Sup. Ct. # 83934

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MARCELLUS WILLIAMS,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Louis County, Missouri,
21st Judicial Circuit, Division 11
The Honorable Emmett M. O'Brien, Judge

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

ROSEMARY E. PERCIVAL, #45292
Assistant Public Defender
Office of the State Public Defender
Capital Litigation Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106
Tel: (816)889-7699
Fax: (816)889-2088

Counsel for Appellant

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JURISDICTIONAL STATEMENT

Marcellus Williams was convicted of first-degree murder, §565.020, and other crimes and was sentenced to death. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

STATEMENT OF FACTS

Early in the morning of August 11, 1998, Dr. Daniel Picus left his house in University City, St. Louis County (Tr.1705). His wife, Lisha, was still home (Tr.1708-1709). When Picus arrived home that evening, he found Lisha's lifeless body on the floor between the stairs and the front door (Tr.1710-12,2198). He immediately called 911 (Tr.1712,1717).

Lisha wore a shirt that she typically wore when she got out of the shower, but she was naked from the waist down (Tr.1718). A knife protruded from her neck (Tr.1712). Blood started on the third step of the stairs and pooled by Lisha's body (Tr.2208-2209). Several drops of Lisha's blood were found in the bathroom upstairs and on a closet door (Tr.2214-17). In the kitchen, a drawer was open and a knife sheath lay on the floor (Tr.1712). Three fingerprints were lifted from within the house (Tr.2221-22). In the front hall were two shoe impressions in blood (one of these prints was lifted) and another not in blood (Tr.2224-27,2245). Hairs were taken from the rug and from Lisha's shirt (Tr.2871-72,2920).

Picus determined that several items were missing from the house, including Lisha's purse and his laptop computer (Tr.1718-19). In her purse, Lisha typically

had a calculator, wallet and credit card, and an identification card (Tr.1776-79). Several drawers or doors were opened, including a desk drawer and a dresser drawer in which they kept out-of-season clothing (Tr.1722-28).

A pane of glass had been broken from the front door (Tr.1735). In the front hall was a hat stand with a mirror on top (Tr.1742-43). The house was eighty years old, and the wooden floors squeaked loudly (Tr.1775).

An autopsy revealed that Lisha died from stab wounds to her head, neck, chest and abdomen (Tr.2163). She sustained sixteen stab wounds, seven of which were fatal (Tr.2163). The police collected blood and skin from under Lisha's fingernails (Tr.2268,2962-63).

Frustrated by the lack of progress in solving the crime, Picus decided to offer a $10,000 reward for information (Tr.1783,1814). The police still had no leads in the case until June 4, 1999, when a twelve-time convicted criminal and crackhead, anxious to receive the reward, came forward.

Henry Cole: Crackhead and Twelve-Time Career Criminal

Henry Cole had twelve convictions spanning over thirty years, including robberies, stealing from homes, and various weapons offenses (Tr.2379-82). The convictions were both state and federal and included several states (Tr.2379-82).

Between April and June 1999, Henry was in the city jail with Marcellus (Tr.2382). After several weeks, they realized they were related and became friends (Tr.2385-87).

In early or mid-May, Henry and Marcellus were watching television, when a story came on about Lisha's death, reporting that there still were no suspects and that a reward for $10,000 had been posted (Tr.2388-89). According to Henry, Marcellus then told him that he had committed the crime (Tr.2390).

Henry stated that Marcellus explained that he took a bus to University City and walked through a residential area looking for a home to burglarize (Tr.2391-92). He saw a house with a large tree shielding the front door (Tr.2393). He knocked on the front door, a side door and a back door, and then returned to the front door (Tr.2394). He broke out a pane, reached his hand in, and opened the door (Tr.2394).

Marcellus believed no one was home (Tr.2394). He looked around downstairs and then went upstairs, where he heard water running (Tr.2394). He took a laptop computer, pocketbook and some jewelry and brought the items to the front door (Tr.2395). He heard the water stop and someone call, "Who is that?" (Tr.2395). Marcellus went to the kitchen and got a knife (Tr.2396). As the woman came down the stairs, she called, "Who's there?" (Tr.2397).

Marcellus saw himself in a mirror and thought the woman could see him too (Tr.2398). Marcellus stabbed the woman in her arm (Tr.2398). Because the woman struggled, Marcellus stabbed her numerous times (Tr.2398). He finally stabbed her in her neck and twisted the knife (Tr.2398-99). He wanted to get out, and he left the knife in her throat (Tr.2399).

Marcellus ran upstairs, washed up, and wiped the blood off his boots and backpack (Tr.2399-2400). He took off his sweater and put it in a bag (Tr.2399). He took a sweater from the house and put it on (Tr.2399). He was not concerned about fingerprints because he wore gloves (Tr.2400).

Downstairs, Marcellus put the pocketbook and computer in his backpack (Tr.2400). He went to the back door but a neighbor was outside on his porch (Tr.2400). Instead, he went out the front door, moving the woman's body so he could leave (Tr.2401).

Henry vouched that he spoke with Marcellus about the incident about four times (Tr.2402). After speaking with Marcellus, he would return to his bunk and write down what Marcellus had told him (Tr.2403). Henry decided to seek the reward, so he elicited more details from Marcellus (Tr.2409-10). Marcellus told Henry he had sold the laptop (Tr.2411).

Marcellus allegedly told Henry that the only other person who knew about the incident was his girlfriend Laura, a prostitute, burglar, and crackhead he'd been seeing a short time (Tr.2414,2508,2510). Marcellus wrote to Laura and told her that Henry would be in touch with her when he got out of jail (Tr.2417).

On June 4, 1999, Henry was released from jail (Tr.2419). He called the police and told them he had information about the murder (Tr.2422). Two police officers picked Henry up and took him to the station (Tr.2422). En route, Henry told the officers he knew that the victim had been stabbed twice in the neck, and that the knife had been twisted and left in the victim's neck (Tr.2424). At the

station, Henry gave a videotaped statement and pulled from his sock the notes he had written in jail (Tr.2420,2428,2474-78). Henry admitted that his sole motivation in talking to the police was the reward (Tr.2455,2588).

Henry agreed to try to find Laura and the laptop and backpack (Tr.2437). He left several messages for Laura and spoke with her once, but she was not willing to meet with him or help Marcellus (Tr.2439-43).

For almost six months, the police took no action on Henry's information.

Laura Asaro: Prostitute, Burglar, and Drug Addict

In November 1999, officers went to Laura's mother's house to speak with Laura (Tr.1910). Laura believed that the officers were there to arrest her on outstanding warrants (Tr.1923). The police offered to help Laura with her warrants if she had information about the murder (Tr.1980). At first, Laura denied that she had any information, but then she agreed to talk (Tr.1910).[1]

Laura stated that on August 11, 1998, she had been dating Marcellus for about three months (Tr.1840). That morning, she woke up in Marcellus' car (Tr.1840). She was tired of getting high, so Marcellus drove her to her mother's house by 9:00 (Tr.1841). Marcellus was wearing black jeans, a white t-shirt, and boots (Tr.1843).

[1] Twice before, in September 1998 and August 1999, when Laura was arrested for prostitution, she told the police she had information about the murder but then vouched she knew nothing (Tr.1900,1905,1909,1922).

At about 3:00 that afternoon, Marcellus returned (Tr.1841-42). Despite the August heat, he was wearing a jacket zipped all the way up (Tr.1842). Laura had never seen the jacket before (Tr.1854).

After a while, Marcellus took off the jacket, and Laura saw blood on his shirt and fingernail scratches on his neck (Tr.1843,1855). He told Laura that he had been in a fight (Tr.1843). Sometime that day, Marcellus took off the clothes he had been wearing, put them in his backpack, and threw it down a sewer (Tr.1845).

When Marcellus picked Laura up, he had a computer in the car (Tr.1859-60). Marcellus took it to a house down the street; when Marcellus returned, the computer was gone, and Marcellus had crack cocaine (Tr.1844,1860-61).

The couple kept a mirror in the car's glove compartment to cut crack cocaine (Tr.1865). After August 11th, there were two new items in the glove compartment--a calculator and a Post-Dispatch ruler (Tr.1865).

The next morning, Laura needed some clothes from the trunk of the car (Tr.1844,1846). Marcellus did not want Laura to open the trunk, and he pushed her away, but not before Laura saw a purse (Tr.1846). Laura snatched the purse from Marcellus and looked inside (Tr.1846). She saw the victim's identification card, coupons, and a black coin purse (Tr.1846).

Laura was angry, believing that Marcellus had another girlfriend (Tr.1847). To appease her, Marcellus told her that the purse belonged to a woman he killed (Tr.1847). He explained that he broke into the woman's house through the back

door (Tr.1848,1851). She was home and the shower was on (Tr.1848). He went into the kitchen and got a knife (Tr.1848). The woman called downstairs, asking if anyone was there (Tr.1851). Wearing a robe, she came downstairs and ran to the door (Tr.1851,1882). Marcellus stabbed her in the arm, and she screamed (Tr.1851). He put his hand over her mouth and stabbed her in the neck (Tr.1851). Marcellus twisted the knife in the woman's neck and she jumped (Tr.1920). A neighbor came by and looked in (Tr.1851). When the neighbor left, Marcellus washed his hands and looked around some more (Tr.1851).

Laura asked Marcellus if he was alone and suggested that someone would tell (Tr.1852). Marcellus grabbed Laura by the throat until she started to choke (Tr.1853). He told her she'd better not tell, or he would hurt Laura's kids and mother (Tr.1853).

On August 31, 1998, Marcellus went to jail on other charges (Tr.1882). Laura visited him about six times (Tr.1882). Marcellus asked Laura not to say anything (Tr.1882). He wrote to her twice, again telling her not to say anything, but Laura lost the letters (Tr.1887).

While Marcellus was in jail, Laura needed to get some things from the trunk of the car (Tr.1888). She went to Marcellus' grandfather's house, and Marcellus' uncle helped her retrieve some of her things (Tr.1888). To open the trunk, the uncle used a screwdriver (Tr.1888). Nothing from the murder remained in the trunk (Tr.1888).

Marcellus had told Laura that someone would be contacting her to help him get out of jail (Tr.1907-1908). But in May 1999, Laura decided that she did not want anything to do with Marcellus (Tr.1907). In June or July, 1999, Laura received a call from Henry but she never met with him (Tr.1896,1906).

Laura admitted that she too was interested in the reward (Tr.1953).

Subsequent Police Investigation

Laura told the police that Marcellus had sold the computer to a man named "Larry", and she showed him where the man lived (Tr.2080-81). The man was Glenn Roberts (Tr.2084). Roberts told the police that Marcellus had pawned the computer to him for $150 or $250 (Tr.2000).[2]

The police searched the sewers for Marcellus' backpack but found nothing (Tr.2181). The sewers are cleaned at least once a year (Tr.2182).

The police searched Marcellus' car with the consent of his grandfather, but no warrant (Tr.66-67,70-72).[3] From the glovebox, they seized a Post-Dispatch

[2] The defense was not allowed to elicit the rest of the conversation--that Marcellus told him that the computer was Laura's and that he was pawning it on her behalf (Tr.2036-39).

[3] Marcellus moved to suppress the items seized in the search (L.F.247-49). The State presented evidence that the grandfather consented to the search and the car was registered to him, but that he did not have the keys; and failed to present any

ruler and a calculator (Tr.2275,2277). From the trunk, they seized a pad of paper on which was written Glenn's name and phone number (Tr.2280).

The Defense Case

The defense focused on the lack of forensic evidence linking Marcellus to the crimes and to the lack of credibility of the State witnesses. It suggested that the police had fed information to Henry and Laura to resolve this long-unsolved, high-profile crime.

Numerous hairs were found on Lisha's shirt and on the rug where her body lay (Tr.2871-72,2920). The rug had been vacuumed eleven days before the crimes (Tr.2754-55). While some of the hairs matched Lisha or Picus, others did not match them or Marcellus (Tr.2871-72,2920). Similarly, two gray pubic hairs found on the rug did not match Lisha, Picus, or Marcellus (Tr.2876-77). Head hairs also found on the rug did not match the victim, her husband, or Marcellus (Tr.2877).

Fingernail clippings taken from Lisha contained blood and skin (Tr.2961). The substance contained Lisha's DNA and none of Marcellus' (Tr.2964).

Bloody footprints at the scene appeared to belong to one assailant, but another footprint was present which bore a different sole pattern, indicating that

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evidence that the grandfather used the car at all (Tr. 62-63,66,68-72,80). The motion was denied (Tr.86).

another person could have been present (Tr.2230-31,2881-82,2886). The print was not made by any of the paramedics' shoes, nor did it match the shoes seized from Marcellus (Tr.2882,3140). A bloody footprint on the carpet matting was not analyzed by the State experts but could also indicate the presence of another person/s at the scene (Tr.2885,2895,2942).

The defense elicited that Henry was anxious to receive his reward money and called the police repeatedly about it (Tr.2455-59,2588). He had already received $5,000 and was expecting more (Tr.2455,2458-59). The defense elicited that Henry may have received favorable treatment on probation violations due to his involvement in this case (Tr.2764). Henry may have learned details of the crimes from six newspaper articles published before he went to the police (Tr.2821-28).

The defense elicited that the police may have spoken to Henry before he gave his videotaped statement. Henry testified that he was brought into a room for questioning, then brought to a cell for about a half hour, and then returned for more questioning, which was videotaped (Tr.2474-78). The police, on the other hand, vouched that the entirety of the questioning was videotaped (Tr.2700-2701).

Fingerprints were found at the scene but were destroyed by the police after they determined the prints had no value (Tr.2221-22). The police also destroyed the front window pane that the assailant had removed to get into the house,

although they claimed that the pane had evidentiary value by showing that the assailant wore gloves (Tr.2202-2203).

The defense challenged Laura's credibility based on her own potential involvement in the crime and discrepancies in her account. In August 1998, Laura called Marcellus' brother Jimmy and asked him if he'd like to buy a laptop for $100 (Tr.2770-73). Laura had access to Marcellus' car even after Marcellus went to jail (Tr.2774,2792). In August 1998, Marcellus' ten-year-old cousin saw Laura get off a bus carrying the laptop computer (Tr.2804-2805).

Laura's statements contained numerous discrepancies. For example, she initially told the police that on the night of the crimes, Marcellus threw the purse away with the clothing he was wearing (Tr.1927,1952); but at trial, she testified that purse was not thrown away until the next morning, and that she had the chance to look through the purse (Tr.1846-47). Initially, Laura stated that she never touched the purse (Tr.1934-35); at trial, she testified that she snatched it from Marcellus and looked through it carefully enough to be able to identify the victim's identification and name its contents (Tr.1847). Initially, she told the police that Marcellus' boots were in the trunk of the car (Tr.1928,1933-34); at trial, she stated that Marcellus threw away everything he had been wearing (Tr.1844-45).

Procedural Highlights

During jury selection, the prosecutor told each of the eleven panels that there were only three steps in its consideration of the death penalty, analogizing to a hallway with three doors (Tr.182,242,335,385,522,645,753,859,996-97,1110,1219). The prosecutor omitted that the jury must unanimously find that the evidence in aggravation, taken as a whole, actually warrants the death penalty, before it weighs the aggravators and mitigators.

The State struck six of the seven black venirepersons, leaving only one to serve on the jury (Tr.1569-70). Defense counsel challenged each of the State's strikes and countered the State's explanations (Tr.1569-71,1585-96,1603-1606). The State gave explanations such as that the venireperson looked too much like Marcellus, or wore unusual clothing, or worked for the post office (Tr.1586-87,1591-93,1603-1605). The court overruled each of the objections (Tr.1591,1597,1606).

Over objection that the State was impermissibly presenting evidence of other crimes, the State was allowed to elicit detailed testimony from two witnesses and twenty-five exhibits regarding Marcellus' alleged attempt to escape from jail while pending trial (Tr.2621-22,2624-35,2631-33,2635-36,2665,2673-84,2688,2695,2697).

Although the court allowed the jurors to take notes, it did not provide the required instruction on note-taking (L.F.481). The instruction omitted three paragraphs setting forth the duties of the jurors regarding their note-taking--that the jurors were not to take their notes out of the courtroom; that note-taking could

distract them from observing the evidence and witnesses; that they could not discuss or share their notes with anyone until deliberating; that the notes themselves are not evidence; and that the jurors may not assume that their own notes, or notes of other jurors, are more accurate than their own recollection of the evidence.

In closing, the State placed the jurors in Laura's shoes by asking if they had ever had "someone's hand around your neck to where you can't breathe (indicating), a man that size, that man's hand ripping your neck" (Tr.3013).

During its five-and-a half-hour deliberations, the jury requested the actual shoe lift from the scene, photographs of the shoe prints, Henry's note detailing the crime, Marcellus' shoes, photographs of the back of Marcellus' car, and photographs of the blood at the crime scene (Tr.3069-72). The jury found Marcellus guilty of burglary, robbery, first-degree murder, and armed criminal action (Tr.3073).

During penalty phase, the State presented evidence over objection that Marcellus had committed two robberies (Tr.3107-3108,3143). It presented evidence that he had burglarized a home in 1997 (Tr.3184). The State presented evidence that in the jail, he had gotten angry at some guards and threatened to kill them (Tr.3168-69). The State presented certified copies of Marcellus' convictions (Tr.3193-96).

Although the court did not allow the State to present victim impact

evidence regarding the victims of the other robberies (Tr.3118), the State argued in closing that the people Marcellus had robbed would never be the same (Tr.3486-87).

The State presented testimony of seven victim impact witnesses, who relayed information about virtually every aspect of Lisha's life and presented numerous photographs, letters, cards and other items (Tr.3201-86).

The defense presented testimony from his family members and friends that they visited Marcellus in prison and also kept in contact through phone calls and letters (Tr.3308,3329,3361,3382,3401,3415,3427,3437). Marcellus encouraged them to work and set goals, made them feel good, and urged the children to do well in school, work hard, and not to make the mistakes he had made (Tr.3308-3309,3338,3359,3408,3421,3427,3442). The death of Marcellus' older brother in 1997 deeply bothered him, since his brother had been a father-figure to him (Tr.3307,3339,3357-58).

Over objection that the aggravators were unsupported by the evidence or duplicative, the court submitted an instruction listing ten aggravators to the jury (L.F.528-29:Tr.3088,3464-65). The court refused to submit mitigating circumstances requested by the defense, including that Marcellus was an accomplice in the murder committed by another person and his participation was relatively minor (L.F.536;Tr.3456-57). Defense counsel objected to portions of the State's closing argument which juxtaposed the defendant's rights with those the victim was denied (Tr.3510,3512).

The jury found all ten aggravators and recommended that Marcellus be sentenced to death (L.F.537). The court overruled Marcellus' motion for new trial and imposed a death sentence (L.F.572-73).

POINT I

After the State elicited from Glenn Roberts that Marcellus had the laptop computer that was taken during the charged crimes and sold it to Roberts under a pawn agreement because he had financial difficulties, the trial court erred and abused its discretion in refusing to let the defense elicit that Marcellus also told Roberts that he had received the laptop from Laura. The court's error violated Marcellus' right to confront and cross-examine the witnesses against him and present a defense, a fair trial, and due process. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,14,18(a). The testimony was proper, because once the State elicited part of Marcellus' statement, the defense should have been allowed to elicit the remainder to place the statement in context for the jury. Marcellus was prejudiced, because the State used his possession of the laptop computer to link him to the charged crimes, there was no other physical evidence linking him to the crimes, and admitting just portions of the transaction distorted the jury's view of it, and Marcellus was not allowed to present the rest of the transaction to remove that distortion and support his defense that he was merely acting as an intermediary between Laura and Roberts when he pawned the laptop.

State v. Quinn, 461 S.W.2d 812 (Mo.1970);

State v. Easley, 662 S.W.2d 248 (Mo.1983);

State v. Beatty, 849 S.W.2d 56 (Mo.App.1993);

Guerrero v. Florida, 532 So.2d 75 (Fla.Dist.Ct.App.1988);

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

Mo.Const.,Art.I,§§10,14,18(a).

POINT II

The trial court abused its discretion in failing to conduct an analysis of the legal and logical relevance of other crimes evidence and in allowing the jury, in guilt phase, to hear repeated testimony and argument and view numerous exhibits showing that Marcellus struck a guard over the head with a metal bar and tried to assault another guard while attempting to escape from jail. The testimony and exhibits violated Marcellus' rights to due process, equal protection, and to be tried only for the crimes with which he was charged. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§2,10,17,18(a). The testimony and exhibits constituted inadmissible evidence of uncharged crimes which was not legally nor logically relevant; was not strictly necessary to prove the charges against Marcellus; and served only to show the jury that Marcellus was a bad person who was the type of person who would commit the charged crimes. In a close case such as this one, where the State's case hinged upon the word of two crack-addicted criminals, the evidence of uncharged crimes must have swayed the jury to convict Marcellus.

State v. Conley, 873 S.W.2d 233,237 (Mo.1994);

Wong Sun v. United States, 83 S.Ct. 407 (1963);

United States v. Meyers, 550 F.2d 1036 (5th Cir.1977);

State v. Reese, 274 S.W.2d 304,307 (Mo.1955);

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

Mo.Const.,Art.I,§§2,10,17,18(a).

POINT III

The trial court plainly erred in allowing the prosecuting attorney to misstate the steps which the jury must follow in assessing punishment. The State incorrectly characterized the process as falling under three steps: (1) finding Marcellus guilty of first-degree murder; (2) finding the existence of at least one aggravating factor beyond a reasonable doubt; and then (3) determining whether death was the appropriate sentence. The State completely omitted the requirement that the jury determine, before it could consider the death sentence at all, whether the evidence in aggravation actually warranted death. Marcellus was prejudiced, because the State's improper characterization of the law impermissibly lowered the State's burden of proof, thereby violating Marcellus' rights to due process, a fair trial, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21.

State v. Tokar, 918 S.W.2d 753 (Mo.1996);

State v. Simmons, 955 S.W.2d 729 (Mo.1997);

Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001);

Hicks v. Oklahoma, 100 S.Ct.2227 (1980);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.030.

POINT IV

The trial court erred in overruling defense counsel's Batson-based objections to the State's use of peremptory strikes to remove Venirepersons Henry Gooden, William Singleton, and Marvin Fortson, because the strikes denied Marcellus and the stricken venirepersons their right to equal protection, and also denied Marcellus his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10, 18(a),21. Marcellus made a prima facie case of racially discriminatory exercise of peremptory challenges by the State, and the State's purported race-neutral explanations were pretextual, because they were inherently racial, or were not logically relevant to the case, or were based on questioning which was not conducted with other jurors, or the State failed to strike other similarly situated venirepersons.

Batson v. Kentucky, 106 S.Ct.1712 (1986);

State v. Parker, 836 S.W.2d 930 (Mo.1992);

Johnson v. Love, 40 F.3d 658 (3rd Cir.1994);

People v. White, 669 N.Y.S.2d 503 (N.Y.App.1998);

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

Mo.Const.,Art.I,§§2,10,18(a),21.

POINT V

The trial court erred in overruling Marcellus' motion to suppress physical evidence seized from Marcellus' car and objections at trial to the admission of the evidence, because the evidence was obtained in violation of Marcellus' right to be free from unreasonable searches and seizures, and its use at trial violated his rights to due process, a fair trial, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends. IV,V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,14,15,18(a),21. The search, based solely on consent given by Marcellus' grandfather, was not effective, because the police could not have reasonably believed that Marcellus' grandfather had common authority over the car. Marcellus was prejudiced, because the State used the illegally seized evidence to corroborate the testimony of the otherwise unbelievable key State witnesses and repeatedly referred to the illegally seized evidence in both guilt and penalty phase closing arguments.

State v. Cole, 706 S.W.2d 917,918 (Mo.App.1986);

State v. White, 755 S.W.2d 363 (Mo.App.1988);

United States v. Matlock, 94 S.Ct. 988 (1974);

Illinois v. Rodriguez, 110 S.Ct. 2793 (1990);

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

Mo.Const.,Art.I,§§10,14,15,18(a),21.

POINT VI

The trial court plainly erred when it submitted Instruction One, explaining the duties of the judge and jury, because the instruction was not in conformity with MAI-CR3d 302.01 and thereby deprived Marcellus of due process, a properly instructed jury and a fair trial. U.S.Const.,Amends.V,VI, XIV; Mo.Const.,Art.I,§§10,14,18(a). Although the jury took notes, the instruction omitted three required paragraphs setting forth the duties of the jurors regarding their note-taking. The court failed to advise the jurors that they were not to take their notes out of the courtroom; that note-taking could distract them from observing the evidence and witnesses; that they could not discuss or share their notes with anyone until deliberating; that the notes themselves are not evidence; and that the jurors may not assume that their own notes, or notes of other jurors, are more accurate than their own recollection of the evidence. Since the jurors took notes during trial, yet were not instructed as to their proper use, the trial court's error resulted in manifest injustice.

State v. Gilmore, 797 S.W.2d 802 (Mo.App.1990);

State v. White, 622 S.W.2d 939 (Mo.1981);

People v. DiLuca, 448 N.Y.S.2d 730 (N.Y.App.1982);

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

Mo.Const.,Art.I,§§10,14,18(a);

MAI-CR3d 302.01.

POINT VII

The trial court plainly erred in penalty phase in letting the State argue victim impact of crimes other than the charged crimes, and in letting the State present victim impact testimony from family members that far exceeded its proper scope. This violated Marcellus' rights to due process, fair trial, reliable sentencing, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),19,21. The State argued how Marcellus' other robberies had impacted upon those victims, that, "[t]he people, the lives that [Marcellus] touches [through his crimes] will never be the same." Then, the victim impact testimony regarding this case far exceeded that which is authorized by §565.030.4 and Payne v. Tennessee. The sheer volume of this evidence overwhelmed the jury with emotion and encouraged the jury to weigh the value of the defendant's life against the victim's.

Payne v. Tennessee, 111 S.Ct. 2597 (1991);

People v. Hope, 702 N.E.2d 1282 (Ill. 1998);

State v. Storey, 40 S.W.3d 898 (Mo.2001);

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

Mo.Const.,Art.I,§§10,18(a),21;

§565.030.

POINT VIII

The trial court erred and plainly erred in overruling Marcellus' objections, giving Instruction 22, and sentencing Marcellus to death. These acts violated Marcellus' rights to due process of law and fair trial by a properly instructed jury, to not be convicted of an offense not charged, to freedom from cruel and unusual punishment and to reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,17,18(a),19,21. Marcellus' death sentence must be vacated and the cause remanded for him to be re-sentenced to life imprisonment without probation or parole or, in the alternative, for a new penalty phase, because the instruction violated Apprendi v. New Jersey and Jones v. United States by containing fatal variances from the information that submitted new, uncharged offenses to the jury in that none of the aggravators were pled in the indictment. The instruction was furthermore faulty in that:

1) aggravator one--depravity of mind--is unconstitutionally vague, in that it failed to narrow the class of murderers eligible for the death penalty and provide a means of distinguishing those murders for which the death penalty is appropriate from those in which it is not;

2) aggravators two, three, and four were duplicative, because the same facts and conduct were used to support and prove all three aggravating circumstances;

3) aggravators six through ten were invalid in that they (a) denied

the jury the ability to assess whether Marcellus' convictions constituted "serious assaultive criminal convictions" as required by §565.030.4(1); and (b) listed the armed criminal action convictions separate from their predicate offenses.

Ring v. Arizona, 2002 WL 1357257 (U.S.,6/24/02);

Apprendi v. New Jersey, 120 S.Ct.2348 (2000);

State v. Henderson, 789 P.2d 603 (N.M.1990);

Servin v. State, 32 P.3d 1277 (Nev.2001);

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

Mo.Const.,Art.I,§§10,17,18(a),19,21;

§565.030.

POINT IX

The trial court erred in refusing to instruct the jury on the statutory mitigator that Marcellus was an accomplice in the murder committed by another person and his participation was relatively minor. The error violated Marcellus' rights to due process, a fair jury trial, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII,XIV; Mo.Const.,Art.I,§§10,18(a),19,21. The defense presented evidence suggesting that another person was present at the time of the crime, since two different sets of shoes impressions were left at the crime scene; hairs left at the crime scene did not belong to the victim, her husband, or Marcellus; and Laura Asaro was seen carrying the laptop computer stolen during the crimes. Marcellus was prejudiced by the court's refusal to instruct the jurors on this mitigator, because the jurors were not told to consider this mitigator in deciding how to assess punishment and the State argued in closing that there were no mitigators for the jury to consider.

Penry v. Lynaugh, 109 S.Ct. 2934 (1989);

Lockett v. Ohio, 98 S.Ct. 2954 (1978);

Eddings v. Oklahoma, 102 S.Ct. 869 (1982);

Delo v. Lashley, 113 S.Ct.1222 (1993);

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

Mo.Const.,Art.I,§§10,18(a),19,21;

§565.032.

POINT X

The trial court plainly erred in failing to intervene *sua sponte* during guilt phase closing to prevent the State from personalizing by describing how the jurors would feel if Marcellus was choking them as he did State witness Laura Asaro. The court also abused its discretion in overruling Marcellus' objections to the State's comments comparing the rights of the victims to Marcellus' rights, that (1) if defense counsel had been in the victim's house asking Marcellus to be merciful, his pleas would have fallen on deaf ears; and (2) Marcellus was the victim's judge, jury, and executioner. The State's repeated violations during closing deprived Marcellus of his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. The trial court's approval of these improper arguments prejudiced Marcellus and affected the outcome of the trial by creating personal fear of Marcellus in the jurors; and allowing the State to skew the jury's view of what should be considered in penalty phase and allowing the State to urge the jury to penalize Marcellus for exercising his constitutional rights.

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

State v. Rhodes, 988 S.W.2d 521 (Mo.1999);

Vickers v. State, 17 S.W.3d 632 (Mo.App.2000);

Caldwell v. Mississippi, 105 S.Ct.2633 (1985);

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

Mo.Const.,Art.I,§§10,18(a),21.

ARGUMENT I

After the State elicited from Glenn Roberts that Marcellus had the laptop computer that was taken during the charged crimes and sold it to Roberts under a pawn agreement because he had financial difficulties, the trial court erred and abused its discretion in refusing to let the defense elicit that Marcellus also told Roberts that he had received the laptop from Laura. The court's error violated Marcellus' right to confront and cross-examine the witnesses against him and present a defense, a fair trial, and due process. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,14,18(a). The testimony was proper, because once the State elicited part of Marcellus' statement, the defense should have been allowed to elicit the remainder to place the statement in context for the jury. Marcellus was prejudiced, because the State used his possession of the laptop computer to link him to the charged crimes, there was no other physical evidence linking him to the crimes, and admitting just portions of the transaction distorted the jury's view of it, and Marcellus was not allowed to present the rest of the transaction to remove that distortion and support his defense that he was merely acting as an intermediary between Laura and Roberts when he pawned the laptop.

No physical evidence tied Marcellus to the charged crimes. The State needed to tie Marcellus to the crimes, other than by the word of two reward-hungry, drug-addicted criminals. So the State presented evidence that Marcellus

pawned the laptop computer that was taken during the crimes. Yet when Marcellus tried to show the jury the whole picture—that he was merely acting as an intermediary between Roberts and Laura, on Laura's behalf—the trial court shut him down. The court's abuse of discretion violated Marcellus' right to confront and cross-examine the witnesses against him and present a defense, a fair trial, and due process. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,14, 18(a).

It made sense that Marcellus was acting on Laura's behalf when he pawned the laptop to Roberts. Marcellus was well acquainted with Roberts, since Roberts was the best friend of Marcellus' uncle (Tr.1999-2000). Roberts knew Laura, but only through Marcellus (Tr.2022). According to Roberts, Laura had been present the times that he and Marcellus discussed the laptop before Marcellus actually brought the laptop to him (Tr.2036). Then, when Marcellus brought the laptop to Roberts, Roberts believed that there was a woman waiting outside in the car (Tr.2002).

Yet the State presented the jury with a distorted, one-sided picture of the conversation and transaction. Roberts testified that Marcellus pawned the laptop to him (Tr.2000,2027). "I guess it was like collateral. I gave him some money, he was supposed to come back and get the computer. … In relationship to the money, you know, it was financial. He said he had financial difficulties or something" (Tr.2000-2001). The State elicited that Roberts wanted to keep the

computer in good shape so that when Marcellus came back for "his merchandise," Roberts could get his money back (Tr.2010).

The State even elicited that Roberts' name and phone number were written on a slip of paper found in the trunk of Marcellus' car (Tr.2019). Marcellus called Roberts from jail on September 18th and 19th, 1998, but Roberts would not accept the collect calls (Tr.2024-25).

By allowing the jury to hear selected portions of the transaction, the State left the jury with the impression that Marcellus had obtained the laptop by committing the crimes. And yet the defense was not allowed to elicit from Roberts that during the transaction, Marcellus also told Roberts that he had received the laptop from Laura and was pawning it on her behalf (Tr.2038). The defense could not elicit that the computer was not Marcellus' (Tr.2034) or that somebody else could come back to pick up the computer (Tr.2034). The court would not even allow Roberts to describe the pawn agreement (Tr.2035)

Defense counsel argued that the testimony should come in under the rule of completeness--that if the State elicited part of Marcellus' statement to Roberts, the defense should be allowed to elicit the rest of it (Tr.1996-97,2037). Defense counsel made an offer of proof that Roberts would testify that he received the computer under a pawn agreement; that it was his understanding that Marcellus received the laptop from Laura; and that he pawned the laptop on behalf of Laura (Tr.2038). Roberts would also testify that Laura could come back and get the

computer, because it was her computer, or at least she was the one who really had possession of it (Tr.2039).

The court held that the defense was attempting to "get into the defendant's self-serving hearsay statement to [Roberts]" (Tr.2036). It stressed that "this is not a breach of contract action on…the contract or the agreement" (Tr.2037). The court further held that if Marcellus made other statements to Roberts, the only way for the jury to hear them was if Marcellus testified; otherwise, it was self-serving hearsay (Tr.1998,2037). This issue is included in the motion for new trial (L.F.544-45).

The trial court has discretion in determining the scope of cross-examination of witnesses, but its decision should be overturned when it has abused that discretion. State v. Hemphill, 669 S.W.2d 633,635-636 (Mo.App.1984).

Under the rule of completeness, the jury should have heard the entire conversation between Roberts and Marcellus. Generally, a defendant's out-of-court, exculpatory statement is inadmissible as self-serving hearsay. State v. Beishline, 920 S.W.2d 622,626-27 (Mo.App.1996). But once the State presents portions of that statement to the jury, it has "opened the door" for the defense to present the other portions of that statement, even if they are self-serving. State v. Quinn, 461 S.W.2d 812,816 (Mo.1970); State v. Collier, 892 S.W.2d 686,695 (Mo.App.1994); State v. Easley, 662 S.W.2d 248,252 (Mo.1983). "It would be incongruous for a defendant's incriminating statement to be considered in isolation from any ameliorating circumstances therein described." State v. Beatty, 849

S.W.2d 56,59 (Mo.App.1993). After all, the State "has no right to introduce selected portions of a defendant's confession and exclude those which tend to mitigate, justify, or excuse the offense charged." *Id*.

Furthermore, an admission may be a statement, or it may be conduct "that tends to incriminate or connect [that party] with the crime charged, or which manifests a consciousness of guilt." State v. Isa, 850 S.W.2d 876,894 (Mo.1993). A permissible inference of guilt may be drawn from the acts of a defendant, subsequent to an offense, if they tend to show a consciousness of guilt and a desire to conceal the offense or a role therein. State v. Walker, 208 S.W.2d 233,236 (Mo.1948).

The purpose of the rule of completeness is to ensure that a statement is not admitted out of context. The rule is violated "when admission of the statement in an edited form distorts the meaning of the statement or excludes information which is substantially exculpatory to declarant." Collier, 892 S.W.2d,695.

In Guerrero v. Florida, 532 So.2d 75,76 (Fla.Dist.Ct.App.1988), the defendant was arrested for driving a stolen car. At trial, the State elicited from the arresting officer that the defendant gave his name but did not have a license and that he was polite and cooperative. *Id*. The defendant was barred from eliciting that he also had told the officer that a girlfriend had given him the car and he did not know it was stolen. *Id*. The jury was instructed to infer guilt from the defendant's unexplained possession of the stolen property. *Id*.

The court reversed, holding that "where the state has 'opened the door' by eliciting testimony as to part of the conversation, defendant is entitled to cross-examine the witness about other relevant statements made during the conversation." *Id*. The defendant's explanation was clearly within the scope of direct examination and was relevant to the key issue at trial. *Id*., 77.

In Eberhardt v. Florida, 55 So.2d 102,103 (Fla.Dist.Ct.App.1989), the key issue at trial was whether the defendant--who had been found passed out in the building--was able to form the requisite intent to commit burglary. The State elicited from the witnesses that the defendant was found asleep in a chair, but the defense was not allowed to elicit whether he appeared to be under the influence of drugs or alcohol. *Id*.,105.

The appellate court held that "once the state asked about the defendant's condition and appearance when found in the building, the defense had a right to question and explore all the facts relevant to defendant's state or condition, including intoxication, when discovered there." *Id*. And once the state elicited portions of the defendant's conversation with the officer, the defendant was entitled to elicit other portions, even though they were self-serving. *Id*.

So, too, in People v. Warren, 237 N.W.2d 247, 248 (Mich.Ct.App.1976), the Michigan Court of Appeals reversed the defendant's murder conviction due to violation of the rule of completeness. It recognized that "clearly, an accused in a criminal prosecution is entitled to the benefit of the entire conversation in which

an admission introduced in evidence against him was made, notwithstanding a part of the conversation is self-serving as to him." *Id*.

In Henderson v. United States, 632 A.2d 419,421 (D.C.1993), the defendant was convicted of murdering his ex-wife. Since there were no witnesses and the physical evidence was inconclusive, it was a circumstantial evidence case, wherein the State relied largely on the defendant's suspicious conduct to allege guilt. *Id*. The State elicited parts of the defendant's statement to the police, but the court excluded other parts that were exculpatory. *Id*.,423.

The Court of Appeals for the District of Columbia applied the rule of completeness, holding that when the State relies on the defendant's conduct to show consciousness of guilt, all of what was said at the time, on the subject, may come in. *Id*.,427. Otherwise, the defendant may improperly be forced to "choose between allowing his or her statement to stand distorted as a result of selective introduction and abandoning his or her Fifth Amendment right not to testify in order to clarify that statement." *Id*.,426.

Finally, in State v. Haynes, 291 So.2d 771,772-74 (La.1974), the Louisiana Supreme Court reversed the defendant's manslaughter conviction based on the trial court's refusal to let the defense present portions of the defendant's statement after the State had presented other portions. Stressing the rule of completeness as a "rule of fairness observed in American jurisdictions," it held, "the prosecution in offering a writing or conversation must not garble it, or select parts, and exclude other parts which might be elucidative of the parts selected." *Id*.,772-73.

The trial court clearly violated the rule of completeness by allowing the jury to receive a distorted view of the transaction and conversation between Marcellus and Glenn Roberts. The State presented only part—that which was most inculpatory—and then objected when the defense tried to elicit other, exculpatory portions of that statement (Tr.2000-2001,2010; 1996-97,2034-35,2037-38). The State elicited that Marcellus was pawning "his" computer to Roberts because he had financial difficulties (Tr.2000-2001); and that Marcellus could come back later when he had money to retrieve "his merchandise" (Tr.2010). The defense, however, was not allowed to elicit the remainder of the statement--that Marcellus was pawning the computer on behalf of Laura, who had given Marcellus the computer and could come back and get it from Roberts (Tr. 1996-97,2034-35,2037-38).

From the testimony, the jury was left with the inaccurate belief that Marcellus had obtained the computer himself by committing the charged crimes. If the jurors had heard the complete conversation between Marcellus and Roberts, however, it would have known that (1) Laura had possession of the computer before Marcellus; (2) Laura was more involved in the crimes than she was willing to admit; and (3) Laura's testimony against Marcellus should be more closely scrutinized since she had an interest in pinning blame on Marcellus.

Marcellus' defense was that the jurors could not believe the testimony of Laura and Henry, who were both drug-abusing criminals who were motivated to lie. Furthermore, none of the physical evidence linked Marcellus to the crime.

The only items of physical evidence possibly tying Marcellus to the crimes were (1) the laptop computer and (2) a calculator and ruler, found in Marcellus' car, which may have belonged to the victim. But no evidence conclusively showed that these items had once belonged to the victim, and even so, Laura very easily could have placed them in the car, since she too was living in it (Tr.1841,1845). The laptop computer, on the other hand, definitely came from the victim's house (Tr.1759-61); thus, it was crucial for the State to show that Marcellus had exclusive possession of it, and for the defense to show that he did not. By refusing to let the defense reveal the rest of the conversation, the court (1) placed exclusive possession with Marcellus; and (2) blocked the defense from showing that when speaking with his uncle's best friend--a person he trusted and thus did not have a motivation to lie to--Marcellus revealed that he had obtained the computer from Laura.

The court explicitly forced Marcellus to choose between curing the distorted evidence created by the State and abandoning his right to remain silent. The court stated that if Marcellus wanted the jury to hear the rest of his conversation with Roberts, "[t]hen Marcellus can tell us that" (Tr.2037). The court ignored the warning of the District of Columbia that such a ruling would improperly force Marcellus to "choose between allowing his or her statement to stand distorted as a result of selective introduction and abandoning his or her Fifth Amendment right not to testify in order to clarify that statement." Henderson, 632 A.2d at 426.

The court also condemned the proposed testimony as self-serving, thereby failing to understand that once the State opened the door by eliciting selected portions of the conversation, the defense was entitled to elicit other portions, despite the fact that they may be self-serving. Collier, 892 S.W.2d at 695; Quinn, 461 S.W.2d at 816; Easley, 662 S.W.2d at 252.

The testimony sought here is identical to the testimony excluded in Guerrero, 532 So.2d 75, which warranted a new trial. The State elicited from the arresting officer that he had a conversation with the defendant and that the defendant was polite and cooperative. *Id*.,76. Yet the court refused to allow the defendant to reveal another part of that conversation--that he had explained to the officer that he had received the stolen property from his girlfriend. *Id*.,76. So too, Marcellus was barred from revealing that he told Roberts that he had received the stolen property from his girlfriend, even after the State elicited other incriminating parts of Marcellus' conversation with Roberts.

This case also resembles Henderson, 632 A.2d at 423, where the State used the defendant's statement to the police to make his conduct look suspicious, even though the defendant in his statement also provided explanations for his conduct. The rule of completeness is especially important when the State "relies on the defendant's conduct to show consciousness of guilt." *Id*.,427. Here, the State used Marcellus' statements and actions with Roberts to make him look guilty, but

Marcellus was not allowed to show the rest of the conversation that would have diminished his guilt.

In a criminal prosecution, the defendant must have a fair opportunity to present his defense. "An essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence" that is essential to the defense. Crane v. Kentucky, 106 S.Ct.2142,2146-47 (1986). "Where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 93 S.Ct. 1038,1049 (1973).

The defendant must also be afforded his right to confront the witnesses against him. Pointer v. Texas, 85 S.Ct. 1065,1068 (1965). The right of confrontation and cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id*.

The court enabled the State to make its case against Marcellus, and to obtain a death sentence, based on half-truths and distorted evidence. The only physical evidence linking Marcellus to the crimes was the laptop computer, so the State was desperate to place sole possession of the laptop with Marcellus. Without it, the only evidence against Marcellus came from the mouths of two reward-hungry, drug addicted criminals. On the flip side, Marcellus was barred from using the conversation with Roberts to support his defense—that Laura obtained the laptop, and Marcellus was merely acting on her behalf when he pawned it to

Roberts. As it was, the jury deliberated for five and a half hours (Tr.3069,3072-73). If the jury had known that Marcellus acted as an intermediary for Laura when he pawned the laptop to Roberts, it would not have convicted him. This Court cannot allow the convictions to stand, obtained as they were by allowing the State free rein while hog-tying the defense.

ARGUMENT II

The trial court abused its discretion in failing to conduct an analysis of the legal and logical relevance of other crimes evidence and in allowing the jury, in guilt phase, to hear repeated testimony and argument and view numerous exhibits showing that Marcellus struck a guard over the head with a metal bar and tried to assault another guard while attempting to escape from jail. The testimony and exhibits violated Marcellus' rights to due process, equal protection, and to be tried only for the crimes with which he was charged. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§2,10,17,18(a). The testimony and exhibits constituted inadmissible evidence of uncharged crimes which was not legally nor logically relevant; was not strictly necessary to prove the charges against Marcellus; and served only to show the jury that Marcellus was a bad person who was the type of person who would commit the charged crimes. In a close case such as this one, where the State's case hinged upon the word of two crack-addicted criminals, the evidence of uncharged crimes must have swayed the jury to convict Marcellus.

After the State presented the bulk of the evidence in its guilt phase case-in-chief, it put Marcellus on trial for attempting to escape from jail through repeated and detailed testimony and introduction of twenty-five exhibits. The State argued that the jury should consider the attempted escape as evidence that Marcellus was

guilty of the murder, since he had been arraigned on the murder just ten days before the escape (Tr.3057).

Despite the fact that the evidence dealt solely with uncharged crimes, the court never examined its legal and logical relevance. If it had done so, it would have learned that just ten days before the escape, Marcellus was also arraigned on multiple charges that, if proven, could have resulted in him spending the rest of his life in prison (Ex.232). The court also would have learned that on the very same day that Marcellus attempted to escape, he had been sentenced to serve two 20-year prison sentences, and that he would be required to serve 85% of those sentences (Tr.3196;§§556.061(8),558.019.3). If the judge had analyzed the logical and legal relevance of the escape evidence, he would have concluded that it had scant probative value and that its probative value was vastly outweighed by its prejudicial effect.

I. The Issue Is Preserved for Appeal

During the State's guilt phase opening statement, defense counsel objected to any mention of the escape attempt, on the grounds that it was not relevant yet was highly prejudicial as evidence of a prior bad act (Tr.1679). Defense counsel objected that it placed the defendant in a position where, to counter the inference made by the state, he would have to elicit that he was in jail on several other charges (Tr.1680). The State advised the court that Marcellus had been arraigned on the murder charge by the time of his attempted escape (Tr.1683), yet failed to

disclose that Marcellus had also been arraigned on unrelated charges of first degree robbery, armed criminal action, kidnapping, and stealing a motor vehicle (Ex.232). The State also failed to disclose that on the same day of the attempted escape, Marcellus had been sentenced to twenty years imprisonment and would have to serve 85% of that sentence (Ex.231). The court overruled the objection (Tr.1684).

Immediately before the testimony, defense counsel objected again on the same grounds (Tr.2612-14). The court again overruled the objection (Tr.2613-14). This issue is included in the motion for new trial (L.F.548-49).

A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *See, e.g*., State v. Henderson, 826 S.W.2d 371,376 (Mo.App.1992). Its rulings will not be overturned absent a clear abuse of discretion. *Id*.,374.

II. The Attempted Escape Mini-Trial

Once the State completed the bulk of its guilt phase case-in-chief, it called two witnesses--Mathieu Hose and Terry Schiller--to testify regarding the attempted escape. Hose testified that he was in jail with Marcellus (Tr. 2617). He, Marcellus, and two other inmates discussed how to escape, including whether "to tie guards up, or to hit them, or kill them" (Tr.2618-19).

On January 28, 2000, Hose saw Marcellus strike a guard with a metal bar (Tr.2621-22). He demonstrated how hard Marcellus swung the bar and explained

that Marcellus hit the guard in the head hard enough for the guard's head to "bust open" and bleed profusely (Tr.2624-25). Meanwhile, the two other inmates picked up a table and struck it against the window, cracking the window (Tr.2628,2632-34). Another guard struggled with Marcellus over the metal bar (Tr.2630-31).

Thirteen exhibits were admitted during Hose's testimony—eleven photographs including those of the room and injured guard; the metal bar; and a blanket used in the plot (Tr. 2622,2626-29,2631-33,2635-36,2665).

Corrections Officer Terry Schiller testified next, reiterating much of what Hose had relayed (Tr.2673). Schiller testified that at about 8:30 p.m. on January 28, 2000, three inmates tried to escape (Tr.2673). Schiller heard a call for help - an officer was down (Tr.2674). He rushed down the hallway and saw an officer bleeding "like a stuck pig from the top of his head" (Tr.2674). Schiller took the officer back into his office and told him to sit down and call for help (Tr.2674).

As Schiller came back into the room, he saw three inmates trying to break out the window with a table (Tr.2674). Marcellus swung an iron bar at him, but Schiller caught the bar as it was coming down, and he and Marcellus fought for control of it (Tr.2674-75). The metal bar came from a weight machine in the gym (Tr.2682).

Meanwhile, the other two inmates were still trying to break out the window (Tr.2675). Schiller let go of the iron bar and left the room (Tr.2675). He demonstrated the entire struggle (Tr.2678).

Schiller used eighteen exhibits in his testimony, six of which had already been admitted through Hose's testimony (Tr.2676-81,2683-84,2688,2697).

The court took judicial notice of the fact that a murder complaint was filed against Marcellus on November 29, 1999; Marcellus was indicted on it on January 6, 2000; and was arraigned on it on January 18, 2000 (Tr.2638).

During closing, the State argued that the attempted escape showed that Marcellus was guilty of the charged crimes:

> Look at what he does in the jail. Look at this (indicating). I'll tell you why I brought this into evidence. Because innocent men don't escape. Innocent men don't try and escape from jail. Innocent men don't hit guards over the head. He had just been indicted, just been arraigned for Murder First Degree. And bam, he devises a plan to escape.
>
> Consciousness of guilt. That's what that is, ladies and gentlemen. That's consciousness of guilt. And it's admissible in a criminal case for that reason. And that's why you heard it.
>
> Whacked that man right over the head. Did he care if he killed that man? I think that Officer Harrison was damn lucky he's alive, being hit over the head with this. Whack, and then swung the bar. Damn lucky, don't you think? But he didn't care if he killed that officer, as long as he got out of jail. Right after he gets indicted and arraigned for murder.
>
> Innocent men don't act that way. Actions speak louder than words, folks. (Tr.3057).

III. The Trial Court Must Evaluate the Logical and Legal Relevance Of "Other Crimes Evidence"

Evidence that the defendant committed an uncharged crime is inadmissible unless the evidence is both logically and legally relevant. To be logically relevant, the evidence must have a legitimate tendency to clearly establish the defendant's guilt of the charged offense, or tend to establish motive, intent, absence of mistake or accident, or common plan or identity. State v. Conley, 873 S.W.2d 233,237 (Mo.1994).

If the trial court finds the evidence to be logically relevant, it must then determine whether it is legally relevant; *i.e*., does the prejudicial effect to the defendant outweigh the logical relevance of the evidence. State v. Diercks, 674 S.W.2d 72,78-79 (Mo.App.1984). Evidence that tends to unnecessarily divert the jury's attention from the question before it is more prejudicial than probative and should be excluded. State v. Taylor, 663 S.W.2d 235,239 (Mo.1984).

A. Evidence of Escape Cannot Be Considered Admissible Per Se

This Court has condemned the per se admissibility of "other crimes evidence" as unconstitutional. In State v. Burns, 978 S.W.2d 759,760 (Mo.1998), this Court considered the constitutionality of §566.025, which allowed the State to introduce other crimes evidence in certain situations as evidence of the defendant's propensity to commit the charged crime. The Court struck down the

statute for failing to allow courts to consider whether the other crimes evidence was logically and legally relevant. *Id*.,761.

Yet Missouri courts seem to accept the per se admissibility of other crimes evidence that supposedly shows consciousness of guilt. Thus, despite the fact that evidence of an escape is other crimes evidence, Missouri courts fail to assess whether the evidence is logically and legally admissible. This Court has held that proof of the defendant's escape is generally admissible to show a consciousness of guilt, even when the defendant is held on multiple charges at the time of his escape. State v. Middleton, 998 S.W.2d 520,528-29 (Mo.1999). The rationale is that it is up to the jury to decide whether the defendant was motivated by a consciousness of guilt or another reason. Middleton, 998 S.W.2d, 529. No court analyzes whether the evidence is logically and legally relevant—that task is left to the unwitting jury, which is not told how it must consider the evidence.

This places the defendant in the intolerable position of having to choose between leaving the jury with the incorrect and misleading impression that the charged crime was the defendant's only motivation to escape; or revealing yet other, highly prejudicial bad acts to the jury and risking a conviction based on propensity evidence. Missouri courts have no guidance on how to weigh this evidence in terms of its logical and legal relevance, and jurors have no guidance on how they are to consider such evidence.

B. Evidence of Marcellus' Attempted Escape Was Not Logically Relevant

Evidence that Marcellus tried to escape from jail did not tend to establish any motive, intent, absence of mistake or accident, or common plan or identity in the charged crimes. The question then becomes whether the attempted escape otherwise has a legitimate tendency to clearly establish Marcellus' guilt of the charged offense.

It did not. Marcellus was in custody on three separate cases. Each of those cases had significant activity on or near the date of the attempted escape. On the very same day of the attempted escape, Marcellus had been sentenced to twenty years imprisonment and would have to serve 85% of that sentence (Tr.3196; §§556.061(8), 558.019.3). On the same day that Marcellus was arraigned on the murder charge, he also was arraigned on multiple charges that if proven could land him in prison for the rest of his life (Ex.232). Given these facts, the fact that Marcellus had been arraigned on the murder charge ten days before the attempted escape had little, if any, probative value. It was impossible to discern whether Marcellus was motivated by consciousness of guilt for the charged crimes or was prompted to try to escape due to the panic of just receiving a twenty-year sentence, or by the prospect of spending the rest of his life in prison on the other case. *See* State v. Moore, 729 S.W.2d 239,240-41 (Mo.App.1987)(although defendant's flight from the crime scene was indicative of guilt, it did not establish whether defendant felt guilty of burglary versus criminal trespass).

The United States Supreme Court has "consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Wong Sun v. United States, 83 S.Ct. 407,415, n.10 (1963); *see also* United States v. Williams, 33 F.3d 876,879 (7th Cir. 1994) ("We have long adhered to the Supreme Court's counsel that courts be wary of the probative value of flight evidence").

Numerous courts around the country hold that the probative value of an escape "as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn:

(1) from the defendant's behavior to flight;

(2) from flight to consciousness of guilt;

(3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and

(4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."

United States v. Meyers, 550 F.2d 1036,1049 (5th Cir.1977); *see also* United States v. Kord, 836 F.2d 368,372 (7th Cir. 1988); United States v. Guerrero, 756 F.2d 1342,1347 (9th Cir.1984); United States v. Ramon-Perez, 703 F.2d 1231,1232 n.1 (11th Cir. 1983); United States v. Beahm, 664 F.2d 414,420 (4th Cir. 1981); United States v. Peltier, 585 F.2d 314,323 (8th Cir. 1978); United States v. Jackson, 572 F.2d 636,639 (7th Cir. 1978); Ex Parte Weaver, 678 So.2d 284,290 (Ala. 1996); State v. Perillo, 649 A.2d 1031,1034 (Vt. 1994).

Evidence of the attempted escape would satisfy the first two factors, but would not satisfy the third or fourth. Marcellus was not only in custody on other charges at the time of the attempted escape, but just that day, he had received two twenty-year sentences, of which he would have to serve 85% (Tr.3196; §§556.061(8), 558.019.3). It is far from clear that Marcellus was motivated by consciousness of guilt of the charged crimes, as opposed to being motivated by panic after receiving the lengthy sentence, or by consciousness of guilt of yet other pending charges. Even if Marcellus was motivated by fear that he would be found guilty of the charged crimes, that does not equate to Marcellus actually being guilty of those crimes.

Missouri courts regularly warn that evidence of other crime should not be presented to the jury in guilt phase unless it is "strictly necessary." State v. Collins, 669 S.W.2d 933,936 (Mo.1984). "[T]he dangerous tendency and misleading probative force of this class of evidence requires that its admission should be subjected by the courts to rigid scrutiny." State v. Reese, 274 S.W.2d 304,307 (Mo.1955). Because such evidence could "raise a legally spurious presumption of guilt in the minds of the jurors," it must be admitted only with great caution. *Id*.

Evidence that Marcellus attempted to escape from the jail was not probative, let alone "strictly necessary." And the court did not exercise any caution in admitting this evidence, let alone subjecting the evidence to rigid scrutiny.

C. Evidence of Marcellus' Attempted Escape Was Not Legally Relevant

Evidence is legally relevant if the prejudicial effect to the defendant does not outweigh the logical relevance. Diercks, 674 S.W.2d, 78-79. Evidence that tends to unnecessarily divert the jury's attention from the question before it is more prejudicial than probative and should be excluded. Taylor, 663 S.W.2d, 239.

Legal relevance must "be resolved in light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." State v. Clover, 924 S.W.2d 853,856 (Mo.1996). In State v. Wallace, 943 S.W.2d 721,724 (Mo.App.1997), the Court of Appeals warned of the danger that other crimes evidence "would inflame the passions of any reasonable juror and instill in them the desire to punish the defendant for the [other crime], an act for which he was not on trial." *Id*.,725.

The State presented a mini-trial of the attempted escape, including eighty-five pages of testimony and twenty-five exhibits, diverting the jury's attention from the very difficult issue of whether Marcellus could be found guilty based upon the word of two self-motivated, drug-addicted criminals. The jury learned that Marcellus struck a guard over the head with an iron bar and attempted to assault another guard (Tr.2621-22, 2674-75). It saw photographs of the injured guard and the witnesses demonstrated how Marcellus wielded the metal bar (Tr.2624-25, 2627, 2676, 2678; Ex.247, 248). The jury learned that Marcellus and the other inmates planned the escape, discussing the possibility of killing a guard if the need arose (Tr.2618-19). Through this lengthy and repeated evidence and

the State's arguments in closing, the State urged the jury to get angry at Marcellus for his actions toward the jail guards, rather than focusing on the facts truly at issue.

IV. This Court Must Provide Instruction to Trial Courts on How to Assess "Other Crimes Evidence" that Supposedly Shows Consciousness of Guilt

Although most courts admit evidence of escape as having some tendency to prove guilt, it is widely acknowledged that such evidence is "only marginally probative as to the ultimate issue of guilt or innocence." United States v. Robinson, 475 F.2d 376,384 (D.C. Cir. 1973); Wong Sun, 83 S.Ct.,415,n.10.

It is crucial that courts evaluate the probative and prejudicial value of this evidence before allowing the jury to hear it. Missouri courts do this regarding every item of "other crime evidence" except those relating to flight or escape. Yet, this is an area where it is most important for the courts to conduct the inquiry--if the court does not conduct the inquiry, the defendant is placed in the untenable position of either (a) leaving the jury with incorrect information about his reasons for escaping; or (b) informing the jury of other bad acts. The court, rather than the jury, must balance the probative and prejudicial value of the evidence.

Evidence of escape should not be held to a different standard than evidence of other uncharged crimes. In no other area do the courts allow evidence of uncharged crimes to go to the jury when it is not clearly relevant, or when the prejudicial effect of the evidence outweighs its probative value.

Here, the court did not conduct any analysis. The discretion typically afforded to trial courts should not apply here, since the court did not exercise its discretion. Instead, it merely found that the evidence is typically admissible, and allowed it to be presented.

V. Marcellus Must Receive a New Trial

Admission of detailed evidence regarding the attempted escape violated Marcellus' rights to due process, equal protection, and to be tried only for the offense with which he is charged. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§2,10,17,18(a).

When evidence that the defendant committed uncharged crimes is improperly received, admission of the evidence is presumed prejudicial. State v. Lancaster, 954 S.W.2d 27,29 (Mo.App.1997); State v. Brooks, 810 S.W.2d 627,634 (Mo.App.1991).

Marcellus suffered immense prejudice by the excessive testimony and exhibits regarding the attempted escape. This was guilt phase. The State repeatedly elicited that Marcellus bashed the head of a jail guard with an iron bar and then attempted to hit another guard with that bar (Tr.2621-22, 2624-25,2674-75,2678). The State used this evidence in arguing for Marcellus to be convicted of the charged crimes:

> Whacked that man right over the head. Did he care if he killed that man? I think that Officer Harrison was damn lucky he's alive, being hit over the head

with this. Whack, and then swung the bar. Damn lucky, don't you think? But he didn't care if he killed that officer, as long as he got out of jail. Right after he gets indicted and arraigned for murder.

(Tr.3057). The State urged the jury to find Marcellus guilty because he was a bad person who would hit a jail guard over the head, without caring if he killed him. The State used the escape, not to show consciousness of guilt, but to portray Marcellus as a bad person. The State's argument is nothing more than a thinly veiled propensity argument, which urged the jury to find Marcellus guilty because he was a "bad person" and distracted the jury from the true issue—whether it could believe the word of two reward-hungry, drug addicted criminals.

The most common danger in admitting evidence of other crimes is that "the jury will penalize the defendant for the prior crime even though he may or may not be guilty of the present crime or that the jury will give more weight to the prior crime than it is actually worth." State v. Sladek, 835 S.W.2d 308,314 (Mo.1992) (Thomas, J. concurring). Although the State argued that Marcellus was someone willing to kill to suit his needs, the jury was not instructed on how it should consider the escape evidence--merely as circumstantial evidence of Marcellus' guilt or instead, as proof that he had a propensity for violence.

The jury deliberated for five and a half hours, demonstrating that this was a close case (Tr.3069,3072). The State's case relied upon the testimony of two drug-addicted criminals with their eyes set on reward money. If the jury did not believe the State's key witnesses--drug-addicted criminals--it would have to acquit

Marcellus. To bolster its case, the State used the attempted escape to portray Marcellus as a bad person who was guilty of the charged crimes because he did other bad things. Marcellus must receive a new trial where his guilt would not be determined based upon evidence of uncharged crimes.

ARGUMENT III

The trial court plainly erred in allowing the prosecuting attorney to misstate the steps which the jury must follow in assessing punishment. The State incorrectly characterized the process as falling under three steps: (1) finding Marcellus guilty of first-degree murder; (2) finding the existence of at least one aggravating factor beyond a reasonable doubt; and then (3) determining whether death was the appropriate sentence. The State completely omitted the requirement that the jury determine, before it could consider the death sentence at all, whether the evidence in aggravation actually warranted death. Marcellus was prejudiced, because the State's improper characterization of the law impermissibly lowered the State's burden of proof, thereby violating Marcellus' rights to due process, a fair trial, freedom from cruel and unusual punishment, and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art. I,§§10,18(a),21.

Death qualification was broken down into eleven panels of about eight venirepersons (Tr.209,231,312,374,448,603,723,814,958,1061,1173). The prosecutor told each of the eleven panels that there were only three steps in its consideration of the death penalty, analogizing to a hallway with three doors (Tr.182,242,335,385,522,645,753,859,996-97,1110,1219). The first door was the "guilt or innocence door" for first degree murder (Tr.182,242,335,385-86,521-22,645,753,859,997,1110,1219). The second door was the "aggravating

circumstances door" where the State had to prove that an aggravating circumstance exists beyond a reasonable doubt, to all twelve jurors (Tr.184,242-43,295,336,386-87,523-24,647,754-55,861,1000-1001,1111,1220). At the third door, the "death penalty door," the jury must weigh the mitigating and aggravating circumstances and "decide whether to open the door and impose the death penalty" (Tr.184-85,243-44,337,387-88,524-25,647-48,755,861-62,1001,1112-13,1222-23).

But §565.030.4 mandates four steps the jury must follow in order to assess the death penalty in any given case:

(1) It must unanimously find the existence of at least one statutory aggravating circumstance;

(2) It must unanimously find that the evidence in aggravation, taken as a whole, warrants the death penalty;

(3) It must conclude that the evidence in aggravation outweighs the evidence in mitigation;

(4) It then must decide that a death sentence is appropriate.

See also MAI-CR3d 313.40, 313.41A, 313.44A, 313.46A.

Defense counsel did not object to the prosecutor's repeated misstatement of the law. Marcellus therefore requests plain error review. Rule30.20.

This Court has repeatedly stressed the importance of the second step of the statute. "[The second step] actually erects a barrier, in favor of the defendant, which must be surpassed before the jury can even begin to consider whether it

should impose the death penalty under the specific facts of the defendant's case they are deciding." State v. Tokar, 918 S.W.2d 753,771 (Mo.1996). The State must completely prove its aggravating case before the jury can even consider the death penalty. State v. Simmons, 955 S.W.2d 729,743 (Mo.1997). By setting forth the process the jury must follow but omitting a key step, the State lowered its burden of proof. The jury was left to believe that the second step of the instructions—a truly vital step—was inconsequential and could be overlooked.

In Carter v. Bowersox, 265 F.3d 705 (8thCir.2001), the trial court failed to instruct the jury on the second step. The Eighth Circuit held that failure to instruct on the second step of the statute was a miscarriage of justice that violated Carter's due process rights under the Fourteenth Amendment. *Id*.,717. It recognized that "Missouri law grants a capital defendant the right not to be sentenced to death unless the jury, in the exercise of its discretion, unanimously finds that evidence of one or more aggravating circumstances warrants the death penalty." *Id*.,716. Because Carter had a legitimate expectation that his sentencing would be in accord with the four-step process set forth by statute, and that expectation was erroneously deprived him by the State, a new sentencing trial was warranted. *Id*.; *see also* Hicks v. Oklahoma, 100 S.Ct.2227,2229 (1980).

This Court dealt with a similar, but distinguishable scenario in State v. Tokar, 918 S.W.2d, 769. There, the State used the three-door analogy during voir dire of the first two panels. *Id*. It described the second door as representing "the State's burden of proof regarding the existence of at least one aggravating

circumstance that warrants the death penalty." *Id*.,769 (emphasis added). On appeal, the defendant objected that the three-door analogy impermissibly downplayed the role of mitigating evidence. *Id*. This Court held that there was no manifest injustice, since both parties adequately explained the role of mitigating and aggravating circumstances. *Id*.[4]

Marcellus' challenge is different. In Tokar, the State advised the jury that the second door could be opened only after the jury found an aggravator that warranted death. *Id*. Here, the State completely omitted the mandate that the evidence in aggravation must warrant death, in order to open the second door. Thus, the jury was left with the false belief that it could proceed to consider the death penalty even if the jurors did not unanimously believe that the evidence in aggravation warranted death. Also, in Tokar, the analogy was used in only the first two panels of voir dire, whereas here, every juror who assessed punishment had been indoctrinated with incorrect information about the process it had to follow (Tr.182-85,242-44,248-49,251,254,257,260,285,335-39,344-45,351-55,385-88,390,396,399-400,403-405,522-25,527-533,535,537-38,540-43,645-

[4] *See also* State v. Ervin, 979 S.W.2d 149,162 (Mo.1998), where the defendant challenged the State's analogy in voir dire that "the death penalty process is like a hallway with three doors." This Court found that the issue was neither preserved for review, nor properly briefed, and found no manifest injustice. *Id*.

48,650-55,664-65,667-68,753-56,760-61,770-71,777-80,784-85,859-63,868,874-75,882).

Voir dire was the lawyers' only opportunity to interact with the jurors regarding the process that had to be followed, to ferret out biases regarding the steps to be followed, and to ascertain which venirepersons could not follow that process. During voir dire, the jurors received informal, repeated instruction as to the steps that had to be followed (Tr.182-85,242-44,248-49,251,254,257,260,285,335-39,344-45,351-55,385-88,390,396,399-400,403-405,522-25,527-533,535,537-38,540-43,645-48,650-55,664-65,667-68,753-56,760-61,770-71,777-80,784-85,859-63,868,874-75,882). Unfortunately, this indoctrination was fatally flawed. The State led the jury to believe that there were just three steps, instead of four, and that it could disregard the necessity of finding that the evidence in aggravation actually warranted the death penalty, before proceeding to the third door—the death penalty door. The State therefore succeeded in impermissibly lowering its burden of proof in penalty phase, in violation of Marcellus' rights to due process, a fair trial, freedom from cruel/unusual punishment, and reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art. I,§§10,18(a),21. This Court must reverse Marcellus' death sentence and remand this case for a new penalty phase.

ARGUMENT IV

The trial court erred in overruling defense counsel's Batson-based objections to the State's use of peremptory strikes to remove Venirepersons Henry Gooden, William Singleton, and Marvin Fortson, because the strikes denied Marcellus and the stricken venirepersons their right to equal protection, and also denied Marcellus his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),21. Marcellus made a prima facie case of racially discriminatory exercise of peremptory challenges by the State, and the State's purported race-neutral explanations were pretextual, because they were inherently racial, or were not logically relevant to the case, or were based on questioning which was not conducted with other jurors, or the State failed to strike other similarly situated venirepersons.

"It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice will influence the jury]." Rosales-Lopez v. U. S., 101 S.Ct. 1629,1636 (1981). Marcellus, a black man, was charged with the stabbing death of a young white woman, a doctor's wife, in her home in a wealthy St. Louis neighborhood. Instead of working to alleviate the danger of racial prejudice, the State exacerbated it, by systematically striking six of the seven black

members from the venire (Tr.1569-70). The State even struck the one black person who could be considered as an alternate (Tr.1607-1608). The resulting jury contained only one black person, despite the fact that black people made up about 25% of the available venire.

The State's improper strikes denied Marcellus and the stricken venirepersons their right to equal protection of the law and also denied Marcellus his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§2,10,18(a),21.

A prosecutor may not strike potential jurors because of their race or on the assumption that black jurors as a group are unable to impartially consider the State's case against a black defendant. Batson v. Kentucky, 106 S.Ct.1712,1719 (1986). Once a defendant objects to the State's strikes based on Batson, the prosecutor must give a race-neutral explanation for removing prospective black jurors from the panel. State v. Parker, 836 S.W.2d 930,939 (Mo.1992). The explanation must give a "clear and reasonably specific" reason for striking the black venirepersons. *Id*. The explanation need not rise to the level of justifying a challenge for cause, and the prosecutor is allowed to rely on "hunches" and past experience, as long as discrimination is not the motive. State v. Antwine, 743 S.W.2d 51,65 (Mo.1988). Although the proffered race-neutral reason cannot be a "charade" that masks discrimination, it does not have to make any sense at this stage of the Batson analysis. State v. Weaver, 912 S.W.2d 499,509 (Mo.1995).

To determine whether a prosecutor has engaged in purposeful discrimination, the trial court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." Parker, 836 S.W.2d, 939. The court should also consider:

(1) the existence of similarly situated white venirepersons not struck by the State;

(2) the "degree of logical relevance" between the explanation and the case to be tried in terms of the nature of the evidence and the potential punishment;

(3) the prosecutor's statements and demeanor during voir dire;

(4) the demeanor of the excluded venirepersons;

(5) the court's past experiences with the prosecutor;

(6) "objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim and the material witnesses."

Id.,940. The court may also consider the racial composition of the jury after the prosecutor has made his strikes and whether the prosecutor's strikes had a disproportionate impact on black venirepersons. State v. Smith, 791 S.W.2d 744,748 (Mo.App.1990).

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

Marcellus properly challenged the State's strikes of Venirepersons Gooden, Singleton, and Fortson. Marcellus objected to the strikes and showed that the affected venirepersons were African-American, as Marcellus is (Tr.1569-71). Marcellus showed that the State's reasons for the strikes were pretextual (Tr.1585-96, 1603-1606). The court overruled each of the objections (Tr.1591, 1597, 1606). Defense counsel included each in the motion for new trial (L.F.553-56).

I. The State's Actions Demonstrate the State's Racial Motivation in Striking Black Venirepersons

The State's strikes had a hugely disproportionate impact on black venirepersons. Of the seven black venirepersons remaining on the panel, the State struck six (Tr.1569-70). The State thus used 67% of its strikes against blacks, who comprised about 25% of the panel. Only one black person made it onto the jury (Supp.L.F.1).

The State had a strong motivation to discriminate. Marcellus, a black man, was charged in the stabbing death of a white woman, a doctor's wife, in her own home in a wealthy St. Louis suburb. The crime went unsolved for quite a while, prompting the posting of a $10,000 reward (Tr.1783,1814). The State argued that the crime was the "type of nightmare that people have when they wake up in a cold sweat, maybe screaming" (Tr.3478) and asked the jurors to sentence Marcellus to death so "our women" won't "be at home at risk" (Tr.3514). Even if the prosecutor's word choice was not intentionally racist, it could trigger covert racial prejudices with the jury. "Even a reference that is not derogatory may carry

impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." McFarland v. Smith, 611 F.2d 414,417 (2d Cir.1979). But by preventing black people from serving on the jury, and then using language that could trigger racial prejudice against the defendant, the State impermissibly used the defendant's race against him to secure a conviction.

The prosecutor's demeanor and past history should have alerted the court to the potential for racially based strikes. This was the same prosecutor who struck black venirepersons for having "wild hair" or goatees in Purkett v. Elem, 115 S.Ct.1769,1772 (1995). Although the United States Supreme Court held that the strikes were proper race-neutral explanations, the Court of Appeals for the Eighth Circuit disagreed, as did Justices Stevens and Breyer of the Supreme Court. Purkett, 115 S.Ct., 1775; Elem v. Purkett, 25 F.3d 679,683 (8th Cir.1994). The trial court also should have analyzed the prosecutor's comments more stringently given his admission that he was questioning one black venireperson more closely than other venirepersons to prepare for a Batson challenge (Tr.1500).

II. The State's Reasons for Its Strikes Are Not Logically Related to this Case

A. Venireperson Number 64: Henry Gooden

During voir dire, Venireperson Number 64, Henry Gooden, stated that he believed he could legitimately and seriously consider the death penalty, as well as life without parole (Tr.762). As foreman, he could sign the death verdict (Tr.762). He believed the death penalty was appropriate in some cases, but not others (Tr.762-63). He works as a mail processing supervisor for the postal service (Tr.1494).

The State said it struck Gooden because he looked like Marcellus (Tr.1586). His glasses were similar to those worn by Marcellus and he had "the same piercing eyes" as Marcellus (Tr.1586). His "quiet demeanor, almost bookish" reminded him of Marcellus (Tr.1590-91). Gooden had two earrings in his left ear, which was a sign of being liberal (Tr.1585). He also had a goatee (Tr.1587). He wore shiny gray pants, a shirt with an orange dragon with Chinese or Arabic lettering, and "a large gold cross very prominent outside his shirt, which I thought was ostentatious looking" (Tr.1586).

The State also explained that it struck Gooden since he is a postal clerk, a mail processing supervisor, "which is a patronage job," and he has found, from "seeing" the people who work at the post office when he goes there, "that postal service workers are very liberal" (Tr.1586-87). The prosecutor differentiated Gooden from Venireperson 12, Clarence Jones, who also is black and works for the postal service but was not struck (Tr.1587). He liked Jones because he is a

mechanic, not "your typical postal worker, mail handler, mail sorter, processor of mail;" was retired military; and was strong on death (Tr.1587).

Defense counsel responded that Gooden did not look anything like Marcellus (Tr.1587). He argued that if the State truly was concerned about Gooden's appearance and clothing, it should have made a record of it (Tr.1588). Because the State was silent on the issue, the defense could not make a record on white venirepersons who dressed similarly to Gooden, but defense counsel stressed that another male venireperson wore an earring yet was not struck, and that other venirepersons wore unusual types of clothing (Tr.1589).

Defense counsel argued that the State's generalization of all postal workers as liberal was not a fair inference (Tr.1588). If the State wanted to show that Gooden was liberal, it should have questioned him individually, as it did with other jurors (Tr.1589). Defense counsel also countered that Gooden stated repeatedly that he could follow the instructions and serve as foreman (Tr.1590).

The court found that the State's reasons were sufficiently race-neutral, since the State is allowed to rely on hunches (Tr.1591).

The court clearly erred in finding the State's excuses to be race-neutral. The State's reasoning falls into three categories: (1) personal appearance; (2) employment as a postal worker; and (3) ability to impose a death sentence.

1. "Gooden Looked Too Much Like Marcellus"

The State justified its strike on the ground that Gooden too closely resembled Marcellus, had earrings and a goatee, and wore ostentatious clothing.

The State's justification, however, failed the test of race-neutrality. After all, could a white person have resembled Marcellus too much? Certainly, if a white person had glasses that resembled Marcellus', the State would not have exercised a peremptory challenge against him. The State's discriminatory intent is inherent in its explanation and cannot serve as a race-neutral explanation.

In Johnson v. Love, the defendant-petitioner was a black male convicted of murdering an elderly white man who had solicited sexual favors from young black boys. 40 F.3d 658,660 (3rd Cir. 1994). At trial, the state used a peremptory strike to remove a young black woman from the jury panel. *Id*.,661. As part of his explanation for striking the venireperson, the prosecuting attorney said, "the victim of [the] crime was not an individual who I felt would get a lot of sympathy from people, certainly not a lot of sympathy from a young black girl." *Id*.,662.

The federal habeas court determined that the explanation, on its face, was not race-neutral. *Id*.,668. The explanation indicated that the prosecutor assumed that the venireperson's objectivity would be impaired because she was black and because the white victim had sexually molested black boys. *Id*. The court found this assumption to be indistinguishable from an assumption that a venireperson's objectivity would be impaired because the defendant was black which is clearly prohibited by the Equal Protection Clause. *Id*.

Even if the prosecutor's statement was sincere, his explanation does not satisfy Batson, because a discriminatory intent is inherent in his explanation for the strike. United States v. Bishop, 959 F.2d 820,827 (9th Cir. 1992). "[T]he Batson inquiry ends and the conviction must be vacated at the second stage of analysis if the state's explanation is such that, taken at face value, it either demonstrates an equal protection violation or would otherwise be inadequate as a matter of law to support the conviction." Johnson, 40 F.3d, 668.

Furthermore, the fact that Gooden wore two earrings in his left ear, a large gold cross, brightly colored, or unusual clothing and had a goatee is not a valid race-neutral reason for striking him. If the State had been so overly concerned about appearance, it should have made a record of it during the questioning. By not mentioning it, and then using it as a basis to strike Gooden, the State left the defense unable to counter the rationale. After all, the defense did not know that clothing style would be a key issue to show bias. If the defense had been put on notice, it would have been able to show that other jurors also wore earrings or were clad in unusual clothing.

Marcellus acknowledges that the Supreme Court has stated that striking a juror for having wild hair or a beard can be racially neutral. Purkett v. Elem, 115 S.Ct. 1769,1770 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. Here, a discriminatory intent was present, since the prosecutor struck Gooden for looking too much like Marcellus.

Also, striking a juror for having certain jewelry or clothing is not racially neutral, when the State cannot explain how it related to the case. Rector v. State, 444 S.E.2d 862,865 (Ga.Ct.App.1994) (strike of black venireperson because she had a gold tooth was not race-neutral when the State could not explain how the tooth related to the outcome of the case). Here, the State failed to show how Gooden's choice of clothing, jewelry or facial hair had any bearing on the case. Its basis for striking Gooden was a pretext to severely limit the number of black jurors.

It has been held not to be racially neutral to strike a venireperson for the disinterested manner in which he sat in the jury box; the fact that a venireperson reminded counsel of a teacher she did not like; that a venireperson seemed studious; or when the expensive clothing worn by a venireperson suggested to counsel that the venireperson may be more inclined to believe the police witnesses over the defendant. Gilchrist v. State, 627 A.2d 44,47-49,54 (Md.Ct.App.1993).

In People v. White, 669 N.Y.S.2d 503,505 (N.Y.App.1998), the State struck two black women wearing dress hats in the courtroom, dressed respectably, and appearing middle-class and reasonably intelligent. The State reasoned that the women would not relate to a young unemployed black girl who was a key State witness. *Id*. The appellate court held that the State's justification was not race-neutral, since whether the venireperson is employed must be sufficiently connected to the facts of the case to validate that the strike was race-neutral. *Id*. The court also found that the State failed to ask the venirepersons whether they

would be biased against an unemployed woman, and failed to substantiate the claim that the women's clothing indicated a bias toward an unemployed witness. *Id*.

Here, the State's justifications for striking Gooden based on his personal appearance were not race-neutral. The State's excuse that Gooden looked too much like Marcellus was inherently racial. The State failed to substantiate how Gooden's clothing, jewelry, or facial hair would make him biased against the State, or was any other way connected to the case. In questioning Gooden, the State failed to focus on these matters, thereby demonstrating that it was not a true concern.

2. "Postal Workers are Inherently Liberal"

The State also justified its strike on the ground that Gooden was a postal worker (Tr.1586-87). In State v. Smith, 791 S.W.2d 744,749 (Mo.App.1990), the prosecutor removed two blacks because they worked for the government. He justified striking government employees "because he had had bad experiences and results with them." *Id*. The Court of Appeals rejected this explanation, because it "does not depend on any observation or assessment of the prospective juror," but rather was merely a "rote neutral explanation," which, although facially legitimate, concealed a discriminatory motive. *Id*.

In State v. Hudson, 822 S.W.2d 477,480-481 (Mo.App.1991), the prosecutor removed two black panelists because they were postal workers. He defended the strike on the ground that postal workers are "too liberal in their

leanings, and also much too tolerant of activities that could be considered criminal." *Id*. He based this observation on his professional experience and also on the fact that members of his family were postal workers. *Id*. The Eastern District held that the State's explanation was legitimate, since the State "engaged in a detailed explanation" of why he believed postal workers would be poor jurors for the state. *Id*. The court reasoned that the "experience based rationale involved more than mere rejection based on employment." *Id*.

In State v. Pepper, 855 S.W.2d 500,502-503 (Mo.App.1993), the prosecutor stated that he "makes a habit" of striking all postal employees because (1) they are deemed bad jurors for the State by his office; and (2) in the past, postal employees have not been good jurors for him. *Id*.,503. The Eastern District held that the explanation was race-neutral because the prosecutor based his strike on advice from his office and on his personal experience as a prosecutor. *Id; see also* State v. Smulls, 935 S.W.2d 9,14-15 (Mo.1996).

In State v. Davis, 894 S.W.2d 703,710 (Mo.App.1995), the Western District held that striking a black venireperson because he was "retired military" was not a legitimate race-neutral reason. The prosecutor failed to show why it would be legitimate to strike retired military venirepersons and failed to explain how the characteristic related to the case. *Id*.

The State's strike of Henry Gooden because he was a mail sorter was pretextual. The State's explanation did not demonstrate why this particular venireperson would not be a good State juror:

> I find that postal service workers are very liberal. And I'm talking about mail handlers and clerks. People that work at the post office in that capacity, especially, are that way, it's been my experience when I go into the post office, seeing the people that work there. And on other juries, I tend to strike postal service employees.

(Tr.1596-87). But how could the prosecutor ascertain, from his stamp-buying trips to the post office, that the employees there were liberal, especially employees such as mail processors, who would not even be seen from the clerk's counter? All that the prosecutor could see was that a lot of black people worked for the postal service, and for this prosecutor, that was enough to conclude that all mail processors and clerks were too liberal to serve on a jury. The prosecutor's strike was not based on his personal observations of Gooden; it was not based on professional experience; and it was not based on any legitimate personal experience. Although the prosecutor makes a habit of striking postal workers, he did not vouch that postal workers had ever been bad jurors for him. The State failed to show how any alleged characteristic of postal workers related to the case.

If the State truly had a problem with postal workers, it would have struck the other postal worker on the venire, 12, Clarence Jones. The State responded that it did not strike Jones, even though he was a postal worker, because he was a mechanic, not a mail sorter (Tr.1587). The distinction between mail sorters and other postal employees demonstrates the pretextual nature of the strike.

3. "Gooden Was Not Certain Enough that He Could Impose a Death Sentence"

The State implied that it struck Gooden because he was not certain enough that he could impose a death sentence. It stated that it did not strike another venireperson, Clarence Jones, because Jones was not a mail sorter, was retired military, and was strong on death (Tr.1587).

The State briefly questioned Gooden about his ability to assess a death sentence:

MR. LARNER: Juror Number 64. In the proper case, under the law and the evidence, could you seriously and legitimately consider imposing the death penalty?

VENIREMAN GOODEN: I believe I could.

MR. LARNER: Okay. Could you also give serious legitimate consideration to the punishment of life without the possibility of probation or parole?

VENIREMAN GOODEN: Yes.

MR. LARNER: If you were the foreman of the jury, could you sign the verdict of death?

VENIREMAN GOODEN: Yes, I could.

***

MR. LARNER: Okay. Have you been in favor of the death penalty in the past, in certain cases?

VENIREMAN GOODEN: In certain cases.

MR. LARNER: Do you think in some cases it might be appropriate, in others, it might not?

VENIREMAN GOODEN: Yes.

(Tr.762-63).

Gooden's answers were clear and definite and evinced an ability to follow the law and consider the full range of punishment. The State cannot rely on any presumption that Gooden was "weak" on death.

B. Venireperson Number 65: William Singleton

William Singleton stated that he thought he could seriously and legitimately vote for the death penalty in the proper case (Tr.763). He thought that a sentence of life in prison could be as bad as a death sentence, since both equate to being in prison until death (Tr.764-66). He stated he would keep an open mind and make a decision as to punishment based on the evidence and the law (Tr.768). He would not hold the State to a burden higher than beyond a reasonable doubt (Tr.776). He could follow the steps in assessing punishment and would be able to consider both punishments (Tr.778).

Singleton disclosed that in 1988 he pled guilty in a court martial to wrongful appropriation of government funds (Tr.1420-21). He was the assistant manager of a military nightclub where $160 was missing (Tr.1422). He did 48 days confinement, paid restitution, and was reduced in rank, but he stayed in military duty and received an honorable discharge (Tr.1420). The maximum

sentence for the crime was six months, leading the State to comment that it was probably a misdemeanor (Tr.1423-24).

The State purportedly struck Singleton because he was not definite enough as to whether he could consider death (Tr.1591). Also, he believed there was no difference between a death sentence and a sentence of life without parole (Tr.1592). Finally, the State offered that Singleton perceived himself as wrongfully convicted of a crime; Singleton may have been dishonest in speaking about it; and the crime may have been a felony (Tr.1592-93).

Defense counsel countered that the prosecutor himself stated that the conviction, which took place in 1988, was probably a misdemeanor (Tr.1594). Other jurors had misdemeanor convictions but were not struck by the State, namely 32, Vinyard, and 67, McDermott (Tr.1594). Many other venirepersons stated that they only "thought" they could consider death (Tr.1594).

The State replied that the other venirepersons with misdemeanor convictions did not serve the length of time that Singleton served or their cases were remote in time (Tr.1594-95). The prosecutor liked Vinyard, because he asked a good question about whether the State could force Marcellus to testify (Tr.1594-95).

The court found that the State's explanations were race-neutral (Tr.1597).

1. Singleton Was Clear and Certain that He Could Follow the Court's Instructions and Impose Death, If Warranted

When the prosecutor asked Singleton if he could seriously and legitimately vote for the death penalty in the proper case, Singleton responded, "I think I could" (Tr.763). When asked again, "Could you see yourself in that position actually voting, if the evidence and the law was there, for the death penalty?", Singleton said, "yes" (Tr.763). The prosecutor returned to Singleton, asking if he would require a higher burden of proof to sentence someone to death (Tr.776-77). The court interjected and asked if Singleton could follow the law regarding reasonable doubt that had been read to him (Tr.775). Singleton responded affirmatively (Tr.775-76). The State again asked Singleton if he would hold the State to a higher burden of proof because it was a death case (Tr.776). Singleton again responded that he would not (Tr.776). A few moments later, despite Singleton's answers, the prosecutor again asked him if he would hold the State to a higher burden of proof (Tr.777). Singleton responded that if the jury found guilt beyond a reasonable doubt, he would be able to follow the steps of the sentencing process as described by the prosecutor and consider both punishments (Tr.777-78).

Singleton's answers demonstrate that he had no hesitancy in following the court's instructions. The State's explanation for striking Singleton—that he was not definite enough on whether he could impose a death sentence—is flat out refuted by the record. Although the State tried and tried to get Singleton to state

that he would have trouble, Singleton consistently stated that he could follow the instructions and consider the full range of punishment.

2. It Was Not Relevant Whether Singleton Thought There Was Little Difference Between the Two Potential Sentences

Singleton stated that he could consider both possible sentences, because to him, both sentences were death sentences—under both sentences, the defendant would be in prison until he died naturally or was put to death (Tr.764-66).

When defense counsel objected to the relevance of the questions, the court asked the prosecutor for the relevance (Tr.766-67). The State responded that he wanted to know what the ultimate punishment was for this venireperson (Tr.767). When the court again asked how that was relevant to the venireperson's biases, the State offered to withdraw its question (Tr.767).

The prosecutor again asked Singleton if he could keep an open mind, make a decision based on the evidence and the law as to punishment, and consider both life without parole and a death sentence (Tr.768). Singleton responded that he could (Tr.768).

The prosecutor should not be allowed to justify a strike on a ground that has no relevance to the facts of the case. Both punishments are valid under the law, and as long as the jurors are able to consider both, they can follow the law and serve as jurors. Notably, the prosecutor failed to question any other jurors on whether they believed one punishment was harsher than the other. If this had truly

been an area of concern for the State it would have at least attempted to question other jurors on this point.

3. Other Jurors Who Were Not Struck Also Had Misdemeanor Convictions

The State's reliance on Singleton's thirteen-year-old misdemeanor conviction is undercut by the presence of two other venirepersons who had misdemeanor convictions yet were not struck by the State. Venireperson 32 (Juror 4), had been convicted of the misdemeanor of receiving stolen property twenty-four years earlier (Tr.1413-14). The State did not ask him anything about the crime or the punishment (Tr.1413-14).

Venireperson 67 revealed that fifteen years earlier, he had been convicted of indecent exposure after he urinated in public in Florida (Tr.1425-26). His sentence was two days time served and a $50 fine (Tr.1427).

The prosecutor asserted that the other venirepersons with misdemeanor convictions did not serve the length of time that Singleton served or their cases were remote in time (Tr.1594-95). But Singleton's case also was remote in time--13 years prior to Marcellus's trial (Tr.1420-21). And the State had no idea of how much time Venireperson 32, Vinyard, served on his conviction for receiving stolen property, since the prosecutor did not ask him any details about the conviction or sentence. If this truly was an area of concern, the prosecutor would have sought this information from Vinyard.

The prosecutor stated that he really liked Vinyard, because he asked a good question about whether the State could force Marcellus to testify (Tr.1594-95).

When defense counsel explained that the defendant is not required to testify and asked if anyone would hold it against Marcellus if he did not testify, Vinyard asked, "[does the State] have the option of making him testify?" (Tr.1531). But Vinyard asked this question after he disclosed his misdemeanor conviction (Tr.1413-14). Apparently, the State wanted to keep Vinyard--a white venireperson--on the panel long before Vinyard inquired about Marcellus testifying, since the prosecutor never asked Vinyard for any of the details regarding his conviction or sentence.

The State grasped for reasons to rationalize its strike of Singleton. During his questioning of Singleton, the prosecutor commented that it sounded like a misdemeanor conviction (Tr.1423-24). Yet, when the prosecutor sought to strike Singleton, he claimed that the conviction was likely a felony (Tr.1592-93).

C. Venireperson Number 72: Marvin Fortson

Marvin Fortson stated that he was sure he could seriously and legitimately consider imposing the death penalty all the way through the process and would follow the law (Tr.783-85). He would keep an open mind, listen to all the evidence, examine the instructions and then determine which punishment is appropriate (Tr.786).

Fortson was fired from a job for fighting with another worker (Tr.1497). The other employee provoked Fortson verbally, and several times, Fortson walked away (Tr.1497-98). Finally Fortson reacted by "putting my hands on him"--punching him three times in the face (Tr.1497-98).

Defense counsel objected to the lengthy and detailed questioning of this venireperson (Tr.1498). The court admonished the prosecutor, because he had previously ordered that there would be no individual voir dire, only questioning of venirepersons who were unemployed or retired (Tr.1499). The court asked the prosecutor what difference it made how hard Fortson hit the other man (Tr.1500). The prosecutor responded, "I'm concerned if I were to strike this juror that there would be a Batson challenge. And I wanted to make that record. If that were the reason" (Tr.1500).

The State rationalized its strike on Fortson's termination for fighting and downplaying his blame in the incident (Tr.1603-1605). The State commented that Fortson may have been offended when other venirepersons laughed when Fortson explained why he was fired (Tr.1605). It also said that Fortson had his arms crossed during the State's death qualification but unfolded them during the defense's questioning (Tr.1604-1605).

Defense counsel responded that not all the venirepersons were questioned as to why they were fired, showing that the State was targeting black venirepersons for extended inquiries (Tr.1606). Defense counsel pointed to the prosecutor's earlier comment that he was questioning Fortson to be able to make his Batson record (Tr.1606). Defense counsel argued that he could not respond to the prosecutor's hunches or things that were not made part of the record (Tr.1606).

The court held that the State had presented race-neutral reasons for its strike (Tr.1606).

1. The State Was Not Truly Interested in Why Venirepersons Left Prior Employment

The State's main reason for striking Fortson—that he was fired from his job for fighting—was pretextual, since the State failed to conduct any meaningful inquiry of other venirepersons to determine why they left prior jobs or if they had ever been in a fight. The court allowed individual voir dire to enable the State to question the venirepersons who were unemployed or retired, regarding their prior jobs (Tr.1466,1499). Despite the limitation, the State questioned nineteen of the remaining venirepersons about their current jobs, and only six others who were retired or unemployed (Tr.1475-1503). Of the nineteen venirepersons questioned about their jobs, only five were asked why they left prior jobs (Tr.1481,1486, 1492,1494,1497). The State obviously was fishing for reasons to strike certain venirepersons, as shown by the State's comment when the court asked why it was relevant to elicit the details of Fortson's fight with another employee: "I'm concerned if I were to strike this juror that there would be a Batson challenge. And I wanted to make that record. If that were the reason" (Tr.1500).

2. Nothing in the Record Supports a Strike Based on Fortson's Demeanor

The State purportedly struck Fortson because he had his arms crossed during the State's death qualification but unfolded them during the defense's questioning (Tr.1604-1605). The State also commented that Fortson may have been offended when other venirepersons laughed when Fortson explained why he was fired (Tr.1605).

The State never bothered to make a record of Fortson's alleged offensive demeanor. If the State had been so overly concerned about it, it should have made a record of it at the time it became apparent. By not mentioning it, and then using it as a basis for a strike, the State left the defense unable to counter the rationale.

III. Marcellus Must Receive a New Trial

The United States Supreme Court has warned, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 106 S.Ct. 1683,1687 (1986). "Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." *Id*.,1688.

Although unspoken, race was a central issue to the case. Marcellus, a black man, was charged with the stabbing death of a young white woman, a doctor's wife, in her home in a wealthy St. Louis neighborhood. The State's case was based upon the word of two drug-addicted, reward-driven criminals. To boost its chances of securing a conviction, the prosecutor selectively exercised six of its nine strikes against six of the seven black venirepersons remaining on the panel. The State knew or hoped that white jurors would be more likely to harbor conscious or subconscious prejudices which would work against a black man, charged with killing a young white woman, in guilt phase and/or penalty phase.

The State's blatantly racial motivations in striking Venirepersons Gooden, Singleton, and Fortson deprived those venirepersons and Marcellus their rights to

the equal protection of the law, and further denied Marcellus his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. The State exercised its peremptory strikes unlawfully, by removing black venirepersons based on their race, and the trial court clearly erred in letting the State exercise these strikes. As a result, this Court must grant Marcellus a new trial.

ARGUMENT V

The trial court erred in overruling Marcellus' motion to suppress physical evidence seized from Marcellus' car and objections at trial to the admission of the evidence, because the evidence was obtained in violation of Marcellus' right to be free from unreasonable searches and seizures, and its use at trial violated his rights to due process, a fair trial, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends. IV,V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,14,15,18(a),21. The search, based solely on consent given by Marcellus' grandfather, was not effective, because the police could not have reasonably believed that Marcellus' grandfather had common authority over the car. Marcellus was prejudiced, because the State used the illegally seized evidence to corroborate the testimony of the otherwise unbelievable key State witnesses and repeatedly referred to the illegally seized evidence in both guilt and penalty phase closing arguments.

The trial court erred in overruling Marcellus' motion to suppress evidence seized by the police when they searched his car without a warrant. The police relied upon the consent given by Marcellus' grandfather, Walter Hill (Tr.66-67,70-72). The consent was invalid, however, because Hill did not have apparent authority to give consent for the police to search the car. Admission of evidence taken as the result of the unlawful search violated Marcellus' right to be free from unreasonable search and seizures, and its use at trial violated his rights to due

process, a fair trial, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.IV,V,VI,VIII,XIV; Mo.Const.,Art.I,§§10, 14,15,18(a),21.

Appellate review of a ruling on a motion to suppress is limited to a determination of whether the evidence was sufficient to sustain the trial court's findings. State v. Corpier, 793 S.W.2d 430,435 (Mo.App.1990). The appellate court must view the evidence and inferences in the light most favorable to the ruling of the trial court. State v. Hughes, 899 S.W.2d 92,95 (Mo.App.1994). The ruling must be reversed if it is clearly erroneous. State v. Harrison, 957 S.W.2d 774,776 (Mo.App.1997).

Defense counsel moved to suppress the items seized (L.F.247-49). They subsequently objected to the admission of and testimony about the items seized during the search (Tr.1866-68,1894-95,2269,2274-77,2749) and included the issue in the motion for new trial (L.F.542).

I. Marcellus Has Standing to Challenge the Search

To have standing to challenge a search under the Fourth Amendment, the defendant must have had a legitimate expectation of privacy in the place or thing being searched. Rakas v. Illinois, 99 S.Ct. 421,430 (1978); State v. McCrary, 621 S.W.2d 266,272 (Mo.1981). The defendant must have both an actual subjective expectation of privacy in the place or thing searched, and this expectation must be reasonable. McCrary, 621 S.W.2d, 273. If the defendant has voluntarily discarded, left behind, or otherwise relinquished his interest in the property, he has

relinquished any legitimate expectation of privacy in that item. State v. Lingar, 726 S.W.2d 728,736 (Mo.1987). "An abandonment is primarily a question of intent and all relevant circumstances existing at the time of the alleged abandonment should be considered." *Id*.

Marcellus had an actual subjective expectation of privacy in his car, and his expectation was reasonable. He and Laura had been sleeping in the car and keeping their clothes there (Tr.1841,1845-46,1862,1871). Surely, Marcellus had an expectation of privacy in the place where he was sleeping and keeping his belongings. Marcellus had no other home--his car was it.

Marcellus did not voluntarily relinquish ownership of the car. He bought the car from his grandfather for about $100, and no evidence suggests that he sold the car back to his grandfather (Tr.1862). Marcellus was arrested in August 1998 and was in custody through the date of the search, November 18, 1999 (Tr.2355). The car was parked on the lot by his grandfather's house, as it was before Marcellus went to jail (Tr.64,1856;Ex.124). The State failed to present any evidence that Marcellus wished to relinquish ownership of the car—rather, the evidence showed that he was away from the car solely due to his involuntary incarceration.

II. The Consent to Search Was Invalid

A search conducted without a warrant, but pursuant to a valid consent, is constitutionally permitted. State v. Cole, 706 S.W.2d 917,918 (Mo.App.1986). To establish consent, the State must prove by a preponderance of the evidence that

the person giving consent did so voluntarily and had the authority to do so. State v. White, 755 S.W.2d 363,366 (Mo.App.1988).

For a third party to give valid consent, he must have "common authority" over the property such that he has mutual use of the property and generally has joint access or control for most purposes, so that he has the right to allow inspection in his own right. United States v. Matlock, 94 S.Ct. 988,993 (1974).

Police officers may carry out a valid warrantless search based on consent only if the facts available at the time of consent would allow a reasonable person to conclude that the third person had common authority over the premises. Illinois v. Rodriguez, 110 S.Ct. 2793,2801 (1990). When police officers are faced with factually ambiguous situations, they must make further inquiry before proceeding with a search. Rodriguez, 110 S.Ct., 2801. "Even when the invitation [to search] is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Id*.

The only witness at the suppression hearing was Detective Dunn. Dunn testified that she and another officer, Detective Anderson, searched the car based on Laura Asaro's videotaped statement, in which she implicated Marcellus and suggested that the police search Marcellus' car (Tr.55). Both officers were familiar with Laura's statement (Tr.53,61,79). From it, the officers knew that Marcellus regularly drove the car; treated it as his own; was sleeping in the car; kept personal belongings in it; and had the keys to the car and its trunk

(Ex.124;Tr.64). The videotaped statement was admitted into evidence for purposes of the motion to suppress (Ex.124;Tr.55).

The officers visited Hill at his house (Tr.50). Hill consented to the search, vouched that the car was his, and signed a consent form (Tr.66-67,70-72). The officers confirmed that the car was registered to Hill (Tr.62-63,68-70).

The detectives did not ask or find out who, if anyone, had access to the car after Marcellus was incarcerated in August 1998 (Tr.81). The car did not look like it had been moved from when Dunn last saw it, six months earlier (Tr.64). The officers asked Hill for the keys but did not receive them (Tr.80).

The knowledge available to the officers at the time of the search was insufficient to show that Hill had authority to consent to the search, because it did not show that Hill had "common authority" over the car. To have common authority, Hill would need to have mutual use of the car and generally have joint access or control of it. Logically, to have common authority over a car, Hill would need to have the keys, or at least have access to the keys. The police knew that Marcellus had keys and that Hill did not (Ex.124;Tr.80). The police knew that Marcellus typically had slept in the car and kept personal belongings in the car (Ex.124;Tr.64). There was no evidence that Hill had ever ridden in the car or driven it, or even been in it.

The police were duty-bound to delve into the situation further to ensure that Hill's consent to search was valid. The officers could not reasonably believe that Hill had common authority over the car. Given the factually ambiguous scenario,

the police were obligated to conduct further inquiry before searching the car. Rodriguez, 110 S.Ct.at 2801.

Ironically, throughout the trial, the State repeatedly referred to the car as belonging to Marcellus. It presented testimony that Hill sold the car to Marcellus for $100 (Tr.1862) and that Marcellus permanently altered the driver's seat so that only he or someone his height would be comfortable driving it (Tr.1862-63). The court admitted at least twelve photographs of the car, which was described as Marcellus' car (Tr.1861-65). The State cannot have it both ways—the car obviously was in Marcellus' control and Hill had no authority to consent to its search.

III. Marcellus Was Prejudiced by the Unlawful Search

The State used items seized in the search to obtain convictions and a death sentence. From the glove compartment, the police seized a Post-Dispatch ruler and a calculator (Tr.2275,2277). The State argued that these items corroborated the testimony of the two key State witnesses (Tr.3053). Since the victim had worked for the Post-Dispatch, the State presented it as an item stolen from the victim's house during the crime and kept by Marcellus as a "trophy" (Tr.3009-10).

From a bag within the car's trunk, the police seized a notepad, which contained a piece of paper on which Glenn Roberts' name and phone number were written (Tr.2277-81). Marcellus' fingerprint was on the notepad (Tr.2322). In closing, the State argued that this corroborated Marcellus' guilt also (Tr.3021-22).

The State took advantage of the illegal evidence in penalty phase also. It argued that Marcellus had no remorse for the crimes:

> How did that murder affect him? What type of regret did he have for that murder? Well, he takes a trophy. He takes her Post-Dispatch ruler.

(Tr.3485).

Since the jury deliberated for almost six hours in guilt phase (Tr.3069-73), the illegally seized evidence very well swayed the jury to find Marcellus guilty. This Court must grant Marcellus a new trial.

ARGUMENT VI

The trial court plainly erred when it submitted Instruction One, explaining the duties of the judge and jury, because the instruction was not in conformity with MAI-CR3d 302.01 and thereby deprived Marcellus of due process, a properly instructed jury, and a fair trial. U.S.Const.,Amends.V, VI,XIV; Mo.Const.,Art.I,§§10,14,18(a). Although the jury took notes, the instruction omitted three required paragraphs setting forth the duties of the jurors regarding their note-taking. The court failed to advise the jurors that they were not to take their notes out of the courtroom; that note-taking could distract them from observing the evidence and witnesses; that they could not discuss or share their notes with anyone until deliberating; that the notes themselves are not evidence; and that the jurors may not assume that their own notes, or notes of other jurors, are more accurate than their own recollection of the evidence. Since the jurors took notes during trial, yet were not instructed as to their proper use, the trial court's error resulted in manifest injustice.

Instruction One, modeled on MAI-CR3d 302.01, is an instruction read to the jury after it is sworn and must be provided to the jury in writing at both guilt and penalty phases. MAI-CR3d 302.01, Note 2; MAI-CR3d313.30A, Note 4. The basic form of Instruction One provides:

Those who participate in a jury trial must do so in accordance with established rules. This is true of the parties, the witnesses, the lawyers, and the judge. It is equally true of jurors. It is the Court's duty to enforce these rules and to instruct you upon the law applicable to the case. It is your duty to follow the law as the Court gives it to you.

However, no statement, ruling, or remark that I may make during the trial is intended to indicate my opinion of what the facts are. It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. In this determination, you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case.

(L.F.481;MAI-CR3d 302.01).

The jury took notes (Tr.1396,1639,3052). Note 4 to MAI-CR3d 302.01 provides that the following material "must" be included in Instruction One if the court allows the jurors to take notes:

> Each of you may take notes in this case but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, remember that note-taking may interfere with your ability to observe the evidence and witnesses as they are presented.
>
> Do not discuss or share your notes with anyone until you begin your deliberations. During deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.
>
> After you reach your verdict, your notes will be collected and destroyed. No one will be allowed to read them.

MAI-CR3d 302.01. Despite the mandate, the trial court failed to provide the complete instruction to the jury (L.F.481). Because defense counsel did not object to the instruction, Marcellus requests plain error review. Rule 30.20; State v.

Wurtzberger, 40 S.W.3d 893,898 (Mo.2001) (plain error review is permitted even when counsel fails to object to the instructions pursuant to rule 28.03).

"Whenever there is an MAI-CR instruction applicable under the law..., the MAI-CR instruction is to be given to the exclusion of any other instruction." State v. Ervin, 979 S.W.2d 149,158 (Mo.1998). Error results when the trial court fails to give a mandatory instruction, State v. Gilmore, 797 S.W.2d 802,805 (Mo.App.1990). The prejudicial effect of such an error must be judicially determined. State v. Storey, 901 S.W.2d 886,892 (Mo.1995); Rule 28.02(f). The errors are presumed to prejudice the defendant unless it is clearly established by the State that the error did not result in prejudice. State v. White, 622 S.W.2d 939,943 (Mo.1981).

Allowing jurors to take notes carries certain risks:

(1) the jurors may believe that they have to take notes, as opposed to it being their choice;

(2) the most skilled note-takers, or the only note-takers, may have a marked advantage in influencing other jurors;

(3) a dishonest juror court sway the deliberations by falsifying notes;

(4) jurors may attach too much significance to their notes merely because they are in writing and attach too little significance to their own independent memory;

(5) conflicts in memory may be settled by inaccurate notes;

(6) jurors busily taking notes may miss important testimony;

(7) note-taking jurors may not pay sufficient attention to witnesses' demeanor on the stand, which is so crucial to assessing credibility;

(8) jurors who are not experienced in note-taking may accentuate irrelevancies in their notes and ignore the more substantial issues and evidence; and

(9) evidence as to which notes are taken may be given greater attention than equally important evidence to which notes are not taken.

See, e.g., United States v. Maclean, 578 F.2d 64,66 (10th Cir.1978); Price v. Texas, 887 S.W.2d 949,951 (Tex.App.1994); People v. DiLuca, 448 N.Y.S.2d 730,734 (N.Y.App.1982).

The only way to alleviate these risks is by the court properly instructing the jurors. Other states allow note-taking as long as the jury is properly instructed. *See, e.g*, Price, 887 S.W.2d, 954-55; State v. Williams, 610 N.E.2d 545,548 (Ohio App.3d 1992); Esaw v. Friedman, 586 A.2d 1164,1169 (Conn.1991); State v. Hendricks**,** 787 A.2d 1270,1277 (Vt.2001.); People v. Carter, 612 N.W.2d 144, n.12 (Mich.2000).

In DiLuca, 448 N.Y.S.2d 734, the New York court reversed the defendant's conviction after the jurors took notes during the trial but the trial court failed to instruct them on the proper use of their notes. "[I]t is our view that should a trial court choose to allow the taking of notes, it is essential that preliminary cautionary instructions be given with respect to both the taking and the use of such notes and thereafter that such instructions be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberations." *Id*.,735. The

court granted a new trial, despite the fact that the issue was not preserved for review. *Id*. Since the "giving of cautionary instructions [is] essential for proper jury deliberations, we deem it appropriate in the interest of justice" to grant a new trial. *Id*.

Essential to the instruction is the warning that the jurors not assume that one juror's notes are more accurate than any other juror's notes or more accurate than any juror's recollections. The gist of this is that the jurors respect each others' recollections of the evidence, whether it be from memory or from notes. It is essential that the jury's verdict be the product of deliberation of twelve jurors, not some lesser number of jurors who have taken notes and refuse to consider the memories of those who have not taken notes. All jurors must know that they are on equal footing in the deliberations--jurors must not feel that they cannot participate because their memories conflict with the notes taken by another juror, nor should other jurors refuse to listen to jurors who have taken few or no notes. The court here failed to warn the jurors about the potential distraction of taking notes and over-reliance on one's notes or on the opinion of another juror who took notes. The court's failure deprived Marcellus of due process, a properly instructed jury, and a fair trial. U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,§§10,14, 18(a). This Court must grant a new trial.

ARGUMENT VII

The trial court plainly erred in penalty phase in letting the State argue victim impact of crimes other than the charged crimes, and in letting the State present victim impact testimony from family members that far exceeded its proper scope. This violated Marcellus' rights to due process, fair trial, reliable sentencing, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),19,21. The State argued how Marcellus' other robberies had impacted upon those victims, that, "[t]he people, the lives that [Marcellus] touches [through his crimes] will never be the same." Then, the victim impact testimony regarding this case far exceeded that which is authorized by §565.030.4 and Payne v. Tennessee. The sheer volume of this evidence overwhelmed the jury with emotion and encouraged the jury to weigh the value of the defendant's life against the victim's.

In Payne v. Tennessee, 111 S.Ct. 2597,2609-11 (1991), the United States Supreme Court held that the Eighth Amendment does not erect a *per se* bar against admission of victim impact evidence and prosecutorial argument on that subject. While Payne permits the admission of evidence and argument regarding the victim's personal characteristics and the crime's impact on the victim's family, it does not permit the unconditional admission of evidence and argument on this topic. *Id.*,2608-2609,2611,n.2. The Supreme Court recognized that, "[i]n the

event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id*.

Defense counsel did not object to the victim impact argument or testimony, so Marcellus requests plain error review. Rule 30.20.

Using the Victims of Other Crimes as Victim Impact for this Crime

§565.030.4 provides that the State may present "evidence concerning the murder victim and the impact of the crime upon the family of the victim and others." It does not authorize the State to present testimony from victims of other crimes as to how those crimes impacted them.

Prior to the start of penalty phase, defense counsel moved to preclude the State from presenting victim impact testimony regarding two robberies for which Marcellus had been convicted (Tr.3084-87). Defense counsel argued that the victims of those robberies could not provide victim impact testimony for the charged crimes (Tr.3085). The court denied the motion, but sustained defense counsel's objections when the State attempted to present victim impact evidence from a robbery victim (Tr.3087,3118).

The State then presented evidence regarding two prior robberies and one burglary committed by Marcellus (Tr.3107-35;3143-49). The State improperly used the evidence to make a victim impact argument:

> [Marcellus] puts this gun to that woman's head. To that woman's head. Loaded with these bullets. Okay? Semi-automatic. Fortunately, fortunately, she didn't resist. She peed in her pants. She'll never be the same. The people, the lives that he touches will never be the same.

(Tr.3486-87).

As evidenced by its argument, the State's goal in presenting detailed testimony of these robberies was to present victim impact testimony, to show that the "people, the lives that [Marcellus] touches will never be the same" (Tr.3487). But neither Payne nor §565.030.4 allow this. The State should not have been allowed to present victim impact argument on crimes other than the charged crimes. The court sustained defense counsel's objections when the State attempted to elicit victim impact testimony from these robbery victims (Tr.3118); the State knew it should not make the victim impact argument, but did it anyway.

The Illinois Supreme Court has held that evidence of the impact of prior offenses on the victims of those offenses was inadmissible and violated the defendant's Eighth Amendment rights. People v. Hope, 702 N.E.2d 1282,1288 (Ill. 1998). "Payne clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried." *Id*. The court erred in allowing the State to present excessive testimony and evidence regarding Marcellus' alleged other crimes and to let the State argue

the evidence as victim impact testimony.

Excessive Victim Impact

The State presented testimony of seven other witnesses, who relayed tidbits and vignettes about the victim's life, job, marriage, family, family vacations, holiday presents and activities, hobbies and interests, dreams, community involvement, interactions with friends, and social commitments (Tr.3201-86). These witnesses were friends of the victim, a neighbor, the victim's mother, her sister-in-law, the mother of a girl that the victim mentored, and the girl herself (Tr.3201-86).

These witnesses gave more than the "quick glimpse of the [victim's] life" anticipated by Payne. The witnesses relayed how they learned of the victim's death, how they reacted, and even how other people reacted (Tr.3209,3222-26,3265-67,3271-73,3277). Two witnesses described the victim's memorial services and presented the programs from both services (Tr.3217,3236-37). A witness showed the jury a songbook the victim created for their caroling group (Tr.3220)

The victim's mother detailed the first tortuous hours after hearing of her daughter's death (Tr.3222-26). She relayed vignettes of how the victim was such a central person within their family and had brought the family together for a reunion (Tr.3238-40). She described how the victim's father and siblings reacted to her death (Tr.3243-44). The victim's mother showed the jury two Christmas letters that victim had sent, and the prosecutor read at length from one (Tr.3240-

42). The victim's mother also showed the jury a birthday card that the victim had made for her, and the prosecutor read the card to the jury (Tr.3244-45). She showed the jury a present that the victim had brought back from Japan for her (Tr.3245). **The victim's mother even read to the jury a letter the victim had written in case of her death (Tr.3247). The letter spanned three transcript pages and detailed what should be done with her property (Tr.3247-49).**

A neighbor testified about a memorial garden, rock, and plaque for the victim in her neighborhood (Tr.3251) and photographs of them were admitted into evidence (Tr.3251).

The victim's sister-in-law detailed how her eight-year-old son asks about the victim and what happened to her:

Q: Did he say anything around Valentine's Day?

A: Yes… He said, Well, Mom, can you send valentines like to heaven, or to God? And I knew what he was going to say, and I said, Well, why, Sweetheart? And he said, Well, could we send one to Aunt Lisha, because she's somebody that I really loved a lot….

Q: Samuel, did you tell Samuel about how Lisha was killed, like someone breaking into her house? Did you tell him that?

A: Yes. We did…. So we did tell them, you know, initially just that she died. And then, you know, Well, how did she die? The whole issue came up that she wasn't old, and only old people die. And so then finally we told them

that a bad person had broken into their house, and the bad person had hurt Aunt Lisha, and she had died.

Q: Is Samuel afraid now?

A: Samuel—yes. I mean, he frequently at night will tell me he's worried that a bad person is going to break into the house, or a burglar is going to come into his house, or someone is going to break into the house.

(Tr.3257-58). The witness showed the jury a birthday card that the victim had made for her three-year old nephew and read it to jury (Tr.3260-61).

The State presented the testimony of Ebony, the girl whom the victim mentored, as well as Ebony's mother (Tr.3267-86). They described the victim's relationship with their family and the activities the victim and Ebony did together (Tr.3274-75,3279-83). Ebony's mother described the victim's plans for Ebony's future and how she encouraged Ebony to attend college and had planned to take Ebony to Africa (Tr.3282-84).

Ten photographs of the victim were presented to the jury and/or admitted into evidence—the victim at holidays, birthdays, on family vacations and reunions, with various family members, and three weeks before her death (Tr.3233,3234,3235,3238,3245-46,3247,3254,3261-64).

Although the State is entitled to show that the victim was something other than a "faceless stranger," State v. Gray, 887 S.W.2d 369,389 (Mo.1994), the State's victim impact testimony went far beyond. Instead of giving the jury a "brief glimpse" of the victim's life, the jury was bombarded with photographs,

cards, letters, vignette after vignette, and a reading of the victim's last wishes for her property. The testimony was calculated to overwhelm the jury with emotion, casting reason to the side. But it is reason—not emotion—which must prevail in a capital sentencing trial. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." Gardner v. Florida, 97 S.Ct.1197,1204-1205 (1977). The State's massive presentation of this highly emotionally charged testimony also encouraged the jury to weigh the value of the defendant's life against that of the victim.

In State v. Storey, 40 S.W.3d 898,908-909 (Mo.2001), this Court expressed reservations about the extent to which the State presented its victim impact testimony. The State presented four photographs; a sketch of the victim that hung in her school; a special edition of the school newspaper in her honor; a picture of the inscription on her tombstone; a poem read by a witness; and the victim's eulogy read by the person who had given it. *Id*. This Court found that while most of the items were proper, reading a poem or eulogy may not be appropriate in every case, and displaying the victim's tombstone would not be proper in any case. *Id*.

The Storey opinion was decided months before this case went to trial, yet the prosecutor failed to heed its warning. This prosecutor presented victim impact evidence that vastly surpassed the amount and intensity of the evidence presented in Storey. Here, the prosecutor presented ten photographs of the victim and two

photographs of her memorial garden, as well as birthday cards, Christmas letters, programs for each of the victim's memorial services, gifts, and a caroling songbook (3201-3266). The victim's sister-in-law detailed the import of the victim's death on her son (Tr.3257-58). Topping off the emotional cavalcade, the victim's mother read a letter her daughter had written in the event of her death, detailing what should be done with her property (Tr.3247-49). Certainly, the victim's mother, reading her daughter's last wishes for her property, did not help the jury understand the victim's unique characteristics—instead, like a photograph of the victim's tombstone in Storey, "it inappropriately drew the jury into the mourning process." *Id.*,909.

The excessive, emotionally-charged victim impact testimony presented by the State so infected the sentencing that it rendered it fundamentally unfair. State v. Knese, 985 S.W.2d 759,772 (Mo.1999). The prosecutor refused to heed this Court's warning in Storey; apparently, prosecutors will only limit their victim impact evidence if they truly fear this Court will reverse based on excessive victim impact evidence. This Court must limit the extent of victim impact testimony and ensure that prosecutors do not continue to present increasingly large amounts of victim impact testimony and increasingly emotionally-intense victim impact testimony. The goal of penalty phase, after all is to gauge the moral culpability of the defendant, not to overwhelm the jury with emotionally-laden evidence that blurs the jury's responsibility of imposing sentence based on reason and common sense. Allowing the State to abuse the use of victim impact evidence violated

Marcellus' rights to due process, fair trial, reliable sentencing, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),19,21. This Court must vacate the death sentence and grant Marcellus a new sentencing trial.

ARGUMENT VIII

The trial court erred and plainly erred in overruling Marcellus' objections, giving Instruction 22, and sentencing Marcellus to death. These acts violated Marcellus' rights to due process of law and fair trial by a properly instructed jury, to not be convicted of an offense not charged, to freedom from cruel and unusual punishment and to reliable sentencing. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,17,18(a),19,21. Marcellus' death sentence must be vacated and the cause remanded for him to be re-sentenced to life imprisonment without probation or parole or, in the alternative, for a new penalty phase, because the instruction violated Apprendi v. New Jersey and Jones v. United States by containing fatal variances from the information that submitted new, uncharged offenses to the jury in that none of the aggravators were pled in the indictment. The instruction was furthermore faulty in that:

1) aggravator one--depravity of mind--is unconstitutionally vague, in that it failed to narrow the class of murderers eligible for the death penalty and provide a means of distinguishing those murders for which the death penalty is appropriate from those in which it is not;

2) aggravators two, three, and four were duplicative, because the same facts and conduct were used to support and prove all three aggravating circumstances;

3) aggravators six through ten were invalid in that they (a) denied

the jury the ability to assess whether Marcellus' convictions constituted "serious assaultive criminal convictions" as required by §565.030.4(1); and (b) listed the armed criminal action convictions separate from their predicate offenses.

The State bombarded the jury with invalid and duplicative aggravators to bolster its case in aggravation and improperly sway the jury to assess a death sentence. The State submitted ten aggravators to the jury (L.F.528-29). None were included in the indictment, and none should have been submitted. Eight were duplicative and should have been submitted as only two. Another was so vague and ambiguous that it should not have been submitted to the jury at all. Since the jury was instructed to weigh the aggravators against the mitigators, the redundance of invalid aggravators skewed the balance in favor of death, in violation of Marcellus' rights to due process of law and fair trial by a properly instructed jury, to not be convicted of an offense not charged, to freedom from cruel and unusual punishment and to reliable sentencing. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,17,18(a),19,21. [5]

The court gave Instruction 22, as follows:

[5] To the extent these issues are not preserved, Marcellus requests plain error review. Mo.S.Ct.Rule30.20.

In determining the punishment to be assessed under Count II against the defendant for the murder of Felicia Gayle, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Felicia Gayle 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:

(1) That the defendant committed repeated and excessive acts of physical abuse upon Felicia Gayle and the killing was therefore unreasonably brutal.

2. Whether the murder of Felicia Gayle was committed while the defendant engaged in perpetration of burglary.

A person commits the crime of burglary when he knowingly enters unlawfully in an inhabitable structure for the purpose of committing stealing therein.

A person commits the crime of stealing if he appropriates property of another with the purpose to deprive her or him thereof, either without her or his consent or by means of deceit or coercion.

3. Whether the murder of Felicia Gayle was committed while the defendant was engaged in the perpetration of robbery.

A person commits the crime of robbery when he forcibly steals property.

4. Whether the defendant murdered Felicia Gayle for the purpose of the defendant receiving money or any other thing of monetary value from Felicia Gayle.

5. Whether the murder of Felicia Gayle was committed for the purpose of preventing a lawful arrest of defendant.

6. Whether the defendant was convicted of assault second degree on April 13, 1988, in the Circuit Court of the City of St. Louis, State of Missouri.

7. Whether the defendant was convicted of robbery first degree on January 28, 2000, in the Circuit Court of the City of St. Louis, State of Missouri.

8. Whether the defendant was convicted of armed criminal action on January 28, 2000, in the Circuit Court of the City of St. Louis, State of Missouri.

9. Whether the defendant was convicted of robbery first degree on May 25, 2001, in the Circuit Court of the County of St. Louis, State of Missouri.

10. Whether the defendant was convicted of armed criminal action on May 25, 2001, in the Circuit Court of the County of St. Louis, State of Missouri.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

> Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F.528-29).

Defense counsel argued that the first aggravator was vague and ambiguous and did not sufficiently guide the jurors in deciding whether to impose the death penalty (Tr.3088). He objected that the third and fourth aggravators were duplicative, in that Marcellus was being punished twice for taking something of value (Tr.3464-65). He also argued that including aggravators on armed criminal action is duplicative (Tr.3465). The court overruled the objections (Tr.3088,3466). Defense counsel included these issues in the motion for new trial (L.F.566-68).

As to the sixth-tenth aggravators, the State offered certified copies of the judgments on each of Marcellus' convictions (Tr.3167,3194,3196-97; Ex.228,231,232).

During deliberations, the jury did not request nor receive any of the exhibits. It returned a finding of all ten aggravators (L.F.537).

I. Fatal Variance

The trial court plainly erred in submitting Instruction 22, because it fatally varied from the offense charged (L.F.17-20,55-62). "Instructions which are at

variance with the charge or which are broader in scope than the evidence are improper unless it is shown that an accused is not prejudiced thereby." State v. Daugherty, 631 S.W.2d 637,639-40 (Mo.1982). A variance is not fatal, and will not require reversal, unless it submits "a new and distinct offense from that with which defendant was charged." State v. Clark, 782 S.W.2d 105,108 (Mo.App.1989).

The State failed to plead any aggravating circumstances in the information (L.F.17-20, 55-62). The addition of aggravating circumstances to first-degree murder increases the range of punishment from life imprisonment to death. §565.030.4(1); *see also*, *e.g.*, State v. Taylor, 18 S.W.3d 366,378 n.18 (Mo.2000); State v. Shaw, 636 S.W.2d 667,675 (Mo.1982). Failing to plead any aggravating circumstances in the charging document means that the State has not charged the greater offense of aggravated first-degree murder.

Instruction 22 varied fatally and materially from the information charging Marcellus with first-degree murder. The instruction submitted a new and greater offense than that charged in the information, and the information gave Marcellus no notice that he was being charged with the greater offense of aggravated first-degree murder. This Court must remand so that Marcellus can be resentenced to life without parole.

II. Aggravator One Was Vague and Ambiguous

The trial court erred in letting the State submit an aggravator to the jury that was so vague it did not channel the jury or limit its discretion to impose the death penalty. Instruction No. 22 advised the jury that it could consider the death penalty if it found that Marcellus committed repeated and excessive acts of physical abuse upon the victim, making the killing unreasonably brutal (L.F.528).

The jury must have a principled means to distinguish those cases in which the death penalty is appropriate from those in which it is not. Maynard v. Cartwright, 108 S.Ct. 1853,1859 (1988). If the jury is not adequately informed as to what it must find to impose the death penalty, it has too much discretion. Gregg v. Georgia, 100 S.Ct. 1759,1764-65 (1976). The discretion of the jury in giving the death penalty must be limited and channeled to sufficiently lessen the risk of wholly arbitrary and capricious action. *Id*.

In State v. Preston, 673 S.W.2d 1 (Mo.1984), this Court set forth a limiting construction of the "depravity of mind" aggravator to save it under Maynard from failing constitutional review. In determining whether the defendant acted with "depravity of mind" the following factors should be considered:

> the mental state of the defendant, infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantial motive; absence of defendant's remorse and the nature of the crime.

Id., at 11.

In State v. Griffin, 756 S.W.2d 475 (Mo.1988), this Court decided that further limitation was necessary to save the depravity of mind aggravator. The Court "expressly" held that "at least one of the Preston factors must be present before a finding of depravity of mind will be found to be supported by the evidence." *Id*,489-90. The Court then limited "brutality" to murders "involv[ing] serious physical abuse." *Id*.,490. "Serious physical abuse" was not defined, but the Court said that "evidence that the murder victim or other victims at the murder scene were beaten or evidence that numerous wounds were inflicted upon a victim will support the aggravating circumstance." *Id*.

But even now, the depravity aggravating circumstance remains too broad. It could still apply to any murder and is unconstitutionally vague. MAI-CR3d 313.40 currently instructs that a murder must be "unreasonably brutal" meaning that "repeated and excessive acts of physical abuse" are committed upon the murder victim to find the "depravity" aggravator. But "repeated" and "excessive" are nowhere described, limited or defined. "Repeated" is a troublesome guideline because even "repeated" acts of violence toward the victim, such as multiple gunshots or stab wounds, do not necessarily prove even deliberation. *See, e.g.,* State v. Samuels, 965 S.W.2d 913,923 (Mo.App.1998) ("Multiple gunshot wounds do not conclusively establish deliberation and thus guarantee that a jury will convict defendant of first degree murder."). If an act--or acts--will not necessarily

establish an element of the offense of first-degree murder, the act or acts cannot serve to distinguish an unaggravated murder from an aggravated murder.

The vagueness of the depravity aggravator and in particular the terms "repeated" and "excessive" is illustrated by State v. Butler, 951 S.W.2d 600 (Mo.1997). In Butler, the Court said that "[a] gunshot wound to the head is an excessive act of physical abuse." *Id.*,606. Because the victim had been shot twice, the Court found both "repeated and excessive acts of physical abuse." *Id*. Under Butler, a single gunshot wound to the head is excessive.

As an objective guideline to distinguish the few cases truly deserving of the death penalty from the many that are not, "depravity" covers too broad a spectrum. "[I]f an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibility to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Newlon v. Armontrout, 885 F.2d 1328,1334 (8th Cir. 1989).

The depravity aggravator--at least when submitted in its "repeated" and "excessive" form as in the present case--fails to give sufficient guidance. The meaning of these terms is uncertain, and unless clarified, could apply to any murder. *See* Butler, 951 S.W.2d, 606. Because the jury was not adequately informed as to what constituted "repeated' and "excessive" it had too much discretion, resulting in a wholly arbitrary and capricious action. Maynard, 108

S.Ct., 1859; Gregg, 100 S.Ct., 1764-65.[6]

III. Aggravator Two Was Not Supported by the Evidence

Aggravator Two required the jury to consider whether Marcellus killed during the perpetration of burglary (L.F.528). But under the definition of burglary provided to the jury, the jury would consider if Marcellus killed while entering the house unlawfully (L.F.528). Marcellus entered the house without intending to harm anyone (Tr.2394). Marcellus knocked on the front door and received no answer; he walked around to the back and knocked on a side door and a back door, and still received no answer (Tr.2394). He returned to the front door and broke into the house (Tr.2394). Marcellus entered the house only after he believed no one was home--he did not kill, or even intend to kill, while entering the house.

For the aggravator, the State used the definition of burglary that it had used in guilt phase (L.F.485,528). But for the aggravator, the State should have used the definition of burglary contained in MAI-Cr3d 333.00: "A person commits the crime of burglary when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing [stealing]." Because the State chose to disregard this definition and provide its own, it is stuck with the higher burden of proof engendered by its modification.

[6] Marcellus recognizes that this Court has rejected this argument, most recently in State v. Cole, 71 S.W.3d 163,171-72 (Mo.2002), but raises this argument to preserve it for federal review.

See, e.g., State v. Thompson, 781 S.W.2d 247,248-49 (Mo.App.1989) (when State assumes higher burden of proof, it is held to that burden).

This case is very similar to State v. Henderson, 789 P.2d 603 (N.M.1990). The State submitted the aggravator that the murder was committed with intent to kill in the commission of or attempt to commit kidnapping. *Id.*,608. But the Supreme Court of New Mexico held that although the defendant raped and then killed the victim, he did not necessarily have the intent to kill at the time he kidnapped her. *Id.*,609. "[E]stablishing the elements of an aggravating circumstance is not the same thing as establishing the elements of a crime." *Id.* Because the State did not prove that the defendant intended to kill at the time he kidnapped the victim, it failed to present sufficient evidence to support the aggravator. *Id.*; *see also* People v. Nieves, 739 N.E.2d 1277,1289 (Ill.2000).

The aggravator instructed the jury to consider whether the murder was committed while Marcellus knowingly entered the house unlawfully to steal (L.F.528). The facts do not support this aggravator, since Marcellus did not kill anyone while entering the house—rather, he believed that no one was home when he entered the house (Tr.2394). Although Marcellus could be found guilty of committing burglary, the State did not present sufficient evidence to support the aggravator that Marcellus killed while entering the house. This aggravator cannot stand.

IV. Aggravators Two, Three, and Four Were Duplicative

Even if the State had presented sufficient evidence to support the second aggravator, the aggravator still must be struck. Aggravators two and three penalized Marcellus for the same conduct as that alleged in aggravator four. Aggravator two alleged that the murder was committed while Marcellus engaged in perpetration of burglary, *i.e*., that he murdered while knowingly entering the house unlawfully to steal (L.F.528). Aggravator three alleged that the murder was committed while Marcellus was engaged in the perpetration of robbery, *i.e*., that he murdered while forcibly stealing property (L.F.528). Aggravator four alleged that Marcellus murdered the victim to receive money or any other thing of monetary value from the victim (L.F.528-29).

The aggravators were duplicative, because they relied on the same set of facts--that Marcellus killed the victim so that he could take things from her house. In Servin v. State, 32 P.3d 1277 (Nev.2001), the defendant's death sentence was set aside, because the jury was instructed on the duplicative aggravators of burglary and home invasion. The Nevada Supreme Court carefully distinguished its analysis from a Blockburger analysis.[7] *Id*.,1287. Even if the two crimes have different elements, if "the actual conduct underlying both aggravators was identical," the aggravators are duplicative and one must be stricken. *Id*.,1287-88.

In Henderson, 789 P.2d at 609, the Supreme Court of New Mexico stressed that "simply because there are sufficient elements present to prove more than one

crime in the same transaction does not mean that more than one aggravating circumstance has been proven." Merely because the State obtained convictions for burglary and robbery did not mean that the evidence supported aggravators on both of those as well as the aggravator that the murder was to obtain items of money from the victim. The court must not use a Blockburger analysis, but instead must consider whether the State used one single set of facts--a killing to obtain items of value from the victim--to form the basis for three separate aggravators. Even if the State has proven different elements to support conviction for different crimes, it has not proven different aggravators if it relies upon merely one single set of facts. Servin, 32 P.3d, 1287-88; Henderson, 789 P.2d, 609.

Each of these three challenged aggravators alleged the same conduct--that Marcellus killed in order to take money from the victim. Because the three aggravators are duplicative, aggravators two and three should be stricken and the case should be remanded for a new penalty phase before a properly instructed jury.[8]

V. Aggravators Six Through Ten Are Invalid

Aggravators six through ten violate Ring v. Arizona, 2002 WL 1357257 (U.S., 6/24/02) and Apprendi v. New Jersey, 120 S.Ct.2348 (2000), by usurping

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[7] Blockburger v. United States, 52 S.Ct. 180 (1932).

[8] Marcellus acknowledges that the Court has previously rejected similar arguments, most recently in State v. Anderson, 2002 WL 985755 (Mo.banc 5/14/02), but raises it to preserve it for federal review.

the jury's legal responsibility to determine whether Marcellus' convictions constituted "serious assaultive criminal convictions" sufficient to increase the maximum penalty from life without parole to death. They also erroneously list the armed criminal action convictions separate from their predicate offenses.

A. Violation of Apprendi v. New Jersey and Ring v. Arizona

In Apprendi, the Supreme Court deemed unconstitutional any statute that "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*.,2363. The key inquiry is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id*.,2365.

Missouri law provides that life imprisonment without parole is the maximum sentence that may be imposed for first-degree murder unless the trier finds at least one statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1).

In Ring v. Arizona, the Supreme Court held that "capital defendants… are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 2002 WL,*5. The Arizona sentencing scheme, like Missouri's, required the finding of an aggravating circumstance before a death sentence could be imposed. *Id*.,*6,8. Because a judge, instead of a jury, made that finding, the resulting death sentence was invalid. *Id*.,*12.

Thus, it was the jury's duty to determine, beyond a reasonable doubt, whether Marcellus has at least one serious assaultive criminal conviction. This

determination includes not only whether Marcellus has a prior conviction but whether it was serious and assaultive. Instead, the court made the determination that Marcellus' criminal convictions were serious and assaultive. Having a jury presume certain facts, thus foreclosing independent jury consideration of those facts, violates a defendant's rights under the Fourteenth Amendment to the United States Constitution. Carella v. California, 109 S.Ct. 2419,2421 (1989). The jury did not even view the certified copies of the judgments--it merely found the aggravators were proven without examining the exhibits.

For at least one of these convictions, the jury easily could have found that, as to Marcellus, the conviction was not serious or assaultive. The State described the second degree assault as follows:

> What happened was that the defendant drove from the County to the City. There was a chase in the City of St. Louis. The defendant and his co-defendant got out, and a shot was fired, at least one, at a police officer.

(Tr.3081). The jury may well have found that the bad conduct alleged was attributable to Marcellus' co-defendant, and thus not found the aggravator. This was a question for the jury, not the trial judge.

In light of Apprendi and Ring, this Court should re-evaluate its prior holdings on this issue. *See*, *e.g.*, State v. Kinder, 942 S.W.2d 313,332 (Mo.1996).

B. The Armed Criminal Action Convictions Should Not Constitute Separate Aggravating Circumstances

Armed criminal action has no existence independent of the underlying felony. State v. Hyman, 37 S.W.3d 384,391 (Mo.App.2001); *see also* State v. Peters, 855 S.W.2d 345,347-48 (Mo.1993). The factual basis for an armed criminal action conviction is so intricately entwined with that of the underlying felony, that it should not be counted separately. As the Supreme Court of New Mexico stressed in Henderson, 789 P.2d, 609, "simply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven.... [E]stablishing the elements of an aggravating circumstance is not the same thing as establishing the elements of a crime." *Id*.

"A strict Blockburger analysis does not necessarily determine whether multiple aggravating circumstances in support of a death sentence are improperly duplicative." Servin, 32 P.3d,1287. Thus, in Servin, the Supreme Court of New Mexico held that the crimes of burglary and home invasion are two valid convictions under double jeopardy analysis. *Id*. But the two crimes could not serve as the basis for two separate aggravators, since "the actual conduct underlying both aggravators was identical." *Id.* "The question is whether the material or significant part of each charge is the same even if the offenses are not the same." *Id*.

Here, each of the armed criminal action counts accompanied robbery counts (L.F.529;Ex.231,232). The aggravating part of each of the robberies is that Marcellus used a gun in robbing people. The prosecutor's description of the offenses during closing shows that Marcellus' use of a gun in those crimes was so intricately entwined with the underlying felony that the jury could not separate it from the underlying felony itself (Tr.3483-87). Since the underlying felony and the armed criminal action were based on the same precise conduct, it cannot justify a separate aggravating circumstance.

VI. Marcellus Must Receive a New Penalty Phase or Be Resentenced to Life Imprisonment Without Parole

The State bombarded the jury with ten aggravators, when only three were possibly valid. Since the jury was instructed to determine whether the facts in mitigation outweighed the facts in aggravation, the jury must have compared the number of facts in mitigation with the number of facts in aggravation (L.F.531). The jury must have been swayed by the sheer number of aggravating factors, despite the fact that so many of them were duplicative. If a jury has been asked to weigh the same aggravating factor repeatedly, an appellate court cannot assume that "it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 112 S.Ct.222,232 (1992).

This Court has reasoned that even if "some duplicativeness occurred", it was not prejudicial since there remained another, valid statutory aggravator. State v. Anderson, No. SC83680, 2002 WL 985755*15 (Mo.banc 5/14/02). But this

reasoning conflicts with those cases where the Court found error at penalty phase and vacated the death sentence despite the fact that one or more valid statutory aggravating circumstances remained. For example, in State v. Storey, 986 S.W.2d 462,464 (Mo.1999), the Court found that the trial court's error in failing to give a "no adverse inference" instruction was not harmless. Although a valid statutory aggravator remained, a new sentencing trial was warranted since the jury always had the discretion to impose life and the ability to impose life did not hinge upon which side had the most statutory factors. *Id.*,464.

Whether or not Missouri is or is not officially a "weighing state," the jury is told in the instructions that they "must...determine" whether the mitigating facts and circumstances "outweigh" the aggravating facts and circumstances (L.F.531). Since the law in this state is that the jury need never impose a sentence of death, Deck v. State, 68 S.W.3d 418,430 (Mo.2002), the Court should reverse and remand for a new penalty phase.

ARGUMENT IX

The trial court erred in refusing to instruct the jury on the statutory mitigator that Marcellus was an accomplice in the murder committed by another person and his participation was relatively minor. The error violated Marcellus' rights to due process, a fair jury trial, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI, VIII,XIV; Mo.Const.,Art.I,§§10,18(a),19,21. The defense presented evidence suggesting that another person was present at the time of the crime, since two different sets of shoes impressions were left at the crime scene; hairs left at the crime scene did not belong to the victim, her husband, or Marcellus; and Laura Asaro was seen carrying the laptop computer stolen during the crimes. Marcellus was prejudiced by the court's refusal to instruct the jurors on this mitigator, because the jurors were not told to consider this mitigator in deciding how to assess punishment and the State argued in closing that there were no mitigators for the jury to consider.

"To provide the individualized sentencing determination required by the Eighth Amendment, the sentencer must be allowed to consider mitigating evidence." Penry v. Lynaugh, 109 S.Ct. 2934,2945 (1989). The jury may "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 98 S.Ct.2954,

2964-65 (1978)(emph. in original). The sentencer must be able to consider and give effect to that evidence in imposing sentence. Eddings v. Oklahoma, 102 S.Ct. 869,877 (1982). Thus, in Penry, the Court held that without an instruction to the jurors that they could consider the defendant's mental retardation and abused background as mitigating evidence, the jury had no means for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision, and the death sentence was invalid. 109 S.Ct., 2952.

To satisfy these constitutional mandates, Missouri's capital sentencing statute provides that the judge "shall" instruct on aggravating and mitigating circumstances. §565.032. The statute sets forth seven statutory mitigating circumstances, including whether "the defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor." §565.032.3(4).

To comply with due process, state courts must give jury instructions in capital cases when the evidence warrants. Delo v. Lashley, 113 S.Ct.1222,1224 (1993). "Missouri law does not demand *proof* that a mitigating circumstance exists; it requires only some supporting evidence. *Id*.,1225.

In deciding whether a defendant is entitled to a particular instruction, the reviewing court should consider the evidence in the light most favorable to the defendant. State v. Battle, 32 S.W.3d 193,195 (Mo.App.2000); *see also* State v. Santillan, 948 S.W.2d 574,577 (Mo.1997); State v. Redmond, 937 S.W.2d 205,209 (Mo.1996).

Defense counsel requested that the court instruct the jury on three mitigating circumstances, as follows:

INSTRUCTION NO. B

If you decide that one or more aggravating circumstances exist as to warrant the imposition of death, as submitted in Instruction No. ___ each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all the evidence relating to the murder of Felicia Gayle.

You may also consider:

1. Whether the murder of Felicia Gayle was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the defendant was an accomplice in the murder of Felicia Gayle and whether his participation was relatively minor.

3. The age of the defendant at the time of the offense.

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

It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, 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.

(L.F.536;MAI-CR3d 313.44A). The court refused to instruct the jury on the extreme emotional disturbance and accomplice mitigators, but agreed to instruct on the defendant's age (Tr.3456). Defense counsel responded that the evidence supported all three of the proposed mitigating circumstances (Tr.3456-57). Because the court refused to instruct on the three mitigators, defense counsel chose not to highlight just one (Tr.3457). As a result, the court did not instruct the jury on any specific statutory mitigating circumstances. Defense counsel included this issue in the motion for new trial (L.F.558-59).

Note three under MAI-CR3d 313.44A provides that "[a]ny one or more of the seven subparagraphs on statutory mitigating circumstances should be given upon request by the defendant if there is evidence to support the specific mitigating circumstance or circumstances requested."

Here, a reasonable juror could have inferred from the evidence that another person was present when the crimes were committed and was the primary actor in the crimes. Numerous hairs were found on the victim's shirt (Tr.2871-72,2920). While some matched the victim or her husband, others did not match them or Marcellus (Tr.2871-72,2920). Similarly, two gray pubic hairs were found on the rug where the victim was laying; but the hairs did not match the victim, her husband, or Marcellus (Tr.2876-77). Finally, head hairs also found on the rug did not match the victim, her husband, or Marcellus (Tr.2877). The jury could

logically infer that the person leaving those hairs was the person struggling with the victim and thus was the primary participant in the crimes.

The State emphasized the bloody footprints at the scene which appeared to belong to one assailant. Yet another footprint was present which bore a different sole pattern, indicating that another person could also have been present during the crimes (Tr.2230-31,2881-82,2886). The print was not made by any of the paramedics' shoes, nor did it match the shoes seized from Marcellus (Tr.2882,3140). A bloody footprint on the carpet matting was not analyzed by the State experts but could also indicate the presence of another person/s at the scene (Tr.2885,2895,2942).

The jury also heard evidence that Laura Asaro was seen carrying the laptop computer bag that was taken during the crimes (Tr.2804-2805). The jury could infer from this evidence that Laura committed the charged crimes, or that Laura was present and participated in the charged crimes.

"Whenever there is an MAI-CR instruction applicable under the law..., the MAI-CR instruction is to be given to the exclusion of any other instruction." State v. Ervin, 979 S.W.2d 149,158 (Mo.1998). Error results when the trial court fails to give an instruction that is required by Missouri Approved Instructions, State v. Gilmore, 797 S.W.2d 802,805 (Mo.App.1990). The prejudicial effect of such error must be judicially determined, State v. Storey, 901 S.W.2d 886,892 (Mo.1995); Rule 28.02(f), but such errors are presumed to prejudice the defendant unless it is clearly established by the State that the error did not result in prejudice.

State v. White, 622 S.W.2d 939,943 (Mo.1981).

Marcellus suffered prejudice by the court's refusal to instruct the jury on this mitigator. The jury was left to believe that there were no mitigating factors it could consider. During closing, the State argued,

> Mitigating circumstances, read the instruction. You're going to have to find them somewhere in this case. I don't know where you're going to find them. But I mean, if you're going to find them, you're going to have to search and search and pull them out of somewhere, because they don't exist.

(Tr.3481). Later, it again argued that "there is nothing mitigating about this case" (Tr.3485). An instruction listing the mitigator would have directed the jury's attention to this valid mitigating circumstance; instead, the jury was misled to believe there were none.

The capital sentencing statutes created in Marcellus the expectation that a jury would assess his punishment after duly considering the evidence in mitigation. The statute created a liberty interest that is entitled to procedural due process protection under the Fourteenth Amendment. Vitek v. Jones, 100 S.Ct. 1254 (1980).

The Supreme Court has held that the denial of a statutory right to jury sentencing also can constitute a violation of substantive due process. Hicks v. Oklahoma, 447 U.S. 343,346 (1980). By refusing to instruct the jury on a statutory mitigator that was supported by the evidence, the court violated Marcellus' rights to due process, a fair jury trial, reliable sentencing, and freedom

from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),19,21. This error is especially grievous given the fact that the court allowed the State to deluge the jury with duplicative and unsubstantiated statutory aggravators. *See* Arg.VIII, *infra*. Without the instruction on this mitigating factor, the jury had no means for expressing its "reasoned moral response" to the mitigating evidence in rendering its sentencing decision, and thus that decision cannot stand.

ARGUMENT X

The trial court plainly erred in failing to intervene *sua sponte* during guilt phase closing to prevent the State from personalizing by describing how the jurors would feel if Marcellus was choking them as he did State witness Laura Asaro. The court also abused its discretion in overruling Marcellus' objections to the State's comments comparing the rights of the victims to Marcellus' rights, that (1) if defense counsel had been in the victim's house asking Marcellus to be merciful, his pleas would have fallen on deaf ears; and (2) Marcellus was the victim's judge, jury, and executioner. The State's repeated violations during closing deprived Marcellus of his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. The trial court's approval of these improper arguments prejudiced Marcellus and affected the outcome of the trial by creating personal fear of Marcellus in the jurors, and allowing the State to skew the jury's view of what should be considered in penalty phase and allowing the State to urge the jury to penalize Marcellus for exercising his constitutional rights.

The State committed two categories of error in its closing arguments. It engaged in improper personalization by placing the jurors in Laura Asaro's shoes

when Marcellus was choking her (Tr.3013). Also, the State juxtaposed the rights that Marcellus had with the rights that the victim was denied (Tr.3510,3512).

Although trial courts have wide discretion in controlling closing arguments, they abuse that discretion when they allow argument that is plainly unwarranted and that has a decisive effect on the jury. State v. Newlon, 627 S.W.2d 606, 616 (Mo.1982). "Trial courts have a duty to ensure that every defendant receives a fair trial, which requires the exercise of its discretion to control obvious prosecutorial misconduct *sua sponte*." State v. Roberts, 838 S.W.2d 126, 131 (Mo.App.1993).

I. "Imagine Marcellus Choking You"

During guilt phase closing, the State attempted to bolster Laura's credibility by arguing that she reasonably feared that Marcellus would hurt her if she reported his alleged crimes:

> And if you've never felt that fear of having someone's hand around your neck to where you can't breathe (indicating), a man that size, that man's hand ripping your neck, --and this little Laura was smaller than Lisha. She wasn't going to come forward. She was scared to death of that man. And rightfully so. Don't blame her a bit, do you?

(Tr.3013). Defense counsel did not object, so Marcellus requests review for plain error. Rule 30.20.

In State v. Storey, 901 S.W.2d 886,901 (Mo.1995), the State urged the jury to place itself in the victim's place. It urged the jurors to imagine having their heads yanked back by the hair and feel a knife severing their throats. *Id*. This Court held that the argument "could only arouse fear in the jury" and was grossly improper. *Id*. Its prejudice was "undeniable." *Id*.

In State v. Rhodes, 988 S.W.2d 521,528 (Mo.1999), the State suggested that the jurors in deliberating act out what the victim went through when she was killed. It urged each juror to feel what its like to be beaten on the floor, with her hands tied behind her back and her nose broken, and to have her head pulled back so hard that its snaps her neck. *Id*. The prosecutor acted out the scene as he spoke. *Id*. This Court recognized that the State's argument was "condemned and uniformly branded improper" since a juror placing herself in the victim's shoes "would be no fairer judge of the case than the … victim herself." *Id*., *citing* Faught v. Washam, 329 S.W.2d 588,602 (Mo.1959). The argument, "designed to cause the jury to abandon reason in favor of passion" was improper and warranted a new sentencing trial. *Id*.,528-29.

The State's argument constituted improper personalization, by asking the jurors to place themselves in Laura's shoes. State v. Simmons, 955 S.W.2d 729,740 (Mo.1997). Although Laura was not the murder victim, she allegedly was the victim of this choking (Tr.1853). The problem with personalizing is that it pits the defendant against the jury personally. It causes the jurors to abandon reason, replacing it with fear of the defendant.

The State knew its case for conviction was weak, hinging upon the word of two drug-addicted, reward-hungry criminals. To bolster the credibility of one of these criminals, the State urged the jurors to place themselves in her shoes as she was choked by Marcellus and imagine her fear of the defendant. The State's argument prompted the jury to base its convictions on fear, rather than the evidence. Allowing the convictions to stand would result in manifest injustice.

II. Juxtaposing Marcellus' Rights With the Rights Denied the Victim

Prior to penalty phase closing, the court sustained defense counsel's motion in limine to prevent the prosecutor from criticizing the defendant for exercising his constitutional rights (Tr.3471). The court warned the prosecutor that an argument weighing the victim's life and the defendant's life could result in a new trial (Tr.3473-74).

Despite the court's ruling and admonition, the State argued, over objection, that, "Had [defense counsel] been in that home asking for mercy for Lisha Gayle, it would have fallen on deaf ears" (Tr.3510). The State continued, over objection:

> There was one juror in that home that afternoon. And that juror was the foreman, foreperson. And he decided without a trial, without hearing evidence, and without instructions of law, he decided Lisha Gayle must die. And that man is right there (indicating).

(Tr.3512). Defense counsel included these issues in the motion for new trial (L.F.562-64).

The argument improperly juxtaposed the constitutional rights that Marcellus had with the rights that were denied the victims. But the sentencer may not "use the sentencing process to punish a defendant, guilt notwithstanding, for exercising his or her right to receive full and fair trial." Vickers v. State, 17 S.W.3d 632, 634 (Mo.App.2000); *see also* United States v. Jackson, 88 S.Ct.1209,1216-17 (1968).

Closing arguments in capital cases must receive a "greater degree of scrutiny" than those in non-capital cases. Caldwell v. Mississippi, 105 S.Ct.2633, 2639 (1985). This Court has recognized that closing arguments are "particularly important in capital cases, where there are unique threats to life and liberty." State v. Barton, 936 S.W.2d 781,783 (Mo.1996).

By overruling defense counsel's objections to the State's argument, the court thus effectively gave the argument its stamp of approval. *Id*.,788. The jury was left with the incorrect belief that it was okay for it to consider the rights Marcellus received as compared to the rights the victim was denied.

Through its arguments, the State skewed the entire procedure under which the jury was supposed to assess Marcellus' guilt and punishment. The State's repeated, intentional, and improper comments during closing must have had a decisive effect on the jury's finding of guilt and imposition of death. The arguments deprived Marcellus of due process, a trial before a fair and impartial

jury, and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. As to (A), this Court must reverse Marcellus' conviction and remand this matter for a new trial, and as to (B), remand for a new sentencing trial.

CONCLUSION

Based on Arguments I, II, IV, V,VI, and X(A), Marcellus respectfully requests that this Court vacate his convictions and sentence and remand this case for a new trial. Based on Arguments III, VII, VIII, IX, and X(B), he requests that the Court remand for a new penalty phase or impose a sentence of life without the possibility of parole.

Respectfully submitted,

_____
ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were delivered to: The Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102; on the 27th day of June, 2002.

_____
Rosemary E. Percival

Certificate of Compliance

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

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,931 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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

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Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910
816/889-7699
Counsel for Appellant