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 REPLY BRIEF

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[1] Collings maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein.

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JURISDICTIONAL STATEMENT

Collings incorporates the Jurisdictional Statement from page 9 of his Opening Brief.

STATEMENT OF FACTS

Collings incorporates the Statement of Facts from pages 10-34 of his Opening Brief.

ARGUMENT I

The State's arguments are wrong in three major respects. First, Collings was in custody at the Muncie Bridge. Second, the court's finding that Clark advised Collings of his rights before Muncie Bridge is an unreasonable determination of the facts that is not entitled to deference. Third, even if Clark had advised Collings of his rights, the totality of the circumstances demonstrates that Collings' confession was the involuntary product of coercion, promises, and exploitation of his fear of vigilante justice.

As the State noted, "the Due Process Clause bars involuntarily obtained confessions from being admissible at trial." (Resp. Br. at 31). The United States Supreme Court held long ago, "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." *Jackson v. Denno*, 378 U.S. 368, 376 (1964). Because Collings' statement was not voluntary, its use at trial violated Collings' right to due process under the Fourteenth Amendment. *See also* Mo. Const., Art. I, Sections 10, 19.

Collings Was in Custody at the Muncie Bridge

The State argues that Collings was not in police custody until after he gave a statement at the Muncie Bridge. (Resp.Br. 34). It argues that because Collings initiated each conversation with Clark, he could not have been in custody. (Resp.Br.34-35). What the State fails to recognize, however, is that a meeting that starts as non-custodial can

become custodial. See, e.g., *State v. Lynn*, 829 S.W.2d 553, 554 (Mo.App.E.D.1992); *State v. Zancauske*, 804 S.W.2d 851, 859 (Mo.App.S.D.1991).

In determining whether an accused is in custody, the court should consider the suspect's "freedom to leave the scene and the purpose, place, and length of an interrogation." *State v. Werner*, 9 S.W.3d 590, 595 (Mo.banc 2000). It should also consider:

(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not under arrest;

(2) whether the suspect possessed unrestrained freedom of movement during questioning;

(3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to answer questions;

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

(5) whether the atmosphere was police dominated; or,

(6) whether the suspect was placed under arrest at the termination of questioning.

Id., citing *United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990). "A particularly strong showing with respect to one factor may compensate for a deficiency with respect to other factors." *Werner*, 9 S.W.3d *at 596; Griffin*, 922 F.2d at 1349.

The purpose of the conversation between Collings and Clark on November 9th differed for each man. Collings' purpose in meeting with Clark was not to confess, but rather to find out if Clark knew who had been following him. (Supp.Tr.588-89,663;Tr.4541,4662,4667). Clark's purpose, on the other hand, was to get information from Collings. (Supp.Tr.1201,1219,1227-28). Despite the State's current assertions, the officers believed that Collings was involved in Rowan's disappearance, even if they may have believed Spears was the primary actor. (Supp.Tr.951-52,1038,1067,1201, 1218,1224). Clark told F.B.I. Agent Ramana of his "gut feeling" that Collings was an "active participant" in Rowan's disappearance. (Supp.Tr.1218,1224). Clark had been instructed by F.B.I. agents that, as soon as Rowan's body was found, Clark should speak with Collings. (Supp.Tr.1041). They knew Collings was near his breaking point, and they wanted him talking. (Supp.Tr.575,580). That morning, an F.B.I. agent told Clark to find Collings and tell him that Rowan's body had been found. (Supp.Tr.1073,1091). Thus, even though Collings sought out Clark, the purpose of the meeting was to secure incriminating information from Collings. This is a strong indicator that the meeting was custodial.

Other factors demonstrate that the meeting was custodial. 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). Strong arm tactics were used, in that Clark admittedly told Collings that he would protect him, but first Collings had to tell what happened to Rowan. (Supp.Tr.902). A reasonable person in these circumstances would not have believed he was at liberty to end the questioning and leave.

The State argues that because Collings was not handcuffed and rode in the front seat of Clark's car, he was not in custody. (Resp.Br.35). But this is belied by the fact that even after Clark admitted Collings was not free to go, *i.e.*, after Collings confessed at the bridge, Collings still was not handcuffed and was allowed to ride in the front seat of the car. (Supp.Tr.381,655-56). Collings was in custody at the Muncie Bridge and should have been advised of his rights before being questioned by Clark.

Collings Was Not Read His Rights Before his Statement at the Muncie Bridge

The State urges that because the trial court found that Clark advised Collings of his rights before they went to the bridge, that finding is sacrosanct. (Resp.Br.33-34). First, the court's ruling is not entitled to deference because the court refused to consider evidence that went directly to the credibility of the State's witnesses. See Arg.II.

Second, while it is true that the court's findings are to be given deference, "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (discussing deference in the *Batson* context). The court's factual findings must be supported by substantial evidence. *State v. Hoopingarner*, 845 S.W.2d 89, 92 (Mo.App.E.D.1993). Other courts have acknowledged that although trial court findings of fact are given deference, they are not unchallengeable. See, e.g., *Wells v. Tenn. Bd. of*

Regents, 9 S.W.3d 779, 783 (Tenn.1999) ("[W]e will not re-evaluate a trial judge's credibility determinations unless they are contradicted by clear and convincing evidence"); *Commonwealth. v. Novo*, 442 Mass. 262, 812 N.E.2d 1169, 1173 (Mass.2004) ("Typically, in reviewing whether a statement was made voluntarily, we accept the judge's subsidiary findings of fact unless not warranted by the evidence"); *State v. Robinson*, 200 *N.J.* 1, 15 (2009); *Cole v. Nofri*, 107 A.D.3d 1510, 1511 (N.Y. App. 2013).

The trial court's finding was an unreasonable determination of the facts. The evidence showed that Clark advised Collings of his constitutional rights only after they returned from the bridge. The strongest piece of evidence is the waiver form itself, which states that Collings received the *Miranda* warnings at 3:00 p.m., after they returned from the bridge. (Supp.Ex.G).

The State posits that even though the *Miranda* waiver form stated that it was signed at 3:00, it must have been signed earlier. (Resp.Br.33). It suggests that, when writing the time down, Collings may have guessed the time, he may have had the wrong time on his wristwatch, or the clock in Clark's office may not have been re-set when daylight savings time ended five days earlier. (Resp. Br. 33). But the State has the burden of proof when a defendant challenges whether his statement was voluntary. *Hoopingarner*, 845 S.W.2d at 92. The State cannot rely on the possibility that Collings may have written the time incorrectly. It must prove facts, not suggest possibilities or rely on speculation.

The State posits that perhaps the clock on the wall was off by an hour, since daylight savings time had ended the Sunday prior to Collings' Friday confession. (Resp.Br.33). This is pure speculation. No evidence was presented that the clock was in fact off by an hour. And, really, how likely is that? This was a municipal office. To think that five days would pass, without anyone changing the time on the clock is not reasonable. Additionally, F.B.I. agents visited the office on November 8th. (Supp.Tr.583-84). Clark would not have wanted the wrong time displayed; or the F.B.I. agents would have told Clark that he needed to fix the time. In a case of this importance, it is not reasonable to believe that Clark would not have double-checked the time that Collings had written on the waiver form and corrected it if it were wrong. And, contrary to the State's suppositions, Collings was not wearing a wristwatch on November 9th, as he is shown without a watch in the first videotaped statement, before he was booked into the jail (Supp.Ex.H;Supp.Tr.311). Most tellingly, Clark included in his own report that Collings signed the form at 3:00 p.m. (Supp.Tr.900-901;D.Supp.Ex.554).

If the clock truly was off by an hour, Collings still would not have written the time as 3:00 p.m. Clark and Collings first spoke, by phone, at 2:08 p.m. (Supp.Tr.588,663). Clark was at Collings' property, and he waited there for Collings. (Supp.Tr.591). Collings arrived at 2:13 or so. (Supp.Tr.750). At about 2:20 p.m., they drove to Clark's office, arriving there at about 2:25 p.m. (Supp.Tr.750-51). Thus, if the clock was off by an hour, Collings would have written a time between 3:25 and 3:30 p.m. as the time of the *Miranda* warnings, not 3:00 p.m. (Supp.Tr.609-10,664-65). The only reason that

Collings wrote the time as 3:00 p.m. was that it was in fact 3:00 p.m. – after he and Clark had already spoken at the Muncie Bridge – when Collings was advised of his rights.

Even if Collings Had Been Advised of His Rights, His Statement Was Still the Product of Coercion, Promises, and Exploitation of Collings' Fear of Vigilante Justice

The waiver of *Miranda* rights is not dispositive in determining whether Collings' statement was given voluntarily. *State v. Hicks*, 408 S.W.3d 90, 95 (Mo.banc 2013). Even if Collings had been advised of his rights, the evidence shows that he gave his statement due to Clark's coercive psychological tactics, promises, and Collings' fear of vigilante justice.

The State argues that Collings' personal characteristics supported a finding that his statement was voluntary. (Resp. Br. at 32). The State noted that Collings was 32 years old, had a normal IQ, and a high school degree. (Resp. Br. at 32). It noted that Collings had "experience in the law" because he had been read his rights in the past. (Resp.Br.32). Finally it pointed to the fact that Collings "withstood persistent questioning" in his second recorded interview on November 9th yet did not implicate Spears. (Resp.Br.32).

These characteristics do not show that Collings would not have succumbed to the law enforcement officers' coercion. Yes, Collings was 32 and had an average IQ and a GED, but he was by no means sophisticated or knowledgeable in the ways of law enforcement. His prior run-in's with the law had been for minor offenses such as squealing his tires or lighting fireworks within the city limits. (Supp.Tr.578-79,888-89). He had been read his rights, but it was just one prior time and "had been quite some time

before," as Clark himself acknowledged. (Sup.Tr.579). Collings was no match for the combined forces of the F.B.I., the Newton, McDonald, and Barry County Sheriff Departments, and Chief Clark. And the fact that Collings did not implicate Spears despite the officers' pressuring did not mean that Collings would not succumb to pressure to confess, but simply that Collings refused to lie about Spears' involvement.

The State argues that Collings did not endure a lengthy detention. (Resp.Br.34). But the State fails to consider the effect of the continued questioning throughout the week. 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 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).

The State argues that *Spano v. New York*, 360 U.S. 315 (1959), is not applicable, because here, there was no promise of help and no subterfuge. (Resp.Br.38). The record shows otherwise. First, Clark promised to protect Collings, but only if he confessed. Clark knew that someone had been following Collings around town and that Collings was shaken and feared for his safety. (Supp.Tr.589-90,899;Tr.4542). 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). Clark admitted, "I told [Collings] 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).

The November 14th meeting between Clark and Collings demonstrates precisely how much Clark exploited his friendship with Collings, as occurred in *Spano*, to coerce him to give up information.[2] Clark wove 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 talked about meeting Collings' father and about visiting Collings' ailing stepfather every day (D.Supp.Ex.551-A,p.4-7). He assured Collings that his animals were being cared for (D.Supp.Ex.551-A,p.6-7). Clark reminded 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:

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[2] Collings maintains his claim from Argument II that the court refused to consider the November 14th conversation as to whether the November 9th statement was voluntary. But because the State argues that the November 14th conversation was, in fact, considered by the court, this Court should consider the November 14th conversation as to the merits of the overall suppression issue.

> 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 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).

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).

The November 14th conversation showed the true extent of the pressure Clark put on Collings to speak, all the while saying he would never pressure Collings:

- "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).
- "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).
- "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).

- "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).

The November 14th conversation shows just how willing Clark was to violate Collings' constitutional rights in order to get information. Collings told Chief Clark at least nine times 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. (D.Supp.Ex.551-A,p.12-13; also,p.11,13,16,19).

Common sense dictates that Clark must have used these same tactics on November 9th. After all, on November 9th, there was much more pressure on Clark to get information from Collings than on the 14th. On the 9th, Clark knew that the F.B.I., and possibly also the Newton, Barry, and McDonald County Sheriff Departments, were counting on him to secure a confession. (Supp.Tr.1035;Tr.3961-62,4659). The law enforcement community must have been facing intense pressure from the public to make arrests. Although Rowan's body had been found, the officers still had nothing to link

Spears or Collings to the crime. Furthermore, if Clark was so willing to violate Collings' constitutional rights on videotape to get incriminating evidence against Spears, he must have been just as willing, if not more willing, to violate Collings' rights when he was alone with Collings, not on videotape, and under great pressure to get Collings to confess.

The State argues that Clark only urged Collings to confess "to alleviate the apparent distress [Collings] appeared to be under." (Resp.Br.38). This argument completely ignores the record. From his very first interaction with Collings, Clark reported Collings' statements back to the other law enforcement agencies. (Supp.Tr.70,554,580-81,909-16). Clark told the F.B.I. he would help in any way he could. (Supp.Tr.581,912,932). He told them he and Collings were long-standing friends and had good rapport. (Supp.Tr.72-73,76). They discussed the nature of Collings' relationship with Clark and even Collings' family dynamics. (Supp.Tr.1037-39;Tr.4659). Clark had a "gut feeling" that Collings was an "active participant" in Rowan's disappearance. (Supp.Tr.1218,1224). Clark and the F.B.I. agents acknowledged that if Collings was going to confess to anyone, it would be to Clark. (Supp.Tr.1035;Tr.3961-62,4659). Clark had been instructed by F.B.I. agents that, as soon as Rowan's body was found, Clark should speak with Collings to get him talking. (Supp.Tr.1041). When Collings feared for his safety, Clark told him he would protect him but only if he talked about what happened to Rowan. (Supp.Tr.901-902). Clark's ultimate goal was not to help Collings.

If Clark was so concerned about Collings, he would have helped Collings find a lawyer when Collings suggested he wanted one, instead of talking him out of it.

(Supp.Tr.937-38). He would not have violated his rights in the November 14th meeting or pressured him repeatedly to incriminate Spears. Clark used the guise of friendship to make Collings think he was talking to a friend, not a law enforcement officer, so that Collings would trust Clark and keep his guard down. Clark was not a friend but a tool of law enforcement aimed at securing incriminating evidence from Collings.

The State next argues that Collings' fear of vigilante justice did not amount to unconstitutional coercion, because Clark merely told Collings that he could not protect him all the time, and this was not coercive. (Resp.Br.39). The State, however, overlooks what Clark wrote in his report the night of November 9th. Collings told Clark he was being followed and that he was scared some people might take matters into their own hands. (Supp.Tr.900). They discussed Collings' fear, and Clark stated that he would protect him, but could not protect him all the time. (Supp.Tr.595-96,899-901). At Clark's office, Collings was still worried and apprehensive about the fact he had been followed. (Supp.Tr.602). Clark wrote in his report, "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.901-902).

This case is directly on point with *Arizona v. Fulminante*, 499 U.S. 279 (1991). In *Fulminante*, the defendant was serving time on a weapons charge when he was befriended by another inmate, Sarivola, an F.B.I. informant. *Id*. at 282-83. Fulminante was a suspect in the death of a child. *Id*. at 282. Several times, Sarivola tried to elicit a confession from Fulminante, but each time, Fulminante denied responsibility. *Id*. at 283. After each conversation, Sarivola reported back to the F.B.I. what Fulminante had said.

Id. Eventually, Sarivola learned that because Fulminante was suspected of killing a child, other inmates had been threatening him. *Id*. Sarivola offered to protect Fulminante from the other inmates on the condition, "You have to tell me about it, you know. I mean, in other words, For me to give you any help." *Id*. Fulminante then confessed. *Id.*

The Supreme Court held that the totality of the circumstances showed that Fulminante's confession was coerced. *Id*. at 286. It noted that Fulminante was an alleged child murderer, so he was in danger of physical harm from the other inmates, and Sarivola knew that Fulminante had received "rough treatment" from the other inmates. *Id*. Using that knowledge, Sarivola offered to protect Fulminante in exchange for a confession. *Id*. The Court agreed with the Arizona Supreme Court's conclusion that, "the confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." *Id*.; see also *Payne v. Arkansas*, 356 U.S. 560, 567 (1958)(police officer promised that if the accused confessed, the officer would protect him from an angry mob outside the jailhouse door). In a footnote, the Court also noted, "Sarivola's position as Fulminante's friend might well have made the latter particularly susceptible to the former's entreaties." *Id*., citing *Spano*, 360 U.S. at 323.

As in *Fulminante*, reversal is warranted here. This Court must reverse for a new trial without use of the coerced confession and its progeny.

ARGUMENT II

The State errs in claiming that the trial court considered the content of the November 14th conversation between Clark and Collings on the question of whether the November 9th statement at the Muncie Bridge should be suppressed. At the hearing on the motion to suppress, the State insisted that the videotape should not be considered as a matter of law, and the court accepted that incorrect statement. The statements on the record and the court's findings show that the court did not consider the content of the November 14th conversation.

The State argues that the record shows that the court considered the content of the November 14th videotaped statement but rejected the inferences Collings wanted drawn from it. (Resp.Br.44). The State is incorrect. At the hearing on the motion to suppress, the State insisted that the videotape should not be considered as a matter of law, and the court accepted that incorrect statement.

At the hearing on the motion to suppress, defense counsel moved for admission of a videotaped statement between Chief Clark and Collings on November 14th, five days after Collings' initial statement. Both sides agreed that the tape would not be admissible at trial. (Supp.Tr.850-51). But defense counsel wanted the court to consider the tape as to the motion to suppress, to show Clark's course of conduct with Collings and so the court could better assess Clark's credibility given his testimony that he never pressured Collings to confess. (Supp.Tr.849).

The court acknowledged that the State was allowed to present otherwise inadmissible evidence to show a course of conduct, and so too, Collings wanted to show

a course of conduct with the videotape. (Supp.Tr.851-52). The court was concerned that the November 14th statement occurred several days after the Muncie Bridge statement. (Supp.Tr.852-53). The court sustained State's objection to the November 14th videotape, but admitted the videotape for purposes of an offer of proof. (Supp.Tr.857,861). The court viewed the videotape. (Supp.Tr.865).

Assistant Attorney General Elizabeth Bock argued that the court should not consider the November 14th videotape as evidence regarding the motion to suppress. She stressed, "The Court may decide it's the totality on November 14th, but that does not wrap back to the 9th." (Supp.Tr.854). She continued:

> I think it's a long stretch when you consider the totality of the circumstances surrounding November 7th or November 9th, to say here's something that happened November 14th, and that's what you're gonna use to consider the totality of the circumstances of the statement made on – on November 9th. And no way – way, stretch of the imagination, is that the legal standard in Missouri.

(Supp.Tr.855). Later, she argued: "We have told [defense counsel] that the Sixth Amendment, in our opinion, would keep this November 14th statement out. But it doesn't bootstrap it back to the voluntariness test in Missouri under November 9th and … prior November 9th statements." (Supp.Tr.871). Ms. Bock again argued that the November 14th videotape "has nothing to do with what happened on November 9th or prior to November 9th." (Supp.Tr.873).

At the end of the suppression hearing, defense counsel again asked the court to consider the November 14th videotape as evidence in the suppression hearing. (Supp.Tr.1360). Prosecutor Cox countered that the videotape "is not admissible and should not be considered by this Court." (Supp.Tr.1362). The court ruled that it "is not going to admit [the November 14th videotape] for purposes of this proceeding." (Supp.Tr.1364). Because neither party asked that the videotape be admitted at trial, "this proceeding" referred solely to the motion to suppress.

The State acknowledges that that the court stated that the offer of proof was refused, but argues that "the rest of the court's discussion" showed that the court considered the merits of the video but rejected it for the purpose Collings proposed. (Resp.Br. 44). The State then cites just part of the court's finding, omitting other parts that show that the court did not consider the November 14th videotape and believed that it could not consider it as a matter of law. The full portion of the court's findings regarding the November 14th videotape is as follows:

> The statements made by the Defendant on November 14, 2007 as an offer of proof by the defense is refused for the purpose of the offer of proof – to attack the Defendant's prior statements to Chief Clint Clark made prior to and on November 9, 2007. The November 14, 2007 interview and in court contact (Chief Clint Clark stood near Defendant at his initial court appearance) does not operate to invalidate the Defendant's voluntary statements made through November 9, 2007. The Court finds that there is no credible evidence that the Defendant was induced to confess on November 9, 2007 by Chief Clark's

> statement that he would stay with him, or try to help him through this difficult process, or try to make it easier for him. *State v. Pippenger*, 708 S.W.2d 256 (Mo.App.1986). The totality of the circumstances considered for the purpose of determining whether a suspect is in custody does not operate to invalidate prior statements of the Defendant. It is used to determine if the Defendant was in custody for the purpose of whether a Defendant should be Mirandized at the time of the making of the statement.

(L.F. 570-71)(emphasis added).

Despite the State's assertions, the court did not consider the merits of the videotape. It rejected the videotape as a matter of law, because it incorrectly believed – having being led astray by the State – that it could not consider what happened on November 14th as part of the totality of the circumstances on the question of whether the November 9th statement was voluntary. The court incorrectly believed that a defendant's later statement could not operate to render a prior statement involuntary. And the State completely ignores the fact that, at the end of the suppression hearing, the court ruled very clearly that it would not admit, *i.e.*, consider, the videotape as evidence for purposes of the motion to suppress. (Supp.Tr.1364).

The State argues that Collings suffered no manifest injustice by the court's refusal to consider the November 14th videotape. It argues that "no law" required the court to find that Clark violated Collings' rights on November 9th because he violated his rights on November 14th. (Resp.Br.51). But the motion court, and this Court, must determine whether the confession was voluntary considering the "totality of the circumstances."

Arizona v. Fulminante, 499 U.S. 279, 286 (1991); *State v. Hicks*, 408 S.W.3d 90, 95 (Mo.banc 2013)("The test for whether a statement is voluntary is whether the totality of circumstances created a physical or psychological coercion …").

In *Haley v. Ohio*, 332 U.S. 596, 600 (1948), the Court rejected the notion that events after a confession are not relevant to the question of whether the confession was voluntary. There, the actions of police officers after the confession "show[ed] such a callous attitude … towards the safeguards which respect for ordinary standards of human relationships" that they called into question the officers' testimony that the interrogation was conducted fairly. *Id.* "When the police are so unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year old boy behind closed doors in the dead of night becomes darkly suspicious." *Id.*; see also *United States v. Watson*, 87 F.3d 927, 931 (7th Cir. 1996)("the district court considers the ***totality*** of the circumstances surrounding the confession. In this case, that included pre-confession and post-confession evidence.")(emphasis in original).

The November 14th videotape was part of the totality of the circumstances regarding the November 9th confession, because it offered a window into the relationship between Collings and Clark and showed the psychological coercion Clark exerted upon Collings. No other evidence could show the nature of their relationship better than this videotape. Even though the November 14th conversation was several days after the November 9th confession, nothing within those few days would have changed the nature of Clark's dealings with Collings. If anything, Clark would have been even more coercive on November 9th, when he was under great pressure to extract a confession from

Collings and when he was not on videotape. The November 14th videotape demonstrated how Clark repeatedly pressured Collings to ignore the advice of counsel and speak to him about the charged events. (D.Supp.Ex.551-A,p.11-13,16,19). At the same time, Clark stated he would never pressure Collings (D.Supp.Ex.551-A,p.13,16), just as he testified at the suppression hearing that he did not pressure Collings. (D.Supp.Ex.551-A,p.743-44). Clark blatantly violated Collings' constitutional rights. (D.Supp.Ex.551-A;Supp.Tr.850,854-55). This evidence spoke directly to the credibility of Clark's testimony that he never pressured Collings to speak and that he was careful to abide by Collings' constitutional rights. (Supp.Tr.559-60,567-69,680-81,694,728,730,732,744, 754,832,846-47). It was directly relevant and probative of Collings' claim that he was coerced to confess and did not do so knowingly and voluntarily. It was manifestly unjust that the court did not consider this vital evidence. The Court must reverse.

ARGUMENT V

The contested photographs served no purpose but to arouse the emotions of the jurors. The State's guilt phase closing argument demonstrates that the State's intent was to use the photographs to urge the jurors to allow their emotions to play a role in the guilt and penalty phase deliberations.

After the court admitted a photograph showing Rowan's full body depicted in the cave, the State moved for admission of eleven more photographs of the body in the cave. The court allowed nine of these eleven photographs. (Tr.4227,4250). The photographs in the cave had one goal, to shock and instill emotion in the jurors. Multiple photographs of Rowan's body in the cave served no other purpose. Collings had left Rowan's body in the cave, but she was not raped in the cave or killed there. There was no evidentiary value served by the jury viewing her multiple times from every possible angle. The State argues that the photographs showed relevant facts, yet it failed to explain how those relevant facts could not be explained from the single, full-body photograph that was already in evidence. (Resp.Br.72-73). The State talks about how the photographs showed the "unusual geologic features" of the cave and the debris already in the cave, but these factors had no true evidentiary value in the case. (Resp.Br.72).

The State argues that the photographs were not prejudicial, since they "did not prevent the jury from properly considering the evidence for the relevant reason instead of allowing the photographs to improperly influence it to decide the case due to passion or prejudice from the photos." (Resp.Br.70-71). But the State's true intent regarding the

photographs was disclosed through its closing arguments, where it did in fact urge the jurors to view the photographs for an improper purpose, instilling emotion into the jurors' deliberations:

> Now, we're not … asking you to let your emotions run wild. We're not asking you to set aside the instructions and not follow the instructions. And those photos were bad. And age is not in the instruction. But her age was in evidence and you do get to consider the evidence and the injuries that she had. And the photos were bad, but they were the Defendant's handiwork and what Chris Collings did to Rowan Ford. So you don't have to turn into robots either.
>
> We're not asking you to let your emotions run wild, but this – you are still humans and you still can consider those photographs for whatever weight you want to give them and whatever evidence you can glean from them.
>
> And you may set aside your emotions. But again, don't forget the Defendant's handiwork as to what happened to Rowan Ford.

(Tr.5637). By telling the jurors that they "may" set aside their emotions and that they could be guided by their emotions as long as their emotions did not "run wild," the prosecutor urged the jurors to allow their emotions to play a role in their guilt-innocence determination. By urging the jurors to consider the gruesome photographs, Rowan's young age, and her injuries, and telling the jurors they did not need to be "robots," the prosecutor encouraged the jurors to get angry and decide the case on emotion, not the evidence as the instructions require.

Appeals to "passion and prejudice" are improper in closing argument. *State v. Banks*, 215 S.W.3d 118, 121 (Mo.banc 2007). Prosecutors must not encourage jurors to decide a case on emotion. *State v. Taylor*, 944 S.W.2d 925, 937 (Mo.banc 1997). A bedrock principle of our jurisprudence is that "triers of fact must base their decisions not upon passion or emotion but upon unimpaired reason." *Elliot v. Kesler*, 799 S.W.2d 97, 107 (Mo.App.W.D.990)(Nugent, J., dissenting). "[A]n appeal to the jury's emotion in an attempt to inflame it improperly" is improper. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App.E.D.1992).

The State's closing argument would have carried over to the jurors' penalty phase deliberations. The jurors were told that they could consider all evidence from the guilt phase when deciding whether Collings should live or die. (L.F.689). In penalty phase, the jurors again considered the photographs and again the State argued that the photographs warranted a death sentence. (Tr.6504,6506). Given that the State used the multiple, gruesome, and unnecessary photographs as an appeal to the jurors that they decide guilt and punishment based on their emotions, this Court must reverse.

ARGUMENT VII

The State argues that Ms. Bock permissibly elicited that when Pickett's brother was murdered, Pickett wanted to kill the murderer. This testimony had no valid purpose.

The State suggests that the testimony was relevant and proper to show Pickett's bias and to impeach him. (Resp.Br.86-89). Pickett was testifying for his son. Of course, he would be biased toward his son. This case is fully distinguishable from those cited by the State concerning the defense's expert witnesses. Those cases stand for the proposition that, where the bias of the witness is not otherwise obvious, the State may elicit how much money the expert is making, how often the expert testifies for the defense, and whether the witness would oppose the death penalty in every case. See, *e.g.*, *Commonwealth v. Ballard*, 2013 WL 6124340 (Pa., 11/21/13); *Braley v. State*, 572 S.E.2d 583 (Ga.2002)(Resp.Br.86).

The testimony was also not admissible as impeachment, because it did not truly impeach Pickett. The fact that Pickett wanted to kill the man who killed his brother did not mean that Pickett did not think that man could change. It just meant that Pickett was angry and spurred by emotion. This had no relevance to the jury's consideration of Collings' sentence. Anger and emotion can play no role in a capital sentencing proceeding. The testimony was just a ploy to show that a murder victim's family would want the murderer dead.

The State argues that the testimony was permissible because Pickett was neither an expert witness nor the victim's family member. (Resp.86-87). But what the State was so

desperately trying to get across to the jury was that just as Pickett wanted his brother's murderer dead, so too Rowan's family wanted Collings dead. This is impermissible.

The State is also mistaken about the extent of the prejudice the testimony engendered. The State argues that because the defense elicited testimony that showed that Pickett was a horrible father, testimony that he wanted to kill his brother's murderer caused no harm. (Resp.Br.90). Pickett was Collings' father, and no matter how bad a father he was, his love for his son was a crucial part of the defense case for a sentence of life without parole. But because of the impermissible testimony, even Collings' own father told the jury it okay for them to impose the death penalty and eased their conscience, because when his loved one was murdered, he too wanted the murderer dead. He in effect made it permissible for the jurors to give in to anger and emotion. The Court must reverse.

ARGUMENT X

The aggravators were not supported by sufficient evidence and were otherwise invalid. The State fails to follow the proper proportionality standard.

The State is wrong in arguing that evidence supported Aggravator #1, that Collings inflicted physical torture on Rowan prior to her death. (Resp.Br.95-96). Evidence was presented that Rowan awoke as Collings started to have sexual intercourse with her; she struggled and cried. (Tr.4564,4690-91;St.Ex.94, p.21,40;S.Ex.I-1,p.35). She sustained a ¾ inch tear in her vagina. (Tr.5209-10). Afterwards, when Collings realized Rowan recognized him, he grabbed a cord and strangled her. (Tr.4565;S.Ex.94, p.22-23,43). Rowan lost consciousness after ten seconds. (Tr.5222-23).

This evidence does not establish torture. Rowan did not have a substantial period of time before death to anticipate and reflect upon it. Ten seconds cannot possibly be considered substantial, and Rowan would not have thought during the rape that Collings would kill her.

The State seems to define torture as being subjected to pain, or suffering, or "knowing death was imminent." (Resp.Br.95-96). "Torture" is not defined by statute and was not defined for the jurors, and thus was unconstitutionally vague. The jurors were not adequately informed as to what they should consider "torture" to be, and thus their discretion was not properly channeled. *Gregg v. Georgia*, 446 U.S. 420, 428 (1976).

The jury must have a principled means to distinguish those cases in which the death penalty is appropriate from those in which it is not. *Maynard v. Cartwright*, 486

U.S. 356, 363-64 (1988). In *State v. Preston*, 673 S.W.2d 1, 11 (Mo.banc 1984), this Court set forth a limiting construction of the "depravity of mind" aggravator to save it under *Maynard* from failing constitutional review. *Id.*; *State v. Griffin*, 756 S.W.2d 475, 489-90 (Mo.banc 1988).

Just as further limitation is required for the "depravity of mind" aggravator, it is required for the "torture" aggravator. Otherwise, "torture" covers too broad a spectrum. Torture can be physical or psychological. *Preston*, 673 S.W.2d at 11. Torture can occur "when the victim has a substantial period of time before death to anticipate and reflect upon it." *Id.*; *see also State v. LaRette*, 648 S.W.2d 96, 101-102 (Mo.banc 1983). Torture can be the infliction of "intense pain to body or mind for purposes of punishment, or to extract a confession or information, or for sadistic pleasure." Black's Law Dictionary (6th Ed.)(1990). Torture can be "an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer's sadistic indulgence…. In essence, torture is the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime." *Leone v. State*, 797 N.E.2d 743 (Ind. 2003).

As to depravity of mind, the jury is given specifics of what it must find. But as to torture, it is not. And yet, torture could conceivably fall under several of the "depravity" subcategories:

- the infliction of physical pain or emotional suffering on the victim for the purpose of making the victim suffer before dying (MAI-CR3D 314.40, Note on Use 8(B)(1));

- repeated and excessive acts of physical abuse upon the victim (MAI-CR3D 314.40, Note on Use 8(B)(2));
- killing for the purpose of causing suffering to the victim (MAI-CR3D 314.40, Note on Use 8(B)(9));
- killing the victim for the sole purpose of deriving pleasure from the act of killing (MAI-CR3D 314.40, Note on Use 8(B)(10)).

When "depravity of mind" is submitted to the jury, the jurors must unanimously agree on the same narrowing factor from MAI-CR3D 314.40, Note on Use 8(B). If more than one narrowing factor was submitted, the jurors must find each narrowing factor unanimously. Yet here, the jury did not unanimously decide as to the "type of conduct" that constituted torture. There is no assurance that all twelve jurors agreed on the same narrowing factor or meaning and hence, no assurance that the jurors were unanimous on this aggravator. *State v. Celis-Garcia*, 344 S.W.3d 150, 158-59 (Mo.banc 2011). Because Aggravator #1 was not a valid aggravator, it cannot be used as a basis for imposing the death penalty.

The State also errs in stating that the State presented sufficient evidence to support Aggravator #3. (Resp.Br.96). The State presented no evidence to show that Rowan was killed because she was a potential witness in a *pending* investigation. *State v. Todd*, 805 S.W.2d 204 (Mo.App.W.D.1991); but see *State v. Shafer*, 969 S.W.2d 719, 739 (Mo.banc

1998). Finding this aggravator when no investigation was pending rendered the death sentence unreliable. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).[3]

Finally, the State dismisses the fact that Collings identified five cases similar to his where the defendant did not receive death. (Resp.Br.102-103). The State argues that because Collings cannot explain precisely why those defendants did not get death, those cases cannot show that Collings' death sentence was excessive or disproportionate. (Resp.Br.103). But the State is simply refusing to accept the proper proportionality standard. Under Section 565.035.3, proportionality review "requires consideration of 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. Dorsey*, 318 S.W.3d 648 (Mo.banc 2010). Collings' sentence is disproportionate and must be vacated.

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[3]Jack Morris, past Chief of the Criminal Division, Office of the Missouri Attorney General, recognized the inapplicability of this circumstance in a similar factual situation. *Wilkins v. Missouri*, 487 U.S. 1233 (1989), Brief of Respondent at 12,fn.7.

CONCLUSION

Collings incorporates the Conclusion from Page 139 of his opening Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on January 3, 2014, the foregoing was served on counsel for the State, Richard Starnes, 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 7,710 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Rosemary E. Percival
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