement officers exploited the close friendship Collings had with Wheaton Police Chief Clinton Clark; engaged in an unlawful "two-step" interrogation; failed to properly advise Collings of his rights; exploited Collings' fear of vigilante justice; and promised protection to Collings premised upon his first confessing.

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

Missouri v. Seibert, 542 U.S. 600 (2004);

Spano v. New York, 360 U.S. 315 (1959);

State v. Rettenberger, 984 P.2d 1009 (Utah 1999);

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

Mo.Const.Art.I,Secs.10,15,19,21.

POINT II

The trial court abused its discretion and plainly erred in barring Collings from presenting relevant, probative evidence at the suppression hearing, while allowing the State to present evidence that was inadmissible or had scant, if any, probative value. The court's inconsistent rulings and refusal to consider Collings' evidence violated Collings' rights to due process, to present a defense, confrontation and cross-examination, a fair and reliable suppression hearing, and freedom from cruel and unusual punishment, as guaranteed by U.S.Const.,Amends.V,VI,VIII, XIV;Mo.Const.,Art.I,Secs.10,18(a)21. The court plainly erred because: (1) videotaped evidence that on November 14th, Chief Clark continuously pressured Collings to speak about the case – despite knowing that Collings was represented by counsel and repeatedly insisted that, at the advice of counsel, he would not speak – was relevant and highly probative, in that the videotape was the best evidence by which the court could gauge the nature of Collings' relationship with Clark, gauge Clark's credibility, and assess the reliability of his testimony that he did not pressure Collings or otherwise violate his rights leading up to the November 9th Muncie Bridge confession; (2) evidence that law enforcement officers also used the "false friend" tactic with co-defendant David Spears was relevant to show that law enforcement intentionally preyed upon the vulnerabilities of the suspects in trying to elicit incriminating statements. In contrast, the court allowed the State to present evidence that is typically inadmissible, *i.e.*, evidence of two polygraph examinations and evidence of other bad acts.

Colorado v. Connelly, 479 U.S. 157 (1986);

Jackson v. Denno, 378 U.S. 368 (1964);

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

Spano v. New York, 360 U.S. 315 (1959);

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

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

Rule 30.20.

POINT III

The trial court erred in overruling Collings' motion for judgment of acquittal at the close of all evidence, accepting the verdict, entering judgment for first-degree murder, and sentencing him to death, in violation of his rights to due process, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII,XIV;Mo.Const.,Art.I,Sec.10,18(a),21. The State failed to prove an element of first-degree murder, that Collings coolly reflected before strangling Rowan, in that the evidence showed that when Collings realized that Rowan had seen his face, he "freaked out," grabbed a cord that was in the truck beside him, and immediately strangled Rowan.

In re Winship, 397 U.S. 358 (1970);

J.N.C.B. v. Juvenile Officer, 403 S.W.3d 120 (Mo.App.W.D.2013);

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. O'Brien, 857 S.W.2d 212 (Mo.banc 1993);

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

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

§§565.002,565.020, RSMo.

POINT IV

The trial court abused its discretion and plainly erred in overruling Collings' objections and admitting into evidence State's Exhibits 39A (item collected from burn pile that looked like string but actually was not) and 40 (ashes from the stove), in allowing the testimony of Stacy Bollinger regarding a partial DNA profile developed from a hair found in the bed of Collings' truck, and testimony and evidence regarding the comparison of "pubic region" hairs found on Rowan's body with Collings' pubic hairs, because the testimony and evidence lacked probative value and was unreliable, speculative, and misleading and thus violated Collings' right to a fair trial and due process, as guaranteed by the U.S.Const.,Amends.V,VI, XIV;Mo.Const.Art.I,Secs.10,18(a), in that

(1) Using Exhibit 39A, the State misled the jury to believe that the murder weapon, *i.e.*, the string/cord, was located on Collings' property, when actually it was not;

(2) With Exhibit 40, the State misled the jury to believe that the fact that a stove contained ashes was evidence of guilt, when actually it had no probative value whatsoever;

(3) testimony about the partial DNA profile misled the jury to believe that the hair found in Collings' truck was Rowan's; and

(4) testimony and evidence about the hair comparison misled the jury to believe that the "pubic region" hairs belonged to Collings when actually, the comparison was so flawed that it had no probative value.

Estelle v. Williams, 425 U.S. 501 (1976);

Giglio v. United States, 405 U.S. 150 (1972);

Napue v. Illinois, 360 U.S. 264 (1959);

State v. Driscoll, 55 S.W.3d 350 (Mo.banc 2001);

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

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

Rule 30.20.

POINT V

The trial court abused its discretion in admitting, over objection, State Exhibits 145, 147, 149-150, 158-162 (portraying Rowan's body in the cave), and Exhibits 179-193, and 196 (autopsy photographs), because admission of these photographs deprived Collings of his rights to a fair trial and to be free from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.Art.I,Secs. 18(a),21, in that Exhibits 145, 147, 149-150, and 158-162 were cumulative to Exhibit 146, and Exhibits 179-193 and 196 were excessively gruesome and prejudicial.

Spears v. Mullin, 343 F.3d 1215 (10th Cir.2003);

State v. Floyd, 360 S.W.2d 630 (Mo.1962);

State v. Lapsy, 298 S.W.2d 357 (Mo.1957);

State v. Murray, 744 S.W.2d 762 (Mo.banc 1988);

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

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

POINT VI

The trial court (1) abused its discretion in overruling Collings' objections and request for a mistrial after the prosecutor, in guilt phase closing argument, stood moot for thirty seconds while holding his hands as if he were strangling someone and then, after the court told him not to proceed further with such a display, repeated the same conduct, because the prosecutor's repeated argument/display constituted improper personalization and prosecutorial misconduct, in that the prosecutor's argument/display placed the jurors in the position of the victim as she was being strangled and induced the jurors to base their deliberations – in both guilt and penalty phase – on fear and anger rather than dispassionate reason; and (2) plainly erred in failing to intercede *sua sponte* to bar the State from arguing in penalty phase closing that defense evidence and argument about David Spears was intended to distract and confuse the jurors and should not be considered, in that the argument disparaged defense counsel, and the jury should not be precluded from considering mitigating evidence. The State's closing arguments violated Collings' rights to due process, a fair 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.

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

State v. Banks, 215 S.W.3d 118 (Mo.banc 2007);

State v. Rhodes, 988 S.W.2d 521 (Mo.banc1999);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

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

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

POINT VII

The trial court abused its discretion in overruling Collings' objection and request for a mistrial and allowing the jury to consider, as evidence that Collings should be executed, that Collings' own father, Dale Pickett, believed in the death penalty. The ruling denied Collings his rights to due process, a fair trial, and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo. Const.,Art.I,Secs.10,18(a),21. The prosecutor, an experienced capital litigator, committed deliberate misconduct by violating a pretrial ruling and eliciting opinion testimony on the appropriateness of a death sentence, in that the prosecutor elicited testimony that when Pickett's brother was killed, he wanted that person dead, and defense counsel had not opened the door to this impermissible and highly prejudicial testimony.

State v. Banks, 215 S.W.3d 118 (Mo.banc 2007);

State v. Burnfin, 771 S.W.2d 908 (Mo.App.W.D.1989);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

State v. Taylor, 944 S.W.2d 925 (Mo.banc 1997);

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

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

POINT VIII

The trial court erred in overruling Collings' objections to Instruction 17, MAI-CR3d-314.44 thereby violating Collings' rights to due process, trial by jury, and a reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21;§565.030.4(3). Instruction 17 relieved the State of its burden of proof, in that it required Collings to establish eligibility for a life sentence by proving that mitigation outweighs aggravation, whereas the jury should have been instructed that the State must prove that aggravation outweighs mitigation or that mitigation weighs less than aggravation.

Bullington v. Missouri, 451 U.S. 430 (1981);

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

State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.030; and

MAI-CR3d-314.44.

POINT IX

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

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

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

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

United States v. Booker, 543 U.S. 232 (2005);

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

Mo.Const.,Art.I,§§10,18(a),21; and

§565.030.

POINT X

Pursuant to its independent duty under Section 565.035 to review death sentences, this Court must vacate Collings' death sentence and impose a sentence of life without parole. Numerous factors support this result: Collings' deep remorse and his acceptance of responsibility, the State's exploitation of the jurors' emotions in both phases of trial, the State's deliberate misconduct, the lack of integrity of the police investigation, and the wealth of mitigating evidence. Collings' sentence is not proportionate when compared to similar cases. The death sentence stands in violation of Collings' rights to due process, fair and reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I, Secs.10,18(a),21;§565.035.3(3),RSMo.

Greathouse v. State, 83 S.W.3d 554 (Mo.App.W.D.2002);

State v. Banks, 215 S.W.3d 118 (Mo.banc 2007);

State v. Davis, 963 S.W.2d 317 (Mo.App.W.D.1997);

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

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

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

§565.035.

ARGUMENT I

The trial court erred in overruling Collings' motion to suppress his November 9, 2007 statements and motion to suppress physical evidence and in admitting the statements and evidence, in violation of Collings' rights to due process, to be free from self-incrimination and unreasonable search and seizure, and to reliable sentencing. U.S.Const.,Amends.IV,V,VIII,XIV;Mo.Const.Art.I,Secs.10, 15,19,21. The totality of the circumstances show that Collings did not confess voluntarily and with full understanding of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that Collings' ensuing statements and consent to search were the direct product of the initial impermissible statement. Law enforcement officers exploited the close friendship Collings had with Wheaton Police Chief Clinton Clark; engaged in an unlawful "two-step" interrogation; failed to properly advise Collings of his rights; exploited Collings' fear of vigilante justice; and promised protection to Collings premised upon his first confessing.

The Supreme Court has warned that, "[i]t is not admissible to do a great right by doing a little wrong… It is not sufficient to do justice by obtaining a proper result by irregular or improper means." *Miranda v. Arizona*, 384 U.S. 436, 447 (1966). Although society has a clear interest in prompt and efficient law enforcement, that interest cannot be attained at the expense of citizens' constitutional rights. *Spano v. New York*, 360 U.S. 315, 321 (1959). Law enforcement officers must scrupulously protect the constitutional rights of suspects, even in the most emotionally-charged or high-profile cases with

pressure mounting to make an arrest, for it is in these cases that the temptation to take shortcuts is the strongest and the risk to constitutional rights is the greatest.

Here, the police were faced with the disappearance of nine-year-old Rowan Ford. The case received intense local, as well as national, media attention. (Supp.Tr.108). The investigation involved a mass force of officers from the Newton, Barry, and McDonald County Sheriff Departments, the F.B.I., the Highway Patrol, and even the A.T.F. (Supp.Tr.68-70) Three suspects were quickly developed, the three men who had last seen Rowan alive. Still, after six days, the police still had no real break in the case. It took a week before Rowan's body was even found. With public pressure to solve the case at a boiling point, police officers knew they had to get one of the three suspects to break.

The target was Christopher Collings. To secure a confession from Collings, the investigators dispatched Wheaton Chief of Police Clinton Clark, a close, long-standing friend of Collings, to elicit a confession. Clark convinced Collings that Clark was speaking to him as a friend, not a law enforcement officer, and that Clark was acting only in Collings' interests. Clark preyed upon Collings' fear of vigilante justice and used it to push Collings to confess, even telling Collings that he would protect him, but only if Collings first told what he knew about Rowan's disappearance (Supp.Tr.902). Using these tactics, Chief Clark overcame Collings' resistance, convinced him to bypass his constitutional rights, and coerced Collings to confess to raping and killing Rowan. Then, *after* Collings confessed, Clark read him his rights. Furthermore, Clark led Collings into giving more statements and consenting to a search of his property. The use at trial of these improper statements and the fruits of the illegal search violated Collings' rights to

due process, to be free from self-incrimination and unreasonable search and seizure, and to reliable sentencing. U.S.Const.,Amends.IV,V,VIII,XIV;Mo.Const.Art.I,Secs.10,15, 19,21.

Standard of Review and Preservation

A trial court's ruling denying a motion to suppress will be reversed if it is clearly erroneous. *State v. Johnson*, 207 S.W.3d 24, 44 (Mo.banc 2006). The ruling is clearly erroneous when the reviewing court has the "definite and firm belief that a mistake has been made." *State v. Cain*, 287 S.W.3d 699, 705 (Mo.App.S.D.2009). In using this standard, the reviewing court must remember that a trial court's determination on the "ultimate issue of 'voluntariness' is a legal determination, subject to independent, de novo review." *Miller v. Fenton*, 474 U.S. 104, 110 (1985).

The State bears both the burden of producing evidence and the risk of non-persuasion to show by a preponderance of the evidence that a motion to suppress should be overruled. *State v. Franklin*, 841 S.W.2d 639, 644 (Mo.banc 1992). The State must show that the defendant's statements were made knowingly, voluntarily, and intelligently. *State v. Bucklew*, 973 S.W.2d 83, 87 (Mo.banc 1998).

The reviewing court should consider the evidence presented at the hearing on the motion to suppress and the evidence presented at trial to determine if there was substantial evidence to support the trial court's ruling. *State v. Pike*, 162 S.W.3d 464, 472 (Mo.banc 2005). "[T]he facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded." *State v. Galazin*, 58 S.W.3d 500, 507 (Mo.banc 2001). Because the trial

court has superior opportunity to assess the witnesses' credibility, deference is given to the trial court's credibility determinations and factual findings. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo.banc 1998). No deference is given to the trial court's ruling on the legal issue of voluntariness. *State v. Taylor*, 298 S.W.3d 482, 492 (Mo.banc 2009).

Defense counsel fully preserved this issue for review. Counsel filed a pretrial motion to suppress and repeatedly objected throughout the trial. (L.F.290-98;Tr.3527-29,3759-60,3999-4001,4291-92,4488-89,4533-34,4823-25,4998,5024,5040, 5386-87,5390,5395,5397,5399-5400,5402-04,5408-09). This issue was included in the motion for new trial. (L.F.717,730,733-36,741-42).

Law Enforcement Exploited Collings' Trust in Chief Clark

Collings had the right to be free from compelled self-incrimination. The Fifth Amendment commands that no person shall be compelled in any criminal case to be a witness against himself. *See also* Mo.Const.,Art.I,Sec.19. This privilege is applicable to the States through the due process clause of the Fourteenth Amendment. *Missouri v. Seibert*, 542 U.S. 600, 607 (2004); *also* Mo.Const.,Art.I,Sec.10. Every defendant has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will…" *Id., citing Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The Supreme Court has recognized that modern standards of interrogation are "psychologically rather than physically oriented" and that "coercion can be mental as well as physical." *Miranda*, 384 U.S. at 446-448. Police conduct in extracting confessions has evolved from physical brutality to "more refined and subtle methods of overcoming a defendant's will." *Jackson v. Denno*, 378 U.S. 368, 389 (1964); *Colorado*

v. Connelly, 479 U.S. 157, 164 (1986)(today, law enforcement has "turned to more subtle forms of psychological persuasion"). The duty to protect constitutional rights does not cease as the methods to extract confessions become more sophisticated. *Spano*, 360 U.S. at 321.

One of the means law enforcement uses is the "false friend" tactic. In *Spano*, the police knew that Spano had a long, close friendship with a police officer, Bruno. *Id*. at 323. After Spano refused to speak with other police officers, the police recognized that Bruno "could be of use" and sent him to speak with Spano to elicit a confession. *Id*. at 318-19. "It was with this material that the officers felt that they could overcome [Spano's] will." *Id*. at 323. The tactic succeeded and Spano confessed. *Id*. at 319.

The Supreme Court reversed, finding that this tactic, coupled with lengthy questioning without access to counsel, rendered the confession involuntary. *Id*. at 323. The Court noted that, "Bruno's was the one face visible to [Spano] in which he could put some trust." *Id*. It warned that, "[a]n open foe may prove a curse, [b]ut a pretended friend is worse." *Id*.

The false friend technique occurs when police officers represent to the defendant that they are his friends and are acting in his best interest. *State v. Rettenberger*, 984 P.2d 1009, 1016 (Utah 1999). This technique is successful because a defendant is more likely to speak once a friendly and trusting attitude is established. *Id*.

> In this atmosphere... the suspect is fooled into trusting that the interrogator's behavior will conform to the norms of friendship: the interrogator will loyally

help the suspect out of the jam, advise the suspect to confess only if confession will be beneficial [to the suspect], and so on.

Id. Although the officers might not exert physical or emotional abuse, this technique still is coercive when it involves "some physical or psychological force or *manipulation* that is designed to induce the accused to talk when he otherwise would not have done so." *Rettenberger*, 984 P.2d at 1016 (emphasis in original). While the "false friend" technique may not, by itself, render a confession involuntary, it is a significant factor to be considered and may provide an environment where other tactics become coercive. *Id*. at 1017. When Rettenberger believed that the police were acting in his best interest, he was less likely to question their false claims about the evidence against him and less likely to assert his right to counsel or to silence. *Id*. He "was more likely to confess, whether guilty or innocent." *Id*.; *see also People v. Adams*, 143 Cal.App.3d 970, 989 (Cal.App.1983)(overruled on another ground); *State v. Wood*, 128 S.W.3d 913, 917 (Mo.App.W.D.2004) (police activity coercive where police knew of Wood's mental illness and strong religious faith and exploited the pastoral relationship, using Wood's minister as his interrogator).

Here, investigators knew Collings had a close, long-standing father-figure relationship with Chief Clark and exploited it. As in *Spano*, law enforcement was finally able to secure from one "friend" what a bevy of experienced F.B.I. agents and officers could not, a confession.

Chief Clark had known Collings since Collings was a young boy. (Supp.Tr.874). Collings trusted Clark, went to him for help and advice, and confided in Clark about

familial problems. (Supp.Tr.882,884,892). Clark was very good friends with Collings' adoptive mother, Betty, and well acquainted with his adoptive father, Clarence. (Supp.Tr.544,885, 898). As Clarence's health declined, Clark often visited him at the town's senior housing complex. (Supp.Tr.544-45,894). When Betty died, Collings sought consolation from Clark. (Supp.Tr.897-98). Even after Collings moved to Arkansas, he made sure to visit Clark whenever he came home. (Supp.Tr.545,891). Clark was an older gentleman, a good ole' boy, and he often addressed Collings as "son." (Supp.Tr.604,935-36,1037;Supp.Ex.H-1,p.76).

Clark told investigators about his "unique" relationship with Collings. (Supp.Tr.934,1032). They learned that Clark had good rapport with Collings, had known him for years, and that they were good friends. (Supp.Tr.72-73;76,909-10). Investigators believed they could use that relationship of trust to secure a confession from Collings. (Supp.Tr.1219). They encouraged Clark to keep speaking with Collings to get him to talk about Rowan's disappearance. (Supp.Tr.71, 1219).

From the start, Collings was considered a suspect, or a "person of interest," along with David Spears and Nathan Mahurin, since they were the last ones to have seen Rowan alive. (Supp.Tr.40,56-57). From his first contact with Collings, Clark consistently reported his conversations with Collings to either Newton County sheriff deputies or F.B.I. agents. (Supp.Tr.70-72). Throughout his contact with Collings, Clark used his relationship of friendship and trust with Collings to make Collings believe that Clark was advising him as a friend, not a cop, and acting in Collings' interest.

On Wednesday, November 7th, Collings became very upset after speaking with F.B.I. agents all day. (Supp.Tr.562). He went to Clark that afternoon and confided to Clark that he had told the F.B.I. agents he "was gonna dummy up on anything else [he] had to say." (Supp.Tr. 561-62,568). Collings also told Clark, "he thought he would – he – that he should get a lawyer, or something to that effect, yes." (Tr.935). In response, Clark told Collings that, although it was his constitutional right to get an attorney, Collings should keep cooperating with law enforcement. (Supp.Tr.569). Clark told Collings it would not be in his best interest to stop cooperating. (Supp.Tr.937). Then Clark immediately read Collings his rights and tried to get Collings to make a statement *to him*. (Supp.Tr.567-69). Clark said to Collings, "Chris, you need to tell me what's on your mind. You need talk to somebody. And if I'm that person, then tell me what's going on, son." (Supp.Tr.935-36). When Collings left without giving a statement, Clark called F.B.I. Agent Ramana and cautioned her that Collings was "about to lawyer [up]," but that Clark had tried to dissuade Collings from doing so. (Supp.Tr.1221-22).

Although Clark testified at the suppression hearing that Collings intended to get a lawyer only if the F.B.I. agents continued to badger him, (Supp.Tr.568,936), Clark had testified otherwise in a sworn deposition. In his deposition, Clark explained that Collings told Clark he would have nothing more to do with the F.B.I. agents and would only speak with Clark. (Supp.Tr.936-37). When Clark asked him about his sudden change in deciding to lawyer-up, Collings stated, "Well,… I think I better get me a lawyer." (Supp.Tr.937). Clark replied, "I'm just going to tell you like it is. It would not be in your best interest to quit cooperating." (Supp.Tr.937-38).

Chief Clark also reported to Agent Ramana that Collings was near a breaking point, that he was very stressed and crying. (Supp. Tr.580,1229). Clark suggested that the agents ease up on Collings for a day. (Supp.Tr.580). He would try to talk to Collings and get him to disclose what happened. (Supp.Tr.1201).

On Thursday, November 8th, Chief Clark met with F.B.I. agents Tarpley and Stinnett. (Supp.Tr. 582,914-15,1033-34). They talked about Clark's relationship with Collings and the dynamics of Collings' family. (Supp.Tr.1037-38). They agreed that once Rowan's body was found, Clark alone should speak with Collings. (Supp.Tr.1041). If Collings was going to confess, it would be to Chief Clark. (Supp.Tr.1035). After all, Collings had not been willing to confess on Sunday, when Deputies Jennings and Stephens spoke with him; or Monday, when Deputies Williams, Stephens and Officer Barnes spoke with him; or Monday evening, when F.B.I. Agent Stinnett spoke with him; or Wednesday, when F.B.I. Agents Stinnett, Stonecipher, and Halford spoke with him. (Supp.Tr.32-34,38,124,135,158,192,758,981-89,997,1145,1155,1172).

On Friday, November 9th, after Rowan's body was found, F.B.I. Agent Tarpley called Chief Clark and asked him to find Collings and tell him that Rowan's body had been found. (Supp.Tr.1073). When Clark found Collings, he immediately informed Agent Tarpley. (Supp.Tr.586,662-63). Clark told Collings, "[S]on, it's over. We… found the body. I think it's time you told me what you've been trying and wanting to tell me all week and what's in your heart." (Supp.Tr.604). When Collings was uncomfortable talking at the police station, Clark suggested, "son, do we need to go somewhere else and talk?" (Supp.Ex.H-1,p.76).

Chief Clark also exploited Collings' fear. Collings had overheard people at the local café talking about vigilante justice and was worried that people might take matters into their own hands. (Supp.Tr.899,1289-90). The morning Rowan's body was found, Collings was followed all over town by a suspicious gray van. (Supp.Tr.584,588-89). Shaken, Collings first went to Clark's office, then called Clark on his cell phone. (Supp.Tr.588,663). Collings told Clark that "he'd driven down several streets and all over Rocky [Comfort] and everywhere else, trying to get rid of whoever was following him. And … finally had shook them." (Supp.Tr.589). Collings asked Clark if the van was law enforcement's, but Clark claimed he knew nothing about it. (Supp.Tr.588-89). Clark told Collings they needed to talk and that Collings should come to Clark's office. (Supp.Tr.592). Collings agreed, and he met and rode with Clark in Clark's police car. (Supp.Tr.592-93).

On the way to Clark's office, Clark told Collings, "I'm not here 24 hours a day, Chris. I can't guarantee your safety, you know, all the time." (Supp.Tr.595-96). Clark saw that Collings was upset, but Clark "just wanted him to know that – that I couldn't be there 24/7." (Supp.Tr.596). "I told him that – you know, that I would – I would protect him and take care of him to what extent that I could, which is normal for – that I would do for anybody." (Supp.Tr.596,899). Clark told Collings he would stay with him, protect him, and help him through "the process." (Supp.Tr.679,900-902). But there was one catch: Collings would have to confess his involvement in Rowan's disappearance. Clark admitted, "I told him I would stay with him all the way through this part of it, but he had to tell me what had happened to Rowan Ford for her sake." (Supp.Tr.902).

Collings was not experienced in the law. He was a construction worker with a G.E.D. and no prior felony convictions (Supp.Tr.759;D.Ex.901,17). In the past, Clark had read him his rights, but only for misdemeanors like squealing his tires and shooting fireworks within city limits. (Supp.Tr.578-79,888-89). It was not likely that Collings had paid much attention.

According to Chief Clark, once at his office, he read Collings his rights. (Supp.Tr.596-97,958). Collings was apprehensive, still worried about the fact that he had been followed. (Supp.Tr.602). He signed "yes" next to each of the enumerated rights on the *Miranda* form, signed the form, and listed the time as 3:00 p.m. (Supp.Tr.599,603; Supp.Ex.L).

Collings' November 9th confession to Clark at the Muncie Bridge was the direct result of Collings' fear for his safety, a fear that was entirely reasonable. Clark acknowledged that he too feared for Collings' safety, as "[t]here had been a lot of talk." (Supp.Ex.H-1,p.72-73). When he initially spoke with Collings that Friday, Clark told him, "I need… to talk to you, make sure you're all right." (Supp.Ex.H-1,p.72-73).

This was a very high profile case, covered extensively by the Springfield, Joplin, and national news media. (Supp.Tr.108). Law enforcement agencies included the Newton, McDonald, and Barry County Sheriff Departments, the F.B.I., the A.T.F., and the Highway Patrol. (Supp.Tr.68-69). As one deputy mentioned, "[t]here's never been that many cops in that part of the country … not in 30 years." (Supp.Ex.I-1,p.23). Various volunteer fire departments were helping, as were hundreds of people. (Supp.Tr.69-70). Posters were all over Newton County. (Supp.Tr.110).

In his first videotaped statement, Collings stated that although he had not been threatened directly, people had been watching him and somebody had been following him. (Supp.Ex.H-1,p.73-74). Whoever had followed him was persistent. Collings was able to temporarily shake the people in the van, but later, the van was following him again. (Supp.Ex.H-1,p.74). The van followed him from close to his house to Rocky Comfort, where Collings went inside a house to buy some marijuana. (Supp.Ex.H-1, p.74). When he got back in his truck, the van "got back behind me there in Rocky [Comfort] and followed me out to Muncie Chapel and back around and back through Wheaton to the café." (Supp.Ex.H-1, p.74). Collings lost the van in the streets of Wheaton. (Supp.Ex.H-1,p.74). He did not think it was a police officer, because an officer would have signaled for him to stop and talk. (Supp.Ex.H-1,p.75). "[T]hey were following me, and they were hanging back. And that made me nervous, so I got the hell out of town, and I called Clint." (Supp.Ex.H-1,p.75).

In his second videotaped statement, Collings again discussed his fear. He stated that he knew he was being watched. (Supp.Ex.I-1,p.38). He worried about his safety at the jail and asked repeatedly for a single-man cell. (Supp.Ex.I-1,p.6-7;Supp.Tr.680). He worried that David Spears might have confessed so that he could get to the jail and harm Collings. (Supp.Ex.I-1,p.21). Deputy Evenson warned Collings that if Collings were not in custody, someone would kill him:

> Evenson: Yeah. [Spears is] not – he's not going to go confess to it if he didn't do it. He's not going to go do that. There are people in the community that would kill him. If he didn't do it, they're going to

kick him back out on the street. What do you think would happen to him? What do you think would happen to him?

Collings: Same thing that happen to me if I ever leave these walls.

Evenson: If –if—if we said, you know what, Chris? I don't believe you did it. See you. Kick you out the door. What would happen to you?

Collings: You wouldn't—I wouldn't be here in the morning.

Evenson: No. We'd be looking for your body. …

Collings: I'd be a long ways off.

Evenson: You would have to, to keep breathing.

Collings: That's what I'm telling you.

Evenson: You would have to.

Collings: I'd tell you guys, you need to get ahold of me, I'll be in central Arkansas. …

Evenson: You would have to get out of this area to stay alive.

Collings: Oh, yeah. Oh, yeah.

Evenson: Because somebody would kill you.

Collings: Oh, yeah.

(Supp.Ex.I-1,p.44-45).

Collings confessed out of fear for his safety, not as a voluntary desire to confess. The threat of mob violence is coercive. *Arizona v. Fulminate*, 499 U.S. 279, 295-96 (1991)(defendant, in prison, was befriended by F.B.I. informant, who told defendant he would protect him from inmates who had been bothering him if he told him facts of the

alleged crime); *Payne v. Arkansas*, 356 U.S. 560, 564-565 (1958) (police chief told Payne that group of people wanted to come into the jail and get him, but if he told the truth, he could probably keep them outside); *United States v. McCullah*, 76 F.3d 1087, 1101 (10th Cir.1996)(person told defendant that gang was out to get him, but if he confessed, he would protect him).

In this second videotaped statement, Chief Clark again used the "false friend" tactic to elicit information from Collings. Chief Clark stated, "Now, as a friend, as someone who has tried to watch over you for seventeen long years, I want you to please tell me the truth." (Supp.Ex.I-1,p.86). "Please, would you do that for an old man? Do that for me." (Supp.Ex.I-1,p.79). Chief Clark told Collings, "I felt good about myself because you had enough faith and trust and confidence in me to come to me with this because you knew I would help you through it and because you knew it was the right thing to do." (Supp.Ex.I-1,p.98).

Law Enforcement Conducted an Impermissible Two-Step Interrogation

Law enforcement officers may not circumvent the requirements of *Miranda* by conducting a question first, *Mirandize* later, strategy for in-custody interrogation. *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, a police officer arrested the defendant and questioned her for 30-40 minutes without advising her of her *Miranda* rights. *Id*. at 605. After Seibert confessed, the officer gave her a 20-minute break. *Id*. He then read Seibert her rights, which she waived. *Id*. She then repeated her prior confession. *Id*.

The Supreme Court held that a confession obtained in this manner was inadmissible at trial. *Id*. at 617. The purpose of the two-step interrogation is "to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id*. at 611. "[W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id*. at 613-14.

Yet that is what occurred here. Collings did not receive the *Miranda* warnings until *after he* had confessed at the Muncie Bridge. After he confessed, he was whisked back to the Wheaton City Hall so he could be *Mirandized* and repeat his confession to a room full of law enforcement officers.

To determine if Collings was in custody, the reviewing court must consider whether, in light of the circumstances of the questioning, a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Although not an exhaustive list, the Court should consider whether:

(1) the suspect was informed that the questioning was voluntary, that they were free to leave, or they were not under arrest;

(2) the suspect possessed unrestrained freedom of movement;

(3) the suspect initiated contact with law enforcement or voluntarily acquiesced to requests for questioning;

(4) strong arm tactics or deceptive stratagems were employed;

(5) the atmosphere surrounding the questioning was police-dominated; and

(6) the suspect was arrested at the end of questioning.

State v. Werner, 9 S.W.3d 590, 595 (Mo. banc 2000). The Court may also consider the location of the questioning, its length, statements made during the questioning, the use of physical restraints during the questioning, and whether the suspect was released at the end of the questioning. *Howes v. Fields*, 132 S.Ct. 1181, 1189 (2012).

Collings was in custody at the Muncie Bridge, so the *Miranda* warnings were mandated. Before he left the Wheaton police station, Collings held his hands out to Chief Clark so he could be handcuffed. (Supp.Tr.608). Although Clark did not handcuff Collings, Collings must have believed he was not free to leave. Clark was in his uniform and thus, probably armed with a gun. (Supp.Tr.50;Tr.3860). Muncie Bridge was an isolated location, and Collings had no transportation home. Collings was not free to leave afterwards. (Supp.Tr.381,384). The totality of circumstances shows that a reasonable person in these circumstances would not have believed he was at liberty to end the questioning and leave.

Although Chief Clark insisted that he read Collings his rights before they left for the Muncie Bridge, it is clear from the waiver form, Clark's report, the phone records, and testimony of other officers that Collings was read his rights only after they returned from the bridge. First, the waiver form itself states that Collings received the *Miranda* warnings at 3:00 p.m. (Supp.Ex.G). Clark maintained that Collings incorrectly listed the time as 3:00 p.m., yet Clark did not correct him. (Supp.Tr.667). Clark could not explain why Collings listed the time as 3:00 p.m., other than to say he was mistaken.

(Supp.Tr.667). He could not explain why, in a case of this importance, he would not have corrected Collings as to the time. (Supp.Tr.667). Furthermore, Clark wrote in his own report that the warning was given at 3:00 p.m. (Supp.Tr.900-901;D.Supp.Ex.554).

Second, the phone records are consistent with the *Miranda* warnings being given at 3:00 p.m., because they show that Clark and Collings returned from the bridge just a few minutes before 3:00 p.m. On the day Rowan's body was found, Clark first heard from Collings when Collings called him at 2:08 p.m. (Supp.Tr.588,663). He and Collings agreed that Clark would stay where he was, and Collings would come to him, since Collings was nearby. (Supp.Tr.591). While Clark waited, he called Agent Tarpley. (Supp.Tr.662-63,665-66). Phone records show that Clark called Tarpley at 2:10 p.m., and Tarpley returned the call at 2:15 p.m. (Supp.Tr.662-63,665). Clark advised Tarpley that he had made contact with Collings and would be interviewing him. (Supp.Tr.665).

When Collings arrived, he and Clark drove to Wheaton City Hall, then drove to the Muncie Bridge. (Supp.Tr.592-93,607-608). It was "a very brief trip, just very few minutes," a distance of 2½-3½ miles. (Supp.Tr.595,607). On the way, Clark called the Barry County Sheriff Department to alert them that he would be speaking to Collings at the Muncie Bridge. (Supp.Tr.609-10,665). Phone records show that the call to Barry County was at 2:30 p.m. (Supp.Tr.664).

After Collings confessed at the Muncie Bridge, Clark called his office and told the clerk to have everyone leave the building. (Supp.Tr.656-57, 668). Records show that call occurred at 2:52 p.m. (Supp.Tr.656-57,668). Clark called Barry County at 2:53 p.m. to announce he was headed back to his office with Collings. (Supp.Tr.668-69). At 2:56

p.m., he called Agent Tarpley, who returned the call at 2:57 p.m. (Supp.Tr.669-70). Thus, Collings and Clark arrived back at Wheaton City Hall shortly before 3:00 p.m., with just enough time for Clark to read Collings his rights and for Collings to list the time as 3:00 p.m.

Third, testimony of other witnesses shows that the warnings were given after Collings had confessed. Chief Clark testified that once he and Collings returned to the Wheaton City Hall after being at the bridge, he merely reminded Collings that he had previously read him his rights. (Supp.Tr.672,837-38,840). But Deputy Jennings testified that Clark advised Collings of his rights at the conference room table and that a *Miranda* form was used. (Supp.Tr.45,89). Deputy Evenson testified that he heard and saw Clark *Mirandize* Collings at the conference room table. (Supp.Tr.258,321,326-27). He too thought a form was used. (Tr.321). Deputy Henry also testified that Clark advised Collings of his *Miranda* rights at the table.[9] (Supp.Tr.471). Collings testified that Clark Mirandized him only after they returned from Muncie Bridge. (Supp.Tr.1247-48).

Other Factors Made the Statements Unreliable

The statements' unreliability is evidenced by several other factors. Collings was worn down through the week by the persistent questioning. Collings was questioned on Sunday, Monday, possibly Tuesday, Wednesday and Friday, amounting to about 20 hours. (Supp.Tr.Supp.Ex.I-1,p.23). At least as of Wednesday, he was operating on very

[9] Henry was uncertain as to whether Clark read Collings his rights; he admitted in a deposition that he did not remember it happening. (Supp.Tr.531,535).

little sleep, having slept only one hour the night before he met with F.B.I. agents. (Tr.760). Collings was repeatedly pulled from work and subjected to questioning and repeated polygraph tests. (Supp.Tr.38,135,558,1143,1145). He passed the first polygraph test, but by the time of the second polygraph, he was completely stressed out and failed it. (Supp.Ex.I-1,p.25;Supp.Tr.562). Law enforcement officers knew that his nerves were wearing thin, he was emotional, and he was near his breaking point. (Supp.Tr.575,580).

Although Collings was read his rights at several points during the week, the warnings were riddled with problems. He signed a *Miranda* waiver on Monday. (Supp.Tr.192,200;Supp.Ex.D). It was given in conjunction with the C.V.S.A. test, and no one signed as a witness. (Supp.Tr.192,200;Supp.Ex.D). On Wednesday, he signed a *Miranda* waiver that stated that Deputy Evenson was a witness, but Evenson admittedly was not present. (Supp.Tr.445,449;Supp.Ex.K). In a case of this importance, such an error shows lack of care and attention to the suspect's rights. On Wednesday, Collings also signed a form that stated he had the right to refuse to take the polygraph test, he could stop the questioning at any time, and he could refuse to answer specific questions. (Supp.Ex.O). But that did not cover the same rights as a *Miranda* waiver, omitting, for example, his right to consult with counsel.

Collings acknowledges that the police need not re-*Mirandize* a suspect every time the interrogation is interrupted. *See*, *e.g.*, *State v. Carollo*, 172 S.W.3d 872, 875 (Mo.App.S.D.2005). But here, the gaps between interrogations were days, not just hours.

He should have been re-*Mirandized* before going to the Muncie Bridge on Friday, November 9th.

Collings acknowledges that, during the videotaped interviews, he said he was not threatened and no promises were made. (Supp.Ex.H-1,p.45,83). He stated he signed the *Miranda* warning of his own free will. (Supp.Ex.H-1,p.46-47). He testified at the suppression hearing that he did not think he was under arrest at the bridge, and no threats or promises were made at Wheaton City Hall. (Supp.Tr.1303,1335-36). By the time he returned from the Muncie Bridge, he was not worried that if he did not speak, he would be turned over to a mob. (Supp.Tr.1337). Nonetheless, these statements do not defeat Collings' assertion that his statements were not voluntary and were given without full understanding of his *Miranda* rights. As in *Spano*, it may have been Collings' choice to eventually speak, but the statement nonetheless was the product of coercion, trickery and a lack of a full understanding of his rights. His statements must be suppressed.

Collings' Ensuing Statements and the Physical Evidence Gained from His Consent to Search Should Have Been Excluded

After giving his statement at the Muncie Bridge, Collings was brought back to the Wheaton police station and almost immediately gave another statement. (Supp.Tr.831-32). At 4:40 p.m., he consented to a search of his property. (Supp.Tr.675;Supp.Ex.G). He then was whisked off to Barry County, where he gave videotaped statements at 5:29 p.m. and 8:02 p.m. (Supp.Tr.676).

The court should have excluded these statements and all evidence secured as a result of the consent to search as "fruits of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); U.S.Const.,Amend.IV,XIV;Mo.Const.,Art.I,Sec.15. The facts and circumstances show the existence of a causal connection between the earlier, unconstitutional confession at the Muncie Bridge and Collings' later statements and consent to search. *See State v. Wright*, 515 S.W.2d 421, 426 (Mo.banc 1974); *Leyra v. Denno*, 347 U.S. 556, 561 (1954)(later statements were so closely related to initial statement that "facts of one control the character of the other… All were simply parts of one continuous process"). Not only were Collings' ensuing statements and consent to search given in close temporal proximity to the first statement, they were also the product of the same coercive factors, *i.e.*, Collings' close bond with Clark and exploitation of Collings' fear of vigilante justice in the community and the jail itself.

The court's error in failing to suppress the statements and the evidence gained from the search was, obviously, not harmless. The Court must reverse and remand for a new trial.

ARGUMENT II

The trial court abused its discretion and plainly erred in barring Collings from presenting relevant, probative evidence at the suppression hearing, while allowing the State to present evidence that was inadmissible or had scant, if any, probative value. The court's inconsistent rulings and refusal to consider Collings' evidence violated Collings' rights to due process, to present a defense, confrontation and cross-examination, a fair and reliable suppression hearing, and freedom from cruel and unusual punishment, as guaranteed by U.S.Const.,Amends.V,VI,VIII, XIV;Mo.Const.,Art.I,Secs.10,18(a)21. The court plainly erred because: (1) videotaped evidence that on November 14th, Chief Clark continuously pressured Collings to speak about the case – despite knowing that Collings was represented by counsel and repeatedly insisted that, at the advice of counsel, he would not speak – was relevant and highly probative, in that the videotape was the best evidence by which the court could gauge the nature of Collings' relationship with Clark, gauge Clark's credibility, and assess the reliability of his testimony that he did not pressure Collings or otherwise violate his rights leading up to the November 9th Muncie Bridge confession; (2) evidence that law enforcement officers also used the "false friend" tactic with co-defendant David Spears was relevant to show that law enforcement intentionally preyed upon the vulnerabilities of the suspects in trying to elicit incriminating statements. In contrast, the court allowed the State to present evidence that is typically inadmissible, *i.e.*, evidence of two polygraph examinations and evidence of other bad acts.

During the suppression hearing, the court barred Collings from presenting probative, relevant evidence, while allowing the State to present evidence that had scant, if any, probative value, or that was inadmissible. The court refused to consider a videotaped interview that showed Clark flagrantly disregarding Collings' constitutional rights and pressuring Collings. The court refused to consider evidence that the law enforcement officers used the "false friend" tactic with co-defendant Spears. On the other hand, the court allowed the State to present evidence that Collings took polygraph tests and that he acted inappropriately toward Rowan's older sister Ariane Parsons.

Standard of Review and Preservation

Trial courts have broad discretion in determining the admissibility of evidence, and that 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). Abuse of discretion occurs when the 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).

Collings recognizes that defense counsel did not include these issues in the motion for new trial and thus, this point is not preserved for appeal. He therefore requests review for plain error under Rule 30.20. Plain error review involves two questions: first, whether the trial court committed an evident, obvious and clear error; and second, whether a manifest injustice or a miscarriage of justice will occur if the error is left uncorrected. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo.banc 2009).

Due Process Mandated that the Court Consider Collings'

Relevant, Probative Evidence

"A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Jackson v. Denno*, 378 U.S. 368, 380 (1964). Due process is violated if a defendant challenging his confession does not have a fair hearing and a reliable determination on the issue of voluntariness. *Id*. at 377. There must be a "full and reliable determination of the voluntariness issue in the trial court." *Id*. at 390-91; *see also State v. Gower*, 418 S.W.2d 10, 13, 14 (Mo.1967).

Evidence is relevant when it tends to prove or disprove a fact in issue or corroborates other relevant evidence. *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc 1998). Before evidence can be excluded as irrelevant, it must appear so beyond a doubt. *State v. O'Neil*, 718 S.W.2d 498, 503 (Mo.banc 1986). Any doubt as to relevance should be resolved by admitting the evidence. *State v. Dees*, 639 S.W.2d 149, 160 (Mo.App.S.D.1982).

An undeniable goal of the legal system is to arrive at the truth. *United States v. Havens*, 446 U.S. 620, 626 (1980). A procedure that frustrates "the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring).

The November 14th Videotape Was Relevant and Probative

As discussed in Argument I, *supra*, Collings moved to suppress his November 9th statements to the police and the evidence gained from the consent to search his home and property. The court heard evidence on the motion over the course of six days. The State presented nine witnesses. (Supp.Tr.21-1198). The defense presented three. (Supp.Tr. 1199-1360).

The State's key witness was Chief Clark. As previously discussed, Clark and Collings had a long-standing friendship. (Supp.Tr.874,892). Throughout the week, until Friday, Collings and Clark spoke privately at least twice. (Supp.Tr.549-52,555-56,561-62). On Friday, they spoke over the phone and then were alone together in Clark's police car, at the Wheaton police station, and at the Muncie Bridge. (Supp.Tr.588,592-93,594-95,611-12).

The nature of these private conversations leading up to Collings' confession was crucial to the court's determination of whether Collings confessed voluntarily and with full understanding of his rights. Clark insisted that he did not treat Collings differently from other people in Wheaton. (Supp.Tr.544,894-96). He claimed he did not pressure Collings, threaten him, or make any promises to Collings. (Tr.559-60,680-81,694,728, 730,732,744, 754,832,846-47). Clark claimed he told Collings he had the constitutional right to counsel and did not discourage Collings from asserting that right. (Supp.Tr.567-69).

To refute Clark's testimony, Collings offered into evidence Defense Exhibit 551 and 551-A, the videotape and transcript of a November 14th meeting between Collings

and Clark at the jail. (Supp.Tr.847). Collings argued that the videotape would allow the court to see first-hand how Clark interacted with Collings while they were alone and how Clark pressured Collings and disregarded Collings' constitutional rights. (Supp.Tr.849, 853-57). Defense counsel argued that the tape would help the court assess the credibility of Clark's testimony that he did not pressure Collings and that he respected Collings' constitutional rights. (Supp.Tr.849,853). Counsel argued that the tape was part of the totality of the circumstances that the court should consider in assessing whether Collings' statements were voluntary. (Supp.Tr.853).

The State objected that the tape was not part of the totality of the circumstances, because it was given five days after Collings' admissions of guilt. (Supp.Tr.854-55). The State did not intend to offer the November 14th statement into evidence. (Supp.Tr. 847,850). It conceded that Clark spoke with Collings despite knowing he was represented by counsel and after Collings repeatedly asserted he would not speak. (Supp.Tr.850,854-55).

The court acknowledged that it had allowed the State to present evidence at the suppression hearing that would not be allowed at the trial, to show a course of conduct and that this was the same type of situation. (Supp.Tr.851-52). Nonetheless, the court sustained the State's objection. (Supp.Tr.857;L.F.570).[10]

[10] Defense counsel played the videotape (D.Supp.Ex.551) as an offer of proof, but the court ruled that it would not consider that evidence. (Supp.Tr.865;L.F.570).

On November 14th, Collings asked to speak with Clark about a matter unrelated to his case.[11] (D.Supp.Ex.551-A,p.3). Collings was extremely upset because he had been served with a restraining order from his ex-wife and was scared that he would be prevented from having contact with his children. (D.Supp.Ex.551-A,p3-5,10). Collings cried throughout the meeting and later told Clark, "I just needed someone to talk to." (D.Supp.Ex.551-A,p.4).

Clark used this opportunity to try to get Collings to implicate David Spears in Rowan's death. Collings had been arraigned the day before, and Clark was present, when Collings' attorney had instructed Collings not to speak about the case. (D.Supp.Ex.551-A,p.12-13). Clark acknowledged that Collings had been arraigned, but then read Collings his rights anyway. (D.Supp.Ex.551-A,p.3). He told Collings they would talk about the papers Collings received from his ex-wife, but first, Collings needed to answer some questions for Clark:

> Clark: We'll talk to you about this, but I have some questions in my mind that I really wish that you would help me with, if you will.
>
> Collings: Well, it depends. If it's about the case, I can't – I was advised by my lawyer not to talk to anybody as far as my case.

(D.Supp.Ex.551-A,p.4). At this point, Clark should have ceased the questioning. Once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). Knowing that Collings was represented by counsel, Clark should not

[11] Defense Suppression Exhibit 551-A is included in the Appendix at A2-10.

have asked him any questions about the case. *United States v. Henry*, 447 U.S. 264, 274 (1980) (government violated defendant's Sixth Amendment right by "intentionally creating a situation likely to induce him to make incriminating statements without the assistance of counsel").

Collings told Clark at least nine times that he could not speak, on advice of counsel. (D.Supp.Ex.551-A,p.4,7,11-12,14,18,25,30,32). Undeterred, Clark pressed on. One tactic Clark used was weaving personal details into the conversation to make Collings think of Clark more as a friend or family member acting in his best interest, than a law enforcement officer working for the prosecution:

> Clark: And I'm not going to pressure you or force you or anything. But there's just some details and some things about that that I would like to clear up. We talked about this. I met your father. You're right. He's a big old boy. We visited out – outside, out here just – I think just before he came in and talked to you.

(D.Supp.Ex.551-A,p.4-5).

Clark again urged Collings to answer questions, again weaving in personal details:

> Like I said, I'm not going to put you under any – any pressure or anything, but Chris, I really wish that some of the details that are conflicting in this, if you so desire, if you would clear that up, and maybe I could get a good night's sleep and – and put – put some things at ease. It's not going to get any worse for you than what it is. I mean, it's as bad as it gets, and you know that as well as I do.

> I talked to [Clarence] too, by the way. He's all right. I been checking on him about every day. And the animals are being taken care of. Everything's all right in that regard, if that helps set your mind at ease, why – why, I'm glad to do that for you.

(D.Supp.Ex.551-A,p.6-7). Clark continued to exploit their long-standing friendship, reminding Collings that he was the one whom Collings came to when his adoptive mother died, and that Collings "ain't never come around town but what you didn't hunt me up." (D.Supp.Ex.551-A,p.14). He told Collings, "I worry about you… I've looked after you." (D.Supp.Ex.551-A,p.22). He called Collings, "old friend." (D.Supp.Ex.551-A,p.10).

Clark urged Collings to believe Clark always acted in his best interests:

> And… that's the last thing I want to do is add to that. But… I really would hate to walk out of this room this evening without knowing, A, … that you're being reassured and that your mind's a little bit at ease over things, and B, I would like to leave here with… the knowledge… of the rest of what happened. And… just have it, just, my God, once and for all (indiscernible).
>
> I mean, it's just that simple. You've never reached out for me but what I wasn't there. And if I wasn't there, it didn't take me long to get there, on this or anything else. I mean, if you just think back. And I once told you, what we do, we do for what's in the best interest of Chris. If you got in trouble and needed a spanking, you got one… If you needed somebody to reassure you, you got that too…. I've always tried to do what was right by you.

(D.Supp.Ex.551-A,p.27-28).

Knowing that Collings was probably at the lowest point in his life and really needed a friend, Clark repeatedly told him he could not speak with Collings at all unless Collings answered his questions. (D.Supp.Ex.551-A,p.7-8,12,16-17,26).

> But… if you don't want to talk, I have no choice. If you don't want to talk about it, I have no choice but to have them go ahead and put you back [in your cell].

(D.Supp.Ex.551-A,p.16).

Clark made an implied promise that he could help Collings. (D.Supp.Ex.551-A,p.19). When Collings stated things were out of their hands, Clark replied, "Let me tell you something, son. It's not out of my hands as much as you think." (D.Supp.Ex.551-A,p.19).

Clark said he would not pressure Collings, but all the while, he was:

- "I'm not going to attempt to coerce you into making any statements or saying anything that you don't want to say. I mean, that's entirely up to you." (D.Supp.Ex.551-A,p.13).
- "Are you absolutely sure you don't want to just… get this over with and get it behind you?" (D.Supp.Ex.551-A,p.17).
- "But… what I need to ask you is – and there again, it's up to you. But I really, really… need to get to the bottom of this." (D.Supp.Ex.551-A,p.11).
- "Are you absolutely sure you don't want to just… get this over with and get it behind you?" (D.Supp.Ex.551-A,p.17).

- "It would be easier for you to tell me what happened." (D.Supp.Ex.551-A,p.18)
- "Chris, I'll ask you one last time. Let's put this matter to rest and get this over with." (D.Supp.Ex.551-A,p.25)
- "You… you don't want to leave this matter hanging half finished. You're not that kind of a man. When you start something, you finish it. [Y]ou've always been that way." (D.Supp.Ex. 551-A,p.28).
- "Now, you want to go ahead… and set this straight, and then you can go eat your supper, I'll go eat breakfast." (D.Supp.Ex.551-A,p.29).
- "I wouldn't even dream of pressuring or coercing you into saying or doing anything that you didn't want to do." (D.Supp.Ex.551-A,p.16).

Collings repeatedly told Clark that he would not speak, on advice of counsel. (D.Supp.Ex.551-A,p.4,7,11-12,14,18,25,30,32). In response, *Clark urged Collings to ignore his counsel's advice*. Clark said, "the advice you received from your attorney, and I was standing there … when he advised you, is just that, it's advice. [Y]ou're free to do as you please in that regard." (D.Supp.Ex.551-A,p.12-13). Clark repeatedly stressed to Collings that the decision was up to him, the situation could not get any worse, and that he was his own man. (D.Supp.Ex.551-A,p.11,13,16,19).

The court plainly erred in refusing to consider the videotape, a window into the relationship between Collings and Clark. The videotape showed how Clark used his long-standing friendship and trust with Collings to pressure Collings, make him believe that Clark was acting in his best interests, and urge him to forego his legal rights. Although Clark repeatedly stated that he would never pressure Collings, the entire

videotape is riddled with Clark pushing Collings to speak, despite Collings' insistence that he had counsel and would not speak about the case. (D.Supp.Ex.551-A,p.4,-8,11-20,22,25-33). Clark knew that Collings had counsel, since Clark appeared at Collings' arraignment. (Supp.Tr.965). Yet Clark repeatedly urged Collings to act contrary to counsel's instructions. (D.Supp.Ex.551-A,p.4,-8,11-20,22,25-33). Clark must have known that his conversation was being videotaped. (D.Supp.Ex.551-A,p.18), yet he blatantly disregarded the law. The November 14th videotape showed the true nature of this crucial relationship and cast serious doubt on Clark's insistence that he treated Collings just like anyone else, did not pressure him, and respected his constitutional rights.

The State argued that the court should not consider the November 14th statement, because it came five days after Collings' initial confession. In determining whether a confession was voluntary, however, the court must consider the totality of the circumstances. *Colorado v. Connelly*, 479 U.S. 157, 176 (1986). The November 14th videotape was part of the totality of the circumstances. It shed light on whether the earlier statements were voluntary because it starkly revealed the relationship between Clark and Collings and the tactics Clark would use to get Collings to talk. Nothing in the record suggested that Clark's relationship or manner of dealing with Collings changed within those five days. The way in which Clark dealt with Collings on November 14th was the same way that he dealt with Collings on November 9th. If anything, Clark would have been more coercive and likely to disregard Collings' constitutional rights on November 9th, when he and Collings were alone and not being videotaped. If Clark was

as willing to commit such a blatant violation of Collings' rights while on videotape, what would have kept him from committing even more egregious misconduct earlier in the investigation, when the police were desperate for a break in the case? All the pressure was on Chief Clark to get Collings to confess; he was Collings' friend and trusted mentor. (Supp.Tr.1035). The court should have considered the November 14th videotape when considering whether Clark was credible and whether the statements were the product of coercion. Had the court done so, it would have sustained the motion to suppress.

Law Enforcement's Use of the False Friend Tactic with David Spears

As previously detailed, a key element of Collings' argument for suppressing his statement and the evidence from the November 9th search is law enforcement's exploitation of his relationship of friendship and trust with Chief Clark as a tactic to fool Collings into thinking that Clark was acting in Collings' best interests and to get Collings to abdicate his constitutional rights. (Supp.Tr.97,100-102); s*ee* Arg.I, *supra*. To show that this was a tactic intentionally used, Collings wanted to elicit that the officers were using this tactic with David Spears as well. (Supp.Tr.97,100-102).

Collings elicited that, as part of their investigation of Spears' involvement, officers brought in Mark Bridges to get Spears to implicate himself. (Supp.Tr.95). Bridges was not a law enforcement officer but rather the Newton County coroner. (Supp.Tr.95). But Bridges was Spears' past employer, and he and Spears had known each other a long time. (Supp.Tr.96). Bridges had good rapport with Spears. (Supp.Tr.96).

When defense counsel asked whether the officers arranged for Bridges to wear a wire while speaking with Spears, the State objected. (Supp.Tr.97). Collings argued that the evidence showed that the officers used Clark and Bridges in a parallel manner, bringing in people who would not normally be part of the investigation, to try to elicit confessions. (Supp.Tr.97,100). The State countered that this evidence had no relevance to Collings' confession. (Supp.Tr.99). The court sustained the objection. (Supp.Tr.100). As an offer of proof, defense counsel elicited that Newton County deputies arranged to have Bridges wear a wear while riding around with Spears. (Supp.Tr.101-102).

The court plainly erred in refusing to consider this evidence. In determining whether a confession was voluntary, the court should consider the totality of the circumstances. *Connelly*, 479 U.S. at 176. Whether the law enforcement officers intentionally targeted friends of the suspects to elicit confessions was relevant to the issue of voluntariness and a deliberate attempt by police to mislead, break down, and circumvent both the suspects' willpower and their reliance on their constitutional rights to counsel and to remain silent. *See, e.g.*, *Spano v. New York*, 360 U.S. 315, 319, 323 (1959).

The Court's Conflicting Opinions Were Fundamentally Unfair

While the court refused to consider relevant, probative defense evidence in the suppression hearing, it allowed the State to present evidence that never should have been considered. Over defense objection, the State was allowed to present evidence that Collings took a Computer Voice Stress Analysis (CVSA) test and a polygraph test. (Supp.Tr.152-54). Defense counsel objected that nothing related to polygraph or CVSA

testing was admissible in court. (Supp.Tr.193-94,196,762,766). *See, e.g., State v. Hall*, 955 S.W.2d 198 (Mo.banc 1997)("improper to introduce whether or not a polygraph test has been taken even if the results are not offered into evidence"). The State reasoned that the court should consider the tests, even though they would not be admissible at trial, because Collings signed rights waivers with regard to the tests. (Supp.Tr.149). The State argued that the tests were relevant to the totality of Collings' contact with law enforcement. (Supp.Tr.149,198). The court ruled that the State could elicit that Collings took the tests, but not what the test were. (Supp.Tr.152-54,198,766).

The State then elicited that Collings agreed to take a "test," and that, as part of the test, an officer advised Collings of his *Miranda* rights. (Supp.Tr.154-55,191-92;Supp. Ex.D). Later, the State elicited that on November 7th, Collings agreed to take another "test;" he signed a form acknowledging he understood he did not have to take the test, he could stop the test at any time, and he could refuse to answer particular questions. (Supp.Tr.757-58,761;Supp.Ex.O).

Thus, although the defense was not allowed relevant, probative evidence to show the totality of the circumstances regarding Clark's relationship with Collings and to expose flaws in Clark's credibility, the State was allowed to use inadmissible polygraph/CVSA evidence to show the totality of the circumstances regarding topics of marginal, if any, probative value.

Additionally, the State was allowed to elicit, over defense objection, that Collings had a sexual encounter with Rowan's older sister, Ariane Parsons, when she was eighteen years old. (Supp.Tr.1007,1159). The State argued that the court should consider detailed

evidence of this sexual encounter because it showed that Collings was willing to talk about topics adverse to his interests when he spoke to the police on November 7th, so his statement must have been voluntary. (Supp.Tr.1162). Collings admitted in his November 7th statement that when Parsons was around 18 years old, she commenced a sexual encounter with him. (Supp.Tr.1009). He stated that Parsons rubbed her breast on him, they fondled each other for about five minutes, and he put his finger in her vagina. (Supp.Tr.1009). Collings stated he was relieved the encounter did not go further, because although Parsons was of age, he considered her like a niece. (Supp.Tr.1009). Parsons moved out about a week later. (Supp.Tr.1009-10). Later, the State, over objection, again elicited testimony about this incident through another witness. (Supp.Tr.1168).

The fact that, earlier in the week, Collings disclosed that he had a voluntary sexual encounter with 18-year-old Parsons did not have any relevance to whether he voluntarily confessed later in the week to raping and murdering nine-year-old Rowan. The details of the salacious encounter certainly had no probative value to whether Collings' November 9th statement was given voluntarily and with full understanding of his rights. The dichotomy in permitting the State to introduce inadmissible polygraph tests and irrelevant sexual encounters with willing, consenting adults, while prohibiting the introduction of a defense videotape depicting the State's chief witness illegally coercing and baiting the defendant into further incriminating statements belies logic or legal justification.

The court's inconsistent rulings and refusal to consider Collings' evidence violated Collings' rights to due process, to present a defense, confrontation and cross-examination, a fair and reliable suppression hearing, and freedom from cruel and unusual

punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21. It was fundamentally unfair to bar relevant, probative defense evidence, yet consider the State's improper, lewd, and prejudicial evidence. The court's rulings violated traditional notions of fair play. Had the court considered the defense evidence, it should have sustained Collings' motion to suppress. Manifest injustice would occur if this ruling is left intact. The Court must reverse.

ARGUMENT III

The trial court erred in overruling Collings' motion for judgment of acquittal at the close of all evidence, accepting the verdict, entering judgment for first-degree murder, and sentencing him to death, in violation of his rights to due process, a fair trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII,XIV;Mo.Const.,Art.I,Sec.10,18(a),21. The State failed to prove an element of first-degree murder, that Collings coolly reflected before strangling Rowan, in that the evidence showed that when Collings realized that Rowan had seen his face, he "freaked out," grabbed a cord that was in the truck beside him, and immediately strangled Rowan.

The State's evidence, even in the light most favorable to the verdict, did not establish first-degree murder in that it did not show that Collings caused Rowan's death after cool deliberation. Instead, it showed that when Collings realized that Rowan had seen his face, he "freaked out," immediately grabbed a cord laying in the truck, and strangled Rowan. The evidence did not prove the cool reflection required for deliberation and hence did not prove first-degree murder.

Standard of Review

In reviewing the sufficiency of the evidence, this Court must determine whether there is substantial evidence from which a reasonable juror could find all of the elements beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo.banc 1993). This Court may not weigh the evidence or determine the credibility or reliability of witnesses. *State v. Sumowski*, 794 S.W.2d 643, 645 (Mo.banc 1990). It must review the facts in

evidence and all inferences reasonably drawn from the evidence in the light most favorable to the verdict and must disregard all evidence to the contrary. *State v. Rhodes*, 988 S.W.2d 521, 525 (Mo.banc 1999). While we are to accept as true all inferences favorable to the State, they must be logical inferences that may be *reasonably* drawn from the evidence." *J.N.C.B. v. Juvenile Officer*, 403 S.W.3d 120, 124 (Mo.App.W.D.2013)(emphasis in original).

The State Failed to Prove Cool Reflection

To support a criminal conviction, the State must prove, beyond a reasonable doubt, that the defendant committed all elements of the crime charged. *In re Winship*, 397 U.S. 358, 362 (1970); U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Sec.10. To convict, the fact-finder must "reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). A conviction based on insufficient evidence violates due process of law. *Id*.

A person commits first-degree murder when he "knowingly causes the death of another person after deliberation upon the matter." §565.020.1, RSMo. Deliberation is "cool reflection for any length of time no matter how brief." §565.002(3), RSMo. Without it, an intentional killing is second-degree murder. *State v. Glass*, 136 S.W.3d 496, 514 (Mo.banc 2004). "Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo.banc 1993). The defendant must have thought of the act for any length of time while in a cool frame of mind. *State v. Shaw*, 569 S.W.2d 375, 377 (Mo.App.St.L.1978).

The State presented evidence that Collings took Rowan from her bedroom as she slept. (Tr.4562). He drove to his trailer, where he had sex with her in the dark. (Tr.4563,4691). Rowan awoke only when Collings started to have sex with her. (Tr.4690-91;Supp.Ex.H-1,p.40). Collings did not speak, because he did not want Rowan to recognize his voice. (Supp.Ex.H-1,p.42). Afterwards, he led Rowan out the trailer in front of him so that she could not see his face. (Tr.4564).

But when they got outside, Rowan turned and saw Collings' face in the light of the moon. (Tr.4565). Collings knew that she had recognized him, and he "freaked out." (Tr.4565;St.Ex.94;Supp.Ex.H-1,p.22). "I just started freaking like, oh my God, she knows who I am. What the hell am I going to do now?... I seen this piece of nylon cord laying on the side of the truck there right beside me, and I just grabbed it." (Supp.Ex.H-1,p.23;Tr.4565,4693-94). Collings stated, "She seen me and I flipped out." (D.Ex.748,p.34). Collings told Clark "something to the effect that, my God, she – she recognized me, and that – that he just kind of freaked out." (Tr.4572). "I was paranoid and freaking out." (S.Ex.94; Supp.Ex.H-1,p.49). Collings insisted, "Clint, you have got to believe – if you don't believe anything else of this whole story, you've got to believe what I'm about to tell you… I fully intended … to take her right back where I found her and leave her." (Tr.4693).

The State argued in closing that Collings must have coolly deliberated, because the act of strangling Rowan took several minutes. (Tr.5591). But the fact that Rowan was strangled does not require the conclusion that Collings coolly reflected. As Judge Wolff noted in *State v. Black*, 50 S.W.3d 778, 797 (Mo.banc 2001)(Wolff, J., dissenting),

"[t]here was time in this case for deliberation but no indication of 'cool reflection'; … time in these circumstances cannot alone suffice to supply evidence of 'cool reflection.'" The State must prove beyond a reasonable doubt that Collings acted in cold blood, with unimpassioned premeditation. *Id.*, *citing O'Brien*, 857 S.W.2d at 218. Although the State showed that the act of strangling Rowan likely took several minutes, it did not prove that Collings acted in a cool frame of mind during that time.

Collings acknowledges that deliberation can be difficult to prove through direct evidence, so it may be established by indirect evidence and inferences reasonably drawn from the evidence. *State v. Smith*, 966 S.W.2d 1, 5 (Mo.App.W.D.1997). But the State should not be allowed to meet its burden of proof as to cool reflection through "inferences" that rise only to the level of speculation or supposition. An inference "is a conclusion drawn by reason from facts established by proof; a deduction or conclusion from facts or propositions known to be true." *J.N.C.B.*, 403 S.W.3d at 124. A supposition, on the other hand, is "a conjecture based on the possibility that a thing could have happened. It is an idea or a notion founded on the probability that a thing may have occurred, but without proof that it did occur." *State v. Waller*, 163 S.W.3d 593, 595 (Mo. App.W.D.2005)(internal quotations and citations omitted). It is not enough that a defendant "*could*" have committed the crime. *Id.* (emphasis in original). Here, while it is *possible* that Collings might have coolly reflected, the State failed to prove beyond a reasonable doubt that he actually did coolly reflect.

Collings was convicted of first-degree murder and sentenced to die for a crime that, at most, should be considered second-degree murder. Thus, Collings was denied his

rights to due process, a fair trial, and to be free 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 vacate Collings' first-degree murder conviction and discharge him from his death sentence.

ARGUMENT IV

The trial court abused its discretion and plainly erred in overruling Collings' objections and admitting into evidence State's Exhibits 39A (item collected from burn pile that looked like string but actually was not) and 40 (ashes from the stove), in allowing the testimony of Stacy Bollinger regarding a partial DNA profile developed from a hair found in the bed of Collings' truck, and testimony and evidence regarding the comparison of "pubic region" hairs found on Rowan's body with Collings' pubic hairs, because the testimony and evidence lacked probative value and was unreliable, speculative, and misleading and thus violated Collings' right to a fair trial and due process, as guaranteed by the U.S.Const.,Amends.V,VI, XIV;Mo.Const.Art.I,Secs.10,18(a), in that

(1) Using Exhibit 39A, the State misled the jury to believe that the murder weapon, *i.e.*, the string/cord, was located on Collings' property, when actually it was not;

(2) With Exhibit 40, the State misled the jury to believe that the fact that a stove contained ashes was evidence of guilt, when actually it had no probative value whatsoever;

(3) testimony about the partial DNA profile misled the jury to believe that the hair found in Collings' truck was Rowan's; and

(4) testimony and evidence about the hair comparison misled the jury to believe that the "pubic region" hairs belonged to Collings when actually, the comparison was so flawed that it had no probative value.

The State adopted a "shotgun" approach to its forensic evidence. It took multiple items of evidence that lacked probative value, fired them at the jury, and hoped that something stuck. The State knew that its evidence was not probative, yet put it in front of the jury anyway. For example, evidence that Collings had a woodstove containing ashes did not prove that Collings burned Rowan's clothing, yet the State put those ashes in front of the jury anyway. The State's own witness stated that Exhibit 39A was not string, yet the State repeatedly called the item string anyway and presented it to the jury as the string Collings used to strangle Rowan. The State knew that evidence of the partial DNA profile and the hair comparison lacked true evidentiary value, yet it proceeded with that evidence too, knowing of the undue weight juries often give to forensic evidence. The State's use of testimony and evidence that lacked probative value and was unreliable, speculative, and misleading violated Collings' right to a fair trial and due process. U.S. Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a).

Standard of Review and Preservation

At trial, counsel objected to the testimony and evidence outlined above. (Tr.4341-45,4927,5349-51,5435-36,5518-195524,5529-34). Counsel furthermore included subparagraphs 1, 2, and 4 in the motion for new trial, but not subparagraph 3. (L.F.740-41,745). Thus, subparagraphs 1, 2, and 4 are preserved for review, but not subparagraph 3. As to subparagraph 3, Collings requests review for plain error. Rule 30.20.

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*. It abuses its discretion when its ruling

is clearly against the logic of the circumstances then before it 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.banc 1997).

Plain error review involves two questions: first, whether the trial court committed an evident, obvious and clear error; and second, whether a manifest injustice or a miscarriage of justice will occur if the error is left uncorrected. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo.banc 2009).

"String" from Burn Pile

Investigators searched Collings' property and found what they believed was a piece of string from a burn pile. (Tr.4299-4301;Ex.39A). The item was seized and sent for testing. (Tr.4332,4334,4348). A criminalist with the Highway Patrol Crime Lab determined that the item was not string, but rather, strands of fiberglass. (Tr.5356,5411, 5415).

Collings objected to the admission of Exhibit 39A. (Tr.4341-45). He argued that the exhibit was not relevant, because it was not string. (Tr.4341-42). The fact that fiberglass strands were found in the burn pile had no relevance to the case. (Tr.4343). Not everything found on the defendant's property was relevant. (Tr.4344). Collings argued that the State was trying to make the jury believe that burnt string was found in the burn pile, when it actually was not. (Tr.4343-44). The court overruled the objection. (Tr.4345,4347).

Despite knowing that the object, State's Exhibit 39A, was not string or cord, the State referred to it as string or cord throughout the trial. When discussing what was

depicted in two photographs of the burn pile, the prosecutor asked, "What – these are – these are both of the same string?" (Tr.4300). The prosecutor did not correct the witness when the witness stated that the object depicted was a piece of string or cord. (Tr.4300). The prosecutor asked his witness to show the jury on the photograph where he saw the string. (Tr.4301). The prosecutor asked his witness if a photograph depicted a "closer-up shot of this cord that you found in the burn pile?" (Tr.4301-02). Another photograph showed "a better picture of the cord." (Tr.4302). The State elicited from another witness that he located a string in the burn pile and seized it as evidence. (Tr.4333). The prosecutor allowed the witness to identify State Exhibit 39A as "nylon string found in burn pile behind large trailer." (Tr.4334). The prosecutor asked the witness if Exhibit 39 contained the string he found. (Tr.4335). The prosecutor referred to the object again as string: "Do you recall when you originally placed the string in – the string that's depicted in Exhibits 125 and 126… But there were originally – the strings were originally in here?" (Tr.4336). He asked the witness, "Now, when you seized the string that we were talking about that was in the burn pile, you put it in this paper bag?" (Tr.4348). When a witness again incorrectly identified Exhibit 39A as the "nylon string" that was collected, the prosecutor did not correct him. (Tr.4373,5055). Even after his own witness testified that the object was not string, the prosecutor allowed another witness to refer to the item as string. (Tr.5434).

The State intentionally misled the jurors to believe that the law enforcement officers found the murder weapon, *i.e.*, the string, on Collings' property. Due process prohibits the State's "knowin[g] use [of] false evidence," because such use violates "any

concept of ordered liberty." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972).

Ashes from Wood-Burning Stove

Ash and debris from inside a wood-burning stove were collected as evidence and admitted into evidence as State's Exhibit 40. (Tr.4296,4924-25). Collings objected to its relevance, since nothing of evidentiary value was found. (Tr.4927). The State argued that it should be admitted, because Collings stated he burned items, and there was ash in the stove. (Tr.4927). The court overruled the objection, reasoning that the evidence was not totally irrelevant. (Tr.4928).

The ashes from the wood-burning stove had no probative value. Of course, there would be ashes in a stove. The fact that the stove contained ashes did not make it any more likely that Collings committed the charged crime. Evidence should only be admitted if it has "some legitimate tendency to establish directly the accused's guilt of the charges." *State v. Driscoll*, 55 S.W.3d 350, 354 (Mo.banc 2001). The court should not have admitted this evidence.

Ms. Bollinger's Testimony

Collings objected to the testimony of Stacy Bollinger, a DNA criminalist with the Highway Patrol Crime Laboratory. (Tr. 5349-51,5418). Ms. Bollinger examined the vaginal and rectal swabs taken from Rowan. (Tr.5424-25). An initial indication showed the presence of sperm or semen, so she performed a differential extraction. (Tr.5425-26).

However, there was insufficient DNA for further analysis. (Tr.5425-27). Ms. Bollinger testified that when a man has a vasectomy, sperm cells are removed from the ejaculate. (Tr.5427). If there were no sperm cells, there would be no DNA. (Tr.5427).

Over objection, Ms. Bollinger also testified that she developed a partial DNA profile from the hair found in the bed of Collings' white pick-up truck. (Tr.5435,5437). A full profile would have had peaks at all sixteen loci, whereas here, there were peaks at six loci. (Tr.5437). The Highway Patrol Crime Lab did not have a threshold number of loci that must be hit to validly achieve a partial profile. (Tr.5437).

Ms. Bollinger believed the partial profile was consistent with Rowan's DNA profile. (Tr.5438-39). It contained female gender characteristics consistent with Rowan. (Tr.5435). For statistical purposes, four loci were used out of thirteen that were possible. (Tr.5440). The frequency of this partial profile in the Caucasian population was 1 in 328,700. (Tr.5443).

Collings recognizes that partial DNA profiles generally are admissible to show that a defendant was not excluded as a possible source of the DNA material. *State v. Taylor*, 382 S.W.3d 251, 257 (Mo.App.W.D.2012). But courts should also be leery in allowing DNA "evidence" that truly lacks any probative value, especially since jurors often place far too great a value on this type of evidence:

> In today's world, the "smoking gun" that jurors wish to see—and, therefore, may place undue weight on—is DNA evidence. In today's world, the "so-called CSI effect," where television shows cause jurors to expect and almost

> demand forensic evidence at trial before they will vote to convict, also may cause jurors to place undue weight on DNA evidence.

State v. Bowman, 337 S.W.3d 679, 694, fn.3 (Mo.banc 2011)(Wolff, J, and Stith, J, concurring)(internal citation and quotation marks omitted).

Collings argued that the partial DNA profile Ms. Bollinger developed from a hair found in the bed of Collings' truck was so weak that it lacked true probative value. (Tr.5350). Because juries place so much weight on DNA evidence, the prejudicial effect outweighed any probative value. (Tr.5349-51). The court overruled Collings objections. (Tr.5355,5435-36).

The problem is that here, unlike in other cases, the jury was hit with multiple pieces of forensic evidence, one after the other, that had no real probative value separately but whose cumulative effect was intended to make the jury believe that the State had some real forensic evidence tying Collings to the charged crime. In reality, the State had none. In a capital case, the need for reliability is heightened. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C.J). Yet here the jury found guilt based upon the cumulative effect of multiple items of questionable, shaky evidence. The result was a verdict that cannot be trusted.

Hair Comparison

During the autopsy, two foreign hairs were found on Rowan's body. (Tr.5509-10). The hairs were of limited value for comparison purposes because they were not pubic hairs but rather "pubic region" hairs, meaning they could be leg or stomach hairs.

(Tr.5511,5513). The examiner photographed the two "pubic region" hairs and compared them to known samples of Collings' pubic hair. (Tr.5510-11,5515,5521).

Collings objected that the comparison had no relevance or probative value because it was like comparing apples and oranges. (Tr.5524). The court overruled the objection. (Tr.5525). On the same ground, Collings objected to admission of photographic exhibits showing enlargements of the hairs. (Tr.5518-19,5523-24,5529-34;St.Ex.209-13). The court allowed the testimony and admitted the exhibits. (Tr.5525,5534).

The examiner testified that the hairs taken from Collings were microscopically similar to the hairs found on Rowan's pubic area. (Tr.5526,5538). The examiner could not say that the hairs were consistent with each other. (Tr.5527). The hairs were Caucasian and were similar in color, diameter variation, and medulla. (Tr.5527,5535).

Demonstrative evidence is admissible and relevant when it tends to connect a defendant to the crime, or throw light upon a material fact in issue in the case. *State v. Isa*, 850 S.W.2d 876, 890 (Mo.banc 1993). Photographs are admissible when they tend to corroborate the testimony of the witness, assist the jury in understanding the facts or prove an element of the case. *Id.* Logically then, when the photographs do none of those things, they should not be admitted.

None of the testimony about the hair comparison should have been allowed. The examiner acknowledged that typically only head hairs and pubic hairs are used for comparison purposes. (Tr.5540). Hairs from other parts of the body, like "pubic region" hairs, are not used. (Tr.5540). The examiner's own procedure manual instructed that the only hairs routinely compared were head and pubic hairs. (Tr.5543). The witness

testified that because the hairs came from different areas of the body, the hairs could not be consistent and there was no comparison. (Tr.5511,5526).

The jurors would not have known how to weigh this evidence. The jurors were told that the "pubic region" hairs were similar to Collings' pubic hairs, but were given no statistical frequency for such similarities. They were left to wonder as to how many people would also have similar hairs. The State should not be allowed to toss evidence out to the jury without grounding that evidence in some manner so that the jurors know how to assess the evidence and what weight it deserves. Because jurors often place undue weight on scientific evidence, too great a risk exists that some jurors concluded that the unknown hairs must have belonged to Collings, when that fact was never legitimately proven.

Due process mandates that guilt be established by probative evidence. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Admitting this testimony and evidence denied Collings due process and a fair trial because the State obtained his conviction with speculative evidence, wholly lacking probative value, which misled and confused the jurors. Collings was prejudiced, because the State built its case by barraging the jury with multiple items of non-existent or at best, limited, forensic value as a means to mislead the jury to believe that the State had considerable forensic evidence of guilt. This falsehood should not withstand review.

ARGUMENT V

The trial court abused its discretion in admitting, over objection, State Exhibits 145, 147, 149-150, 158-162 (portraying Rowan's body in the cave), and Exhibits 179-193, and 196 (autopsy photographs), because admission of these photographs deprived Collings of his rights to a fair trial and to be free from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.Art.I,Secs. 18(a),21, in that Exhibits 145, 147, 149-150, and 158-162 were cumulative to Exhibit 146, and Exhibits 179-193 and 196 were excessively gruesome and prejudicial.

The trial court abused its discretion by admitting into evidence numerous duplicative, unduly gruesome, and unnecessary photographs of Rowan's body in the cave and during the autopsy. The State's intent in offering these photographs – which were excessive both in number and in content – was to shock the jurors and obtain a conviction and death sentence based on emotion rather than dispassionate reason. Exacerbating the prejudice was the fact that, with the exception of one photograph – a close-up of the young victim's vagina – the photographs were passed to the jurors as eight-by-ten inch photographs or published electronically on a screen that was four feet, six inches high by four feet, ten inches wide, making these images literally, larger than life. (Tr.3564,4089-90,4227-28,4232,4234,4250-54). Admission of these photographs deprived Collings of his rights to a fair trial and to be free from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.Art.I,Secs.18(a),21.

Standard of Review and Preservation

The trial court has broad discretion to admit photographs and its ruling will be affirmed absent an abuse of discretion. *State v. Dorsey*, 318 S.W.3d 648, 657 (Mo.banc 2010). "Photographs are admissible if they accurately and fairly represent what they purport to depict and tend to prove or disprove any elements of the charged offense." *State v. Jaco*, 156 S.W.3d 775, 778 (Mo.banc 2005). Although gruesome, photographs may be admissible where they show the nature and location of wounds, assist in better understanding the testimony and aid in establishing an element. *Dorsey*, 318 S.W.3d at 657. Photographs should not be admitted, however, when their prejudicial effect overrides their probative value. *State v. Murray*, 744 S.W.2d 762, 772 (Mo.banc 1988). When reviewing trial court decisions regarding the admissibility of evidence, the court examines for prejudice, not mere error, and reversal is only appropriate if the error was so prejudicial that the defendant has been deprived of his right to a fair trial. *State v. Tokar*, 918 S.W.2d 753, 761 (Mo.banc 1996).

This issue is fully preserved for review. Counsel objected to the admission of each of the exhibits at issue. (Tr.4196,4201-02,4204,4207,4211,4213-15,4220,4245-50,5190-01,5196, 5200,5206,5208-09,5216,5217-22,5266-67,5269). The issue is included in the motion for new trial. (L.F.731-32,742-43).

The State Used the Photographs to Shock, Not Aid, the Jury

Collings acknowledges that, "gruesome crimes produce gruesome, yet probative, photographs, and a defendant may not escape the brutality of his own actions." *Baumruk v. State*, 364 S.W.3d 518, 539 (Mo.banc 2012). On the other hand, gory "photographs

should not be admitted where their sole purpose is to arouse the emotions of the jury and to prejudice the defendant." *State v. Floyd*, 360 S.W.2d 630, 633 (Mo.1962). "The sound governing principle is that photographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially necessary to show material facts or conditions." *Id.*

Photographs can be so gruesome and prejudicial that they violate fundamental fairness. *Spears v. Mullin*, 343 F.3d 1215, 1227 (10th Cir.2003). In *Spears*, the photographs depicted numerous post-mortem wounds. *Id.* The jury, however, was to determine whether the defendant caused the victim *conscious* suffering. *Id.* at 1226-27. Because the photographs showed only post-mortem wounds, they were not relevant to the victim's conscious suffering, and yet they were very prejudicial. *Id.* at 1226-28. "This highly inflammatory evidence fatally infected the trial and deprived [the defendants] of their constitutional rights to a fundamentally fair sentencing proceeding." *Id.* at 1229.

Cumulative evidence is "additional evidence of the same kind tending to prove the same point as other evidence already admitted." *State v. Green*, 603 S.W.2d 50, 51 (Mo.App.E.D.1980). The trial court has discretion to reject such evidence. *State v. Reichert*, 854 S.W.2d 584, 599-600 (Mo.App.S.D.1993). In *State v. Lapsy*, 298 S.W.2d 357, 361 (Mo.1957), this Court warned, "We see no reason why the trial court should permit the introduction of four pictures of the same scene with no difference between them except the angle from which they were taken."

Photographs of the Body in the Cave

The State moved to admit Exhibit 146, a photograph of Rowan's body in the cave. (Tr. 4089;St.Ex.146). The photograph showed the entire length of her body in the cave. (St.Ex.46). The court admitted the exhibit. (Tr.4089). The State then moved to admit eleven other photographs of Rowan's body in the cave. (Tr.4195,4245). Defense counsel objected that the court had already admitted Exhibit 146, and that Exhibits145, 147-150, and 158-162 were cumulative and their prejudicial effect outweighed any probative value. (Tr.4196-4205,4245-50). The court denied admission of two photographs, Exhibits 148 and 157, as duplicative. (Tr.4206-07,4223,4250). But it admitted the remaining nine photographs, thereby totaling ten photographs of Rowan's body in the cave. (Tr.4089,4227,4250).

Exhibits 145, 147, 149, and 150

Exhibits 145, 147, 149, and 150 served no purpose beyond what was served by Exhibit 146, *i.e.*, displaying Rowan's body in the cave. Exhibit 145 was taken further away and showed only part of Rowan's body. (St.Ex.145). Exhibit 147 showed the top half of Rowan's body, plus part of the wall of the cave. (St.Ex.147). Other than more detail of the wall of the cave – which had no relevance – Exhibit 147 contained no more detail as to Rowan's body than what was contained in Exhibit 146. (St.Ex.146,147). The other photographs were simply different angles of the body or more close-up photos of what the jury had seen through Exhibit 146. But the jury had no need to see different angles of how the body lay in the cave. That fact did not establish any element of the State's case or serve any legitimate purpose. The fact to be established was that Rowan

was found in the cave, and Exhibit 146 established that fact. Furthermore, the fact that the photographs showed different views of the rock ledges within the cave was irrelevant and should not have been used as justification to show photo after photo of Rowan's body in the cave. If the appearance of the ledges truly was significant, the photographer would have photographed the ledges itself. This was a ploy to inundate the jury with more and more unnecessary, yet gruesome, photographs.

The State argued that Exhibit 149 was relevant to prove the statutory rape aggravator and to corroborate Collings' admission that he raped Rowan. (Tr.4205). But showing a close-up of nine-year-old Rowan's torn vaginal area in the cave was excessive in light of the fact that the State planned to present another close-up of Rowan's vaginal area while she lay in the cave, and three other close-up photos of Rowan's vaginal area from the autopsy. Further photographs to the same effect served only to inflame the jury, their true purpose.

Exhibits 158-162

The State argued that Exhibit 158 showed the right side of Rowan's face and a ligature injury to her neck and showed that she had been moved to a tarp. (Tr. 4217-18). It argued that doctor who conducted the autopsy could use Exhibit 158 to show that the injuries seen at the autopsy were consistent with the injuries depicted in Exhibit 158. (Tr. 4218). The State argued that Exhibit 159 "is the same situation." (Tr. 4218). It showed the right-hand side of Rowan's face, ligature marks on her neck, bags on her hands, her body on the tarp, and leaves that were taken with the body onto the tarp or that were stuck to her face. (Tr. 4219). Exhibit 160 showed a frontal view of her neck and part of

her chin, and it also has a scale on it and it shows her body on the tarp. (Tr. 4219). The State argued that Exhibit 161 "again" showed a close-up of her vaginal area and the debris around her leg and thigh. (Tr.4219-20). Finally, the State argued that 162 showed Rowan's buttocks. (Tr. 4220).

Exhibits 158 through 162 were intended solely to urge the jury to resort to emotion rather than reasoned deliberation in deciding the issues in this case. These photos were fully cumulative to the autopsy photographs. The jury did not need to see the ligature marks on the body in the cave, when it would see them with the testimony of the doctor who conducted the autopsy. No valid reason existed for the forensic pathologist to use Exhibit 158 to show that the injuries seen at the autopsy were consistent with the injuries in the cave. (Tr.4218). Why would they be any different? Exhibits 158 and 159 show Rowan's face, but have no probative value beyond the autopsy photographs. The fact that leaves were stuck to her face had no true probative value.

The prejudicial effect of the photographs was exacerbated by the fact that these exhibits were presented to the jury larger than life, on a screen that was four feet, six inches high and four feet, ten inches wide. (Tr.3564,4089-90,4227-28,4232,4234,4250-54). The screen was 25 feet from the front of the jury box. (Tr.3564).

Autopsy Photographs: Exhibits 179-184, 186-193 and 196

Defense counsel objected to the sheer number of autopsy photographs admitted into evidence and more precisely, that the photographs were duplicative, excessively prejudicial, and lacking in probative value. (L.F.743;Tr.5157). The court overruled

Collings' objections and admitted the exhibits. (Tr.5192,5196,5200,5206,5208-09,5216,5217-22,5266-67,5269). The exhibits are summarized as follows:

Ex. #	Description of Photograph	Cite
177	Body on gurney	Tr.4880
178	Body on gurney	Tr.4885[12]
179	Body on gurney	Tr.5192
180	Neck (left side)	Tr.5219
181	Neck	Tr.5218
182	Head and neck	Tr.5200
183	Close-up of right side of neck	Tr.5221
184	Close-up of left side and back of neck	Tr.5216
186	Neck	Tr.5220
187	Close-up of back of neck	Tr.5217
188	Pony tail	Tr.5222
189	Legs spread apart, vaginal area	Tr.5206
190	Close up of legs spread apart, vaginal area (4 x 6)	Tr.5208-09
191	Mouth	Tr.5196
192	Left foot	Tr.5266
193	Right foot	Tr.5267

[12] Defense counsel did not object to Exhibits 177 and 178. (Tr.4880,4885).

196	Socks	Tr.5269

The exhibits were published to the jury. (Tr.5151). Exhibits 177 and 178 were published electronically, on the screen that was four feet, six inches high and four feet, ten inches wide. (Tr.3564,4880,4885). The others were passed from juror to juror. (Tr. 5151,5273). With the exception of Exhibit 190, each autopsy photograph was eight-by-ten inches. (Tr.5155). Exhibit 190 was four-by-six inches. (Tr.5151).

The court abused its discretion in admitting Exhibits 179-184, 186-193 and 196. Seventeen photographs of Rowan's body at the autopsy were submitted to the jurors. (Tr.5273). The sheer number of autopsy photographs was excessive. The photographs were gruesome, especially the close-ups of Rowan's vaginal area, (St.Ex.189,190), and their prejudicial effect vastly outweighed any probative value.

The autopsy photographs were duplicative. The State presented three photographs showing Rowan's body on the gurney at the start of the autopsy. (Ex.177-79). It presented seven photographs of the victim's neck. (Ex.180-184,186-87). Two of those photographs showed exactly the same thing, the right side of Rowan's neck. (Ex.182,183;5161-62). Three were duplicative, in that they each showed the left side of the face and neck. (Ex.180,181,186;Tr.5164-65). Two were virtually identical but for the fact that one included a ruler. (Ex.184,187;Tr.5165). The State presented two photographs of Rowan with legs spread, her vagina fully exposed. (Ex.189-90).

The State intended to shock the jury with injuries that occurred post-mortem, such as the injuries to Rowan's mouth and the body's showing signs of death in her feet.

(Ex.191-193). But, as in *Spears*, *supra*, the photographs showing post-mortem injuries lacked probative value, yet were highly prejudicial, and should have been excluded. *Spears*, 343 F.3d at 1227-29. This highly inflammatory evidence fatally infected the trial and deprived Collings of his constitutional rights to a fundamentally fair trial and sentencing proceeding. *Id*. at 1229.

Apart from their prejudicial effect in the guilt phase, these photographs would prejudicially effect the jurors in considering Collings' punishment. The jurors would not have forgotten these photographs by the time they reached penalty phase, especially given the dramatic manner in which the photographs were displayed to the jurors.

The Supreme Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. *Deck v. Missouri*, 544 U.S. 622, 632 (2005). "It is of vital importance that the decisions made in that context be, and appear to be, based on reason rather than caprice or emotion." *Monge v. California*, 524 U.S. 721, 732 (1998). Here, the death sentence cannot be trusted as reliable, given the multiple gruesome, unnecessary photographs of this nine-year-old victim inflicted upon the jury.

The Court must reverse for a new trial.

ARGUMENT VI

The trial court (1) abused its discretion in overruling Collings' objections and request for a mistrial after the prosecutor, in guilt phase closing argument, stood moot for thirty seconds while holding his hands as if he were strangling someone and then, after the court told him not to proceed further with such a display, repeated the same conduct, because the prosecutor's repeated argument/display constituted improper personalization and prosecutorial misconduct, in that the prosecutor's argument/display placed the jurors in the position of the victim as she was being strangled and induced the jurors to base their deliberations – in both guilt and penalty phase – on fear and anger rather than dispassionate reason; and (2) plainly erred in failing to intercede *sua sponte* to bar the State from arguing in penalty phase closing that defense evidence and argument about David Spears was intended to distract and confuse the jurors and should not be considered, in that the argument disparaged defense counsel, and the jury should not be precluded from considering mitigating evidence. The State's closing arguments violated Collings' rights to due process, a fair 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.

Missouri courts have long held that an accused is entitled to a fair trial, and it is the duty of both the court and the prosecutor to see that he gets one. *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo.banc 1947). The trial court must exercise its discretion to control prosecutorial misconduct to ensure that every defendant receives a fair trial. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App.E.D.1992). "Trial judges are clothed with

abundant authority to conduct the proceedings of their courts with dignity and to prevent appeals to mere passion and prejudice, and it is their duty on proper occasion to exercise that authority with salutary vigor." *State v. Banks*, 215 S.W.3d 118, 121 (Mo.banc 2007).

As the State's representative, the prosecutor must remain impartial, as his role is not to seek a conviction at any cost but to seek justice. *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc 1995). He may prosecute with vigor and strike blows but he is not at liberty to strike foul ones. *State v. Burnfin*, 771 S.W.2d 908, 912 (Mo.App.W.D.1989).

The prosecutor's arguments violated Collings' rights to due process, a fair 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. Prosecutorial misconduct in closing argument can violate due process and the Eighth Amendment. *State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo.banc1999). Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Standard of Review and Preservation

Trial courts have wide discretion in controlling closing arguments. *State v. Edwards*, 116 S.W.3d 511, 537 (Mo.banc 2003). They abuse that discretion when they allow argument that is plainly unwarranted and that has a decisive effect on the jury. *Banks*, 215 S.W.3d at 121. 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).

The trial court's refusal to grant a mistrial is reviewed for abuse of discretion. *State v. Ward*, 242 S.W.3d 698, 704 (Mo.banc 2008). An abuse of discretion occurs when the ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the reviewer's sense of justice and indicate a lack of careful consideration. *Id*. A mistrial is appropriate only in extraordinary circumstances where prejudice cannot be otherwise removed. *Id*.

Collings objected and preserved the objection for review as to the guilt phase argument (Tr.5626-31,6228-29;L.F.746-47). But he did not object to the penalty phase argument, and thus, Collings requests review for plain error as to that argument. Rule 30.20. Reversal is warranted under plain error review when the improper argument "had a decisive effect on the outcome of the trial and amounts to manifest injustice." *State v. Edwards*, 116 S.W.3d 511, 536-37 (Mo.banc 2003).

Improper Personalization

Prosecutor Cox argued that Collings went to a deep, dark place that led him "to kill this girl, that led him to put that cord around her neck for what he described as minutes that seemed like an hour, that led him to do this (indicating)." (Tr.5626). Cox then stood silent for approximately thirty seconds while displaying his hands in the manner Collings said he used when putting the cord around Rowan's neck. (Tr.5626-28). Defense counsel objected that the State's argument was improper personalization. (Tr.5626-27). She argued that Cox was putting the jurors in the place of the victim, even without stating those words, because he was "walking around with what I would describe as a kind of a mean look on his face, and he is pulling his hands apart in a manner that

has been described by witnesses as the manner – as the gesture that Chris Collings made when he told Clint Clark how he strangled this girl." (Tr.5627). Cox countered that he was rebutting defense counsel's argument that Collings did not coolly reflect. (Tr.5628).

The court overruled defense counsel's motion for a mistrial but directed Cox not to go any further with this argument. (Tr.5628,6228-29). But Cox ignored the court's instruction. Moments later, he began his display again. (Tr.5628-29). Defense counsel again objected to the personalization:

> Since Mr. Cox got up – got back up, from the very first word he spoke, he has continued to hold his hands in exactly the same gesture he was holding them in and he has continued then to move them as he described how she went down to the ground, then he moves his hands lower and he pulls them apart. He's doing exactly the same thing.

(Tr.5629). Cox argued that he should be able to hold his hands to show how the crime occurred. (Tr.5629-30). He argued that he had not asked the jurors to put themselves in the victim's place, but just was arguing Collings' statement that "he held the rope tighter and tighter." (Tr.5630). The court noted that Cox had been holding out his clenched fists (Tr.5630). Recognizing the impropriety, the court told Cox, "we probably need to stop," but nonetheless overruled defense counsel's objection. (Tr.5631,6228-29).

The State's argument constituted improper personalization, by urging the jurors to personally experience what Rowan went through while she was being strangled. *State v. Simmons*, 955 S.W.2d 729, 740 (Mo.banc 1997). The problem with personalizing is that it pits the defendant against the jury personally. It causes the jurors to abandon reason,

replacing it with fear or anger. "It is well settled that the prosecutor may not personalize his argument to the jury. The jury must act objectively, without fear or prejudice." *State v. Raspberry*, 452 S.W.2d 169, 172 (Mo.banc 1970). The State's argument prompted the jury to base its deliberations in both the guilt and penalty phase on emotion rather than the evidence.

The State's repeated personalization here was just as egregious as the closing arguments that were held to be impermissible in *Rhodes*, 988 S.W.2d at 528, and *Storey*, 901 S.W.2d at 901. In *Storey*, the State urged the jurors to imagine having their heads yanked back by the hair and feel a knife severing their throats. 901 S.W.2d at 901. This Court held that the argument was grossly improper, and its prejudice was "undeniable." *Id*. "Inflammatory arguments that inflame and arouse fear in the jury are especially prejudicial when the death penalty is at issue." *Id*.

In *Rhodes*, 988 S.W.2d at 528, the State suggested that while deliberating, the jurors act out what the victim went through when she was killed. It urged each juror to feel what it is like to be beaten on the floor, with her hands tied behind her back and her nose broken, and to have her head pulled back so hard that its snaps her neck. *Id*. The prosecutor acted out the scene as he spoke. *Id*. This Court recognized that the State's argument was "condemned and uniformly branded improper" since a juror placing herself in the victim's shoes "would be no fairer judge of the case than the … victim herself." *Id*. The argument, "designed to cause the jury to abandon reason in favor of passion" was improper and warranted a new sentencing trial. *Id*. at 528-29.

The State's display here was designed solely to arouse personal animosity toward Collings and obtain a guilty verdict and a death sentence based on fear and anger rather than reason. This Court has held that "inflammatory arguments are always improper if they do not in any way help the jury to make a reasoned and deliberate decision to impose the death penalty." *Id*. at 528, *citing State v. Taylor*, 944 S.W.2d 925, 937 (Mo.banc 1997). Asking the jurors to place themselves in the shoes of the victims is improper personalization that "can only arouse fear in the jury." *Storey*, 901 S.W.2d at 901.

The prejudice is heightened here since the trial court overruled defense counsel's objections and took no corrective action, thereby giving the State's argument/display its imprimatur. *Taylor*, 944 S.W.2d at 938; *State v. Barton*, 936 S.W.2d 781, 788 (Mo.banc 1996).

Misstatement Regarding Mitigating Evidence

The prosecutor argued that David Spears was not on trial, and that evidence and argument about David Spears was "just something to distract you with. Distract and confuse. Distract and confuse. Try to get some …little thing burrowed down deep, something to distract and confuse you. Don't let it happen." (Tr.6503). The prosecutor argued that the penalty phase concerned only Collings, Rowan, and the people who were affected by Rowan's death. (Tr.6503). He also argued that the jury did not need to reconcile the discrepancies between Collings' and Spears' statements. (Tr.6504). He argued, "David Spears is not on trial and has nothing to do with this Defendant's punishment. It has nothing to do with this Defendant's punishment." (Tr.6504).

The argument was improper because it encouraged the jurors not to consider relevant evidence in mitigation. It urged the jurors to believe that the only point of the Spears evidence was to "distract and confuse" the jurors. (Tr.6503). The Court has repeatedly mandated that a capital jury must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(emphasis added). So, too, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper v. South Carolina*, 476 U.S. 1, 4 (1987). In a capital case, where a barrier to the jury's consideration of mitigation is imposed, the verdict is unreliable. *Mills v. Maryland*, 486 U.S. 367, 375 (1988).

The jurors could have viewed the Spears evidence in several ways. Evidence was presented that Spears was one of the last people to see Rowan alive, that he acted suspiciously the day she disappeared, and that dogs alerted to the scent of human remains in his truck (Tr.3647,3650,3652-53,3695,5905,5913). The jury could have concluded that Spears played a role in the crime, especially given his confession to having done so. If so, the jurors might not be as willing to sentence Collings to death, thinking that perhaps Spears was the worse of the two people involved in the crime, since Rowan was his step-daughter. Both Collings' "character and record" and the "circumstances of the particular offense" must be considered. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The jury also might have concluded that Spears confessed falsely, and that the police tactics and investigation were not reliable, making jurors less willing to impose a death sentence. Finally, the jurors could have considered the Spears evidence in determining Collings' character. After all, Collings resolutely took responsibility for his actions and was unwilling to let his friend, presumably an innocent man despite his confession, take the fall for something he had not done, despite strong pressure from the police to do so (Supp.Ex.I-1;D.Supp.Ex.551-A). Contrary to the prosecution's disparaging remarks, the jurors should have been allowed to consider any and all of this David Spears' evidence in their deliberations.

Reversal 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). The State's repeated arguments were intended solely to arouse the jury's passion and prejudices. This was especially detrimental in this capital case, "where there are unique threats to life and liberty." *Barton*, 936 S.W.2d at 783. The prosecutor infused the jurors' deliberations with misstatements of facts, fear, emotion, and false issues.

Collings suffered manifest injustice. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). As earlier discussed, *supra*, Collings had strong mitigating evidence. He had a turbulent, disruptive childhood, failed to meet developmental milestones, and was

plagued by emotional difficulties. He had no prior felony convictions, accepted full responsibility for his actions, and was remorseful. The State's arguments urging the jurors to disregard the Spears evidence must have been a decisive factor for the jury in returning a death verdict. The court should reverse.

ARGUMENT VII

The trial court abused its discretion in overruling Collings' objection and request for a mistrial and allowing the jury to consider, as evidence that Collings should be executed, that Collings' own father, Dale Pickett, believed in the death penalty. The ruling denied Collings his rights to due process, a fair trial, and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo. Const.,Art.I,Secs.10,18(a),21. The prosecutor, an experienced capital litigator, committed deliberate misconduct by violating a pretrial ruling and eliciting opinion testimony on the appropriateness of a death sentence, in that the prosecutor elicited testimony that when Pickett's brother was killed, he wanted that person dead, and defense counsel had not opened the door to this impermissible and highly prejudicial testimony.

Collings' biological father, Dale Pickett, testified on Collings' behalf in the penalty phase. (Tr.5934-61). Defense counsel elicited the following testimony:

> Mr. Moreland: This – these jurors are being asked to decide whether Christopher receive – is sentenced to death or not. Is there anything that this jury – this jury needs to hear before they make that decision? Is there any more – anything further you need to tell them?
>
> Mr. Pickett: Well, I know that my son made a serious mistake. Mistakes is something that everybody makes. Regardless of what happens, I still love my son and everything and I'll still be there for him. But I know a man

can change. Anybody can change. I have. It's basically about the only thing I know to say.

(Tr.5961). The court then took a recess. (Tr. 5962).

On cross-examination, the prosecutor, Elizabeth Bock, elicited the following:

Ms. Bock: Mr. Pickett, you do believe in the death sentence, don't you?

A. No, I do not.

Q. When your brother was murdered –

Mr. Moreland: Objection, Your Honor –

Ms. Bock:

Q. – you wanted the death penalty to be given?

Mr. Moreland: Objection, Your Honor.

Mr. Pickett: I wanted to be the one to kill him.

(Tr.5979-80).

Collings objected that it was improper to elicit a witness' belief that the defendant should receive the death penalty and requested a mistrial. (Tr.5979-80). The testimony was inappropriate, inflammatory, and invaded the province of the jury. (Tr.5980,5982-83). Ms. Bock responded that Collings opened the door to the testimony when Pickett testified that Collings made a mistake and that anyone could change. (Tr.5981). She argued that the defense asked Pickett what should happen to Collings and that Pickett said Collings should not get the death penalty. (Tr.5980-81). She argued that she was entitled to elicit that Pickett "personally believes in [the death penalty], because he wanted it for somebody else. And that's what I did." (Tr.5981). Ms. Bock argued that

the jurors would infer from Pickett's testimony that his son could change that he should get life without parole. (Tr.5981-82). The court overruled the objection and request for a mistrial. (Tr. 5982-83). Although the court precluded Ms. Bock from re-asking the question, Ms. Bock informed the jury that the court overruled Collings' objection. (Tr.5982-83).

The State's misconduct, coupled with the trial court's rulings, denied Collings his rights to due process, a fair trial, and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21; *see also State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo.banc1999)(Prosecutorial misconduct can violate due process and the Eighth Amendment).

As discussed in Argument VI, *supra*, Missouri courts have long held that an accused is entitled to a fair trial, and it is the duty of both the court and the prosecutor to see that he gets one. *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo.banc 1947). The prosecutor must remain impartial and seek justice. *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc 1995). "The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." *State v. Banks*, 215 S.W.3d 118, 121 (Mo.banc 2007), *quoting State v. Burnfin*, 771 S.W.2d 908, 912 (Mo.App.W.D.1989).

Standard of Review and Preservation

Trial courts have broad discretion in determining the admissibility of evidence, and that 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). Abuse of discretion occurs when the 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).

A mistrial "is a drastic remedy that should be used only when necessary to cure grievous prejudice." *State v. Smith*, 944 S.W.2d 901, 917 (Mo.banc 1997). "The decision to overrule a motion for mistrial will not be overturned absent a finding that the trial court abused its discretion." *Id.*

Collings fully preserved this issue by timely objecting and including the issue in the motion for new trial. (Tr.5979-83;L.F.750-51).

The State Committed Prosecutorial Misconduct

During a pretrial conference, the parties discussed the procedure to follow if one party believed the other opened the door to otherwise inadmissible testimony. (Pre.Tr. 896-97). Defense counsel commented that she always approached the bench before eliciting such testimony, because "you can't unring the bell." (Pre.Tr.897-98). The court ruled that "everyone here I think has been around the block and understands you don't unring the bell... I really never had a problem with … with experienced counsel. But when this issue comes up, you approach the Bench." (Pre.Tr.898).

The prosecutor, Elizabeth Bock, was an Assistant Attorney General and an experienced capital litigator. (Pre.Tr.532,538,896-98). She knew that the testimony she elicited would not have been permissible unless the defense had opened the door to it. Thus, she did not argue that the testimony was independently admissible; she only argued that it was admissible because the defense opened the door. (Tr.5980-81). Yet she did

not approach the bench to seek the court's permission to pursue the questioning, despite the court's pretrial ruling.

Exacerbating the misconduct was the fact that the court had called a recess between Pickett's direct-examination and the cross. (Tr.5962). Thus, this was not a situation where the issue surprised counsel and she had to make a split-second decision. This experienced capital litigator had a recess over which she could think about the issue, speak with co-counsel, or even telephone the Appellate Division of the Attorney General's Office for advice.[13] Furthermore, she had ample opportunity to provide the court and/or opposing counsel with notice of her intent to elicit the inadmissible testimony so that the parties could discuss it, and the court could make a ruling on whether the testimony was proper. Nothing stopped Ms. Bock from approaching the bench during the cross-examination prior to eliciting the damaging testimony.

Had Ms. Bock approached the bench, defense counsel would have told the court that testimony about a witness' views on the death penalty is always improper. A victim's family member can never give an opinion about the appropriateness of a particular sentence. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc 1997). Neither can an expert. *State v. Nickens*, 403 S.W.2d 582, 587 (Mo.1966). The State itself conceded, in *State v. Roll*, 942 S.W.2d 370, 378 (Mo.banc 1997), that family members' opinions as to the appropriate sentence are inadmissible. A lay witness may not "state a conclusion

[13] Ms. Bock advised the court that she consulted on other issues with attorneys from the Appellate Division of the Attorney General's Office during the trial. (Tr.5349).

concerning the ultimate issue for the jury." *State v. Dixon*, 70 S.W.3d 540, 548-49 (Mo.App.W.D.2002).

It is a specious argument to contend that Pickett's direct examination testimony opened the door to this misconduct. Pickett acknowledged that Collings made a serious mistake, that people can change, and that he loved his son and would be there for him. (Tr.5961). This was standard mitigating evidence. Pickett did not ask the jury to impose a sentence of life without parole. To follow the State's logic, the defense could never present evidence on future dangerousness or testimony from the defendant's family members that they would visit him in prison without "opening the door" to opinion evidence by the State's witnesses that the defendant should receive the death sentence.

This misconduct warrants a new penalty phase. As mentioned above, Ms. Bock, having had time to ponder, deliberately disobeyed the court's pretrial ruling and elicited testimony she knew was normally inadmissible without first clearing it with the court. The situation here is akin to that in *State v. Spencer*, 307 S.W.2d 440, 445 (Mo.1957):

> [W]e cannot escape the conclusion that it was obvious that the question was known by the prosecuting attorney to be improper, and that it was asked not only with the full knowledge that an objection would and should be sustained, but that once asked, whether or not answered, the prejudicial effect would be implanted in the minds of the jury.

Ms. Bock knew that, even had the court sustained the objection, which it unquestionably should have, the evidence would have stuck with the jurors. She was ringing a bell that could not be un-rung.

Collings was substantially prejudiced. The court overruled defense counsel's objections and thereby effectively gave the State's argument its stamp of approval. *State v. Barton*, 936 S.W.2d 781, 788 (Mo.banc 1996). The prosecutor, in open court, confirmed to the jury that the objection was overruled. (Tr.5982-83). Thus, the jury was left free to consider, in determining whether Collings should receive the death penalty, that Collings' own father was in favor of the death penalty when his brother was murdered.

In *State v. Banks*, 215 S.W.3d 118,119 (Mo.banc 2007), the defendant was convicted of first-degree murder regarding a shooting at a crack house. In closing argument, Banks challenged the ability of the State's witnesses, drug users, to accurately perceive what occurred. *Id*. In rebuttal, the prosecutor analogized to the crack house as hell and called the defendant the Devil. *Id*. This Court held that the argument was improper. *Id*. at 120. It noted that the prosecutor has "the responsibility of a minister of justice and not simply that of an advocate." *Id*. at 119-20. The prosecutor is obligated "to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence." *Id*. at 120.

The Court lamented that too often, prosecutors forget that duty. *Id*. Too often, prosecutors purposefully engage in misconduct, knowing that even if an objection is sustained, the jury will have heard the "poisonous influence" and nothing will erase it. *Id., quoting Hildreth v. Key*, 341 S.W.2d 601, 616 (Mo.App.1960). The Court stressed that sometimes, lawyers believe cases should be decided "by appeals to prejudice, fear, envy, and bias, regardless of whether those emotions have anything to do with the facts

and law of the case." *Id*. at 122. The "only realistic deterrent to improper conduct," this Court held, is "through the trial and appellate courts." *Banks*, 215 S.W.2d at 120. Yet too often the appellate courts contribute to the problem, feeding the prosecutors' temptation to commit misconduct, by finding no abuse of discretion or no prejudice. *Id*. at 122. The Court reminded everyone involved in trials that "juries are to decide cases on the evidence presented-not appeals to unreasoned emotion or name-calling." *Id*. at 123. It reversed for a new trial. *Id*. The same should happen here.

This "hard blow" was below the belt, and it hurt. Collings had strong mitigating evidence in his corner. He detailed for the jury how his birth parents were drug-using alcoholics who were in and out of jail and prison. (Tr.5939,5949,5970,5986,5994,6154-55,6174;D.Ex.901,p. 2-4). His adoptive parents provided more stability, yet also were beset by problems – the sudden death of their daughter, followed by their separation and divorce. (Tr.6162,6186, 6317;D.Ex.901,p.3,8). He attempted suicide at age 7 and at age 15, was placed in a psychiatric hospital for two months. (Tr.6051,6180,6243). By age 15, Collings had been sexually assaulted by two different people. (Tr.6170,6241;D.Ex. 901,p.4). Like his parents, Collings faced substance abuse difficulties. (Tr.6268,6270). Despite the problems he faced throughout his childhood and through his teen years, Collings obtained his GED and was working full-time. (Tr.3709,6268,6271;D.Ex.901, p.16-17). He visited his ailing adoptive father and gave him his weekly shot; and even in jail, tried to make sure Clarence was cared for properly. (Tr.6029-30,6271-72;D.Supp. Ex.551-A,p.17). His adoptive mother died just two weeks before the crime. (Tr.6061). Collings had no prior felony convictions. He gave a full confession, accepted full

responsibility, and expressed deep remorse. (Tr.4561-70,4690-91;St.Ex.94;Supp.Ex.H-1,p.31-32,47,52-53,70).

Testimony by a defendant's parent can be one of the most powerful elements of the defendant's case. But here, the State's sucker-punch knocked the breath out of Pickett's testimony. The thing that would stick with the jury from Pickett's testimony was not the difficult childhood turmoil from which Collings had emerged, but the fact that when Pickett's loved one was murdered, he too wanted that person dead. Any reluctance a juror may have had regarding imposing the death penalty could now be easily overcome in the jury room by the response, "His own father thinks death is the appropriate punishment for murder. His own father."

If the words of *Banks* still have weight after over fifty years of prosecutorial misconduct in the quest for capital punishment, then a new penalty phase is warranted here.

ARGUMENT VIII

The trial court erred in overruling Collings' objections to Instruction 17, MAI-CR3d-314.44 thereby violating Collings' rights to due process, trial by jury, and a reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21;§565.030.4(3). Instruction 17 relieved the State of its burden of proof, in that it required Collings to establish eligibility for a life sentence by proving that mitigation outweighs aggravation, whereas the jury should have been instructed that the State must prove that aggravation outweighs mitigation or that mitigation weighs less than aggravation.

Collings objected that Instruction 17 shifted the burden of proof from the State to the defense, in that it required the jury to determine whether there were facts or circumstances in mitigation of punishment that were sufficient to outweigh facts or circumstances in aggravation of punishment. (Tr.6430-35). The trial court overruled the objection. (Tr.6437). The issue is included in the motion for new trial.[14] (L.F.757-60).

Instruction 17, in pertinent part, told the jury to:

"[D]etermine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment....

"If each juror determines that there are facts or circumstances in mitigation of

[14] Collings recognizes that the Court has previously rejected this claim, but raises it here so the issue may be further reviewed in federal court.

punishment sufficient to outweigh the facts or circumstances in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life...."

(L.F.689;Appendix,p.A11).

For a defendant convicted of first-degree murder, a sentence of life without parole is the default sentence. A jury can only impose a death sentence if the State proves the defendant death-eligible through proof of additional aggravating circumstances. In *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo.banc 1992), this Court held that Missouri complies with the dictates of the Eighth Amendment because juries can only give death in certain circumstances. To impose death, the "*jury must unanimously find that* ***mitigating circumstances weigh less than aggravating circumstances.***" *Id*.

Instruction 17 would be proper if it required the jury to "unanimously find that mitigating circumstances weigh less than aggravating circumstances" at the weighing step. It would be proper if it told the jurors that it had to return a sentence of life without parole if all jurors did not agree that the State proved beyond a reasonable doubt that the evidence in aggravation outweighed the evidence in mitigation.

But instead, Instruction 17 allowed for the imposition of a life sentence only if each juror determined that the mitigating evidence outweighed the aggravating evidence. The instruction imposed on Collings the burden of proving he was not death-eligible. Thus, the instruction violated *Ring v. Arizona*, 536 U.S. 584,609 (2002);U.S.Const., Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. It failed to comply with *Whitfield*

or the constitutional requirement that the State bear the burden of proving death-eligibility.[15]

Collings was prejudiced, because had the jury been correctly instructed, the result would have been a sentence of life without parole. The Court must reverse for a new penalty phase.

[15] In *Bullington v. Missouri*, 451 U.S. 430,432 (1981), the Court held that by enacting a penalty phase procedure that so closely "resembles a trial on the issue of guilt or innocence, … Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.'" *Id.* at 444.

ARGUMENT IX

The trial court erred in sentencing Collings to death for a crime never pled in the information, thereby violating his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21. The State never charged Collings with the only offense punishable by death in Missouri – *aggravated* first degree murder – in that the State failed to plead in the information those facts the jury had to find beyond a reasonable doubt before Collings could be sentenced to death.[16]

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

Missouri's legislature has expressly provided that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds the State has proven at least one statutory

[16]Collings acknowledges that this Court has previously rejected this argument, but he raises it to preserve a federal constitutional issue not yet ruled on by the United States Supreme Court.

aggravating circumstance beyond a reasonable doubt. §565.030.4(2); *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003). Missouri's statutory aggravators are facts required to increase the punishment for a defendant convicted of first-degree murder from life imprisonment to death. Missouri's statutory aggravators serve as "the functional equivalent of an element of a greater offense…." *Ring*, 536 U.S. at 609 *citing Apprendi*, 530 U.S. at 494, n.19.

While the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime – first-degree murder punishable by either LWOP or death – the statute's "effect" is quite different. In reality, Missouri allows for 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.

Thus, to pass constitutional muster, the statutory aggravators must be pled in the charging document and proven beyond a reasonable doubt. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005); *State v. Fortin*, 843 A.2d 974 (N.J. 2004). The State failed to plead in the information those facts that the jury must find beyond a reasonable doubt before Collings could be sentenced to death. (L.F.61-62). Thus, it 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 (L.F.423-38,717;Pre.Tr.813-31).

The trial court's error in sentencing Collings to death for a crime never pled in the information violated Collings' rights to jury trial, presumption of innocence, proof

beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. This Court must vacate the death sentence and impose a sentence of life without parole.

ARGUMENT X

Pursuant to its independent duty under Section 565.035 to review death sentences, this Court must vacate Collings' death sentence and impose a sentence of life without parole. Numerous factors support this result: Collings' deep remorse and his acceptance of responsibility, the State's exploitation of the jurors' emotions in both phases of trial, the State's deliberate misconduct, the lack of integrity of the police investigation, and the wealth of mitigating evidence. Collings' sentence is not proportionate when compared to similar cases. The death sentence stands in violation of Collings' rights to due process, fair and reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I, Secs.10,18(a),21;§565.035.3(3),RSMo.

Pursuant to §565.035, RSMo, the Court should grant proportionality review. First, the State obtained the conviction and death verdict by exploiting the emotions of the jurors. The State knew that the rape of a nine-year-old girl would make the jurors angry. Although the State validly could introduce some evidence of the sexual assault as part of the circumstances of the charged crime, the State far exceeded what was necessary, choosing instead to emphasize the facts of the rape. When just a few photographs would have sufficed, the State barraged the jury with a multitude of photographs of Rowan's body in the cave and during the autopsy, including multiple photographs of the dead girl's vagina. *See* Arg.V, *supra*. Most of the photographs were displayed on a large screen, making them, literally, larger than life. (Tr.3564,4089-90,4227-28,4232, 4234,4250-54). The prosecutor acted out the crime during closing, even when

admonished to stop, personalizing the crime to the jury and arousing passion, anger, and fear toward Collings. (Tr.5626-30).

The State deliberately engaged in misconduct during the penalty phase, introducing impermissible testimony designed to severely undercut the testimony of a key mitigation witness, Collings' father. (Tr.5979-83). Such intentional misconduct should not be sanctioned, *State v. Banks*, 215 S.W.3d 118, 120-23 (Mo.banc 2007), and surely would be deterred with a sentence of life without parole through proportionality review.

Collings went to Chief Clark six days after Rowan was reported missing and gave a full confession. (Supp.Tr.588,590-91,663;Tr.4543,4661-70). This Court has recognized that confessing and cooperating with the police can be grounds for granting proportionality relief. *State v. McIlvoy*, 629 S.W.2d 333 (Mo.banc 1982) (telephoning police three days after crime, turning himself in, and waiting for police to arrive were factors in favor of proportionality relief).

In addition to confessing and accepting full responsibility, Collings was remorseful. (Tr.4561-70,4690-91;St.Ex.94;Supp.Ex.H-1,p.31-32,47,52-53,70). Chief Clark testified that Collings cried when he confessed what he had done. (Tr.4555). During the first videotaped statement, when the officers told Collings that he would have to again tell what he had done, one of the officers stated, "I know that's hard for you. I can tell when I was watching you before, and it's really difficult… [W]e'll be patient with you." (Supp.Ex.H-1,p.8,10). Collings stated, "I'm just trying to get through this, because this is really hard." (Supp.Ex.H-1,p.17). Collings had to stop talking so that he

could compose himself before talking about the rape. (Supp.Ex.H-1,p.19). He mentioned that he had been "bawling like a baby all afternoon." (Supp.Ex.H-1,p.47). He felt guilty and remorseful. (Supp.Ex.H-1,p.70).

A sentence of life without parole should be imposed given the strange circumstances of the investigation. The State's witnesses gave conflicting testimony as to whether Collings was read his rights before going to the Muncie Bridge or not until after he returned. (Supp.Tr.45,89,258,321,326-27,471,672,837-38,840). One officer signed as a witness on a waiver form when he was not present when it was signed. (Supp.Tr.445, 449;Supp.Ex.K). Although at least six law enforcement officers from four different agencies (Newton and Barry County Sheriff Departments, Wheaton Police Department and F.B.I.) were present for Collings' second confession, not a single officer thought to tape the statement. (Tr.4712,4716). The key State witness was caught on videotape coercing and violating Collings' rights, yet the trial court would not consider it as evidence favoring suppression. (Supp.Tr.847-57;L.F.570).

Perhaps the oddest thing of all was David Spears' confession. During the late afternoon of November 9th, after Collings had confessed, Spears gave a confession implicating himself in the crime. (D.Ex.748,p.14-17). He knew how Rowan was killed and supposedly told the police where to find the body. (D.Ex.748,p.17,116). The problem was that Spears' confession conflicted with Collings' account that no one else was involved in Rowan's death. As defense counsel mentioned in closing, three things were possible. (Tr.6490-92). Officers could have made up Spears' confession to induce Collings to talk about Spears involvement. (Tr.6490-91). Alternatively, Spears could

have been an innocent man who was so pressured by the officers that he gave a false confession. (Tr.6491-92). Or, Spears could have been involved, and Collings took the full rap to protect his friend. (Tr.6492-93).

Collings steadfastly refused to implicate Spears. He insisted that Spears was innocent, and that he himself was the only person to blame. (D.Ex.748,p.13,15-20,22,32,39,46-48,53,56,72-74,77,79,84,86-89,91,101,104,109,116). Collings could have tried to improve his situation by implicating Spears and trying to work a deal. But he repeatedly insisted that Spears was not involved. Collings did not want an innocent man to pay the price for his crime. At the end of the second videotaped statement, one of the interviewing officers noted that, "I've never seen anything like it in twenty-five years." (D.Ex.748,p.125).

A sentence of life without parole is warranted given the evidence in mitigation. Collings' birth parents were drug-using alcoholics who were in and out of jail and prison. (Tr.5939,5949,5970,5986,5994,6154-55,6174;D.Ex.901,p. 2-4). His adoptive parents provided more stability, yet also were beset by problems – the sudden death of their daughter, followed by their separation and divorce. (Tr.6162,6186,6317;D.Ex.901, p.3,8). Collings attempted suicide at age 7, and at age 15, he was placed in a psychiatric hospital for two months. (Tr.6051,6180,6243). By age 15, Collings had been sexually assaulted by two different people. (Tr.6170,6241;D.Ex.901,p.4). Like his parents, Collings faced substance abuse difficulties. (Tr.6268,6270). But Collings obtained his GED and was working full-time. (Tr.3709,6268,6271;D.Ex.901,p.16-17). He visited his ailing adoptive father and gave him his weekly shot; and even in jail, tried to make sure

Clarence was cared for properly. (Tr.6029-30,6271-72;D.Supp.Ex.551-A,p.17). His adoptive mother died just two weeks before the crime. (Tr.6061). Collings had no prior felony convictions.

Although Collings' intoxication does not relieve him of responsibility for his crimes, it is a factor the Court should consider. Collings drank five six-packs of Smirnoff Ice and smoked a "hog's leg," a marijuana cigarette as fat as his thumb. (S.Ex.94,p.16; Tr.4560). Alcoholism is a disease, one that was obviously in Collings' bloodline. (Tr.6268,6270). Collings was not in a clear frame of mind, and he should not be judged as harshly as someone who was.

Additionally, the Court should impose a life sentence because the death sentence for Collings is disproportionate to the sentences imposed in similar cases. Regarding this analysis, the Court has held that it must consider "all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life imprisonment without the possibility of probation or parole." *State v. McFadden*, 391 S.W.3d 408, 428 (Mo.banc 2013). In each of the following cases, the defendant raped and killed his victim. In each, the jury chose a sentence of life without parole over death. And in each, the defendant appealed his conviction.

Carlos Greathouse was convicted of first-degree murder. *Greathouse v. State*, 83 S.W.3d 554 (Mo.App.W.D.2002). Because the opinion in Greathouse's appeal was not published, the facts of the crime are taken from opinion in the co-defendant's post-conviction appeal. *Coday v. State*, 179 S.W.3d 343, 347-48 (Mo.App.S.D.2005). The victim, a high school student, was hit in the head with a rock, fracturing her skull,

dislocating her spine, and causing extensive brain damage. *Id*. at 347-48. Before that lethal blow, she was punched in her head and face at least ten times and struck by a pipe-like object. *Id*. at 348. She had defensive wounds on her hands, and numerous scratches, scrapes and bruises. *Id*. Deep scratches on her thighs indicated she had been "sawed on" with a briar. *Id*. She had been sexually assaulted numerous times, both vaginally and anally. *Id*. at 349. A two-foot briar was stuck in her vagina, probably after she was dead. *Id*. at 347-48. Although the State sought a death sentence, the jury recommended life without parole.[17]

In *State v. Davis*, 963 S.W.2d 317, 321-22 (Mo.App.W.D.1997), the defendant raped a 14-year-old girl. *Id*. at 321. After the victim walked away, Davis told his friends they would have to kill her, so he pursued and shot her. *Id*. at 322. He kept the shell casing as a "souvenir." *Id*. The jury recommended life without parole. *Id*. at 323, 330.

In *State v. Brandon*, 17 S.W.3d 565, 565-66 (Mo.App.E.D.2000), the defendant was found guilty of first-degree murder, forcible rape, forcible sodomy, and armed criminal action. The jury recommended life without parole. *See* CaseNet, *State v. Jerry Brandon*, City of St. Louis Case No. 22971-00382-01 (entry dated October 10, 1998).

[17] Greathouse appealed the denial of post-conviction relief, and this Court initially accepted transfer but re-transferred the case after oral argument. The briefs before this Court show that the jury chose life without parole over the death penalty. *See Greathouse v. State*, SC84322 (App.Br.p.21;Resp.Br.,p.15).

In *State v. Johnson*, 328 S.W.3d 385, 389 (Mo.App.E.D.2010), Johnson raped and strangled the victim in her home. The jury recommended life without parole. *Id*. at 395.

In *State v. Little*, 861 S.W.2d 729, 730-31 (Mo.App.E.D.1993), the defendant was convicted of three counts of first-degree murder, one count of second-degree murder, two counts of forcible rape, two counts of robbery first degree, and one of attempted forcible rape. The jury recommended life without parole. *Id*.

Upholding a death sentence for Collings under all these circumstances, and in light of the circumstances cited above, violates the Eighth Amendment's requirement of heightened scrutiny of a capital sentence. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). It also violates Collings' rights to due process and to be free from cruel and unusual punishment. U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Secs.10,21. This Court must set aside the death sentence and resentence Collings to life without parole.

CONCLUSION

Collings respectfully requests the following relief:

- Arguments I and II: Reverse and remand for a new trial.
- Argument III: Order imposition of conviction of second-degree murder and remand for a new sentencing trial.
- Arguments IV-V: Reverse and remand for a new trial.
- Argument VI: Reverse and remand for a new trial as to Part (1) and for a new penalty phase trial on Part (2).
- Arguments VII-VIII: Reverse and remand for a new penalty phase trial.
- Arguments IX-X: Resentence to life without parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on September 13, 2013, the foregoing was served on counsel for the State, Shaun Mackelprang, through the e-filing system of the Missouri Office of the State Courts Administrator.

I certify that the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,712 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Rosemary E. Percival
Rosemary E. Percival, #45292