IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC89833**
	)	
BRIAN J. DORSEY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
13th JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Brian pled guilty to two counts of first degree murder, §565.020 RSMo, before the Hon. Gene Hamilton in the Circuit Court of Boone County, on change of venue from Callaway County, Missouri. He was thereafter tried before a jury, which assessed punishment at death on both counts.

Because the penalty imposed was death, this Court has exclusive appellate jurisdiction. Mo.Const., Art.V,§3.

STATEMENT OF FACTS

Jenny Smith, an internal auditor for Nixa, Missouri, was a cousin of Sarah Bonnie[1] and Brian Dorsey, their parents having been first cousins. (T982-83). In their family, being cousins—whether first or second—meant you were "family" and you were close.(T983-84). As family, they spent holidays together and were part of each others' lives. (T983). Jenny loved her Cousin Sarah dearly and was especially close to her Cousin Brian, who was three weeks apart from her in age.(T984-85). They grew up together and vacationed together, and she knew Brian to be fun, fun-loving, easy to be with, a big teddy bear and very sweet.(T985). When Jenny heard that Sarah and Sarah's husband Ben were dead, and then heard that Brian was their suspected killer, she couldn't believe it. (T986). Jenny and the whole family knew about Brian's problems—his drug and alcohol abuse and his suicide attempts.(T988). They knew of his problems, which were "painfully obvious," but also knew what he was like when drugs, alcohol and depression didn't control his life.(T988).

On December 23, 2006, Pam Brauner, a first cousin to Brian's mother Patty and to Sarah's father Mike, answered the phone while at her father's house in Holt's Summit.(T974). Brian had called for Pam's younger brother, Kevin, for

[1] Saran and Ben Bonnie, as well as Brian Dorsey, are referred to by their given names because of the potential confusion, given that many family members bear the same last names. No disrespect is intended by these references.

whom Brian occasionally worked construction. (T975). Pam asked Brian if he needed help and Brian finally told her that he owed money and had no way to repay it so needed to borrow it.(T975-76). Pam knew that, under normal circumstances, Brian wouldn't have asked her for money, so she knew he was in dire straits.(T976). She also knew that Brian wanted the money for drugs and she told him she didn't have any money to spare.(T976).

After talking to Brian, Pam called another cousin, Linda, to confirm that she had done right in not giving Brian any money and to ask if she should call Brian's mother, Patty, who lived in Warsaw, Missouri.(T976). Linda advised that she do so.(T976). Pam, who was concerned because of Brian's two prior suicide attempts, called Patty.(T977). Brian had also called his mom, asking her for money to repay his drug debt.(T862,895). Patty told Brian she would be in Jefferson City the next day.(T862).

Traci Sheley, Sarah's older sister, and Brian's first cousin, was at home around 5 p.m. on December 23, 2006, when she also received a phone call from Brian, who sounded a "little different, maybe a little shaky."(T577-78). Brian asked to borrow money and, when Traci told him she didn't have it, he told her he needed to call someone else.(T579). Traci then called her older sister Krista and her younger sister, Sarah, and told them that Brian needed money for drugs. (T579). Sarah told Traci that she had already spoken to Brian.(T580,895). Sarah called Traci again and told her that she and her husband, Ben, were going to

Brian's apartment because drug dealers wouldn't let him out until they were paid.(T580,896).

Traci and another friend of Sarah and Ben's, Darin Carel, met Sarah outside of Brian's apartment.(T580,596-97,889). Ben came out of the apartment, leaned over the porch railing, and asked that they bring him a beer.(T581). When they entered the apartment, Brian appeared to have been crying.(T590-92). A black man and a white woman drug dealer left the apartment, the black man asking Darin for a beer as he passed by.(T581,597). Brian returned to Ben and Sarah's house, riding with them, while Darin and Traci followed in their vehicles. (T582,597). Traci picked up her husband, Jon, and three of her children to join the group for the evening.(T582).

At the house, the women stayed inside, cooking and cleaning, in preparation for a family gathering the next day.(T565,583). The men congregated in Ben's shop, in which a pool table was set up, and, after cleaning off the table, played pool and drank beer through the evening.(T566-67,592,599,890). About 6:30 p.m., Sarah's mother, Diana, and her daughter, Jade, called.(T540). When Jade heard that Brian, "BeeJee," was there, she told her grandmother that she wanted to see him so Diana brought Jade back home from what had been planned as a sleep-over with her grandparents.(T540,567). Diana remained at Sarah and Ben's for a while, visiting with family and friends. (T542). When she left, Traci and her family had already gone home, leaving Sarah, Ben, Jade, Brian and Darin.(T542). When Traci left, everyone was in the house, except Brian and

Darin, who were still in the shop.(T586). Sarah tried to get Darin to spend the night but he went home instead.(T601).

About 1 a.m. Sunday, December 24, 2006, Brian came to Patricia Cannella, who he knew from having borrowed money from her to buy drugs, with some items that he wanted to use to repay the debt.(T604-05,886-88). Brian was driving a white car, which he said was his, and in the car was the property he was trying to sell, including electronic equipment, guns, jewelry, and cell phones.(T607-09). That night Brian drove around, trying to sell the property to people in the streets.(T607). Brian was heavily intoxicated and had a bottle of vodka with him.(T611). Cannella ultimately took the wheel because of Brian's intoxication.(T606). Priscella Gilley was at Cannella's house that weekend and saw Brian try to sell the property, including the car.(T616-19).

Sometime that day, Cannella tried to sell a rifle to Antonio Hickmon. (T627-28). The gun was in the trunk of the car Cannella was driving.(T629). Cannella also offered a cell phone for sale, which Hickmon purchased for his mother after they went to her house to ensure that it was for sale.(T630-31). Among those present was a "white guy" who appeared shaky and nervous.(T632-33). Hickmon thought he "needed some more crack or something."(T634). When the phone was later retrieved from Hickmon's mother, it was identified as Brian's.(T767-69).

On December 24, Ben and Sarah didn't arrive at the house of Ben's parents, Gregg and Marilyn, for an 11 a.m. scheduled family get-

together.(T533,543,803,812). Amber Bonnie, the wife of Ben's brother, Jake, called Mike and Diane Mosier, Sarah's parents, and asked that they go over and check since the Bonnies had gotten no response to repeated phone calls. (T533,543,803,812). The Mosiers drove to Ben and Sarah's house and, when they entered, found Jade sitting on the living room couch watching television.(T535). Mike jimmied the lock on one of the master bedroom doors and found Ben and Sarah dead.(T535-36). Each had died from a single gunshot wound to the head, fired from a shotgun, which caused immediate death.(T716-21).

Areas of the master bedroom were in disarray.(T668). The room held a strong odor of bleach, and it was later determined that bleach had been poured over parts of Sarah's body, including her mid-section.(T672-76). She wore only a t-shirt (T679) and results from a sexual assault kit revealed that Ben Bonnie and Darin Carel could be eliminated as the source of sperm cells found but that Brian could not.(T841-49). The prosecutor, Mr. Sterner, told the jury in his opening that there was no evidence when a sexual assault occurred that night—before or after death.(T520).

On December 24, 2006, Patty and Larry Dorsey, Brian's parents, had driven to Jefferson City from their home in Warsaw, Missouri, in preparation for a family get-together.(T858). They first stopped by Brian's apartment but, since he wasn't home, they went grocery shopping.(T858). They received a call from Patty's cousin Linda, who told them that Ben and Sarah had been shot, and they immediately drove to Ben and Sarah's house.(T859-60). Mike, Patty's brother,

told them that Brian had been at the house the night before and the police were looking for him.(T860).

Patty and Larry returned to Brian's apartment but, not finding him there, checked into a motel for the night.(T863). One of the officers came to the hotel and asked for their help in finding Brian, which they agreed to provide.(T864). The next day, they returned to Warsaw.(T863). They continued to try to reach Brian by phone but were unsuccessful.(T863). They were sad and concerned because of Ben and Sarah's deaths and because, since Brian had made two prior suicide attempts, they believed he had tried, successfully this time.(T864,874).

At around 11 p.m. on December 25th, they heard from Brian, who told Patty he wanted to talk to her one last time since he was preparing to commit suicide.(T874). Patty was able to convince Brian to call her back and, when he did so about 30 minutes later, he agreed that they could come and get him so that he could turn himself in.(T875). Patty and Larry drove to Jefferson City and picked Brian up across the river from the capitol.(T875). They went to the Fulton jail the next morning, where Brian acknowledged that he was the person the police needed to talk to about Ben and Sarah's deaths.(T27,36,44,900).

Brian testified that he had been awake and smoking crack cocaine for two to three days and, when it ran out and he had no money to buy more, he began making phone calls asking family for money.(T886-87,894). When Ben and Sarah came to his apartment to free him from the drug dealers, Brian went with them, stopping for more beer on the way to their house.(T889). That night, as he, Ben,

Jon and Darin played pool, he continued to drink beer.(T890,897). Later that evening, he got a bottle of vodka from the kitchen and drank it too.(T951). Although Brian testified that he didn't recall everything that occurred that night, as he tried to sell the property later that night, he realized that it wasn't his.(T898-99).

In Sarah's car, which officers had found parked in the river bottoms, officers found property identified as belonging to Sarah and Ben, including a rifle on the passenger front seat, and a 20-gauge shotgun.(T550-51,560,587-89,736,742-50). Patricia Cannella identified much of the property as that which Brian had attempted to sell early in the morning of December 24.(T607-09).

On March 10, 2008, Brian pled guilty to two counts of first degree murder before the Hon. Gene Hamilton.(T88-100). In pleading guilty, Brian admitted to having killed Sarah and Ben.(T92-95). He requested a jury trial as to punishment.(T91). Jury selection began on August 26, 2008.(T107).

After hardship and general voir dire and before death qualification, (T107-335), the court instructed each panel of the jury in part as follows:

> Before the jury may consider imposing the death penalty, it must also find unanimously and beyond a reasonable doubt that the evidence before it establishes the existence of at least one special act or fact or circumstance specified by law called a statutory aggravating circumstance.
>
> If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death. If the jury does find at least one statutory aggravating

> circumstance, it still cannot return a sentence of death unless it also unanimously finds that the evidence aggravation of punishment, taken as a whole, warrants the death penalty, and that this evidence is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death.

(T341-42,390,441). Mr. Ahsens then told the first panel that, in the second step, he had to prove beyond a reasonable doubt that "all of the facts of the case, taken as a whole, warrant the death penalty."(T344).

Before the evidentiary portion of trial, defense counsel objected to the State's use of multiple photographs of the bodies at the scene and during the autopsies, and to multiple photographs of the master bedroom.(T500-06). Counsel argued the photographs were irrelevant, cumulative, and their probative value was substantially outweighed by their prejudicial effect. Mr. Sterner responded that, especially as to Exhibit 20, it "most clearly shows this perspective of the body and the gore. Part of this issue is how wanton and vile this crime was. The gore about this body, in particular, is best shown in this photograph."(T502). The court overruled the objections.(T502-06). The State introduced the photographs and then, during its deliberations, the jury requested that the photographs be sent back.(T1033-35;LF187).

At trial, the State introduced evidence, substantially as set forth above.[2] It also introduced, as victim impact evidence, testimony from Sarah and Ben's family about their feelings, how the loss has impacted them and their families, and what Sarah and Ben will not experience.(T553-54,561-62,590,807,813). It also called Sharon Newlin, who testified that, during a rainstorm in April, 2006, when her disabled son was riding with her, Brian's car had hit hers from behind as they traveled south on Highway 54.(T704-09). Brian pled guilty to leaving the scene of an accident.(T708-11; Exh.69). The State also called Jefferson City Officers Duncan and Campbell, who testified that, in November, 2004, they arrested Brian for driving under the influence after he almost hit a patrol car, and they then found a plastic bag of crack cocaine in Brian's jacket.(T772-78). Brian also pled guilty to possession of a controlled substance.(T778;Exh.70)[3]. In January, 2005, while making an unrelated arrest, Officer Chris Gosche found a rock of crack cocaine

[2] Any further facts necessary to develop the issues will be set forth in the Argument section of this brief.

[3] Although Mr. Ahsens described Exhibits 70 and 71 as "duly-certified record[s] of judgment and conviction" (T783), in actuality they are agreements to conditions of probation for possession of a controlled substance, for which imposition of the sentence was suspended and for which Brian was placed on probation for five years. (Exhs. 70,71).

that had fallen from Brian's jacket and he was arrested on another drug possession charge.(T781-83;Exh.71).

Kimberly Luebbering, a probation officer who supervised Brian in Drug Court, testified that Brian was unsuccessful in that program.(T785-87). Brian had acknowledged using drugs and alcohol while in drug court.(T787). Luebbering noted Brian's severe mental health issues continued while he was in drug court, and further noted that he had been hospitalized during that time because he had attempted suicide.(T787-89).

Patty Dorsey confirmed that Brian had mental health problems, having made two documented suicide attempts—one in 1995 when he took an overdose of pills, and one in 2005, when he slit his wrists.(T864-67). Both times, he was placed in hospital psychiatric wards for a few days and then was discharged. (T866,868). He went to Valley Hope and to Two Rivers Hospital in Kansas City, both in attempts to get and stay substance-free but, each time, he had relapses. (T869-71). Patty recalled that, before Brian developed Major Depression and became drug and alcohol-addicted in his mid-20's, he was a happy person. (T872,880). Rudy York, with whom Brian played football in school, said Brian was not a fighter and that the coaches had attempted to make him more aggressive.(T902-06). Adam Horn, Brian and Sarah's cousin, confirmed that Brian was not a violent or aggressive person.(T908-11). Adam recalled that everyone had loved their big teddy-bear of a cousin.(T910).

Ron Cole, the former Jeff City Jays football coach, knew and liked Brian.(T915-17). Although not gifted as an athlete, Brian tried hard, listening to the coaches and caring about his team.(T917). Attorney Roger Brown, Brian's coach in the Babe Ruth Leagues, recalled Brian did whatever was assigned to him, always volunteering, never complaining.(T928). Brian was well-liked by team members, coaches, and community members who knew him after high school as he cut hair for a living.(T929-31). He "was a ball player … a friend. This is somebody who you wanted to see succeed."(T932).

Dr. Robert Smith, a clinical psychologist and addiction specialist, confirmed the impression of other witnesses. He found, based on interviews, test results, and record review, that Brian has suffered from alcohol and drug addiction, along with Major Depression, his entire adult life.(T939-45). Brian has received similar diagnoses before, having been hospitalized at least three times for psychiatric-related issues.(T945). Although various treatments—for both his depression and his addictions—had been attempted, none had worked.(T942-43). Dr. Smith noted that, in some cases, the only effective treatment is long-term, involving treatment of both the depression and the addictions.(T941-42,947-48). If patients receive six to eight months of in-patient treatment, then another two to four months of out-patient treatment, 60% have a better success rate.(T948).

At the instruction conference, defense counsel objected to Instructions 6 and 8, because, they argued, in each verdict-director, two of the statutory aggravators were duplicative.(T994-995). During closing arguments, it was

discovered that Instructions 11 and 12 didn't comport with the MAI.(T1106). Over defense objection, the Court read the corrected version of the instructions to the jury.(T1008-10).

In Mr. Ahsens' initial closing argument, he told the jury that, as to the statutory aggravators, "And so if you find one of them for one or both of the counts, then step one is satisfied"(T998). In his final closing, he told the jury,

> …we all have the capacity to do great evil and to do great good….
>
> Because these acts and the repercussions of those acts on these families is evil. And make no mistake, friends, there is evil in the world.
>
> A much smarter man that I am once said, 'The only thing necessary for evil to triumph is for good men to do nothing.'
>
> Well, what I'm afraid of is, if you do not come back with the most severe penalty, it will have the impact of having done nothing.

(T1026). He continued,

> …the way I was raised, forgiveness is conditioned upon repentance, and repentance is conditioned upon taking responsibility. I don't think that that Sunday-morning lesson necessarily translates directly into the law, but it does tell us something in this case.

(T1027). He then told them,

> Step one has been complete. There's a double murder, where you orphan a child and steal their property and have sex at some point in the process with the female victim.

(T1028). And, finally, he told them,

> Mercy is something that is granted to the weak and the innocent by the strong. You're strong in the sense that, as a group, you have the power to render sentence in this case. Do your duty."

(T1029).

Along with their note requesting to see the photographs, during its deliberations the jury also asked "Can we do a secret ballot vote between us to determine the proper penalty before working through final instructions?"(T1040). The court responded that the jury should be guided by the instructions.(T1040).

The jury returned its verdicts, assessing the punishment at death on both counts.(T1042-43). It found all three statutory aggravators that had been pled for Count I in Instruction 6 and all four that had been pled for Count II in Instruction 8.(LF176-178-79). It did not list, under the "depravity of mind" aggravators, the instructions' limiting construction language.(LF176,178-79).

The trial court fixed Brian's punishment at death.(T1054,1058-59). This appeal follows.

POINTS RELIED ON

I. Brian's Sentences Are Disproportionate

The trial court erred in accepting the jury's death verdicts and in sentencing Brian to death, and this Court, in the exercise of its independent proportionality review, under §565.035 RSMo, should reduce Brian's sentences to life imprisonment with no opportunity for probation or parole, because Missouri's death penalty scheme, both facially and as applied, denies due process, fundamental fairness and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that Brian has consistently acknowledged his culpability for the offenses and has consistently expressed his heartfelt remorse for his actions; the evidence was insufficient to support one of the statutory aggravators submitted and found on Count II and the State submitted and the jury found duplicative statutory aggravators on both Counts; the jury was misinstructed and allowed to reach its sentencing decision by combining its consideration of both Counts and was misinstructed as to the burden of proof; the evidence and argument, including the State's photographic exhibits and the State's closing arguments, reveal that Brian's sentences were imposed because of passion, prejudice and other arbitrary factors; and, a review of cases in which the defendant has been highly intoxicated while killing two people reveals that a life sentence has been deemed appropriate and that the death sentences in this case are excessive and disproportionate. Should this Court fail to

consider all similar cases, including those in which the defendant has been sentenced to life without parole, due process and the Eighth Amendment will be violated, rendering the imposition of the death penalty arbitrary and capricious.

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

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

State v. Beishline, 926 S.W.2d 501 (Mo.App.,W.D. 1996);

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

Mo.Const.,Art.I,§§10,18,21.

II. Instruction 10 Combines Both Counts for Final Step

The trial court plainly erred in submitting Instruction 10 to the jury and then accepting the jury's death verdicts on both counts because these actions denied Brian's rights to due process, a properly-instructed jury, a fundamentally fair trial, and freedom from cruel and unusual punishment, U.S.Const., Amends.VI,VIII,XIV; Mo.Const.,Art.I, §§10, 18(a), 21, in that Instruction 10, patterned after MAI-CR3d 314.46, told the jury that "As to Count I and Count II," while they were not compelled to fix death as the punishment, they were to consider "all the evidence in deciding whether to assess and declare the punishment at death." The instruction told the jury to consider the evidence as to *both* counts in deciding the punishment on each and thus allowed the jury to sentence Brian to death on each count based on evidence applicable to the other count. This destroyed the channeled discretion guaranteed by Missouri's death penalty statute and instructions.

State v. Cooey, 544 N.E.2d 895 (Ohio 1989);

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

Zant v. Stephens, 462 U.S. 862 (1983);

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

Mo.Const.,Art.I,§§10,18(a),21.

III. Rape Statutory Aggravator Lacks Evidentiary Support

The trial court plainly erred in submitting Instruction 8, accepting the jury's death verdict on Count II, and sentencing Brian to death on that Count because those actions denied Brian due process, a properly-instructed jury, a fundamentally fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that the State presented no evidence that any sexual assault of Sarah Bonnie occurred before her death, and the State conceded that no such evidence existed. Since there was no evidence that any action in furtherance of a sexual assault occurred before her death, the State failed to prove beyond a reasonable doubt that the sexual assault occurred "by the use of forcible compulsion." The statutory aggravator that the murder was committed "while the defendant was engaged in the perpetration of rape" was thus invalid and its consideration by the jury improperly skewed the balance toward death.

State v. Niederstadt, 66 S.W.3d 12 (Mo.banc 2002);

State v. Vandevere, 175 S.W.3d 107 (Mo.banc 2005);

State v. McLaughlin, 265 S.W.3d 257 (Mo.banc 2008);

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

Mo.Const.,Art.I,§§10,18(a),21.

IV. Ahsens' Improper Arguments Created Prejudicial Error

The trial court plainly erred in failing to declare a mistrial *sua sponte* when Mr. Ahsens argued in:

Voir Dire

That jurors must find whether death was "warranted;" must find a statutory aggravator; in the second step, they must find that mitigators outweighed aggravators, and their decision, whether for life or death, had to be unanimous.

Closing

That if jurors found a statutory aggravator for either Count, step one was satisfied; in step two, they must examine all of the evidence and decide if death was appropriate; evil was in the world; a "much smarter man" than Mr. Ahsens stated that evil would triumph if good men did nothing; Mr. Ahsens feared a life without parole sentence was doing nothing; Mr. Ahsens was raised to believe forgiveness is based on repentance; mercy is granted to the weak and innocent by the strong, and jurors should "do their duty" because these statements and arguments denied Brian due process, a fundamentally fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that Ahsens misstated the law, injected external sources of law; referred to facts outside the record; personalized, and injected emotion, all of which rendered Brian's death sentences unreliable.

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

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

Comm. v. Garcia, 912 N.E.2d 511 (Mass.App. 2009);

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

Mo.Const.,Art.I,§§5,10,18(a),21.

V. Photographs Used Solely To Create Prejudice

The trial court erred and abused its discretion in overruling Brian's objections and admitting in penalty phase Exhibits 20, 21, 28 and 29, color photographs of the bodies, because their admission denied Brian due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that the probative value of the photographs was vastly outweighed by their prejudicial effect, as they were largely irrelevant to any question before the jury, they were used solely to engender passion and prejudice and their duplicative nature compounded the prejudice from each individual photograph. Brian's death sentences flowed directly from the State's use of the photographs.

State v. Wood, 596 S.W.2d 394 (Mo.banc 1980);

State v. Robinson, 328 S.W.2d 667 (Mo. 1959);

State v. Clawson, 270 S.E.2d 659 (W.Va. 1980);

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

Mo.Const., Art.I, §§2,10,18(a),21.

VI. Instructions Violated Due Process and Right to Jury Trial

The trial court erred and plainly erred in denying Brian's motions objecting to Missouri's statutory death penalty scheme and Missouri's death penalty instructions; requesting that the death penalty statute be declared unconstitutional or that the State give notice of all evidence of unconvicted crimes that it intended to introduce, and for disclosure of evidence relating to victim impact; in submitting Instructions 7 and 9 to the jury, admitting evidence of non-statutory aggravating circumstances, including victim impact evidence, and accepting the jury's verdicts, because those actions denied Brian due process, a fundamentally fair jury trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that these Instructions improperly place the burden of proof on the defense; fail to require the State to prove an eligibility step beyond a reasonable doubt; are contrary to §565.030 RSMo by requiring that the jury unanimously find that mitigators outweigh aggravators to impose life; allow the jury to consider constitutionally-impermissible evidence in aggravation of punishment, and insulate the jury's decision from appellate review by not requiring that it make written findings on the second step. The jury likely considered the evidence adduced under those Instructions, giving it an unknown quantum of weight, in reaching its penalty phase decisions.

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

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

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

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

Mo.Const.,Art.I,§§10,17,18(a),21.

VII. Statutory Aggravators Are Duplicative

The trial court erred in submitting Instructions 6 and 8, accepting the jury's verdicts and sentencing Brian to death because those actions denied Brian due process, a fundamentally fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, as to Count I, Instruction 6 submitted, as statutory aggravators, both that the Benjamin Bonnie murder was committed during the commission of another unlawful homicide and that the murder was depraved because it was part of a plan to kill more than one person, and, as to Count II, Instruction 8 submitted, as statutory aggravators, both that the Sarah Bonnie murder was committed during a rape and that the murder was depraved because, during or immediately after the murder, Brian had sexual intercourse with Sarah. As to both Counts, two aggravators duplicated each other and, letting the jury consider and double-count them rendered their death verdicts unreliable. Alternatively, as to Count I, insufficient evidence supported submitting the "plan to kill more than one person" aggravator and, as to Count II, insufficient evidence supported submitting the "rape" aggravator.

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

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

Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991);

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

Mo.Const.,Art.I,§§10,18(a),21.

ARGUMENTS

I. Brian's Sentences Are Disproportionate

The trial court erred in accepting the jury's death verdicts and in sentencing Brian to death, and this Court, in the exercise of its independent proportionality review, under §565.035 RSMo, should reduce Brian's sentences to life imprisonment with no opportunity for probation or parole, because Missouri's death penalty scheme, both facially and as applied, denies due process, fundamental fairness and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that Brian has consistently acknowledged his culpability for the offenses and has consistently expressed his heartfelt remorse for his actions; the evidence was insufficient to support one of the statutory aggravators submitted and found on Count II and the State submitted and the jury found duplicative statutory aggravators on both Counts; the jury was misinstructed and allowed to reach its sentencing decision by combining its consideration of both Counts and was misinstructed as to the burden of proof; the evidence and argument, including the State's photographic exhibits and the State's closing arguments, reveal that Brian's sentences were imposed because of passion, prejudice and other arbitrary factors; and, a review of cases in which the defendant has been highly intoxicated while killing two people reveals that a life sentence has been deemed appropriate and that the death sentences in this case are excessive and disproportionate. Should this Court fail to

consider all similar cases, including those in which the defendant has been sentenced to life without parole, due process and the Eighth Amendment will be violated, rendering the imposition of the death penalty arbitrary and capricious.

This Court must "compare each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure that a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978).

The defense did not and does not dispute that the families of Ben and Sarah Bonnie have sustained an enormous loss. (T553-54,560-62,799,807,813). But that loss is a consequence of any murder and provides no principled way to distinguish a case for which the death penalty is appropriate from the host of cases for which it is not. Distinct from many murder cases, however, in this case, family members of the victims, who also happen to be family members of Brian, asked Judge Hamilton to spare Brian's life.

Linda Stone, the oldest living member of the John and Neva Armstrong family, which includes the Mosier and Dorsey families, wrote to Judge Hamilton before sentencing. She told him, "Our entire family was at Mike and Diana's, Sarah's mom and dad, this Fourth of July. This includes Patty and Larry, Brian's mom and dad. And of course they would be—Mike and Patty and brother and sister. We all cried, but we had as good a day as we could with three people

missing; Sarah, Ben ***and*** Brian." (LF205)(emphasis in original). Ms. Stone stated she truly believed "that we are letting Sarah down if Brian is put to death. She never gave up on Brian, trying to help him get off drugs and turn his life around, as hers had. I remember Sarah's mother, Diana, telling her to just leave Brian alone, but Sarah said, 'He needs somebody and I'm not giving up on him.' Sarah was that way, because that's the way our family is." (LF205).

Jenni Smith, Sarah and Brian's cousin, told Judge Hamilton, "The Brian I know couldn't hurt Sarah. The Brian I know would have taken a bullet for Sarah before he allowed her to be hurt. **Brian in his *right mind* never could have done it.** Not to Sarah. Not to anyone." (LF210)(emphasis in original). Ms. Smith stated,

> What he did was not right. It is not okay. I am angry and heartbroken and I am unable to forgive him for being weaker than the monster [crack cocaine] and continuing to feed it. But one more body isn't going to fix this. One more body will not bring our Sarah or Ben back. One more body will not make this right and it sure won't make it fair. It's just going to make it worse. Two mothers have lost a child. Taking a third mother's child can't ever make restitution for that aching deficit.

(LF211). She acknowledged,

> This tragedy is the worst thing I and my family have ever known. Crack cocaine and addiction are the worst things that can ever touch a life. But Brian is not the worst of the worst as the death penalty is truly reserved

> for. It seems cruel and unusual to sentence to death a man who turned himself in and accepted responsibility by admitting his guilt: a man with no prior history of violence or intent.

(LF212). This Court should take the step that Judge Hamilton did not and order that Brian be re-sentenced to life with no opportunity for probation or parole.

In asking Judge Hamilton to spare Brian's life, Jenni Smith stated that, while she understood "the import and weight of a jury decision, [] I feel that the twelve people who deliberated this case were not given all the facts."(LF211). Brian's jurors also were exposed to passion, prejudice and a host of arbitrary factors that led to their death verdicts. §565.035.3(1) RSMo.

As argued in more detail in Point II, *infra*, Instruction 10 told the jury that, in deciding the penalty on each separate Count, they could combine their deliberations and consider both Counts together. (LF181). The Instruction thus allowed the jury to consider, for example, in determining Brian's punishment for the murder of Ben, information that was particular to Sarah, like the impact of her death on her family. It created the likelihood that the jury would not render separate, independent verdicts.

Instruction 10 was contrary to the Missouri Approved Instructions, which contain the prefatory language "As to Count __," and which thus presume that each Count will be decided separately and each verdict will be independent. *See MAI-Cr3d 304.12, 314.40, 314.44*. It violated Due Process and the Eighth Amendment since, when a defendant is convicted of a capital crime, "the penalty

for each individual count must be assessed separately," *State v. Cooey*, 544 N.E.2d 895, 916 (Ohio 1989). It violated the basic tenets upon which death penalty jurisprudence is founded—that a defendant be sentenced based on the jury's determination that a certain penalty is appropriate in that particular case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This arbitrary factor impacted the jury's verdicts. Brian's death sentences cannot stand.

As this Court noted in *State v. Whitfield*, 107 S.W.3d 253, 259 (Mo.banc 2003), even if a jury finds a statutory aggravator as to a particular Count, a death sentence is not the only sentence that it may then impose. The jury "is never required to impose the death penalty, no matter how egregious the crime." *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc 2002). Since statutory aggravators, along with non-statutory aggravating evidence, are weighed against mitigating evidence, the jury's consideration of an additional, improperly-submitted aggravator makes a difference. It places a thumb on death's side of the scale, skewing the jury's verdict toward death. *Stringer v. Black*, 503 U.S. 222, 232 (1992).

As argued in more detail in Point III, *infra*, by submitting to Brian's jury in Count II that the murder was committed "while the defendant was engaged in the perpetration of rape," (LF178), the jury's verdicts were again skewed toward

death.[4] Although the evidence adduced at trial may have been sufficient for a jury to conclude that Brian had sexual intercourse with Sarah's body at some point that night, no evidence was adduced from which the jury could legitimately find that it was "by the use of forcible compulsion." Thus, there was insufficient evidence to establish the commission of a rape.

As Mr. Sterner told the jury in opening, "Exactly when … he had his way with her body, whether it be living or dead, **we do not know**."(T520)(emphasis added). Distinct from *State v. McLaughlin*, 265 S.W.3d 257 (Mo.banc 2008), there was no evidence that "the forcible compulsion that leads to the rape [began] before the death of the victim." *Id.* at 268. Thus, the on-going criminal assault rule relied on in *McLaughlin* does not apply. There was no evidence that any action in furtherance of a sexual assault occurred before Sarah was killed. The State adduced no evidence to support submission of that statutory aggravator. Since the jury considered a statutory aggravator unsupported by the evidence, its verdicts were rendered arbitrary and capricious. Brian's death sentences cannot stand.

Instruction 6 submitted as statutory aggravators both that the murder of Benjamin Bonnie was committed during the commission of another homicide and

[4] Had the jury not been misinstructed in Instruction 10 to consider the evidence in both cases together while deciding the punishment on each, this error might not have rendered the verdict in Count I constitutionally-problematic.

that it involved depravity of mind because it was part of the plan to kill more than one person.(LF176). Instruction 8 submitted as statutory aggravators both that the murder of Sarah Bonnie was committed during the commission of a rape and that it involved depravity of mind because, while killing Sarah or immediately thereafter, Brian had sexual intercourse with her.(LF178). As argued in Point VII, *infra*, as to both Counts, the State thus submitted two statutory aggravators that went to the same conduct. This allowed the jury to double-count that conduct as it weighed aggravators against mitigators and decided which sentence to impose.

A capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). By submitting two aggravators that double-count the same aspect of Brian's conduct as to each Count, the Court did not adequately narrow the class of those who are death-eligible. This duplication unduly enhanced the qualitative value of that conduct in the jury's decision, especially on Step Two, as to whether aggravators outweighed mitigators. This duplication rendered Brian's death sentences constitutionally-infirm. *See Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991); *Willie v. State*, 585 So.2d 660 (Miss. 1991).

As argued in Point V, *infra*, the photographs the State chose to place before the jury and that the Court sent back to the jury during their deliberations also rendered Brian's death sentences constitutionally-infirm. Mr. Sterner implicitly acknowledged his rationale in exposing the jury to them when, pre-trial, he told

Judge Hamilton, "Well, State's Exhibit 20 is a photo that most clearly shows this perspective of the body and the gore. Part of this issue is how wanton and vile this crime was. The gore about this body, in particular, is best shown in this photograph."(T502).

The so-called limiting construction for the depravity of mind aggravator might make a finding of "gore" relevant if the State chose to allege that the killing was depraved because the defendant "purposely mutilated or grossly disfigured the body," or "committed repeated and excessive acts of physical abuse" such that the gore would demonstrate the existence of those limiting constructions. *See MAI-CR3d 314.40, Notes on Use 8*. Here, however, the State alleged that the murders involved depravity because the first involved more than one murder and for the second, the murder occurred during or immediately before sexual intercourse. For neither construction is "gore" relevant.

Rules of evidence apply in penalty phase. Indeed, §565.030.4 RSMo specifically provides that evidence "may be presented subject to the rules of evidence at criminal trials." If evidence is not logically and legally relevant, it must be excluded.

Evidence is logically relevant if it tends to make a material fact's existence more or less probable. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc 2002); *State v. Smith*, 32 S.W.3d 532, 546 (Mo.banc 2000). Even if logically relevant, for evidence to be admissible, it must also be legally relevant. Legal relevance weighs probative value against costs—unfair prejudice, confusion of the issues,

misleading the jury, undue delay, wasted time and cumulativeness. *Anderson*, 76 S.W.3d at 276; *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992)(Thomas, J., concurring).

If photographs of a victim's body are used solely to arouse the jury's emotions and prejudice the defendant, *State v. Wood*, 596 S.W.2d 394 (Mo.banc 1980), or their needlessly-inflammatory nature outweighs their probative value, they should be excluded. *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959). "The fundamental rationale barring the introduction of gruesome photographs is that their impact on the jury is such that it will become so incensed and inflamed at the horrible conditions depicted that it will not be able to objectively decide the issue of the defendant's guilt." *State v. Clawson*, 270 S.E.2d 659, 674 (W.Va. 1980). Mr. Sterner's remarks to Judge Hamilton revealed his purpose—to prejudice Brian and arouse the jury's emotions. It worked. Brian's death sentences were the resulting prejudice.

As argued in Point IV, *infra*, Mr. Ahsens' argument, in which he misstated the law, injected external sources of law, personalized, and injected emotion, also impacted the jury's punishment decisions and rendered Brian's death sentences constitutionally-infirm. Despite Mr. Ahsens' obligation, as a prosecutor, to do justice, not just try to win the case, *Berger v.United States*, 295 U.S. 78, 88 (1935); *Rule 4.3.8*, he violated that obligation at every turn and preyed on the jury's tendency to believe him, precisely because he is a representative of the State and an officer of the court. *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc 1995).

Despite that the Legislature has eliminated the "warrant" requirement, Mr. Ahsens told the jury that the warrant step still applied (T344-45); contrary to the statute, he told them that, for them to render a life without parole verdict, they must be unanimous (T445) and he told them that, if they found a statutory aggravator on one Count, that satisfied step one for both Counts (T998-99).

Ahsens told them that doing nothing and thus allowing evil to flourish in this case would result if they did not sentence Brian to death. (T1026, 1029). While many courts have permitted a prosecutor to refer to Edmund Burke in closing, if, through that reference, the prosecutor ties "doing nothing" to returning a death verdict, it is clearly improper. Exhorting jurors that it is their duty to sentence a defendant to death encourages them to ignore the facts and the law and decide the case based on emotion. *United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999); *Deyerle v. State*, 2009 WL1491039 (Nev. 2009); *Comm. v. Garcia*, 912 N.E.2d 511, 513-14 (Mass.App. 2009); *Wilson v. State*, 777 So.2d 856 (Ala.Crim.App.1999); *Lafond v. State*, 89 P.3d 324, 332 (Wyo. 2004).

Finally, Ahsens told the jury that mercy is only "something that is granted to the weak and the innocent by the strong."(T1029). That argument effectively told the jury that it could not consider mercy. Jurors may vote for life for any reason or none at all. *Deck*, 68 S.W.3d at 430; §565.030.4(4) RSMo. Mercy is one such reason. Because Ahsens was cloaked in the mantle of the State—and jurors were likely to believe him because of that association—his argument, which bore the force and authority of his office, carried weight where it should have had none

at all. *Storey*, 901 S.W.2d at 901. Ahsens' closing argument prejudiced Brian, resulting in his death sentences.

Sentencing someone to death is cruel and unusual punishment if that punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*, 408 U.S. 238 (1972). Post-*Furman*, Georgia sought to comply with *Furman's* directives, enacting a new death penalty statute. *Walker v. Georgia*, 555 U.S. ___ , 2008 WL 2847268 (2008) at 1. That statute included the requirement of proportionality review. *Id.* This procedural safeguard was enacted to avoid arbitrariness and assure proportionate sentencing. *Id., citing Gregg v. Georgia*, 428 U.S. 153 (1976); *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

Georgia's Supreme Court stated that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Walker*, at 1, quoting the Georgia Supreme Court's answer to the certified question in *Zant*, 462 U.S. at 880, n.19. But, in *Walker*, that Court conducted an "utterly perfunctory review." *Walker*, at 2. Its review consisted of a single sentence, stating it "considered whether imposition of the death penalty in this case was proportionate as compared to sentences imposed in similar offenses." *Id.* That Court referred to cases contained in the Appendix as support for its conclusion that Walker's punishment was not "disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value." *Id., quoting, Walker v. State*, 653 S.E.2d 439, 447-48 (Ga. 2007). The Court alluded to the Appendix, which

contained 21 cases in which juries had imposed death, but the Court never addressed those cases' facts or aggravators pled or found. *Walker* at 2.

Justice Stevens, who wrote to express his dissent from the denial of certiorari in *Walker* was concerned because many cases involved offenses like Walker's but those juries had imposed life. *Id*. at 3. And, in other, similar cases, the State didn't seek death. *Id.* Justice Stevens stated that similar cases, including where juries imposed life, are "relevant to the question of whether a death sentence is proportionate to the offense." *Id.*

Georgia's proportionality review, which is now limited to other cases in which death was imposed, began to change around 1984 and the Court's decision in *Pulley v. Harris*, 465 U.S. 37 (1984). The *Pulley* Court held that the "Eighth Amendment does not require comparative proportionality review of every capital case." *Walker*, at 3, *citing Pulley*. Justice Stevens noted that *Pulley* should not be read to undermine the proposition that proportionality review is an important part of the Georgia scheme. *Walker*. Justice Stevens concluded that the likely result of the *Walker* Court's limited review was the "arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment." *Id*. at 4.

Justice Stevens noted that the Georgia Supreme Court's review is also flawed because it fails to comply with the statutory directive to maintain detailed trial judge reports in murder cases. *Id.* at 4. "When a defendant's life is at stake, th[is] Court has been particularly sensitive to insure that every safeguard is observed." *Id., quoting Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell

and Stevens, JJ.). Justice Stevens warned that, "The Georgia Supreme Court owes its capital litigants the same duty of care and must take seriously its obligation to safeguard against the imposition of death sentences that are arbitrary…." *Walker*, at 4.

Missouri's death penalty statute mandating proportionality review, §565.035, is nearly identical to Georgia's. It requires that this Court consider "similar cases, considering both the crime, the strength of the evidence, and the defendant." §565.035.3(3). And, like Georgia's, Missouri's statute requires that this Court "accumulate records of **all cases** in which the sentence of death **or life imprisonment without probation or parole** was imposed…." §565.035.3(6) RSMo (emphasis added).

Like the Georgia Supreme Court, this Court does not review all similar cases, as our statute requires. This Court routinely affirms death sentences by comparing only cases in which death was imposed, using "aggravating circumstances as the sole criteria for comparing one death penalty case to another." *State v. Davis*, 814 S.W.2d 593, 607 (Mo.banc 1991)(Blackmar, J., concurring in part and dissenting in part). This Court has refused to compare cases "in which the state chose not to charge a defendant with capital murder, the state agreed to a plea bargain whereby a defendant pled guilty to a lesser charge, the conviction was for an offense less than capital murder, or the state waived the death penalty." *State v. Bolder*, 635 S.W.2d 673, 685 (Mo.banc 1982); *see also, State v. Black*, 50 S.W.3d 778, 793-96 (Mo.banc 2001)(Wolff, J., dissenting)

("This Court has eschewed the statutory invitation to treat like cases alike by refusing to consider similar cases (or even the same case) where lesser sentences are given to other defendants," *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424 (2001)).

This Court's review also denies due process. When a state statute includes "language of an unmistakable mandatory character," the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 428 (1986)(O'Connor, J., concurring and dissenting). Under the Due Process Clause, a state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

Since Missouri provides a statutory right of proportionality review and has thus created a protected liberty interest, in implementing that review, the State and this Court must ensure it meets due process. This Court does not maintain trial judge records of all similar cases, as the statute requires.[5] In May, 1994, this Court did not have 189 life cases, as §565.035.6 RSMo required.

[5] Brian requests that this Court take judicial notice of Professor Galliher's report, submitted in *State v. Parker*, SC74794, reported at 886 S.W.2d 908 (Mo.banc 1994). *See, In re Estate of Danforth*, 705 S.W.2d 609, 610 (Mo.App.,S.D. 1986)(providing for judicial notice of the record resulting in an opinion to determine grounds on which opinion is based).

If this Court engages in the proportionality review the Legislature has required, §565.035.3(3) RSMo, and considers whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases," it will find Brian's sentences both disproportionate and excessive. The opinion in *State v. Little*, 861 S.W.2d 729 (Mo.App.,E.D. 1993), can inform this Court's decision. In *Little*, the defendant was convicted of three counts of first degree murder, one count of second degree murder, two counts of forcible rape and two counts of first degree robbery. The State sought the death penalty on each murder charge. The jury rendered life verdicts. *Id.* at 731. One of the victims was a nun. *Id.* at 732. The defendant's prior unrelated robbery and rape convictions were placed before the jury, as were uncharged sexual assaults. *Id.* The Court stated that "The sentence, not the usual issue of guilt or innocence, was the real contest in this case." *Id.* at 733.

Other cases that this Court should consider include that of Levi King. Mr. King pled guilty in Pulaski County, on change of venue from McDonald County, Missouri, to two sentences of life without probation or parole in Case No.07PU-CR00040-01. In Greene County, Missouri, Richard DeLong strangled a mother, who was carrying her full-term unborn child, and her other three children, but he received sentences of life without probation or parole. His jury heard of his addiction to drugs as evidence in mitigation of punishment. In Boone County, Missouri, Eric Beishline was convicted of one murder but the State introduced evidence of three other murder victims as it sought the death penalty. The jury

heard evidence of Beishline's cocaine psychosis as it returned a life without probation or parole verdict. *State v. Beishline*, 926 S.W.2d 501, 505 (Mo.App.,W.D. 1996).

Brian's sentences are clearly disproportionate when viewed in light of these cases. Brian's three prior bad acts involved no violence. Two were for drug possession. A third involved a relatively minor car accident. (Exh.69-71).

Brian is a crack cocaine addict who, at the time of the offense, was highly intoxicated and seeking the drug. He suffers from Major Depressive Disorder and has attempted suicide on several occasions. He has accepted responsibility for his actions in this case and he has consistently expressed his heartfelt remorse. (Defense Exh.A). As family, teachers, coaches, and friends recognize, when Brian is not doing drugs or alcohol, he is "a ball player … a friend. This is somebody who you wanted to see succeed."(T932).

As noted, this Court has routinely failed to consider, in undertaking its proportionality review, any cases other than those in which death has been imposed. *State v. Gray*, 887 S.W.2d 369, 389 (Mo.banc 1994). Its review is thus fatally flawed. Brian requests that this Court reconsider Missouri decisions, including *Gray; State v. Edwards*, 116 S.W.3d 511, 548 (Mo.banc 2003) and *State v. Clay*, 975 S.W.2d 121, 146 (Mo.banc 1998), especially in light of Justice Stevens' statements in *Walker v. Georgia, supra*.

These factors, individually and cumulatively, require that this Court vacate Brian's sentences and that it order that he be re-sentenced to life imprisonment

without probation or parole.

II. Instruction 10 Combines Both Counts for Final Step

The trial court plainly erred in submitting Instruction 10 to the jury and then accepting the jury's death verdicts on both counts because these actions denied Brian's rights to due process, a properly-instructed jury, a fundamentally fair trial, and freedom from cruel and unusual punishment, U.S.Const., Amends.VI,VIII,XIV; Mo.Const.,Art.I, §§10, 18(a), 21, in that Instruction 10, patterned after MAI-CR3d 314.46, told the jury that "As to Count I and Count II," while they were not compelled to fix death as the punishment, they were to consider "all the evidence in deciding whether to assess and declare the punishment at death." The instruction told the jury to consider the evidence as to *both* counts in deciding the punishment on each and thus allowed the jury to sentence Brian to death on each count based on evidence applicable to the other count. This destroyed the channeled discretion guaranteed by Missouri's death penalty statute and instructions.

Because of the qualitative difference between death and all other forms of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983). It is vitally important, both to the defendant and 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). Because of the severity of sentence, careful scrutiny of "any colorable claim of error" is required. *Stephens*, 462 U.S. at 885.

Missouri's Legislature promulgated its current death penalty statutes to ensure that sentences are not arbitrarily or capriciously imposed but are based on reason. See *Bullington v. Missouri*, 451 U.S. 430, 432-33 (1981); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The statutes contain substantive standards that guide the sentencer's discretion. *Id.* This Court's jury instructions pass those standards along to each jury, as they undertake the awesome task of deciding the appropriate punishment for capital defendants. In this case, Instruction 10, which did not comport with the MAI, rendered the process arbitrary and capricious. The jury's resulting death verdicts cannot stand.

Standard of Review

Rule 28.02(c) provides that, "Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form." Rule 28.02(f) further provides that, "The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03." Reversible error occurs when there was error in submitting the instruction and the defendant was prejudiced thereby. *State v. Taylor*, 134 S.W.3d 21, 25 (Mo.banc 2004). The prejudicial effect of the error is to be determined by

considering the facts and the instructions together. *State v. Dismang*, 151 S.W.3d 155, 164 (Mo.App., W.D. 2004). The burden is on the instruction's proponent to show that no prejudice resulted. *Snyder v. Chicago R.I. & P.R. Co.*, 521 S.W.2d 161, 164 (Mo.App., W.D. 1973).

Here, counsel did not object to the giving of Instruction 10. Plain error review is requested since a manifest injustice or a miscarriage of justice will occur if this instructional error is allowed to go un-corrected. *Rule 30.20.* For instructional error to rise to the level of plain error, "the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict." *State v. Deck*, 994 S.W.2d 527, 540 (Mo.banc 1999). By telling the jury to make its findings on the final step of the process for both counts in one instruction, the trial court so misdirected the jury that it should be apparent to this Court that the error affected the jury's verdicts. *State v. Haynes*, 158 SW.3d 918, 919 (Mo.App.,W.D. 2005); *State v. Parkus*, 753 S.W.2d 881, 888 (Mo.banc 1988). The incorrect instruction told the jury that its verdicts on both Counts need not be separate and independent, as the law requires.

The Instructions

The State submitted and the trial court gave, for each of Counts I (Benjamin Bonnie homicide) and II (Sarah Bonnie homicide), an instruction based on MAI-CR3d 314.40. (LF176,178-79). These instructions, Instructions 6 and 8, set forth the "statutory aggravators" of the first eligibility step. The defense submitted and the trial court gave, for each of Counts I and II, an instruction based on MAI-

CR3d 314.44, the "weighing" step. (LF177,180). The State then submitted and the trial court gave Instruction 10. It stated,

> As to Count I and Count II, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to asses and declare the punishment at death. Whether that is to be your final decision rests with you.

(LF181). The State then submitted and the trial court gave Instructions 11[6] and 12, again one for each of the two counts. (LF182-84). The jury's verdict forms reflect only their findings as to statutory aggravators.(LF190-91).

The MAI's

The Approved Instructions assume that each count of an indictment or information will be submitted separately—so that the jury can make its determination of guilt and punishment independently as to each such offense. MAI-CR3d 304.12, for example, instructs "The defendant is charged with a separate offense in each of the [] counts submitted to you. Each count must be

[6] The legal file contains only the first page of Instruction 11 and both pages of Instruction 12. (LF182-84). The instructions are identical, except as to the references to the separate counts. The complete Instruction 11 appears in the Supplemental Legal File.

considered separately. You should return a separate verdict for each count and you can return only one verdict for each count." The Approved Instructions under the 314 Series continue under that assumption, with the "under Count ___" language prefacing each such instruction. *See MAI-CR3d 314.40 and 314.44.*

MAI-CR3d 314.46, upon which Instruction 10 was modeled, also contains that language. It states,

> (As to Count __, you) (You) are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

MAI-CR3d 314.46. The inclusion of the prefatory language "under Count___" makes clear that, as to all of these instructions, the jury is to make its decision separately as to each count.

The Law

Not surprisingly, the instances of reported cases in which finders of fact have commingled their findings between and among various counts are rare. In *State v. Cooey*, 544 N.E.2d 895 (Ohio 1989)[7], the Ohio Supreme Court addressed

[7] *Cooey* has been overruled on other grounds. *See State v. Smith*, 684 N.E.2d 668, 684 (Ohio 1997).

the issue. There, the defendant had been charged with four counts of murder, each of which carried three distinct statutory aggravators. A three judge panel at the trial level combined all 12 aggravators and weighed them collectively against the mitigators in deciding whether death should be imposed. *Id.* at 916-17. The Court held that the lower court's action, combining aggravators pertinent to several different counts, denied Cooey "that 'consideration of … the circumstances of the *particular* offense …' that is 'a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Id.* at 916, citing *Woodson*, 428 U.S. at 304. The Court concluded that "when a capital defendant is convicted of more than one count of aggravated murder, the penalty for each individual count must be assessed separately." *Cooey*, 544 N.E.2d at 916-17. The Court confirmed that position in *State v. Palmer*, 687 N.E.2d 685 (Ohio 1997)[8]. The Fourth Circuit reached a similar result in *United States v. Barnette*, 390 F.3d 775, 810 (4th Cir. 2004).[9]

In this case, Instruction 10 accomplished what the *Woodson* and *Cooey* Courts condemned—it allowed the jury to consider together, in its final and most

[8] In *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2004), the petitioner challenged the joinder. The Court found that the prejudice engendered by the joinder was minimized by instructions that directed the jury to consider each count separately. *Id.* at 639. Here, by contrast, Instruction 10 instructed that the counts be considered together.

[9] *Barnette* has been overruled on other grounds.

challenging step, the evidence from separate counts in determining the ultimate punishment as to each such Count.

Given the nature of the evidence presented and the manner in which the jury had otherwise been instructed, this Instruction was particularly damning. For instance, it allowed the jury, in deciding whether to impose death on Brian for Sarah's murder, to consider the impact of Ben's murder on Ben's family—his brother, his mother, and his father. Similarly, it allowed them to consider the impact of Sarah's murder on Sarah's family—her sisters and her parents—in deciding whether to sentence Brian to death for Ben's murder. It further allowed them to consider, in deciding whether to sentence Brian to death for Ben's murder, that there had been a sexual assault on Sarah—something submitted as an aggravator as to Sarah but not as to Ben.

Instruction 10 is also particularly damning in light of the jury's note sent out at 5:50 p.m.. They asked, "Can we do a secret ballet [sic] vote between us to determine the proper penalty Before working through final Instructions?"(LF188). Given that the trial court merely told them to be guided by the instructions, (LF189), it is impossible to state with certainty where the jury was having problems at that point. But, given that Instruction 10 did not comport with the MAI's and allowed the jury to sentence Brian on each count based on evidence only applicable to the other count, that it had a question and wanted to vote before going through all of the instructions, should have sent up a warning flare.

Instruction 10 did not conform to MAI-CR3d 314.46. Its submission, telling the jury that its verdicts need not be separate and independent, as both the Instructions and the law require, violated Brian's state and federal constitutional rights to due process, a properly-selected jury, a fundamentally fair trial and freedom from cruel and unusual punishment. Its submission created constitutional error that cannot be ignored. This Court must reverse and remand for a new penalty phase trial.

III. Rape Statutory Aggravator Lacks Evidentiary Support

The trial court plainly erred in submitting Instruction 8, accepting the jury's death verdict on Count II, and sentencing Brian to death on that Count because those actions denied Brian due process, a properly-instructed jury, a fundamentally fair trial, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that the State presented no evidence that any sexual assault of Sarah Bonnie occurred before her death, and the State conceded that no such evidence existed. Since there was no evidence that any action in furtherance of a sexual assault occurred before her death, the State failed to prove beyond a reasonable doubt that the sexual assault occurred "by the use of forcible compulsion." The statutory aggravator that the murder was committed "while the defendant was engaged in the perpetration of rape" was thus invalid and its consideration by the jury improperly skewed the balance toward death.

As he described the evidence that would be adduced, Mr. Sterner told the jury in his opening statement, "Who died first, we don't know. Who the defendant shot first, we don't know. Exactly when in the course of the night's horror he had his way with her body, whether it be living or dead, we do not know."(T520). The evidence backed up Sterner's comments. While sperm cells for which Brian could not be eliminated as the source were found in Sarah's body,(T845-49), the State produced no evidence showing when sexual contact occurred. And, tellingly, the

State did not argue in closing that any action related to the purported sexual contact occurred before Sarah's death.

Since there was no evidence that any sexual contact occurred before Sarah's death, the State could not prove beyond a reasonable doubt that Brian had sexual intercourse with Sarah without her consent by the use of forcible compulsion. The statutory aggravator that Brian killed Sarah while "engaged in the perpetration of rape," which was submitted in Instruction 8, was thus invalid since it was based on no evidence. Submitting Instruction 8, accepting the jury's death verdict on Count II, and sentencing Brian to death on that Count violated Brian's state and federal constitutional rights to due process, a properly-instructed jury, a fundamentally fair trial, reliable sentencing and freedom from cruel and unusual punishment.

Standard of Review

Appellate review of sufficiency of the evidence "is limited to a determination of whether the state presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty. *State v. Niederstadt*, 66 S.W.3d 12, 13-14 (Mo.banc 2002). Evidence and inferences are viewed "in the light most favorable to the verdict, ignoring all contrary evidence and inferences." *Id.* at 14.

Since no objection to Instruction 8 was raised on this basis at trial, plain error review is requested. *Rule 30.20*. Plain error review is appropriate for instructional error if a manifest injustice or a miscarriage of justice has resulted.

Plain error review is warranted here since, by instructing the jury to consider a statutory aggravator that was supported by no evidence, the trial court so misdirected the jury that it should be apparent to this Court that the error affected the jury's verdict. *State v. Deck,* 994 S.W.2d 527, 540 (Mo.banc 1999); *State v. Haynes,* 158 SW.3d 918, 919 (Mo.App.,W.D. 2005); *State v. Parkus,* 753 S.W.2d 881, 888 (Mo.banc 1988).

The Charge and the Instruction

The State filed its Notice of Intent to Seek the Death Penalty, alleging four statutory aggravators, three of which, it asserted, applied to Ben Bonnie, and all of which, it asserted, applied to Sarah Bonnie.(LF33-34). Specifically to Sarah, the State alleged that "The murders [sic] in the first degree of Sarah Bonnie was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate a felony of any degree of rape [Section 565.032.2(11)]."(LF34). Instruction 8, which set forth the statutory aggravators that the State alleged applied, asked that the jury decide

> 4. Whether the murder of Sarah Bonnie was committed while the defendant was engaged in the perpetration of rape.
>
> A person commits the crime of forcible rape if the person has sexual intercourse with another person by the use of forcible compulsion.
>
> Forcible compulsion means either (a) physical force that overcomes reasonable resistance; or (b) a threat, expressed or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of

himself or herself or another person. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent and renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.

(LF178).[10] The Notice and Instruction conformed to the applicable statute, §566.030.1, and the Approved Instructions. MAI-CR3d 314.40.

The Evidence

As the State's evidence showed, much of the Bonnies' house was in substantial disarray, under the State's theory, because Brian had searched for items that he could sell for drugs.(Exhs.11,12). Many of the State's witnesses confirmed that, on the day after the murders, Brian had attempted to sell things identified as having belonged to Sarah and Ben, and that they had not given him permission to take.(T550-51,558-60,567,587-89,601,603-09,617-19). The State's evidence showed Ben apparently kneeling beside the bed, with his torso over the bed and Sarah, lying face up on the bed. (Exhs.14-16,21-22). Bleach had been poured over Sarah's midsection and it had run down her leg.(T672-76,679,686;Exh.21-22,32). From a sexual assault kit, intact sperm cells were found on both vaginal swabs.(T841). Both Ben Bonnie and Darin Carel were eliminated as possible

[10] Since the form of the Instruction is not challenged, it is not set forth in its entirety.

sources of the cells.(T845-46). Brian, however, could not be eliminated as a possible source of the cells.(T847).

Under a sufficiency of the evidence standard, while the evidence may have been sufficient for a jury to conclude that Brian had sexual intercourse with Sarah's body, *Niederstadt* 66 S.W.3d at 14, it was not sufficient to establish that he had sexual intercourse with her "by the use of forcible compulsion." Lacking that critical element, the evidence was insufficient to submit the rape statutory aggravator, let alone allow a death sentence to rest upon that finding.

No Forcible Compulsion Means No Rape Occurred

Forcible compulsion "implies the use of physical force to lead a person to act against his will." *State v. Sandles*, 740 S.W.2d 169, 174 (Mo.banc 1987). The force doesn't of necessity come after the victim has physically resisted, *State v. Vandevere*, 175 S.W.3d 107, 108 (Mo.banc 2005). But, the "force used must be calculated to overcome the victim's resistance." *Id.* For "forcible compulsion" and "reasonable resistance" to come into play, the sexual assault victim must, for any step of the offense, be alive and thus capable of having his or her will overborne. Since there is no evidence, as Mr. Sterner acknowledged, that Sarah was alive for the sexual assault, the State's evidence fails on that essential element of the offense.

***State v. McLaughlin** Is Distinguishable*

This Court recently held that "it is rape where defendant both kills and sexually assaults a victim in a single, continuous act, or in a series of closely

related acts, and where, as a part of the course of conduct, defendant uses forcible compulsion against the victim, even if portions of the rape, including penetration, occur once the victim already has been killed." *State v. McLaughlin*, 265 S.W.3d 257, 270 (Mo.banc 2008). This Court rejected the so-called minority rule that a rape victim must be alive at the moment of penetration because "where the perpetrator uses force to gain control over the victim, defendant has used force to accomplish the rape just as much as if the force occurred later in the sexual contact." *Id.* This Court's conclusion was based on the "ongoing criminal assault" rule, under which, if the "forcible compulsion that leads to the rape begins before the death of the victim, the defendant is guilty of rape even if the jury believes defendant killed the victim before penetration or before the sexual assault was concluded." *Id.* at 268.

In *McLaughlin*, the evidence showed that, after a historically tempestuous relationship that lasted for several years, on October 27, 2003, McLaughlin was arrested and charged with burglarizing Ms. Guenther's home. *Id*. at 260. He was arraigned on the charge and, because of that incident, Ms. Guenther obtained an order of protection against him. *Id.* Within the month, McLaughlin went to Ms. Guenter's job-site and waited for her to get off work. *Id.* As she left the building and walked toward her truck that day, he spoke to her. *Id.* Expert evidence suggested that McLaughlin forced her to the ground, raped her, stabbed her repeatedly and dragged her body to his car. *Id.*

McLaughlin was charged with first degree murder and forcible rape and moved for a judgment of acquittal on the rape charge because there was no evidence that he had had sex with Ms. Guenther while she was alive. *Id.* In rejecting McLaughlin's argument, this Court looked to the reasoning of other courts that have addressed the issue.

In *State v. Brobeck*, 751 S.W.2d 828, 832 (Tenn. 1988), which this Court cited with approval, the defendant was convicted of felony murder and aggravated rape. The evidence indicated that the defendant and the victim had struggled as he attempted to rape her and that penetration occurred immediately after he killed her with a shot to the head. *Id.* at 830-31. The Tennessee Supreme Court rejected the intermediate appellate court's opinion that rape could only exist if penetration occurred before death. *Id.* at 831.

In *Lipham v. State*, 364 S.E.2d 840 (Ga. 1988), the defendant was convicted of murder and rape. The evidence indicated that the defendant entered and ransacked the victim's home, looking for something to steal. *Id*. at 842. The evidence further showed that the victim had a "'pressed-contact' gunshot wound on the left side of her head, the location of which suggests that the killer was at least on the bed and very possibly lying on top of the victim when he shot her." *Id.* The *Lipham* court analogized that case to when an armed robber kills his victim and thereafter takes the victim's money. Although the robbery victim is dead when the robbery is consummated, it is still armed robbery because the theft can be consummated precisely because of the earlier force. *Id.*

McLaughlin, Brobeck and *Lipham* are all based upon a fundamentally different set of circumstances than those in this case. In each of those cases, there was some proof that a substantial step toward the sexual assault (or the robbery, in the *Lipham* court's analogy) had been taken before the victim was killed. In *Lipham*, for example, the court expressly noted that the physical evidence was consistent with the defendant lying atop the victim as he shot her. By contrast, here, there is no evidence that any action in furtherance of a sexual assault occurred before Sarah was killed. Although there is evidence of sexual contact, the State adduced no evidence to support the rape aggravator.

Because no evidence was adduced to support this statutory aggravator, it was improperly submitted. Its consideration placed a thumb on death's side of the scales, skewing the process toward death. *Stringer v. Black*, 503 U.S. 222, 232 (1992).

As this Court noted in *State v. Whitfield*, 107 S.W.3d 253, 259 (Mo.banc 2003), even if a jury finds statutory aggravators, a death sentence is not the only possible sentence it might impose. Since those statutory aggravators, along with non-statutory aggravating evidence, are weighed against mitigating evidence, consideration of an additional, improperly-submitted factor makes a difference.

This Court should, therefore, vacate Brian's sentences and reverse and remand for a new trial.[11] In the alternative, this Court should re-sentence Brian to life imprisonment without probation or parole.

[11] Because Instruction 10 told the jury to consider all of the evidence on both Counts in determining the appropriate sentence on each, the error created by submitting this aggravator on Count II has also permeated Count I. *See Point II*.

IV. Ahsens' Improper Arguments Created Prejudicial Error

The trial court plainly erred in failing to declare a mistrial *sua sponte* when Mr. Ahsens argued in:

Voir Dire

That jurors must find whether death was "warranted;" must find a statutory aggravator; in the second step, they must find that mitigators outweighed aggravators, and their decision, whether for life or death, had to be unanimous.

Closing

That if jurors found a statutory aggravator for either Count, step one was satisfied; in step two, they must examine all of the evidence and decide if death was appropriate; evil was in the world; a "much smarter man" than Mr. Ahsens stated that evil would triumph if good men did nothing; Mr. Ahsens feared a life without parole sentence was doing nothing; Mr. Ahsens was raised to believe forgiveness is based on repentance; mercy is granted to the weak and innocent by the strong, and jurors should "do their duty" because these statements and arguments denied Brian due process, a fundamentally fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, in that Ahsens misstated the law, injected external sources of law; referred to facts outside the record; personalized, and injected emotion, all of which rendered Brian's death sentences unreliable.

This Court has condemned prosecutorial argument that renders the jury's verdicts unreliable. *State v. Storey*, 901 S.W.2d 886 (Mo.banc 1995); *State v. Rhodes*, 988 S.W.2d 521 (Mo.banc 1999). After all, an accused is entitled to a fair trial and prosecutors must do nothing to deprive him of one nor obtain a wrongful conviction. *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27 (banc 1947); *Berger v. United States*, 295 U.S. 78, 88 (1935); *Rule 4.3.8*.

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). Argument may be so outrageous as to violate due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8th Cir. 1989); *Antwine v. Delo*, 54 F.3d 1357, 1364 (8th Cir. 1995); *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999). Especially in capital cases, closing arguments must undergo a "greater degree of scrutiny." *Caldwell v. Mississippi*, 472 U.S. 30, 329 (1985); *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

Prosecutors have a special duty in criminal cases. *Berger*, *supra*. Because they speak with the authority of the State behind them, they must be careful not to overstep the bounds of proper argument since their statements are "'apt to carry much weight against the accused when they should carry none' because the jury is aware of the prosecutor's duty to serve justice, not just win the case." *Storey*, 901 S.W.2d at 901, citing *Berger*, 295 U.S. at 88; *Rule 4.3.8*. While argument may be intended as mere rhetorical flourish, what and how a prosecutor tells jurors is of

critical importance. When prosecutors misstate the law and the facts, because of their unique position in the criminal process, jurors are likely to believe them.

Standard of Review and Preservation

Trial courts have wide discretion in controlling closing argument but abuse that discretion if they allow plainly unwarranted and injurious arguments. *State v. Reyes*, 108 S.W.3d 161, 168 (Mo.App.,W.D. 2003). Defense counsel did not object to Mr. Ahsens' repeated, improper statements and arguments in both voir dire and closing. Brian therefore requests plain error review, *Rule 30.20*, since a manifest injustice or a miscarriage of justice will have occurred if these errors are left uncorrected.

Mr. Ahsens' repeated, intentional misconduct violated Brian's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment. The trial court plainly erred in failing *sua sponte* to declare a mistrial. This Court should grant relief since, if it merely notes the improper nature of Mr. Ahsens' remarks but does not take action, it will recall "'the bitter tear shed by the Walrus as he ate the oysters….'" *State v. Mills*, 748 A.2d 318, 326 (Conn.App.2000), citing *State v. Ubaldi*, 190 Conn. 559, 571, 462 A.2d 1001 (1983).

Voir Dire

Voir dire is intended to expose juror bias so that the parties can intelligently exercise their cause and peremptory challenges and thereby select a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc 1998); *Morgan v.*

Illinois, 504 U.S. 719, 729 (1992). Questions calculated to create prejudice are impermissible. *State v. Lacy*, 851 S.W.2d 623, 629 (Mo.App.,E.D. 1993). Also impermissible in voir dire are misstatements of the law since they risk misleading the jury. *State v. Jones*, 615 S.W.2d 416 (Mo.1981); *Tucker v. Kemp*, 762 F.2d 1496, 1507 (11th Cir. 1985); *State v. Storey*, 901 S.W.2d 886, 902 (Mo.banc 1995).

As he began death-qualification with each panel, Mr. Ahsens misstated the law governing penalty phase. He told the first panel, "The second thing that I must prove beyond a reasonable doubt is that all of the facts of the case, taken as a whole, warrant the death penalty … So I have to prove that the case, as a whole, warrants the death penalty." (T344). He then told them, "in the process of weighing them, you weigh all of the facts in the case, aggravating circumstances, and mitigating circumstances, and if you find unanimously, you know, those mitigating factors just aren't enough to overcome or outweigh the aggravating facts taken as a whole, then that step go is over and you now go to step three."(T345). As to the first statement, Mr. Ahsens misstated the law since the Legislature has eliminated the "warrant" step. *See §565.030.4*; *State v. Whitfield*, 107 S.W.3d 253, 258 (Mo.banc 2003).[12]

As to the second, Mr. Ahsens misstated the law and thus misled the jury by essentially telling them that the burden was on the defense to prove that mitigation

[12] Ahsens' misstatement of the law reflected the Court's, as he read the jury an outdated version of MAI-CR3d 300.03A.(T342,390,440).

outweighed aggravation at that stage of the process. Despite that this is a death-eligibility step, *Id.* at 259, Mr. Ahsens put the burden of proof beyond a reasonable doubt on the defense, not the State, as due process requires. *State v. Roberts*, 615 S.W.2d 496, 497(Mo.App.,E.D.1981); *State v. Ford*, 491 S.W.2d 540, 542-43 (Mo.1973); *In re Winship*, 397 U.S. 358 (1970). Ms. Ahsens' argument was directly contrary to *Kansas v. Marsh*, 548 U.S. 163, 178-79 (2006). There, the Court cautioned, "although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence." Mr. Ahsens misinstructed the second and third panels (T393,444) in like fashion.

Mr. Ahsens also misinstructed the third panel that their "choice, whether for death or life in prison without parole, must be unanimous, either way." (T445). Although any decision for death must be unanimous, the same is not true for a life without parole verdict. *Mills v. Maryland*, 486 U.S. 367 (1988); *Whitfield*, 107 S.W.3d at 257-61; §565.030 RSMo.

Penalty Phase

Mr. Ahsens continued his pattern of misinstructing the jury in penalty phase. Although he told them that they had to make their decision as to step one independently for the two Counts, he then told them, "And so if you find one of them [statutory aggravators] **for one or both of the counts**, then step one is

satisfied… Then you go to that step two….”(T998-99)(emphasis added). This argument told the jury that, if they found a statutory aggravator as to either Count, step one was satisfied as to both Counts—and Brian was thus death-eligible as to both Counts. This argument is flatly contrary to Missouri’s statutes and the Approved Instructions. Section 565.030 presumes that, for each count of first degree murder, a jury will be instructed separately as to the appropriate sentence to impose. The Approved Instructions contain language supporting that presumption, since they contain the prefatory language, “under Count __.” By instructing and arguing to the jury that they need not find a statutory aggravator as to each Count, the risk was created that they did not make a separate, independent death-eligibility finding on that step for each Count. Even though, in their verdicts, they ultimately listed statutory aggravators, (LF190-91), they may well have decided Brian’s punishment using a process not condoned by either the statutes or the Instructions. After all, they asked the court, “Can we do a secret ballet [sic] vote between us to determine the proper penalty before working through final instructions?”(LF188). Mr. Ahsens’ argument created the likelihood that Brian’s death sentences were arbitrarily and capriciously imposed. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

In his final closing, Mr. Ahsens told the jury that there is “good and evil in every human being” and

> these acts and the repercussions of those acts on these families is evil. And make no mistake, friends, there is evil in the world. A much smarter man

> than I am once said, "The only thing necessary for evil to triumph is for good men to do nothing." Well, what I'm afraid of is, if you do not come back with the most severe penalty, it will have the impact of having done nothing.

(T1026). Mr. Ahsens' quote of Edmund Burke improperly characterized Brian as "evil," which, through its contrast to good, encouraged the jury to decide Brian's sentence based on an external source of law and on passion and prejudice. *Darden v. Wainwright*, 477 U.S. 168, 179 (1986); *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn.1998); *State v. Debler*, 856 S.W.2d 641, 656 (Mo.banc 1993); *People v. Clemons*, 89 P.3d 479, 483 (Colo.App. 2004). Mr. Ahsens' argument was intended to influence the jury to impose death to combat "evil" in their community. *Id.; Berry v. State*, 233 S.W.3d 847, 864 (Tex.Crim.App. 2007). Moreover, despite Mr. Ahsens' claim that Brian is "evil," no evidence supported his assertion. *State v. Hodges*, 586 S.W.2d 420 (Mo.App.,E.D. 1979).

The prejudice arising from this comment was exacerbated when Mr. Ahsens later told jurors to "Do your duty."(T1029). Since Mr. Ahsens had just told them that imposing a life sentence was tantamount to doing nothing, and that they need not grant him mercy, telling them to "do their duty" clearly meant to sentence Brian to death. Exhorting jurors that it is their duty to sentence a defendant to death is clearly improper, as it encourages them to ignore the facts and the law and decide the case based on emotion. *United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999); *Deyerle v. State*, 2009 WL1491039 (Nev.

2009); *Comm. v. Garcia*, 912 N.E.2d 511, 513-14 (Mass.App. 2009); *Wilson v. State*, 777 So.2d 856 (Ala.Crim.App.1999); *Lafond v. State*, 89 P.3d 324, 332 (Wyo. 2004).

Mr. Ahsens also told the jury that, "…the way I was raised, forgiveness is conditioned upon repentance, and repentance is conditioned upon taking responsibility. I don't think that that Sunday-morning lesson necessarily translates directly into the law, but it does tell something in this case."(T1027). Mr. Ahsens thus personalized the case to himself, injecting his own code of ethics and moral responsibility, and likening it to lessons learned in church. This argument improperly encouraged the jury to give more weight to Mr. Ahsens' argument than it was entitled to and essentially made him an unsworn witness. *Storey*, 901 S.W.2d at 901-02. It also injected an external source of law, encouraging the jury to decide the case, not based on the instructions, but upon either Mr. Ahsens' code or the code derived from their own belief systems. *Debler*, 856 S.W.2d at 656.

As Mr. Ahsens finished his final closing, he told the jury,

> I think what you heard from the defense is a every eloquent plea for mercy. And that's a fine thing. It's what they should have done. But I want you to keep something in mind. Mercy is something that is granted to the weak and the innocent by the strong. You're strong in the sense that, as a group, you have the power to render sentence in this case. So you are the strong, I suppose. But when you talk about the weak and the innocent, that man does not qualify.

(T1029). Although Mr. Ahsens did not improperly tell the jury that they couldn't consider mercy, *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993); *California v. Brown*, 479 U.S. 538 (1987), by telling the jury that mercy only could be granted under a limited set of circumstances, those that he deemed proper, Mr. Ahsens once again misstated the law and thus misled the jury. *State v. Storey*, 901 S.W.2d 886, 902 (Mo.banc 1995); *State v. Jones*, 615 S.W.2d 416 (Mo.1981); *Tucker v. Kemp*, 762 F.2d 1496,1507 (11th Cir. 1985). Of interest, is that Mr. Ahsens' argument apparently is based upon the beliefs of the Ku Klux Klan. *See, State v. Henderson*, 762 N.W.2d 1, 13 (Neb. 2009). The final step of the process allows the jury to sentence a defendant to life for any reason or for none at all. §565.030.4(4) RSMo. Mr. Ahsens' argument improperly limited the jury's belief that it could consider mercy as it rendered its verdict. This Court, in *State v. Forrest*, 183 S.W.3d 218, 228 (Mo.banc 2006), rejected a similar claim, finding that prosecutors "may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, and in that connection may argue that the defendant should not be granted mercy." A prosecutor may argue that a jury should not grant mercy in a particular case. But, to tell a jury that mercy can only be granted to the innocent eliminates mercy from consideration in the penalty phase of a capital case. That argument is contrary to the law.

Mr. Ahsens' arguments were clearly improper. This Court should vacate Brian's sentences and order that he be re-sentenced to life without parole, §565.040.2, or reverse and remand for a new trial.

V. Photographs Used Solely To Create Prejudice

The trial court erred and abused its discretion in overruling Brian's objections and admitting in penalty phase Exhibits 20, 21, 28 and 29, color photographs of the bodies, because their admission denied Brian due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that the probative value of the photographs was vastly outweighed by their prejudicial effect, as they were largely irrelevant to any question before the jury, they were used solely to engender passion and prejudice and their duplicative nature compounded the prejudice from each individual photograph. Brian's death sentences flowed directly from the State's use of the photographs.

Just before the evidentiary portion of trial, defense counsel lodged objections to the many photographs of the bodies that the State intended to introduce in this penalty phase. (T499-506). Counsel alleged their prejudice outweighed any probative value they might have and noted that duplicative photos compounded that prejudice. In response, particularly as to Exhibits 20 and 21, Mr. Sterner, the prosecutor, told the Court, "Well, State's Exhibit 20 is a photo that most clearly shows this perspective of the body and the gore. Part of this issue is how wanton and vile this crime was. The gore about this body, in particular, is best shown in this photograph."(T502).

Mr. Sterner's remarks tell the tale. While he couldn't legitimately argue to or instruct the jury that gore, and the emotion that gore elicits, should be the driving force behind their verdict, through these photographs, his intent in placing them before the jury was to elicit that emotion. The photographs rendered the jury's verdicts unreliable, based not on reason and common sense but on emotion, passion and prejudice.

Because the death penalty is qualitatively different from any term of imprisonment, a "corresponding difference [exists] in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). Death cannot be imposed under procedures that create a substantial risk of arbitrary or capricious sentencing. *Furman v. Georgia*, 408 U.S. 238 (1972). The emotional impact of the photographs outweighed any probative value they might have had. Their admission acted to deny Brian's state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment.

Standard of Review and Preservation

A trial court has broad discretion in deciding whether to admit photographs. *State v. Strong*, 142 S.W.3d 702, 715, 720 (Mo.banc 2004). That decision will not be overturned absent an abuse of discretion. *Id.* at 715. Counsel objected pre-trial to the photographs (T499-506), and then again as the State offered them at

trial.(T643,671,678,681,683,684,686). Counsel preserved the objection in the new trial motion.(LF198).

The Evidence

Det. Jeff Nichols testified that, as part of his duties, he photographed the scene.(T655-58). He photographed the bodies, focusing in Exhibits 20 and 21on Sarah's head and body. (Exh.20,21). Both photographs highlighted the blood on her face and saturating her t-shirt. (Exh.20,21). Although Exhibit 21 extends the view to encompass her groin as well, no additional injuries are shown by that view. (Exh.21).

Nichols also photographed the gunshot wound to Sarah's chin and the secondary bruising that resulted from the wound itself. (Exh.28,29). Neither photograph, Exhibit 28 or 29, showed anything the other did not—both showed the gunshot wound, both showed the bruising to the chin, and both showed the lividity in the neck area.(Exh.28,29).

Counsel objected to all four photographs as they were offered. (T678,681,684). The court overruled the objections (T678,681,684) and, when the jury asked to see them during deliberations, sent them back, again over objection. (T1033-35). Counsel preserved the objection to the photographs in the new trial motion.(LF198).

The Law

The United States Supreme Court has yet to resolve an issue presented in *Thompson v. Oklahoma*, 487 U.S. 815 (1988)—whether inflammatory and

prejudicial photographs of the victim's body, introduced during guilt phase and then reincorporated into penalty phase, violate the accused's constitutional right to reliable sentencing. *See also Mann v. Oklahoma*, 488 U.S. 876 (1988)(Marshall, J., dissenting from denial of certiorari); *Tucker v. Kemp*, 480 U.S. 911 (1987)(Brennan, J., dissenting from denial of certiorari). As Justice Marshall stated in *Mann*, because the introduction of "ghastly photographs" of the victims presents "substantial and recurring issues of constitutional dimension," review of this issue in this case is warranted.

Admissibility of Photographs

Even gruesome or graphic photographs may be admissible if they show the nature and location of wounds, the body's condition, or prove an element of the State's case. *State v. Knese*, 985 S.W.2d 759, 768 (Mo.banc 1999); *State v. Mease*, 842 S.W.2d 98, 108 (Mo.banc 1992). But, if photographs of a victim's body are used solely to arouse the jury's emotions and prejudice the defendant, *State v. Wood*, 596 S.W.2d 394 (Mo.banc 1980), or their needlessly-inflammatory nature outweighs their probative value, they should be excluded. *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959). "The fundamental rationale barring the introduction of gruesome photographs is that their impact on the jury is such that it will become so incensed and inflamed at the horrible conditions depicted that it will not be able to objectively decide the issue of the defendant's guilt." *State v. Clawson*, 270 S.E.2d 659, 674 (W.Va. 1980).

These rules are grounded in concepts of logical and legal relevance. Evidence is logically relevant if it tends to make a material fact's existence more or less probable. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc 2002); *State v. Smith*, 32 S.W.3d 532, 546 (Mo.banc 2000). But, even if logically relevant, for evidence to be admissible, it must also be legally relevant. Legal relevance weighs probative value against costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasted time and cumulativeness. *Anderson*, 76 S.W.3d at 276; *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992)(Thomas, J., concurring). If evidence is improperly admitted, the reviewing court must determine if prejudice resulted, such that a fair trial was denied. *Anderson*, 76 S.W.3d at 277. When the error is preserved, it is presumed prejudicial and the State must show harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *State v. Rhodes*, 988 S.W.2d 521, 529 (Mo.banc 1999).

When the error occurs in penalty phase, its constitutional dimension is amplified, raising the question of whether the evidence so unfairly infects sentencing as to "render the jury's imposition of the death penalty a denial of due process" and violate the Eighth Amendment. *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994); *Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968)("An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of [sentencing]."). The 10th Circuit addressed this question in *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003) and affirmed the grant of habeas

relief, finding that the admission of gruesome photographs in penalty phase created precisely that kind of constitutional error.

In *Spears*, the State incorporated its first-phase evidence and then presented six photographs of the victim's body from the crime scene. *Id.* at 1224. It asserted they were relevant to show the victim had suffered serious physical abuse before dying. *Id.* at 1226. The 10th Circuit agreed with the District Court that the photographs depicting the victim's many injuries—large gashes, stabs, exposed intestines, swollen face, and black eye—rendered Spears' penalty phase fundamentally unfair. *Id.* at 1228. It noted that Oklahoma's "heinous, atrocious and cruel" aggravator focuses on the victim's conscious suffering and, because the evidence did not establish the victim was conscious when those injuries were inflicted, the photographs were unduly prejudicial. *Id.* It held, "the gruesome photographs potentially misled the jury, as they necessarily had a strong impact on the jurors' minds."*Id.*

The Court found that, even if "minimally relevant" to the heinous, atrocious and cruel aggravator, the photographs' prejudicial effect outweighed their probative value. *Id.* The State waited to spring them in penalty phase, deliberately waiting to present them "solely for their shock value." *Id.* The appellate court recognized the photographs were the State's primary evidence in aggravation. *Id.* The Court concluded that the effect of this evidence was great, given the strength of the mitigation evidence and the "not particularly strong" evidence supporting the other statutory aggravator. *Id.*

In *Reese v. State*, 33 S.W.3d 238 (Tex.Crim.App.2000), the Texas Court decided whether admitting an 8x10 color photograph of the victim and her unborn child in penalty phase created reversible error. The photograph arguably showed the results and foreseeable consequences of the defendant's actions and was therefore logically relevant to the special issues in penalty phase. *Id.* at 240.

That finding did not end the inquiry, however, since relevant evidence is properly excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Factors to be considered include whether the ultimate issue is seriously contested by the opponent; the state had other, convincing evidence to establish the ultimate issue on which the evidence was relevant; the probative value of the evidence was not particularly compelling and the evidence was such that an instruction to disregard would likely not have been efficacious. *Id.* at 241. The Court further noted that, with photographs, reviewing courts should consider their number and size; whether they are black and white or color; the detail shown; whether the body is naked, clothed or has been altered post-offense to enhance the gruesomeness. *Id.*

The *Reese* Court held that the photograph at issue, the only one admitted in penalty phase, was improperly admitted, despite its relevance to show the results and foreseeable consequences of the defendant's actions and his violent, vicious nature. *Id.* at 241-42. The photograph could "impress the jury in some irrational yet indelible way," showing much more than the facts relevant to penalty phase,

suggesting "that the jury's decision be made on an emotional basis and not on the basis of the other relevant evidence introduced at trial." *Id.* at 242.

The Court in *Stringer v. State*, 500 So.2d 928 (Miss. 1986) similarly found that admitting photographs in penalty phase created reversible error. Stringer was being tried for the second of two homicides, yet the State introduced photographs of the victims of both homicides. The Court found reversible error not just because the State used the photographs to get a "second bite at the apple" in seeking death for the first homicide but because

> …the prosecution could not be content with merely introducing the photographs of Nell McWilliams into evidence, but displayed them to the jury during closing argument as part of its "slide show." We deplore this practice. As the West Virginia court noted in *Clawson*, the effect is to take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury.

Id. at 935. The Court went on

> It is the jury's duty to weigh the permissible aggravating circumstances against any mitigating factors to determine whether the defendant deserves to suffer the death penalty. Just as a lack of evidence taints this process, so does the admission of irrelevant or inflammatory evidence. Color slides of the body of another victim, projected on a screen during closing argument, are an unnecessary dramatic effect that can only be intended to inflame and prejudice the jury.

Id. This tactic so prejudiced the jury that it denied the defendant a fair sentencing phase. *Id.*

The Courts' analyses in *Spears*, *Reese* and *Stringer* are helpful in gauging the constitutional infirmity created by the introduction of the photographs in this case, especially viewed through the lens of *Woodson*, which stresses the qualitative difference in the death penalty and the requirement that sentencing be based on reason and common sense and not the result of an emotional onslaught.

For what legitimate purposes could the State adduce this evidence? It was entitled to present evidence about the offenses so that it could prove up its statutory aggravators. But, this case is distinct from *State v. Strong*, 142 S.W.3d at 720, where this Court found no error in the admission of photographs of the bodies in penalty phase. There, the State introduced the photographs in a purported attempt to show that the murder was depraved, since the limiting construction of that aggravator was that "You can make a determination of depravity of mind only if you find the defendant committed repeated and excessive acts of physical abuse…."

Here, by contrast, although the State submitted as a statutory aggravator for both Counts that the murders involved depravity of mind, as to Count I, the murder was alleged to be depraved because it was "part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life."(LF176). As to Count II, the murder was alleged to be depraved because "the defendant, while killing Sarah Bonnie or immediately thereafter, had

sexual intercourse with her."(LF178). Yet, the prosecutor, Mr. Sterner, revealed his true purpose in showing the jury these photographs when he responded to counsel's pre-trial objection. "Part of this issue is how wanton and vile this crime was. The gore about this body, in particular, is best shown in this photograph." (T502). Given Mr. Sterner's comments, it becomes apparent that the State used the photographs, not to show the factual underpinning of the offense, but as a tool to inflame the jury's emotions. *Stringer*, 500 So.2d at 935. Further, like in *Spears*, where their admission was condemned, the photographs weren't introduced to support the existence of any statutory aggravator. *Spears*, 343 F.3d at 1228. Mr. Sterner told the court that they showed "gore" and that was why he wanted them before the jury.

Since Exhibits 20 and 21 both focus the jury's attention on the same thing—the blood on Sarah's face and arms, and the blood saturating her t-shirt—they are also duplicative and thus cumulative. Exhibits 28 and 29 are likewise cumulative, neither giving the jury any more information than the other. The State's rationale for using two photographs to depict each aspect of Sarah's body is clear—repetition exacerbates the prejudicial effect.

When the State introduces evidence solely to arouse "the passions and prejudices of the jury, in such a manner as to cause them to abandon any serious consideration of the facts of the case and give expression only to their emotions," the accused's right to a fair trial is violated. *Kiefer v. State*, 239 Ind. 103, 153 N.E.2d 899, 905 (1958); *Clawson*, 270 S.E.2d at 612-13. Because that happened

here, as Mr. Sterner himself stated, (T502), this Court must vacate Brian's sentences and either order him re-sentenced to life without probation or parole, §565.040.2 RSMo, or remand for a new trial.

VI. Instructions Violated Due Process and Right to Jury Trial

The trial court erred and plainly erred in denying Brian's motions objecting to Missouri's statutory death penalty scheme and Missouri's death penalty instructions; requesting that the death penalty statute be declared unconstitutional or that the State give notice of all evidence of unconvicted crimes that it intended to introduce, and for disclosure of evidence relating to victim impact; in submitting Instructions 7 and 9 to the jury, admitting evidence of non-statutory aggravating circumstances, including victim impact evidence, and accepting the jury's verdicts, because those actions denied Brian due process, a fundamentally fair jury trial, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends. VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that these Instructions improperly place the burden of proof on the defense; fail to require the State to prove an eligibility step beyond a reasonable doubt; are contrary to §565.030 RSMo by requiring that the jury unanimously find that mitigators outweigh aggravators to impose life; allow the jury to consider constitutionally-impermissible evidence in aggravation of punishment, and insulate the jury's decision from appellate review by not requiring that it make written findings on the second step. The jury likely considered the evidence adduced under those Instructions, giving it an unknown quantum of weight, in reaching its penalty phase decisions.

The State's evidence consisted of proof of the homicides and that Brian took property from the home and tried to sell it, presentation of Brian's prior bad acts—two drug possession convictions and one leaving the scene of an accident conviction—, and victim impact evidence, through Sarah and Ben Bonnie's family and friends. In closing, Mr. Ahsens told the jury to consider that "these acts and the repercussions of those acts on these families is evil. And make no mistake, friends, there is evil in the world. A much smarter man than I am once said, 'The only thing necessary for evil to triumph is for good men to do nothing.'"(T1026). He then encouraged the jury to sentence Brian to death, telling them "Do your duty."(T1029).

The instructions told the jurors to consider the evidence they heard, weighing the evidence they found to be aggravating against the mitigating evidence, in deciding what punishment to impose. But, they were never instructed exactly what they could consider, that the State bore the burden of proof as to the eligibility steps. They also were affirmatively instructed that the defense bore the burden of proving that mitigators outweighed aggravators. By introducing evidence of non-statutory aggravation, including victim impact evidence, in the context of Instructions 7 and 9, modeled after MAI-CR3d 314.44, the instructional error was compounded. The trial court violated Brian's state and federal constitutional rights to due process, a fundamentally fair jury trial, reliable sentencing and freedom from cruel and unusual punishment by denying Brian's

pre-trial motions, admitting the evidence of non-statutory aggravation, submitting these instructions to the jury and accepting the jury's verdicts.

Standard of Review

This Court will reverse if there was error in submitting an instruction and if the submission prejudiced the defendant. *State v. Johnson*, 207 S.W.3d 24, 46-47 (Mo.banc 2006). MAI's are presumed valid and, when applicable, are to be given to the exclusion of other instructions. *Id.* If the MAI conflicts with the substantive law, however, it must not be given. *State v. Carson*, 941 S.W.2d 518, 520 (Mo.banc 1997); *Clark v. Missouri & Northern Arkansas RR Co., Inc.*, 157 S.W.3d 665, 671 (Mo.App.,W.D. 2004). When the trial court fails to give an instruction that comports with the MAI, the applicable Notes on Use, or the substantive law, reversible error occurs. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002). That error is presumed prejudicial and the State must "clearly show … that the error did not result in prejudice." *Id.* at 284.

Since counsel did not renew objections to the giving of Instructions 7 and 9 on these grounds, plain error review is requested. A manifest injustice or a miscarriage of justice will occur if this instructional error is allowed to go un-corrected. *Rule 30.20.* By telling the jury to make its findings on the final step of the process for both counts in one instruction, the trial court so misdirected the jury that it should be apparent to this Court that the error affected the jury's verdict. *State v. Deck*, 994 S.W.2d 527,540 (Mo.banc 1999); *State v. Haynes*, 158

SW.3d 918, 919 (Mo.App.,W.D. 2005); *State v. Parkus*, 753 S.W.2d 881, 888 (Mo.banc 1988).

The Pre-Trial Motions

Pre-trial, the defense moved to preclude the State from introducing victim impact evidence or to find that Missouri's death penalty statutes and instructions are unconstitutional because they provide no guidance to the jury as to how victim impact evidence, among other non-statutory aggravating evidence, is to be considered and weighed in the jury's decision on what penalty to impose.(LF94-100). The defense attached a proposed instruction to that motion to eliminate some of the arbitrariness arising from the jury's undirected consideration of such emotionally-charged evidence.(LF100). That instruction stated:

> You have heard testimony [and seen exhibits] regarding the victim in this case and the impact [his. Her] death has had on [his, her] [family, friends]. Such evidence is not a statutory aggravator. This evidence was offered solely for the purpose of informing you about the specific harm caused by the death of the victim. In determining what punishment to assess in this case, this evidence should be considered in the same way you consider all the evidence you have heard, that is, fairly and impartially. You are specifically instructed that you are not to consider this evidence for purposes of determining the worth of the victim's life as compared to the worth of mr. name's life. You are also specifically instructed that you are

not to decide the issue of punishment for mr. name's on the basis of sympathy for the [friends] [and, or] [family] of the victim.

(LF100).

The defense also moved that the court declare §565.032.1(2) RSMo unconstitutional or to require that the State give notice of what evidence it intended to adduce in penalty phase as non-statutory aggravating circumstances.(LF115-19). The defense alleged that when the State does not give notice of its non-statutory aggravating evidence and then the court's instructions provide no guidance on what the jury may consider and under what standard the evidence may be considered, the untenable risk is created that jurors may apply a lesser standard of proof or consider aggravating evidence which it constitutionally may not. *Id.*

The Instructions

Despite the defense's pre-trial motions, the court submitted Instructions 7 and 9, patterned after MAI-CR3d 314.44[13]. Instruction 7 provided:

As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 6 exists, you must then determine whether

[13] Instructions 7 and 9 are virtually identical, differing only in the Count as to which they refer. Only Instruction 7 is set forth, but the challenge to Instruction 9 is not waived thereby.

there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

In deciding this question, you may consider all of the evidence including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 6, and evidence presented in support of mitigating circumstances submitted in this instruction.

As a circumstance that may be in mitigation of punishment, you shall consider:

Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of 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 by the Department of Corrections without eligibility for probation or parole.

(LF177).

Instructions 7 and 9 conflict with the substantive law as set forth in *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003); *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Kansas v. Marsh*, 548 U.S. 163 (2006), and the statute upon which they are based, §565.030.4 RSMo.[14]

The Law

The Fourteenth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantee to capital defendants that a jury must find, beyond a reasonable doubt, all facts upon which an increased punishment is contingent. *Whitfield*, 107 S.W.3d at 257; *Ring*, 536 U.S. at 600; *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). A fact increases the maximum punishment when its absence renders the higher sentence unavailable. *Ring*, 536 U.S. at 600-01.

In *Whitfield*, this Court held that, under the then-in-effect §565.030 RSMo, the first three of the four statutory steps are eligibility steps, requiring jury findings of fact. *Whitfield*, 107 S.W.3d at 256, 261. Although the "warrant" step has since been eliminated, the *Whitfield* analysis continues with unabated effect as to the remaining factual determinations the statute requires. Specifically, the "weighing" step authorized by Instructions 7 and 9 is one of those requiring "factual findings

[14] This Court has rejected this claim, *see State v. Zink*, 181 S.W.3d 66, 74(Mo.banc 2005). Brian presents it for reconsideration and preservation for federal review.

that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *Id.* at 261.

While *Whitfield's* focus was that the jury must make the requisite factual findings, *Whitfield* was squarely based on *Ring* and *Apprendi*, which further require that any factual death-eligibility finding be made beyond a reasonable doubt.*Id.* at 257; citing *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 494. Further, since these death-eligibility findings are the functional equivalent of an element of a greater offense, *Id.* at 494 n. 19; *Ring*, 536 U.S. at 609, the burden of proof beyond a reasonable doubt falls squarely on the State. *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979). Instructions 7 and 9 violate these core constitutional principles.

Section 565.030.4 RSMo provides, in part, that in penalty phase, "the trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor … (3) if the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listen in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier…."

Aside from evidence ostensibly supporting the statutory aggravators, the State presented evidence of so-called non-statutory aggravators of two general types—victim impact evidence and prior bad acts, some of which resulted in convictions. Diana Mosier, Sarah's mother, testified that her life has changed as

she has begun to raise her granddaughter, Jade and that Jade had nightmares, cried and needed counseling and finally didn't seem so afraid anymore. (T553). She stated that she thought the jury could probably understand her pain.(T553). Sarah's sisters, Krista and Traci, testified about their loss. Krista testified that Sarah and Ben would not experience Jade's first boyfriend or first kiss, her graduations from high school or college, her wedding.(T561). Sarah, who, Krista recalled, had artistic talents with flowers, wouldn't be able to create flower arrangements for Jade's wedding and Ben wouldn't get to walk Jade down the aisle.(T561). Over a late objection, Krista stated that Brian had taken the lives of two people who were just starting out, and took the innocence of a young child.(T562). Traci stated that the murders had almost destroyed their family and that words could not express how much pain and sorrow they had caused.(T590).

The State also adduced evidence of Brian's prior convictions for leaving the scene of an accident and possession of a controlled substance and his prior bad acts of driving while intoxicated. Sharon Newlin testified that, on April 26, 2006, as she and her disabled son were driving on Highway 54 north of Jefferson City in a rainstorm, Brian's car hit them from behind.(T704-07). As they got out of their cars, she told Brian that she had called the police and he then got back in his car and left.(T707-08). The State introduced Exhibit 69, the certified record of conviction of leaving the scene of a motor vehicle accident.(T710). On cross, Newlin stated that she knew Brian had pled guilty to leaving the scene, that he was

insured and that she had been dealing with his insurance company to compensate her for her car damage.(T710-11).

Officer Duncan of the Jefferson City police department testified that on November 29, 2004, Brian's wife had been trying to find him and Duncan found Brian, who seemed to be under the influence of some narcotic.(T770-01). Duncan told Brian that, because of his condition, he shouldn't drive, but, Duncan later saw Brian driving his Blazer.(T772-73). Brian almost hit the patrol car and Duncan took him into custody for driving under the influence.(T773). Sergeant Campbell arrived at the scene as Duncan administered a field sobriety test.(T775-76). Campbell recalled that Brian was sweaty, animated and kept fidgeting with the left sleeve of his jacket.(T776-77). When Brian removed his jacket, Campbell picked it up and felt a bulge, a baggie of crack, in the inner lining.(T777-78). The State then introduced Exhibit 70, which referred to Brian's conviction for possession of a controlled substance and set forth the conditions of his probation.(T778).

Jefferson City Officer Gosche testified that, on January 30, 2005, while he was searching for someone else, he found Brian in the same apartment, on the couch with the person he was seeking.(T781-82). While Gosche searched the couch, he lifted Brian's jacket and a rock of crack fell to the ground.(T782). Gosche arrested Brian.(T783). The State introduced Exhibit 71, which referred to Brian's conviction for drug possession and set forth the conditions of his probation.(T783).

For none of this evidence, either the victim impact or the prior bad acts, was the jury instructed what, if any, burden of proof to apply. As this Court noted in *State v. Debler*, 856 S.W.2d 641, 657 (Mo.banc 1993), evidence of unadjudicated bad acts lacks the reliability of prior convictions, yet is enormously prejudicial. Here, the jury was told to consider and weigh against mitigation evidence the emotionally-charged victim impact evidence, as well as evidence of Brian's drug and alcohol-related prior misconduct, some of which resulted in convictions. Especially as to the victim impact evidence, without some instruction guiding the jury's consideration of that evidence, it is likely that the jury's verdicts were based on emotion, not reason and common sense, and thus were rendered unreliable. After all, as Justice Souter noted in his concurrence in *Payne v. Tennessee*, 501 U.S. 808, 836 (1991), "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." Only through an instruction that squarely requires the jury to find the facts upon which it will base a death sentence unanimously beyond a reasonable doubt can **some** of that unreliability be cured. *Debler*, 856 S.W.2d at 657.[15]

[15] Brian acknowledges that this Court has retreated from its opinion in *Debler*, now reading that case solely to require notice of non-statutory aggravators. *See, e.g.*, *State v. Strong*, 142 S.W.3d 702, 719-20 (Mo.banc 2004). He respectfully

The first paragraph of Instructions 7 and 9 squarely violate *Ring*, *Apprendi*, *Whitfield* and *Winship*. Despite that this is a death-eligibility step, the paragraph tells jurors to "determine" whether mitigators outweigh aggravators. The paragraph thus puts the burden of proof on the defense, not the State, as due process requires. *State v. Roberts*, 615 S.W.2d 496, 497 (Mo.App.,E.D. 1981); *State v. Ford*, 491 S.W.2d 540, 542-43 (Mo.1973). As the Court cautioned in *Marsh*, "although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence." *Marsh*, 548 U.S. at 178-79. Instructions 7 and 9 also fail to require that the finding in this death-eligibility step be beyond a reasonable doubt, as constitutionally-mandated. *Winship, supra*.

The second paragraph is even worse. It tells jurors that, in weighing mitigators and aggravators, they can consider anything presented in either phase, whether "found" by the jury or not. Despite that this is a death-eligibility step, which requires that the burden of proof be beyond a reasonable doubt, *Ring*, 536 U.S. at 602, and on the State, *Winship*, *supra*, it specifies no burden of proof and certainly doesn't place it on the State. Thus, it allows jurors to weigh evidence

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suggests that *Debler's* analysis accords with *Whitfield* and *Ring* and requests that this Court re-adopt the rationale of that opinion.

that has never been found—beyond a reasonable doubt or under any legal standard—as evidence in aggravation. Especially since so much of the State's evidence was emotionally-charged victim impact evidence, an instruction on how the jury was to treat that evidence was required. Despite *Whitfield* and *Ring*'s teachings and despite the critical importance of that evidence to the jury's decision, the instruction gave jurors no guidance on how to consider that evidence. Rendering the lack of instructional guidance even more problematic is that Brian's jury was not required to specify in writing the circumstances upon which it made its decision at this step of the process. Thus, the jury's finding is insulated from this Court's review. Just as the jury must specify in writing the statutory aggravators it finds beyond a reasonable doubt, so, too, must it be required to specify in writing its findings at this step of the process. Only in that manner can this Court be assured that the jury's verdict is reliable.

This Court should reverse and remand for a new penalty phase before a properly-instructed jury or, in the alternative, reverse and order that Brian be re-sentenced to life without parole. §565.040 RSMo.

VII. Statutory Aggravators Are Duplicative

The trial court erred in submitting Instructions 6 and 8, accepting the jury's verdicts and sentencing Brian to death because those actions denied Brian due process, a fundamentally fair trial before a properly-instructed jury, reliable sentencing and freedom from cruel and unusual punishment, U.S.Const.,Amends.VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21, in that, as to Count I, Instruction 6 submitted, as statutory aggravators, both that the Benjamin Bonnie murder was committed during the commission of another unlawful homicide and that the murder was depraved because it was part of a plan to kill more than one person, and, as to Count II, Instruction 8 submitted, as statutory aggravators, both that the Sarah Bonnie murder was committed during a rape and that the murder was depraved because, during or immediately after the murder, Brian had sexual intercourse with Sarah. As to both Counts, two aggravators duplicated each other and, letting the jury consider and double-count them rendered their death verdicts unreliable. Alternatively, as to Count I, insufficient evidence supported submitting the "plan to kill more than one person" aggravator and, as to Count II, insufficient evidence supported submitting the "rape" aggravator.

As this Court recognized in *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), that a jury may find the existence of one or more statutory aggravating circumstances does not end the inquiry as to whether a defendant is death-eligible. Rather, every step until the last, in which the jury is given discretion "to impose a

life sentence without regard to the weight it gave to aggravators and mitigators it found," *Id.* at 261, is an eligibility step. For those steps, the jury must determine unanimously beyond a reasonable doubt that the defendant is still death-eligible or the sentence must be life without parole. Because Brian's jury was asked to consider duplicative statutory aggravators as to both Counts, its weighing process on an eligibility step was impermissibly skewed toward death. Brian's death sentences cannot stand.

Standard of Review

Trial counsel objected to Instructions 6 and 8, asserting that in both instructions, two of the statutory aggravators set forth were duplicative. (T994-95). Counsel preserved the challenge in the new trial motion. (LF198-99). Instructional error occurs when the objecting party shows that the instruction misdirected, misled or confused the jury and prejudice resulted. *Sorrell v. Norfolk Southern RY Co.*, 249 S.W.3d 207, 209 (Mo.banc 2008).

The Instructions

Instruction 6 set forth, in part,[16] that the jury should find whether the following statutory aggravators existed:

[16] Since Brian challenges not the Instructions themselves but only the statutory aggravators alleged to be duplicative, he has not set forth the entire instruction. The instructions are, however, included in the Appendix. No waiver is thereby intended.

1. Whether the murder of Benjamin Bonnie was committed while the defendant was engaged in the commission of another unlawful homicide of Sarah Bonnie.

and

3. Whether the murder of Benjamin Bonnie involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of depravity of mind only if you find: That the defendant killed Benjamin Bonnie as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life.

(LF176).

Instruction 8 set forth, in part, that the jury should find whether the following statutory aggravators existed:

3. Whether the murder of Sarah Bonnie involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of depravity only if you find: That the defendant, while killing Sarah Bonnie or immediately thereafter, had sexual intercourse with her.

4. Whether the murder of Sarah Bonnie was committed while the defendant was engaged in the perpetration of rape.

(LF178).

Duplicative Aggravators Render Death Sentences Constitutionally-Infirm

By submitting as statutory aggravators in Instruction 6 both that Benjamin Bonnie's homicide was committed during the unlawful homicide of Sarah Bonnie and that Benjamin Bonnie's homicide involved depravity of mind because it was part of a "plan to kill more than one person," the court allowed the jury to double-count the same conduct—killing more than one person—as it weighed aggravators against mitigators and decided whether to impose death on Count I. Similarly, as to Count II, submitting both that Brian raped and had sexual intercourse with Sarah Bonnie allowed the jury to consider and double-count the same conduct in its weighing step and its ultimate decision on punishment.

Because the death penalty is qualitatively different from a term of imprisonment, however long, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To adequately minimize the risk of a wholly arbitrary and capricious sentencing decision, the sentencer's discretion must be limited and channeled, through clearly defined aggravating circumstances. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Here, by submitting two aggravators that double-count the same aspect of Brian's conduct as to each Count, the Court did not adequately narrow the class of

those who are death-eligible. This duplication unduly enhanced the qualitative value of that conduct in the jury's decision, especially on Step Two, as to whether aggravators outweighed mitigators.

In the weighing step, the jury must determine whether "there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier." If the trier finds that the evidence in mitigation outweighs the evidence in aggravation at that step, it must "assess and declare the punishment at life imprisonment…." §565.030.4 RSMo. Thus, if an improper element is thrown into the mix at that eligibility step, the balance is changed and any resulting death sentences cannot stand.

That is what happened in *State v. Griffin*, 848 S.W.2d 464 (Mo.banc 1993). As a non-statutory aggravator, the State introduced in penalty phase, among a host of the defendant's prior convictions, the record of one conviction of a different Reginald Griffin. This Court reversed for a new penalty phase, holding that, "To uphold this verdict would be manifest injustice." *Id.* at 471. If reversal must occur when the jury considers improper non-statutory aggravation, surely it must also occur when it considers improper, duplicative statutory aggravators.

This Court has rejected this argument, *see, e.g., State v. Griffin*, 756 S.W.2d 475, 489 (Mo.banc 1988); *State v. Anderson*, 79 S.W.3d 420, 442 (Mo.banc 2002), holding that, "even assuming *arguendo* that some duplicativeness occurred with

regard to the first and third submitted statutory aggravators, it would not have been prejudicial in the case at bar." *Id.* Brian requests reconsideration of that position, given this Court's subsequent decision in *Whitfield, supra,* and since at least two other state Supreme Courts have concluded that similar duplication renders death sentences constitutionally-infirm. *See Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991); *Willie v. State*, 585 So.2d 660 (Miss. 1991).

Insufficiency of Evidence Supporting Aggravators

Statutory aggravators are the penalty phase equivalent of elements of the offense—they are part of what make a defendant death-eligible. *Whitfield*, 107 S.W.3d at 257; *Ring v. Arizona*, 536 U.S. 584, 609 (2002). As elements of the offense, they must be proved by the State unanimously and beyond a reasonable doubt. *Id.* at 602; *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979).

If this Court finds that the statutory aggravators at issue here in Count I are not duplicative because the "depravity of mind" aggravator requires proof of an additional element, that Brian had a plan to kill more than one person, Brian submits in the alternative that insufficient evidence supports that submission. He further maintains that, if this Court finds that the "sexual assault" and "rape" aggravators are not duplicative, insufficient evidence also supports the submission of the rape aggravator, as argued in Point III, *supra*.

As to Count I, the State alleged that the homicide was depraved because Benjamin Bonnie was killed "as a part of defendant's plan to kill more than one

person…." (LF176). Of significance is that the jury is instructed that it must find the existence of not merely a "deliberate" killing but one that is part of a plan. Deliberation means cool reflection, for any period of time, no matter how brief. *State v. Tisius*, 92 S.W.3d 751, 764 (Mo.banc 2002); §565.002 RSMo. By contrast, a *plan* to kill more than one person must entail something more.

Helpful in resolving this question is *Gill v. State*, 14 So.3d 946 (Fla. 2009). There, the defendant alleged that there was insufficient evidence in penalty phase to support a finding that the murder was committed in a "cold, calculated and premeditated manner." *Id.* at 962. The Court noted that to find that aggravator, the killing must have been the product of "cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the defendant exhibited heightened premeditation (premeditated)…." *Id.* Because the defendant had carried out the murder that he had planned over time, the Court found sufficient evidence supported the aggravator's submission.

Here, by contrast, no evidence supports the existence of a plan to kill more than one person. Although Brian's guilty plea permits the finding that deliberation exists, there is no evidence of any plan to kill more than one person. There is only the fact that more than one person was killed. And, while the Legislature has defined deliberation such that it can take place instantaneously, no such definition exists for a "plan." As an eligibility factor, this is a fact that must be found

unanimously beyond a reasonable doubt by the trier, *Ring, supra; Winship, supra*. Its existence may not be presumed.

Conclusion

Because Brian's jury considered duplicative aggravators that skewed its weighing decision toward death, this Court should vacate Brian's death sentences and either resentence him to life without parole, §565.040.2 RSMo, or remand for a new penalty phase trial. Should this Court find that the aggravators are not duplicative but that insufficient evidence supported their submission, this Court should vacate Brian's death sentences and resentence him to life without parole, §565.040.2 RSMo, or remand for a new penalty phase trial.

CONCLUSION

Based on the foregoing arguments, Brian requests that this Court reverse and remand for a new penalty phase, or that this Court re-sentence him to life without probation or parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of December, 2009, two true and correct copies of the foregoing brief and floppy disk(s) containing a copy of this brief were hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

_____
Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 23,365 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson