IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
vs.	)	**No. SC84036**
	)	
MICHAEL A. TISIUS,	)	
	)	
APPELLANT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY
THIRTEENTH JUDICIAL CIRCUIT
THE HONORABLE FRANK CONLEY, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

DEBORAH B. WAFER, MO BAR NO. 29351
OFFICE OF THE PUBLIC DEFENDER
1221 LOCUST STREET; SUITE 410
ST. LOUIS, MISSOURI 63103
(314) 340-7662 - TELEPHONE
(314) 340-7666 - FAX

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Instructions

Other Authorities

JURISDICTIONAL STATEMENT

After trial in Boone County, a jury convicted appellant Michael Tisius of two counts of first degree murder, §565.020, RSMo 1994.[1] In accordance with the jury's verdict at the penalty phase trial, the trial court, the Hon. Frank Conley, imposed a sentence of death on each count. This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

Patty Lambert[2] and Chuck Tisius had been married a little over a year when Patty gave birth to their son Michael on February 16, 1981 (T1064-65). Chuck was disappointed because he wanted a girl (T1065-68).

Two months after Mike's birth, Chuck left Patty and the boys[3], joined the Army reserves, and never returned (T1069). When Mike was about three, Patty lost their home "because of back taxes" and moved to St. Louis City with both children and her then boyfriend Mark Keck (T1069-70; DefEx14). Chuck Tisius, meantime, remarried twice; at Chuck's third wedding Mike, then age four or five, was "pretty upset" (T1071-74; DefEx15). For the most part, however, Mike was a pretty happy child (T1072--76;

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1 All statutory references are to RSMo 1994 unless otherwise noted.

2 Michael's mother, who remarried after her divorce from Chuck Tisius, identified herself as "Patty Lambert" at trial and will be so called in this brief.

3 Patty's older son, Joey Mertens, was about 2 & 1/2 years old when Mike was born (T1065-66).

DefEx's14-17).

Chuck's new wife had a girl at the end of Mike's kindergarten year (T1080). At first Chuck followed the custody schedule - which called for him to have Mike every Wednesday, plus every other weekend - but when Mike was in first grade, after Chuck and his new wife started having children, Chuck stopped getting Mike on a regular basis (T1076-77, 1084). Once a month, maybe, Chuck would show up (T1078, 1084). On the days that Chuck was supposed to come, thinking that his dad would be there, Mike would sit on the front porch and wait - one hour, two hours - but Chuck "just wouldn't show up" (T1077).

Problems with Chuck paying child support began when Mike was in second or third grade (T1081). Chuck's failure to pay child support lasted throughout Mike's life (T1081-82).

Chuck Tisius was a policeman, and Mike first wanted to be a policeman (T1081). Later, when Mike was in first or second grade, he decided he wanted to be an artist (T1081). Mike was quiet and shy (T1082). He wanted to draw "all the time" and he loved music" (T1082).

Patty and the boys moved to Hillsboro, Missouri, in June of 1988, "because the schools were a lot better" (T1082-83). As Mike grew older he began to get depressed (T1086). At age ten Mike began wetting his bed; this continued until he was at least fifteen (T1087). In fifth or sixth grade, Mike began expressing self-hatred (T1089-90, 1131). Mike wrote critical, disparaging things about himself:

I'm weird. I'm stupid. Nobody likes me. I'm ugly. I'm a geek. Nobody loves

me. I'm not worth a such. I'm a dork. I'm a moron. I'm a glob. I'm a geek, a zooid."

(T1090; DefEx25). Another of Mike's notes read:

I'm a butt head. I'm a boring kid because everyone says I have no friends at all. My mom hates me. Joey hates me. My dad don't give a crap about me. He's always saying I'm stupid. I don't care about my stupid dad. I'm scared of the ball when someone throws it at me. I'm a big crybaby. I cry over the littlest things. I'm a wimp. dumb. Fag. Faggot. Cory, Jamie and E.J. can beat me up. I'm dumb because I barely passed fourth grade because she didn't like me. She put me in fifth grade. Mrs. Moore passed me in sixth because she thinks I can do the work. If I could of I would of. So I can't. And not to get smart but I'll probably flunk sixth grade unless she either thinks I'm good or just hates me just to put me in seventh. The end. By Mike Tisius.

(T1091-92; DefEx26). Mike filled sheets of paper with self-deprecatory statements and he also wrote things such as "I hate myself" and "I wish everybody would die or I wish I would die" on his pants and shoes (T1131).

Mike flunked sixth grade and had to repeat it (T1092). At the beginning of Mike's second year of sixth grade, Chuck got legal custody of Mike, and Mike moved to Chuck's house (T1093). About two and a half months later, Chuck brought Mike back late one night and told Patty that she could have Mike because he (Chuck) didn't want Mike any more (T1093). In front of Mike, Chuck told Patty that he didn't care about Mike and called Mike "all kinds of names" (T1094). Mike sat and cried while Chuck called him a

"son of a bitch and a mother fucker" (T1094).

Mike also had problems with his older, half-brother (T1127-32, 1134-35). From the day Patty brought Mike home from the hospital, her older son - Joey Mertens - didn't want Mike there (T1127). Joey's dislike and jealousy of Mike became hatred as the boys grew (T1127).

Joey beat Mike often - every day - until Joey was eighteen or nineteen (T1127, 1135). It wasn't just "brother fights" (T1128). Joey "would just explode on" Mike (T1128). Joey used his fists to beat Mike, and he threw baseballs, baseball gloves, and shoes at Mike (T1132). Mike fought back up to a point, but he couldn't beat Joey and finally just quit fighting back (T1128).

Joey's abuse of Mike was not just physical. Joey told Mike that his dad didn't want him and that Joey and Patty didn't want him either (T1129). Joey's own dad maintained regular contact with him, and Joey taunted Mike about being rejected by Chuck (T1129-30).

Mike began running away when he was 12 or 13 (T1094). He did not go far, usually to a friend's house, and he was not gone for long (T1094-95).

Patty married Mark Keck in 1996 (T1096). She sold her house in Hillsboro and moved with Mike, who was then fifteen, to Mark's house in Maplewood (T1096-97). After a couple of months, Mark "kind of threw [Patty] and Michael out" (T1097). Patty went to stay with a friend, and Mike went to stay with his uncle -- Don Tisius, Chuck's older brother -- while Patty looked for a place where she and Mike could live (T1097-98). During this time, Chuck would not answer his phone or return calls; Mike had no contact

with him at all (T1099).

Mike dropped out of school in ninth grade when he was sixteen (T1099). At one point, because of problems with Mike, Patty took him to Chuck's house to try to get some help from Chuck (T1099-1100). Chuck threatened to have Patty and Mike arrested if they did not leave (T1100).

Patty tried to get help for Mike by taking him to counseling (T1100-01). The counselors gave him Prozac and Paxil (T1100).

When Mike was 16 or 17, he tried to find help through the Youth in Need residential program (T1101, 1168). Since Chuck had legal custody (from when Mike had gone to live with him in sixth grade), he, not Patty, had to sign the papers necessary for Mike to enter the program (T1101-02). Patty and Mike went to Chuck's house to try to get him to sign the papers (T1101). He refused and, again, threatened to have them arrested if they did not leave (T1101). Chuck also failed to respond to calls made to him by John Reichle - a case manager for St. Louis County's Youth Programs - who was trying to help Mike enter the Youth in Need program (T1168-69).

In 1996 or 1997, Mike moved to Moberly to live with a friend, Stan, who was living there (T1103). Between ages 16 and 19, Mike lived in "quite a few" different places returning twice, briefly, to his mother's house (T1106-07). He did not like the rules at home, and his older brother beat him (T1107-08).

June of 2000 found Mike, then nineteen, incarcerated in the Randolph County jail (T794-95; 1062). He shared a cell with other inmates including twenty-seven year old Roy Vance (T796; 1062). Roy was manipulative (T804). Roy and Mike concocted a

plan - which began as a joke - calling for Mike to get a gun and go into the jail and order the guards into a cell (T835, StEx61). Mike would then give Roy the gun, and Roy would "take over" (T835; StEx61).

Roy also recruited his girlfriend, Tracie Bulington, also twenty-seven, to help with the breakout plan telling her "that he was facing 50 or 51 years" in prison and that he "couldn't do that" (T1051, 1062). At first Tracie refused, but Roy persisted telling her that he would never see his daughter again and demanding that Tracie help (T1051-52).

Roy discussed this plan with Mike no less than ten times while Mike was still in jail (T835). Before Mike was released, on June 13th, he told Roy that he would get him out of jail (T795, 797).

Roy supplied Mike with phone numbers for Tracie's mother and for a friend of Roy's and Tracie's -- Karl -- so Mike would be able to contact Tracie (T1016). Using the phone numbers, Mike contacted Tracie upon his release (T1016).

Mike went to Columbia, Missouri, and Tracie drove there and picked him up (T1018). Tracie and Mike began discussed the plan which was to get a gun, take it into the jail and use it to intimidate the guards and to lock them in a holding cell, and lock them up, give the gun to Roy, get the keys and let everybody open all the cell doors and let them all out (T835, 1018; StEx61).

In the early morning hours of June 22nd, shortly after midnight, Mike and Tracie went to the jail ostensibly to deliver cigarettes to Roy (T835, 1032). Mike had a gun that Tracie had taken from her parents' house (T836, 1018; St.Ex61). Mike was "real nervous" (T1059-61). "[H]is face was blank, he was almost expressionless" (T1061).

"There was terror in his eyes almost" (T1061). "He looked terrified" T1061).

According to the trial testimony of Sgt. Platte, Mike chatted with Jason Acton for about ten minutes, then pulled out the gun and shot the jailers (T836). According to Tracie Bulington's trial testimony, Mike spoke to Jason Acton for two minutes, then "put the gun over the counter" and the "[f]irst shot was fired" (T1035). Mike first shot Jason Acton then Leon Egley (T836, 1036-37 StEx61).

Next Mike ran back to the cells with some keys to try to free Roy, but the key he had wouldn't unlock the cell (T836; StEx61). Mike ran to where the jailers had been seated to look for more keys (StEx61). Leon Egley grabbed Tracie's leg, she screamed, so Mike fired two or three shots at Leon (T836; StEx61).

Tracie and Mike ran to Tracie's car and she drove away (T837, 1039-40; StEx61). Before they left Huntsville, Mike threw the jail keys out of the car window (T837; StEx61). Along the way, Tracie wrapped the gun in a blue handkerchief and threw it out of the car window (T837-38, 1040; StEx61). She drove west and had reached Kansas when the car died (T837).

On the morning of June 22, 2000, Officer Brian Vincent of Elwood, Kansas was driving to a hearing when he spotted a man and woman with a duffel bag walking down U.S. Highway 36 in Wathena, Kansas (T807). As he arrived at the courthouse, Officer Vincent heard a broadcast that two people generally matching the description of the two people he had seen in Wathena were wanted for killing two deputies in Missouri (T808).

Driving back to Elwood after his hearing, Officer Vincent saw near a Pizza Hut the two people he had seen earlier (T810). With "backup," Chief Walker of the Wathena

Police Department, Officer Vincent approached the two people who "were sitting on a curb there on the sidewalk of the Pizza Hut" (T811, 817-18). The officers determined that the people at the Pizza Hut were Mike Tisius and Tracie Bulington, that there were Missouri arrest warrants for both for homicide, and arrested them (T811- 12, 818). Mike said to the officers, "I think I did something bad last night" (T813-14).

In the time that Tracie was with Mike prior to the attempted jail break, Mike talked constantly about Roy and "spoke very highly" of him (T1054, 1062-63). Tracie's impression of Mike was that he was a nice, meek kid (T1063). After her arrest, Tracie told the officers that while driving to Kansas, Mike said over and over and over again, "I'm sorry, Roy" (T1056).

After his arrest, Mike made a written statement describing the plan and shooting the jail guards:

> The planning was orig[i]nally just a joke and somewhere along the lines got serious. Roy Vance said to just tell the guards to come back there to the cell and he would have the rest under control. Well I got out of jail and looked up his girlfriend and she wanted to go through with getting him out. Around 12:15 am we went to the jail and Tracie pulled out a gun from a green army bag behind the driver seat. I took the gun, (not aware what was going to happen.) We went to the jail and Tracie acted like she wanted to drop off some cigarettes. And I pulled out the gun, and before I knew it “I” was already dead when I pulled the trigger Got scared and shot a[t] the other guard. Ran back to the cells and had the wrong key. When I went back up we can’t find no keys arounds. One guard grabbed Tracie

and she screamed so I shot again and again (I don't know why why why.) As we left we ran to the car and I through the keys out the [c]ar window. When we got further I gave Tracie the gun and she tossed it and a blue rag out the window. We kept driving to KANSAS and we ditched the car and started walking we finally decided to turn our selves in I know what I have done was wrong and will never be fixed. No I don't believe they deserved it. An Officer asked me if I could go back and do it all over what would I do. I said I would kill myself to save their lives. I know I deserve what ever I get and got coming to me.

(StEx61).

Prior to the shooting and Mike's arrest, Patty Lambert had last seen her son on June 17, 2000, when she drove him to a Quik Trip gas station in Columbia, Missouri to meet some people (T1108). She knew one of them as Tracie Bulington (T1109-10). The next time Patty spoke to Mike was when he called her after being arrested (T1110). He was crying on the phone (T1112).

At the conclusion of voir dire, the state moved to strike for cause a number of jurors, including No. 95 - Patti Lou Grant, who had expressed opposition to the death penalty (T528-32). The trial court overruled defense objections and granted the state's motion to strike Ms. Grant (T531).

At the penalty phase trial, Tracie testified that in the few days that she knew Mike before the attempted jail break, Mike frequently played a rap music song from a CD by the group "Bone, Thugs 'n Harmony" (hereinafter, Bone) (T1026-27). In the brief time period before the attempted jail break, Mike played one song repeatedly (T1027).

Overruling defense objections that playing this profanity-laden rap song by Bone would violate Mike's First Amendment rights, the trial court allowed the state to play the music for the jury (T1041; StEx67).

To avoid repetition, additional facts necessary to the Points raised will be included in the argument.

POINTS RELIED ON

Point 1

The trial court erred in overruling defense objections 1) to the state's evidence and arguments concerning Mike's listening, "over and over," while driving around with co-defendant Tracie Bulington, to a rap song whose lyrics included the chorus "Mo Murda, Mo Murda" (StEx67) by the rap music group "Bone, Thugs n' Harmony" and to admitting and playing to the jury this rap song, and 2) to the state's failure to disclose that Tracie had told the prosecutor -- contrary to what she had said previously at her deposition -- that she knew and could identify the particular song that Mike was playing "Bone, Thugs 'n Harmony. This violated Mike's rights to freedom of thought, speech, expression, and ideas, to due process of law and a fair trial, to be sentenced only for the offenses charged and not for bad character or for his First Amendment right to enjoy rap music, to be free from cruel and unusual punishment, to reliable sentencing and to access to justice. U.S.Const, Amend's I, VI, VIII, XIV; Mo.Const., Art. I, §§ 8, 10, 14, 18(a) and 21. The rulings prejudiced Mike in that his right to play and enjoy music of his choice, including rap music by Bone, Thugs 'n Harmony and StEx67, is protected by the First

Amendment, and evidence regarding Mike's enjoyment of this music was neither logically nor legally relevant to the issues at the penalty phase trial. The state failed to establish that the music by Bone, Thugs 'n Harmony, and Mike's enjoyment of a CD by that group were in any manner connected to the charged offense, but this evidence portrayed Mike as worthy of death because rap music is widely viewed as connected to gangs, violence, and illegal activities. Allowing the jury to listen to the rap song from StEx67 prejudiced Mike because this music was replete with profanity, references to violence including "mo murda," and racially and sexually disparaging lyrics. The prejudice was further compounded by the prosecutor's constant echoing of the "mo murda" chorus during his closing argument thereby obtaining the death penalty by violating Tisius's First Amendment rights. The error in allowing the state to admit and use this evidence requires that Mike's sentence be reversed and the cause remanded for a new penalty phase trial. The state's failure to disclose that Tracie had told the prosecutor that she could identify the particular song Mike played was prejudicial because the defense had been prepared based on Tracie's deposition statement that she could not identify the song which meant the state would not be able to admit or play the CD. The failure to disclose Tracie's changed statement prevented the defense from being able to prepare to defend against this evidence and is an additional reason that the cause must be reversed for a new penalty phase trial.

Dawson v. Delaware, 503 U.S. 159 (1992);

Torries v. Hebert, 111 F.Supp.2d 806 (W.D.La 2000);

State v. Cheeseboro, 552 S.E.2d 300 (S.C. 2001);

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

U.S.Const., Amend's I, VIII, and XIV.

Point Two

The trial court erred in overruling Mike's objection and sustaining the state's motion to strike juror Grant for cause. This violated Mike's rights to due process of law, fundamental fairness, trial by a fair, impartial, and fairly selected jury, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's V, XIV, VI, and VIII; Mo.Const., Art I, §§ 10, 14, 18(a) and 21. The state inaccurately represented that juror Grant was "unequivocal in her unwillingness to vote for the death penalty" but, in fact, juror Grant was not unequivocal in her opposition to the death penalty and indicated that in some instances she could vote to impose a sentence of death. The erroneous exclusion of this juror who at no time indicated that her beliefs would prevent her from following the court's instructions requires that Mike's sentences of death be vacated and he be re-sentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial.

Witherspoon v. Illinois, 391 U.S. 510 (1968);

Wainwright v. Witt, 469 U.S. 412 (1985);

Ray v. Gream, 860 S.W.2d 325 (Mo.banc 1993);

Szuchon v. Lehman, 273 F.3d 299 (3rd Cir. 2001)

U.S.Const., Amend's VI, VIII, and XIV.

Point Three

The trial court erred in overruling Mike's motion for judgment of acquittal at the close of all evidence and entering judgment against him for first degree murder and sentencing him to death. This violated his rights to due process of law, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; Mo.Const., Art I, §§ 10, 14, 18(a) and 21; Mo.R.S., §565.035.3(3). As reflected in the prosecutor's argument, there was no evidence that Mike deliberated on killing Officers Acton and Egley. The evidence was of a plan to get Vance out of jail by intimidating the jail guards with a gun. Neither Mike's statement nor Tracie's testimony includes any evidence showing that Mike deliberated on the shooting or on killing Officers Acton and Egley. Further, numerous errors in the admission and exclusion of evidence at penalty phase, plus the lack of evidentiary support for the element of deliberation and substantial mitigating evidence concerning Mike himself, undermine confidence in the reliability of the death verdict and require that it be vacated.

State v. Snow, 293 Mo. 143, 238 S.W. 1069 (Mo. 1922);

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

State v. Baker, 859 S.W.2d 805 (Mo.App.E.D. 1993);

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S.Ct. 1678 (2001);

U.S.Const., Amend's VIII and XIV;

RSMo. §565.035.3(3)

RSMo. §565.020.1;

RSMo. §565.021.1;

RSMo. §562.016.3(1).

Point Four

The trial court erred in overruling Mike's motion to quash the information for failure to comply with *Jones v. United States* and *Apprendi v. New Jersey* and exceeded its jurisdiction in sentencing Mike to death for counts I and II. This violated his rights to due process of law and freedom from cruel and unusual punishment, U.S.Const. Amend's XIV and VIII; Mo.Const., Art I, §§ 10, 14, 18(a) and 21. Missouri's statutes authorize a sentence of death only upon a finding of at least one of the seventeen statutory aggravating circumstances comprising both alternate elements of the offense of "aggravated first degree murder" and facts of which the prosecution must prove at least one to increase the punishment for first degree murder from life imprisonment without probation or parole to death. As the information in the present case failed to plead any aggravating circumstances as to the two charged offenses of first degree murder, the offenses actually charged against Mike were unaggravated first degree murder for which the only authorized sentence is life imprisonment without probation or parole. The trial court thus lacked jurisdiction to sentence Mike to death, and the death sentences imposed for the charged offenses were not authorized. The judgment must be reversed and Mike's sentences of death vacated.

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

Jones v. United States, 526 U.S. 227 (1999);

State v. Bolder, 635 S.W.2d 673 (Mo.banc 1982);

State v. Parkhurst, 845 S.W.2d 31 (Mo.banc 1992);

U.S.Const., Amend's VIII and XIV;

RSMo. §565.030.4(1);

RSMo. §565.032.2;

RSMo. §565.020.

Point Five

The trial court erred at the penalty phase trial in sustaining the state's objections and refusing to allow the defense to elicit from Patty Lambert, Mike Tisius's mother, that he expressed remorse over his actions. This violated defendant's rights to due process of law, to fundamental fairness, to present a defense, to meaningful access to the courts, and to freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI, VIII; Mo.Const., Art. 1 §§10, 14, 18(a), and 21.

Lambert's testimony was admissible because facts pertaining to remorse are relevant to jury's decision as to what would be the appropriate punishment and, ultimately, to this Court's determination of the proportionality of the sentences of death imposed on Mike.

State v. Brown, 998 S.W.2d 531 (Mo.banc 1999);

State v. Anderson, 2002 WL 985755 (Mo.banc 2002);

State v. Black, 50 S.W.3d 778 (Mo.banc 2001);

State v. Worthington, 8 S.W.3d 83 (Mo.banc 1999);

U.S.Const., Amend's VI, VIII, and XIV.

Point Six

The trial court erred in sustaining state objections and excluding a letter from codefendant Roy Vance to "Karl" - offered first as DefEx3 and subsequently as DefEx9 - soliciting Karl to assist in breaking Vance out of jail. This violated Mike's rights to due process of law and fundamental fairness, to present a defense, to meaningful access to the courts, and to freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI, VIII; Mo.Const., Art. 1 §§10, 14, 18(a), and 21. Excluding the letter prejudiced Mike because it was relevant to defend against and rebut the state's case as to 1) the critical issue of intent, i.e., whether there was a plan to kill the jailers or whether the plan was to intimidate them and put them in a cell to effect Roy Vance's escape, 2) the relative culpabilities of the codefendants, and whether Tracie was taking directions from Mike or whether Vance was the mastermind of the plan and was directing both Tracie and Mike.

Crane v. Kentucky, 476 U.S. 683 (1986);

State v. Pizzella, 723 S.W.2d 384 (Mo.banc 1987);

State v. Ray, 945 S.W.2d 462 (Mo.App.W.D. 1997);

State v. Harris, 64 S.W.2d 256, 334 Mo. 38 (Mo. 1933);

U.S.Const., Amend's VI, VIII, and XIV.

Point Seven

The trial court erred and plainly erred in overruling Mike's objections and

giving the jury Instructions 24 and 29, as to Counts I and II, respectively. This violated his 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., Amend's V, VI, VIII, and VIII; Mo.Const., Art. I, §§ 10, 18(a), 19, and 21. Mike's death sentences must be vacated and the cause remanded for him to be re-sentenced to life imprisonment without probation or parole or, in the alternative, or for a new penalty phase trial in that

1) as to Instruction 24:

a) there was no evidence to support the aggravating circumstance based on §565.032.2(7) -- depravity of mind -- because there was no evidence that Mike killed Egley as part of his plan to kill more than one person and the aggravator is unconstitutionally vague as applied in this manner,

b) "the plan to kill more than one person" aggravator was duplicative of the aggravator, also submitted in Instruction 24, based on §565.032.2(2) - Leon Egley's murder was committed while the defendant was engaged in the commission of another unlawful homicide - because the same facts and conduct were used to support and prove both aggravating circumstances, and

2) Instructions 24 and 29 violated *Apprendi v. New Jersey* and *Jones v. United States* and were fatal variances from the information that submitted new, uncharged offenses to the jury in that none of the aggravators were pled in the indictment.

Maynard v. Cartwright, 486 U.S. 447 (1984);

***Kinder v. Bowersox*,** 272 F.3d 532, 549 (8th Cir. 2001);

Tuilaepa v. California, 512 U.S. 967 (1994);

State v. Madison, 997 S.W.2d 16 (Mo.banc 1999);

U.S.Const., Amend's VI, VIII and XIV;

Mo.Const., Art. 1, §10, 14, 18(a), and 21;

§565.032.2(7), RSMo. 1994;

§565.030.4(1), RSMo. 1994;

Rule 30.20;

MAI-CR 3rd 313.40.

Point Eight

The trial court erred in overruling Mike's objection to cameras in the courtroom which was made just before opening statements when defense counsel first learned that there would be cameras in the courtroom and Mike's subsequent request for a mistrial when the prosecutor announced in open Court that witness Heather Graham did not wish to be videotaped. This violated Mike's rights to due process of law, trial by fair and impartial jury, freedom from cruel and unusual punishment, and reliable sentencing, U.S.Const., Amend's XIV, VI, and VIII, Mo.Const., Art. I, §§ 10, 14, 18(a), and 21, and it violated this Court's Operating Rule 16. Mike was prejudiced in that the lack of notice denied him a meaningful opportunity to present to the judge, and be heard on, his objections: that cameras in the courtroom would subject the jury to pressure to convict the defendant and to sentence him to death and that the witnesses would be able to see the coverage and could change their testimony based on what they might see. Unless Operating Rule 16's requirement of

notice to parties is gratuitous and meaningless, it must mean that the parties shall have a meaningful opportunity to be heard.

Estes v. Texas, 381 U.S. 532 (1965);

Chandler v. Florida, 449 U.S. 560 (1981);

U.S.Const., Amend's VI, VIII and XIV;

Mo.Const., Art. 1, §10, 14, 18(a), and 21;

Operating Rule 16.03(b).

Point Nine

The trial court erred in sustaining the state's objections and refusing to allow defense counsel to elicit Dr. Shirley Taylor's opinion that Mike would not be a danger to others in prison if sentenced to imprisonment for life without probation or parole. This violated defendant's rights to due process of law, to fundamental fairness, to present a defense, to meaningful access to the courts, and to freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI, VIII; Mo.Const., Art. 1 §§10, 14, 18(a), and 21.

Notwithstanding the trial court's ruling that prosecutor could not "argue" future dangerousness, future dangerousness had already been put in issue by the very nature of offense: shooting two jail guards. Future dangerousness was also raised by the state's evidence of Mike's behavior and statements after his arrest plus state's repeated refrain, "how many officers does he have to shoot before he gets the death penalty?" Mike was prejudiced and his sentence must be vacated and a sentence of life imprisonment without probation or parole imposed or, alternatively, the cause

reversed and remanded for a new penalty phase trial because the court's ruling meant that the defense could not present any evidence to defend against, counter, and rebut state evidence and arguments suggesting Mike would be dangerous in prison if sentenced to life imprisonment without probation or parole and, therefore, death was the appropriate sentence.

Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002);

Simmons v. South Carolina, 512 U.S. 154 (1994);

State v. Chambers, 891 S.W.2d 93 (Mo.banc 1994);

U.S.Const., Amend's VI, VIII and XIV;

Mo.Const., Art. 1, §§10, 14, 18(a), and 21;

Rule 30.20.

Point Ten

The trial court erred in overruling defense objections to Instruction No's 28 and 33 (MAI-CR3d 313.48A), submitting these instructions to the jury, and sentencing Mike to death on Counts I and II. This violated Mike's rights to due process of law, trial by a correctly instructed jury, present a defense, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's XIV, VI, and VIII. These instructions prejudiced Mike by failing to include all the steps that the jury must follow in the sentencing process. Specifically, they failed to advise the jury of the essential "third step" in the weighing process: that if each juror determined that there were facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then the jury must

return a verdict of life imprisonment without the possibility of probation or parole.

State v. Carson, 941 S.W.2d 518 (Mo.banc 1997);

Skipper v. South Carolina, 476 U.S. 1 (1986);

Boyde v. California, 494 U.S. 370 (1990);

Buchanan v. Angelone, 522 U.S. 269 (1998);

U.S.Const., Amend's VI, VIII, and XIV;

Mo.Const., Art. 1, §§10, 14, 18(a), and 21;

§565.030.4(3), RSMo. 1994;

MAI-CR3d 313.48A.

ARGUMENT

As to Point One: The trial court erred in overruling defense objections 1) to the state's evidence and arguments concerning Mike's listening, "over and over," while driving around with co-defendant Tracie Bulington, to a rap song whose lyrics included the chorus "Mo Murda, Mo Murda" (StEx67) by the rap music group "Bone, Thugs n' Harmony" and to admitting and playing to the jury this rap song, and 2) to the state's failure to disclose that Tracie had told the prosecutor -- contrary to what she had said previously at her deposition -- that she knew and could identify the particular song that Mike was playing "Bone, Thugs 'n Harmony. This violated Mike's rights to freedom of thought, speech, expression, and ideas, to due process of law and a fair trial, to be sentenced only for the offenses charged and not for bad character or for his First Amendment right to enjoy rap music, to be free from cruel and unusual punishment, to reliable sentencing and to access to

justice. U.S.Const, Amend's I, VI, VIII, XIV; Mo.Const., Art. I, §§ 8, 10, 14, 18(a) and 21. The rulings prejudiced Mike in that his right to play and enjoy music of his choice, including rap music by Bone, Thugs 'n Harmony and StEx67, is protected by the First Amendment, and evidence regarding Mike's enjoyment of this music was neither logically nor legally relevant to the issues at the penalty phase trial. The state failed to establish that the music by Bone, Thugs 'n Harmony, and Mike's enjoyment of a CD by that group were in any manner connected to the charged offense, but this evidence portrayed Mike as worthy of death because rap music is widely viewed as connected to gangs, violence, and illegal activities. Allowing the jury to listen to the rap song from StEx67 prejudiced Mike because this music was replete with profanity, references to violence including "mo murda," and racially and sexually disparaging lyrics. The prejudice was further compounded by the prosecutor's constant echoing of the "mo murda" chorus during his closing argument thereby obtaining the death penalty by violating Tisius's First Amendment rights. The error in allowing the state to admit and use this evidence requires that Mike's sentence be reversed and the cause remanded for a new penalty phase trial. The state's failure to disclose that Tracie had told the prosecutor that she could identify the particular song Mike played was prejudicial because the defense had been prepared based on Tracie's deposition statement that she could not identify the song which meant the state would not be able to admit or play the CD. The failure to disclose Tracie's changed statement prevented the defense from being able to prepare to defend against this evidence and is an additional reason

that the cause must be reversed for a new penalty phase trial.

At penalty phase, Tracie Bulington testified on direct examination that as she and Mike were driving around in her car on the 21st, Mike was playing music by the group "Bone, Thugs 'n Harmony" (hereinafter, "Bone") (T1026). She said Mike played this music often and played one song over and over (T1027). This was not the first time that Mike had played this music (T1026).

The prosecutor asked Tracie, "At some point in time that evening after listening to this recording repeatedly did the defendant make some statement that led you to believe that you were about to change what you were going to do or that you were about to do something?" (T1032). Tracie responded:

> A. [Tracie] At one point he said that it was getting about time and then there was times when he'd sit there and say that he was going to go in and just start shooting and that he had to do, had to do what he had to do.
>
> Q. [prosecutor] Did he say shooting or did he just say he had to do what he had to do?
>
> A. Well, he said that he, one point he said he'd go in with a blaze of glory.

(T1032).

At the end of Tracie's direct examination, the prosecutor requested leave to "play the disc, State's Exhibit 67 for the jury" (T1041). Defense counsel objected that the music was "extremely prejudicial" and "filled with foul lyrics" (T1041). Counsel objected to playing the song based on Mike's "first amendment right to listen to whatever kind of music he wants to listen to" (T1041). "Trying to draw these terrible inferences from this is extremely prejudicial and violates all of his rights, the state and federalization

stipulation filed" (T1041). The court denied the objection as "continuing" and the prosecutor played the disc (T1041, StEx67).

On cross examination, Tracie testified that all rap songs sounded the same to her, that she didn't know what the song was about, that she didn't know if it was about "shooting jail guards" or "protecting one's turf" (T1043). She did know that the group was extremely popular and the CD album sold a lot of copies (T1043).

Cera Brogley, a friend of Mike's from high school, testified at penalty phase that he liked rap music (T1188-90). Cera remembered that Mike liked the popular group "Bone" and they would "listen to it all day long" (T1190-91). Cera said that Bone was not really "gangster rap or "thug rap and Bone did not advocate violence (T1191).

The defense preserved this point for review by including it in the motion for new trial (LF252-53).

Listening to the Bone CD, StEx67, the jury would have been greeted with a funereal, dirge-like chorus intoning "mo murda, mo murda, come again, mo murda, mo murda, come again..." (T1041; StEx67). Next the jury would have been bombarded with Bone's rapid-fire recitation of lyrics, interspersed with further choruses of "mo murda, mo murda, mo murda, mo murda" (T1041; StEx67). Although the lyrics pour out quickly, the jury likely would have caught at least some of the following words of the song: "niggah ... tossed in the river, niggah... pump blood... row hoes... I'm a real thugish niggah ... so I would have to kill ya so die ... fucked up bang ... bloody bodies ... dumped in the alley ... put one in ya head ... drugs ... buckshot ... put 'em on the ground ... gotta kill ... shiver fuck that niggah..." (StEx67).

Confronted with the song's coarse language, replete with profanity, vivid images of violence, and offensive racial and sexual references, the jury would have been repulsed and would have swallowed the prosecutor's disarmingly simple -- but legally irrelevant and very prejudicial -- "mo murda" argument: that the jury should find that Mike planned to murder the jailers because he listened to this "mo murda" music, and his listening to this rap music was a reason Mike should die:

> It was planned. It was a jail break. Sitting out in that car *Mo Murda, Mo Murda.* Go in with a blaze of glory.

(T1257).

But neither this argument nor the evidence elicited from Tracie establishes the relevance of the Bone CD to the jury's decision on punishment. The prosecutor did not establish a connection between Mike listening to the music and his shooting of the jailers. Other than the prosecutor's speculative argument nothing suggested that this music somehow played a role in the shootings at the jail.

A defendant's aesthetic tastes in art, literature or music are not relevant to the question of punishment for crimes committed by the defendant. Admission of this evidence violated the First and Fourteenth Amendments - protecting Mike's right to listen to music of his choosing, even if repulsive - and requires the Court to reverse for a new penalty phase proceeding.

In ***Dawson v. Delaware***, 503 U.S. 159 (1992), the issue before the Court was whether, at the penalty phase of Dawson's trial, the admission of evidence of Dawson's membership in the Aryan Brotherhood violated his First and Fourteenth Amendment

rights. ***Id***. at 160. The Aryan Brotherhood penalty phase evidence presented by the state was in the form of a stipulation that read:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

Id. at 162. The prosecutor also 'introduced evidence that Dawson had tattooed the words "Aryan Brotherhood" on his hand.' ***Id***.

The Supreme Court held that " the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." ***Id***. at 160, 163. The prosecution in ***Dawson*** had anticipated presenting evidence that would establish that the Aryan Brotherhood was a "white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates." ***Id***. at 165. Instead, the prosecution used the stipulation which proved only that the Aryan Brotherhood was a white racist prison gang operating in more than one state. ***Id***. The Supreme Court indicated that had the state introduced evidence establishing the violent and illegal activities of the Aryan Brotherhood and their advocacy of prison violence, such facts would have been admissible because relevant to sentencing issues. ***Id***. Mere evidence of defendant's membership in a white racist prison gang, an association protected by the First Amendment, was not relevant to any sentencing issues and thus not

admissible. ***Id***.

"[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." ***Id***. But, to be admissible at the penalty phase trial, evidence must be relevant to the sentencing issues in the case. ***Id***. at 164-68.

"Music is one of the oldest forms of human expression" and is protected under the First Amendment. ***Ward v. Rock Against Racism,*** 491 U.S. 781, 790 (1989); ***Schad v. Borough of Mount Ephraim***, 452 U.S. 61, 65 (1981). 'The "First Amendment protection extends to rap music" and ... the First Amendment protection is not weakened because the music takes on an unpopular or even dangerous viewpoint.' ***Torries v. Hebert***, 111 F.Supp.2d 806, 809 (W.D.La 2000) *citing* ***Davidson v. Time Warner, Inc.***, 1997 WL 405907, 15 (S.D.Tex. 1997); ***Betts v. McCaughtry***, 827 F.Supp. 1400, 1406 (W.D.Wis. 1993).

Mike's enjoyment of rap music, like Dawson's membership in the Aryan Brotherhood, is an activity protected by the First Amendment. If, in ***Dawson,*** the admission at penalty phase of evidence of defendant's membership in a white racist prison gang -- a gang with a reputation for committing illegal, violent acts -- violates the First and Fourteenth Amendments, then in the present case, the admission at penalty phase of evidence that Mike listened to rap music -- music!! -- not a gang known for being violent!! -- must also violate the First and Fourteenth Amendments. As in ***Dawson***, the state here failed entirely to demonstrate the relevance to the sentencing issues of Mike engaging in his

protected First Amendment activity of listening to music, and the cause must be reversed for a new penalty phase trial.

The challenged evidence in this case was offered and received based on an assumption: that we fully endorse and agree with the contents and views of the art (including rap music) and artists (including rap musicians) that we listen to, enjoy, and watch. But much art involves, role playing, exaggeration, theatre; rap music in particular involves not just raunchy lyrics but strictly "musical" elements of rhythm, melody, harmony, orchestration, etc. Merely listening to an album, or watching a movie or a play, or viewing a work of art does not mean acceptance of everything - or anything - about the work of art or the values that it may express. Few authors, Shakespeare included, intended that their audience would emulate their villains or even their heroes: did Shakespeare intend teenage lovers to commit suicide after Romeo and Juliet? The connection between listening to music and committing a crime is too tenuous to make what we listen to or watch on TV relevant in the penalty phase of a murder trial.

In the present case, the question is whether Mike's enjoying and playing rap music by the rap group Bone - indistinguishable from and subject to the same First and Fourteenth Amendment protections as the right of association in ***Dawson*** - was legally relevant to the question of whether Mike should be sentenced to death. The answer is no: because the state failed to establish any connection between the music and the question of punishment, the music was irrelevant to the sentencing phase issues and its admission was reversible error.

The prosecutor never explained - never even attempted to explain the relevance of this

CD to the penalty phase issues. He presented no evidence that the rap group Bone, or Bone's music, was in any manner, in Randolph County, Missouri, or anywhere else in the country, linked to murder or violent, illegal activities or to people committing murder or violent, illegal activities. Although the lyrics included images of violence - "mo murda ... bloody bodies," etc., there was nothing in to indicate that the song - or the group - advocated listeners to go out and commit violent acts, murder, murder of jail guards, or murder of white jail guards. And, there was nothing even remotely suggesting reasons why people who listened to music by Bone should be sentenced to death.

The meaning of the "mo murda" lyrics was never explained by the state - although Cera Brogley did say that the group, Bone, wanted to get away from being violent. "Mo murda" was just as likely a song reflecting and describing the environment in which the group members lived as they were growing up[4] -- an expression of regret over the occurrence of "mo murda" in their neighborhood -- as a call to commit "mo murda." Even assuming, for argument, that the lyrics somehow glorified or exalted "murda," there was no evidence that Mike was taking direction from the music or that the music caused him to shoot the jailers.

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[4] At least one music reviewer, David Levine - reviewing for the Internet Web Site Urban Desires Music - suggests that "Bone" does not endorse the specific activities mentioned in their lyrics. Levine says the group simply sings about what they have seen. www.urbandesires.com/1.3/Music/docs/bone.html http://launch.yahoo.com/artist/artistFocus.asp?artistID=1003242:

If the state had really believed that the rap music evidence was linked to the offense, there was no reason for the state to not have presented it at the first stage of trial. Despite the prosecutor's attempt to link, by argument, the fact that Mike allegedly said, "at some point" after listening to the CD, that he was going to go into the jail in "a blaze of glory," there is no connection between Mike's action and the music or between Bone and the offense. There was no evidence that any members of the group Bone had committed crimes or that Mike was trying to emulate them. Mike's enjoyment of rap music and, in particular, rap music with lyrics concerning violence and murder, are matters entirely unrelated to the charged offenses. There is nothing to indicate that the charged offenses were inspired or motivated by said rap music or that the charged offenses were in any manner connected or related to the rap music that Mike heard.[5]

:

[5] Appellant's counsel found the following review of the group on the internet:

> While many '90s rappers rely on braggadocio and gang posturing to reach the masses, Bone Thugs-N-Harmony one-up the competition with vocal skills that are wildly inventive and totally original. A fast, rhythmic, complex rapping style known as "flowing" combines with group harmonies to provide a vocal attack that is stunning--add to that the stark imagery and true-life tales of hard times on the streets of Cleveland, Ohio, and the result is mind-numbing.
>
> The group adopted Bone as a surname, hence cousins Layzie Bone and Wish Bone joined with Bizzy Bone and Krayzie Bone. (Original fifth Bone, Flesh-N-Bone, has since broken away.) The band headed to L.A. on minimal savings and

State v. Nelson, 715 A.2d 281 (N.J. 1998), arising from a capital penalty phase proceeding, is a case in which New Jersey's highest appellate court applied ***Dawson's*** distinction between evidence that merely demonstrates a defendant's abstract beliefs and evidence that establishes a connection between a defendant's views or associations and

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auditioned for rap star/label head Eazy-E over the telephone. The Bone later rapped for Eazy in person backstage when he appeared in a Cleveland concert. Eazy released the Bone's first EP, Creepin On Ah Come Up, in '94; it has since gone quadruple-platinum. While many rap stars prove to be one-hit-wonders, Bone came back hard the following year with a full-length LP that eulogized their late mentor Eazy-E, who died from AIDS complications. Entitled E. 1999 Eternal, the LP smacked Michael Jackson from the No. 1 spot on the album charts and has sold five million units to date. Its single, "Tha Crossroads," won a Grammy and tied the Beatles' "Can't Buy Me Love" as the fastest-rising pop single ever.

Bone established Mo Thugs Records and began developing and releasing Cleveland artists, as well as their own solo LPs. Krayzie in particular has gone into production with recordings by Graveyard Shift, Poetic Hustla'z and others. As of this writing, they are preparing for the August '97 release of the highly-anticipated The Art Of War, a 2-CD package divided into "World War I" and "World War II" discs.

This Biography was written by S.L. Duff

http://launch.yahoo.com/artist/artistFocus.asp?artistID=1003242

the charged offense to require a new sentencing trial. Prior to the charged murders of two police officers, Nelson had developed an obsession with guns and with the idea that "the Founding Fathers had in mind that there might be another bloody revolution," and adopted the belief that the second amendment was "sacrosanct." ***Id***. at 283, 285, 291. At penalty phase, the prosecutor argued that in killing the officers, Nelson acted in accordance with her views on guns, the second amendment and bloody revolution. ***Id***. at 290-91.

The New Jersey Supreme Court held that ***Dawson*** applied; admission, at the penalty phase, of Nelson's beliefs and thoughts on the Second Amendment, guns, and "bloody revolution" fell "in the same category as Delaware's evidence concerning Dawson's membership in the Aryan Brotherhood." ***Id***. at 292. "Had the State proved that defendant desired or advocated violent attacks on the government (such as in the Oklahoma City or World Trade Center bombings), that evidence would have been relevant to rebut defendant's mitigating contentions that the lack of police training, her emotional disturbance, and her impaired capacity to appreciate the wrongfulness of her conduct caused the deaths of the two officers." ***Id***. *But the state failed to show "that defendant was actually a revolutionary*." ***Id***., emphasis added. The state failed to connect 'defendant's "abstract belief" in the importance of the second amendment and the Founders' concern about a future revolution' with the charged offenses. Id. Under ***Dawson***, 'admission of such "abstract beliefs," without more, violated defendant's First Amendment rights. ***Id***. at 293 *citing* ***Dawson***, 503 U.S. at 167.

In ***Dawson***, the Court found that the ordinary rules of evidence pertaining to relevance

that apply in non capital cases or at guilt phase also apply at penalty phase. 503 U.S. at 164-65. In non capital cases, even when evidence of the defendant's literary and aesthetic preferences may be logically relevant, such evidence must be excluded if the prejudicial effect outweighs any probative value. ***State v. Driscoll,*** 55 S.W.3d 350, 354-55 (Mo.banc 2001). A brief review of a few cases that have considered the admissibility and prejudicial effect of rap music and literature owned or possessed by the defendant is instructive.

In ***State v. Cheeseboro***, 552 S.E.2d 300 (S.C. 2001), appellant challenged the trial court's decision to admit into evidence the lyrics to rap song authored by defendant while incarcerated; the lyrics were as follows:

> Ruckus, I believe you're a perpetrator, gold and platinum hater, cause me and J.D. is a force like Dark Vador. Who do you despise a strong enterprise? Do the greed in your eyes lead you to tell lies? Victimize me and Jermain Dupri, don't let me see or else there'll be death in this industry. Want let go, set it fo' sho', I get hype like Mike put yo' blood on the dance flo'. Blow fo' blow, toe to toe, with that no mo'. Like the 4th of July, I spray fire in the sky. If I hear your voice, better run like horses or like metamorphis, turn all y'all to corpses. No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool. Ten murder cases, why the sad faces? Cause when I skipped town, I left a trail [of] bodies on the ground. Your whole click ain't nothing but tricks, bitch pulling sticks, grown men sucking dicks. No one bring ruckus like King Justice, but toughest the So So Def most corruptest.

Id. at 312. The South Carolina Supreme Court held the trial court erred: "the song's reference to leaving no prints and bodies left in a pool of blood" were "references too vague in context to support the admission of this evidence" as an admission against interest." ***Id***. at 313. Although the error was harmless in that letters authored by the defendant of the same tone had properly been admitted, the Court observed that the "minimal probative value" of defendant's lyrics was "far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, *i.e.* his propensity for violence in general." ***Id***. The lyrics' "general references glorifying violence" did not justify admission at trial. ***Id***.

In ***State v. Mann***, 2002 WL 506865 (April 5, 2002 N.C.), the trial court agreed with defendant's argument that 'admitting into evidence, over defendant's objection, a promotional photograph in which he is depicted as rap musician "Doc Terra (Da Mann)"' was of no probative value and served only to tarnish defendant's character because "in our society, rap musicians have become synonymous with gang membership and criminal activity." ***Id***. at *6. Although holding that "the photograph did not tend to prove the existence of any fact of consequence to the determination of defendant's guilt," the Court found "overwhelming evidence of defendant's guilt and affirmed. ***Id***.

In ***People of the Territory of Guam v. Shymanovitz***, 157 F.3d 1154 (9th Cir. 1998), the Ninth Circuit Court of Appeals held it was reversible error to admit, at the trial of a defendant charged with multiple counts of sexually and physically abusing children, evidence of the contents of several "sexually explicit" gay adult magazines found in defendant's residence. The comments of the Ninth Circuit, in holding this evidence was

irrelevant to the offenses charged and that its admission was reversible error, bear repeating:

"The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401." ***Id***. **at 1158**. "At the very most, Shymanovitz's possession of the sexually explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and not that he actually engaged in, or even had a propensity to engage in, any sexual conduct of any kind. ***Id***. at 1158-59.

> Criminal activity is a wildly popular subject of fiction and nonfiction writing ranging from the National Enquirer to Les Miserables to In Cold Blood. Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct. Under the government's theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov's Lolita, and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories. Woe, particularly, to the son accused of patricide or incest who has a copy of Oedipus Rex at his bedside.

Id.

In ***State v. Hanson***, 731 P.2d 1140 (Wash.App. 1987), the defendant was charged with first degree assault for shooting a clerk during a robbery. Overruling defendant's

objections, the trial court permitted the prosecutor to cross examine the defendant about works of fiction he had authored - some of which depicted violent incidents. 731 P.2d at 1143. On appeal, Hanson contended that "the jury may have seized on the correlation between certain elements of his fiction and aspects of his personal life, [FN4] to conclude that [he] was a violent person who was likely to commit this violent crime." ***Id***. at 1144. The Washington Court of Appeals reversed:

> Assuming arguendo that the defendant placed his character for nonviolence in issue during his direct testimony, we hold that his writings were irrelevant to rebut this character evidence. Without some further foundation, the defendant's writings were simply not probative. A writer of crime fiction, for example, can hardly be said to have displayed criminal propensities through works he or she has authored.

Id. The Court went on to find that even if the State had been able to show the relevance of the writings, "any probative value would be overwhelmed by the danger of unfair prejudice." ***Id***.

In ***Dawson***, the Supreme Court left unanswered the question of whether the admission of Aryan Brotherhood evidence at penalty phase was harmless error leaving it "open for consideration by the Supreme Court of Delaware on remand." ***Id***. at 168-69. Justice Blackmun's concurring opinion in ***Dawson*** suggested that "[b]ecause of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today. ***Id***. at 169.

On remand, the Delaware Supreme Court did apply a harmless error analysis and

found the evidence was not harmless. ***Dawson v. State***, 608 A.2d 1201, 1203-06 (Del. 1992). But in ***Flanagan v. State***, 846 P.2d 1053 (Nev. 1993), relying on ***Zant v. Stephens***, 462 U.S. 862 (1983), the Nevada Supreme Court held that because the prosecution had "submitted evidence of appellants' religious beliefs" in violation of the First Amendment which the "jury would not otherwise have heard," there was "no room for a harmless-error analysis." ***Id***. at 1058.

Appellant submits that the rationale articulated in ***Flanagan***, as derived from ***Zant***, is the correct one. That is: where the defendant's ideas, beliefs or associations have no connection to the issues, harmless error analysis is not appropriate. Accordingly, because the state violated Mike's rights under the 1st and 14th Amendments by introducing and using evidence of Mike's enjoyment of rap music to obtain the death sentence against him despite establishing no connection, no relevance between the music and the sentencing issue, this Court must vacate the sentence of death and remand for a new penalty phase trial.

Alternatively, should the Court follow the approach taken by Delaware instead of Nevada and review the erroneous admission of the rap music evidence under the harmless error standard, the Court must find that the admission of this evidence at the penalty trial and the prosecutor's repeated references to and use of this evidence during his argument prejudiced appellant and require reversal. When reviewing for harmless error, this Court must reverse unless the state establishes beyond a reasonable doubt that the error in the admission of evidence was harmless. ***State v. Storey***, 986 S.W.2d 462, 464 (Mo.banc 1999). And this evidence was far from harmless.

Although playing and listening to rap music, even rap music about murder, is not a crime, *and is protected by the First Amendment*, it is an understatement to say that that the jury most likely was not favorably impressed by the rap music and was prejudiced against Mike as a result. *See*, ***State v. Mann***, *supra*, (promotional photograph in which defendant was shown as rap musician "Doc Terra (Da Mann)"' was of no probative value and served only to tarnish defendant's character because "in our society, rap musicians have become synonymous with gang membership and criminal activity"); ***State v. Cheeseboro***; *see also*, Allison Samuels, N'Gai Croal, David Gates, and Alisha Davis, "Battle for the Soul of Hip-Hop" ***Newsweek***, October 9, 2000, p.58 (citing poll showing that "almost two thirds [of voters nationwide] say [rap] has too much violence").

Indeed, the prosecutor suggested Mike's actions were no different than the rap music he played. The prosecutor stressed in his opening statement and closing arguments how "cold" the crime was, how Mike "played a song by Bone's, Thugs 'n Harmony, a rap group which included the lyrics over and over again of Mo Murda, Mo Murda, Mo Murda" and how, with that song, he "psyched himself up to go in and do just exactly what he did" (T955-56, 1257).

Because the subject matter of the rap music at issue here involves violence and murder, and because Mike was charged and convicted of murder, the jury would have thought this evidence was related to the offense. The jury would have used this evidence improperly at penalty phase to find Mike enjoyed murder, was obsessed with murder, spent his time thinking about murder and, therefore, had a propensity for murder. From this, the jury would, and eventually did, conclude that the appropriate sentence was death.

Further, the record shows that this was not an overwhelming case for death. Even with the rap music evidence, the jury deliberated for over eight hours - from 11:15 a.m. to shortly after 8:00 p.m. - before returning verdicts of death (T1296-97). It cannot be said, in these circumstances, that admission of the rap music evidence was harmless beyond a reasonable doubt. Even assuming - for the sake of argument - that had the rap music evidence not been admitted, the jury still would have found all the aggravating circumstances submitted, it is impossible for this Court to say that the jury would still have given death: because a jury never has to give death. §565.030.4(4); *See*, ***State v. Storey***, *supra*, 986 S.W.2d at 464-65 *citing* ***State v. Johnson***, 968 S.W.2d 686, 701 (Mo.banc 1998); ***State v. Brooks***, 960 S.W.2d 479, 497 (Mo.banc 1997). When a jury that takes more than eight hours to decide sentence, it cannot be said that the state's case for death was overwhelming and the erroneously admitted evidence was harmful. In light of the irrelevant, extraordinarily prejudicial rap music evidence admitted at trial, it also cannot be said that the sentence satisfied the Constitutional requirements of due process and reliable sentencing.

There is an additional reason that the cause must be reversed for a new sentencing trial: the state failed to disclose that Tracie Bulington had told the prosecutor, contrary to what she stated in her deposition, that she could identify the song that Mike played.

The defense "Motion for Disclosure of Evidence in a Capital Trial" requested disclosure of "[a]ll statements, written or oral, made by any of the codefendants, to any person, at the time of or subsequent to their arrests in this case ... including those relevant to: (a) the alleged crime..." (LF37-38). The defense "Request for Discovery" requested disclosure of "the following ... throughout the duration of this cause ... "the substance of

any oral statements made by the defendant or by a codefendant..." (LF43).

The record shows that at some point after Tracie's deposition and before she testified at Mike's trial, the statements that Tracie made at her deposition -- regarding the rap music that Mike played in her car -- changed:

Q. [Prosecutor] Ma'am, I'm going to show you what is marked as State's Exhibit 67. Show you the mark on the exterior of the package. Have you seen this particular disc before?

A. [Tracie] Yes, I have.

Q. In fact, you listened to it earlier today, did you not?

A. Yes, I did.

Q. Does this have the recording of that same song you heard the defendant play over and over again on it?

A. Yes, it does.

Mr. Estes [Defense counsel]: Your Honor, I object. May we approach.

(Counsel approached the bench and the following proceedings were had:)

Mr. Kenyon [Defense counsel]: Your Honor, we're going to object to this. This is new extremely irrelevant information [we're] getting from this witness this morning. We had no advanced notice that they were playing this. I mean I know exactly what they're going to do. They played this for her this morning so she could have an opportunity to see if she could identify it. I think that we're entitled to know what they're going to do in advance of trial. This is all last minute. The information that we had prior to this point is that this witness could not identify the name of the song.

In her previous deposition she successfully was able to identify the name of the band, and she was even able to identify the name of the album that this particular song is on. And so the only other thing that she was able to say about it was that they, is that the lyrics *Mo Murda* were said throughout this song. That was the extent of the information that she had when we took her deposition. And we just took her deposition last month.

Mr. Estes: Been a few weeks. The end of last month. Beginning of last month. I'm sorry. We're in August now.

Mr. Kenyon: So our defense to deal with this issue, Your Honor, the defense we had to deal with this was we went and we investigated this and we went ahead and printed out the lyrics. Every one of us saw what was on that CD. We learned after a week or so that the words *Mo Murda* appeared in at least one other song repeatedly. In a different song. And so we were prepared to come in here this morning, we're prepared to come in here with the information the State had given us to this date to deal with it in this manner. This is a surprise. It's prejudicial. There's other ways we need to decide how to deal with this. We can't deal with new evidence that the State is generating the morning of the trial, the morning of the penalty phase. We're not equipped to deal with this at this point. And I think that they're under an obligation, the defendant's due process right to have notice of what kind of information the State is going to put on. And this is something that they're just creating today. So we would object to any kind of further testimony from this witness concerning any song that she listened to today and her ability to, I mean their ability to get her to identify it

at the last minute.

Mr. Ahsens: Your Honor, they knew of the fact --

The Court: Just a minute. One of you will do the objecting. I'll give you an opportunity to discuss it with Mr. Kenyon.

Mr. Ahsens: The fact that this song was played repeatedly by the defendant is known or a song using those particular lyrics was known to the defendant when they deposed this witness some weeks ago. She described it as a group, the major lyrics within it. She was not able to identify the name of the tune but she was able to identify the name of the album it was on. All we did was go to the internet and look it up. You know, this is something that's on the public domain. And I don't see, they knew the fact, they could acquire it the same way we did.

Mr. Kenyon: Well, wait a minute. We didn't have the ability. No, we acquired the same facts. We got the same lyrics. We got the same CD. We listened to it. And what we weren't able to do is go into the jail at our leisure and speak with her and say oh by the way, let me play this for you and see if you can identify that for us. That's not something that's part of the public domain. That's the aspect I'm objecting to. We did everything we could based on the information that was given to us.

Mr. Ahsens: Also that's part of the foundation. I don't know why you wouldn't expect that we would establish the foundation. I mean --

The Court: The objection will be overruled. Let's proceed.

Mr. Kenyon: Federalize.

The Court: yes, sir.

(The following proceedings were had in open court:)

Q. Just so we're clear, this disc contains the song you heard the defendant play repeatedly shortly before you enter the Huntsville --

A. The song that I remember hearing him play, yes, sir. Yes, sir.

Mr. Estes: I'm sorry, I can't hear.

A. The song I remember him hearing him play, yes.

Q. So you heard that song over and over again?

(T1027-30). The defense included the trial court's ruling in the motion for new trial (LF252-53).

The prosecutor failed, absolutely, to address the state's failure to observe the discovery rules. The discovery rules are not mere formalities. The rules "clearly intend to allow both sides to know the witnesses and evidence to be introduced at trial." ***State v. Whitfield***, 837 S.W.2d 503, 508 (Mo.banc 1992). These rules permit a defendant the opportunity to prepare in advance of trial and to avoid surprise. ***State v. Kehner***, 776 S.W.2d 396 (Mo.App.E.D. 1989). The duty to disclose such information is not satisfied by one response, but is a continuing one. ***State v. Royal,*** 610 S.W.2d 946, 951 (Mo.banc 1981).

"The determination of whether the State violated a rule of discovery rests within the sound discretion of the trial court." ***State v. Willis***, 2 S.W.3d 801, 803 (Mo.App.W.D. 1999). The trial court also has discretion to select an appropriate remedy for a discovery violation. ***Id***. On appeal, the Court reviews to determine whether the trial court abused its discretion. ***Id***.

Here, the state had an obligation to disclose Tracie's change in testimony as soon as the state learned of her new statement. Failing to do so caught the defense absolutely by surprise. The defense, believing that Tracie could not identify the song that Mike had listened to, had no reason to anticipate that the state would play the Bone CD - StEx67. For this reason, overruling the defense objection to Tracie's testimony -- which, ultimately, led to the state being able to play the disc -- was prejudicial, reversible error.

For the foregoing reasons, the sentences of death on both counts must be vacated and Mike re-sentenced to life imprisonment without probation or parole, or, in the alternative, the cause must be reversed and remanded for a new penalty phase trial.

<u>As to Point Two:</u> The trial court erred in overruling Mike's objection and sustaining the state's motion to strike juror Grant for cause. This violated Mike's rights to due process of law, fundamental fairness, trial by a fair, impartial, and fairly selected jury, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's V, XIV, VI, and VIII; Mo.Const., Art I, §§ 10, 14, 18(a) and 21. The state inaccurately represented that juror Grant was "unequivocal in her unwillingness to vote for the death penalty" but, in fact, juror Grant was not unequivocal in her opposition to the death penalty and indicated that in some instances she could vote to impose a sentence of death. The erroneous exclusion of this juror who at no time indicated that her beliefs would prevent her from following the court's instructions requires that Mike's sentences of death be vacated and he be re-sentenced to life imprisonment without probation or parole or, alternatively, that the cause be remanded for a new penalty phase trial.

The prosecutor's claim that Ms. Grant was "unequivocal in her unwillingness to vote for the death penalty" (T531) reflects only Ms. Grant's first statement -- to the prosecutor -- that she could not vote for death (T433-34). But Ms. Grant later modified this statement by saying that that if a case was "horrendous" or "horrible" or terrible" she could vote for death (T466-67). Evidently, the prosecutor overlooked, or forgot or never heard Ms. Grant subsequent clarification of her initial response. Contrary to the prosecutor's representations, Ms. Grant's entire voir dire documents that Ms. Grant could consider both penalties and could, where she felt the facts warranted the death penalty, vote to impose the death penalty. For this reason, excluding Ms. Grant was error and requires that Mike's sentences of death be vacated and the cause remanded for a new sentencing phase trial.

During the state's "***Witherspoon***" - or death qualification - voir dire of small group number three, the prosecutor prefaced his questions to individual jurors by describing the steps the jurors would follow at the penalty stage (T422-29). He explained that the jury would receive "written instructions" outlining and explaining the "very definite process" the jury "must follow" and "exactly how" the jury would "go about" deciding punishment" (T422-24). Next he reviewed the steps of the penalty phase trial (T423-27). Finally, the prosecutor asked each of the prospective jurors whether, "presum[ing]" that they were at "step four" or "the final point of decision" and that it was "now time to decide" punishment, "could you vote for the death penalty?" (T429-42).

Juror Patti Lou Grant, No. 95, gave the following responses to the prosecutor:

MR. AHSENS [Prosecutor]: Ms. Grant, final point of decision. Could you vote for

the death penalty?

VENIREMAN GRANT: No.

MR. AHSENS: Excuse me.

VENIREMAN GRANT: No.

MR. AHSENS: Again, do you have any similar reservations about life in prison without parole?

VENIREMAN GRANT: No.

MR. AHSENS: Is this a belief that you held prior to coming in here today?

VENIREMAN GRANT: Yes.

MR. AHSENS: So this is something you have thought about, given some consideration to?

VENIREMAN GRANT: Yes.

MR. AHSENS: I take it then that there is no point in trying to talk you out of it. And it is as they say your final answer?

VENIREMAN GRANT: Yes.

MR. AHSENS: Thank you so much.

(T433-34).

Defense counsel subsequently voir dired this small group (T443-65). Before concluding, he questioned four jurors, including Ms. Grant, who had previously responded that they could not vote for the death penalty:

MR. KENYON: Ms. Kennard and Ms. Grant, and I guess I'll just ask all of you kind of en masse here. Ms. Kennard, Ms. Grant, Mr. Jameson, and Ms.

Goldman, has there been anything that has been said that I've said or anybody else has said since the prosecutor has been up here and you gave your answers to the prosecutor, is there anything that has been said that makes you believe that if you found that he did this terrible crime, killed these two jail guards, could any one of you realistically consider the death penalty?

No.

VENIREMAN GRANT: It would have to be horrendous.

MR. KENYON: It would have to be?

VENIREMAN GRANT: The crime would have had to have been terrible.

MR. KENYON: Okay. And if the crime was, I'm assuming then from that answer that if the crime was terrible enough, that you could actually, you might even though you might be leaning away from the death penalty, you really want to stay away from the death penalty, the facts of the crime could be so horrible that you could?

VENIREMAN GRANT: Yes.

MR. KENYON: Conceive of yourself of voting for the death penalty?

VENIREMAN GRANT: Yes.

MR. KENYON: That was Ms. Grant.

(T466-67).

Neither the prosecutor nor the trial judge questioned Ms. Grant any further. In particular, they never asked her if her views about the death penalty would prevent her from following the court's instructions.

At the conclusion of voir dire, the prosecutor moved to strike Ms. Grant for cause saying she was "unequivocal in her unwillingness to vote for the death penalty" (T531). The court sustained the motion and struck Ms. Grant for cause (T531; LF229). Defense counsel included the trial court's ruling as a point of error in the motion for new trial[6] (LF243-44).

"The trial court has broad discretion to determine the qualifications of prospective jurors." ***State v. Parker***, 886 S.W.2d 908, 919 (Mo.banc 1994). But, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by

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[6] At the beginning of the "strikes for cause" segment of the ***Witherspoon*** voir dire, defense counsel objected each time the state moved to strike a juror who had expressed opposition to the death penalty (T528-29). Fairly quickly, perhaps to save time, the judge began to anticipate and preempt defense counsel's objections. Immediately after ruling on a state motion to strike, before defense counsel objected, the judge would state that the objection was "noted" or noted as "continuing" (T529-32). This record indicates that the judge, the prosecutor, and defense counsel all understood that the defense objected to each and every one of the state's motions to strike a juror who had expressed opposition to the death penalty, and that the judge was treating the objections as continuing.

For this reason, though defense counsel did not formally object to the state's motion to strike juror Grant, and the court did not "note" this objection, appellant believes the record warrants treating this Point One as preserved. In the event that the court disagrees, appellant respectfully requests that the court review for plain error. Rule 30.20.

excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." ***Witherspoon v. Illinois***, 391 U.S. 510, 522 (1968).

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

Id., 391 U.S. at 522 n. 21 (emphasis added).

'"[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" ***Morgan v. Illinois***, 504 U.S. 719, 728 (1992) *citing* ***Wainwright v. Witt***, 469 U.S. 412, 424 (1985) *quoting* ***Adams v. Texas***,

448 U.S. 38, 45 (1980). "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." ***Morgan***, 504 U.S. at 728. "The burden of proving bias rests on the party seeking to excuse the venire member for cause." ***Witt***, 469 U.S. at 423; ***Lockhart v. McCree***, 476 U.S. 162, 170 n. 7 (1986).

"The qualifications of a prospective juror are not determined conclusively by a single response, but are determined on the basis of the voir dire as a whole." ***State v. Rousan***, 961 S.W.2d 831, 839 (Mo.banc 1998) (citations omitted). "Initial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire *voir dire* examination of the venireperson is determinative." ***State v. Feltrop***, 803 S.W.2d 1, 8 (Mo.banc 1991) (citation omitted). "The question is not whether a prospective juror holds opinions about the case, but whether these opinions will yield and the juror will determine the issues under the law." ***Id***. (citation omitted).

Jurors initially making statements that would disqualify them may be rehabilitated. ***Ray v. Gream***, 860 S.W.2d 325, 332 (Mo.banc 1993); ***State v. Edwards***, 740 S.W.2d 237, 240-43 (Mo.App.E.D. 1987). Ms. Grant's ***entire*** voir dire - ***Rousan***, ***Feltrop*** - shows that she "rehabilitated" herself, that she could serve as a fair and impartial juror, that she was not irrevocably committed to vote against the death penalty, and that she could, if she thought the facts of the case warranted it, vote for the death penalty. Significantly, well informed by the court and the attorneys as to importance of voir dire and the need to provide full and complete answers to the questions asked, and, further, the importance of the court's instructions, Ms. Grant never stated that her opposition to the death penalty

would prevent her from following the court's instructions.

Before voir dire began, the trial court instructed the jurors that they should "listen carefully to all of the questions" (T133). The judge instructed the jurors that if at some point "during the examination you should remember something which you failed to answer before or which would modify an answer that you gave before, raise your hand and you'll be asked about that" (T133). The court further instructed the jurors that their answers "must not only be truthful, but they must be full and complete" (T133-34).

Finally, before the parties began their respective voir dires, the judge more than once asked the prospective jurors whether they could follow the court's instructions and, conversely, whether there was anyone who could not follow the instructions (e.g., T135, T189). During voir dire the prosecutor (T422-24), and defense counsel (T444, 445, 446, 447, 448, 450) emphasized the importance of, and need to follow, the court's instructions.

On appeal, it is presumed that each juror followed the court's instructions. *See, e.g.*, ***State v. Madison***, 997 S.W.2d 16, 21 (Mo.banc 1999) (jury will be "presumed to know and follow the instructions" even when instructions conflict with the argument of the prosecutor); ***State v. Payton***, 895 S.W.2d 283, 284-85 (Mo.App.S.D. 1995) (jury will be presumed to have followed instructions given prior to opening statements of counsel); ***State v. Chamberlain***, 648 S.W.2d 238, 241 (Mo.App.S.D. 1983) (jury will be presumed to have followed preliminary instructions read at the start of trial).

In accordance with the law, it must be presumed that - as instructed - Ms. Grant gave full and complete answers. Indeed, in accordance with the instructions, when questioned by defense counsel, she did modify her earlier response to the prosecutor (that she could

not vote for death) to clarify that if the facts of a case warranted it -- *i.e*., if a case were horrendous, horrible or terrible -- she could vote for death. Ms. Grant never stated or indicated that her opposition to the death penalty would prevent her from following the court's instructions, and it must be presumed that she could follow the instructions.

Nor - after Ms. Grant had told defense counsel that she could vote to sentence Tisius to death if the case were "horrendous" or "terrible" or "horrible" (T466-67) - did the prosecutor or the judge ask any follow up questions regarding her initial answers. In particular, they never asked her whether her views on the death penalty would prevent her from following the court's instructions.

The facts of ***Szuchon v. Lehman***, 273 F.3d 299 (3rd Cir. 2001), are similar and that case is instructive. In ***Szuchon***, the prosecutor asked a potential juror, Mr. Rexford, whether he would "have any conscientious scruple or any hesitation to find [defendant] guilty of first degree murder?" 273 F.3d at 329. Mr. Rexford responded, "I do not believe in capital punishment." ***Id***. The trial court sustained the prosecutor's motion and struck Mr. Rexford for cause. ***Id***. On appeal, the Sixth Circuit reversed finding that "[t]his limited questioning provided no evidence that Rexford's lack of belief in capital punishment would have prevented or substantially impaired his ability to apply the law."

The facts of the present case show even more clearly than in ***Szuchon v. Lehman*** that the excluded juror -- here, Ms. Grant -- could set aside her personal beliefs and follow the court's instructions. Ms. Grant's statement that in some cases -- "horrible" or "terrible" or "horrendous" -- she could vote for death provides affirmative evidence -- going beyond that provided by the record in ***Szuchon v. Lehman***, that Ms. Grant's views would not

interfere with her ability to serve as a juror. Despite the prosecutor's claim that Ms. Grant was "unequivocal in her unwillingness to vote for the death penalty" (T531), her entire voir dire shows that if the facts warranted it, she could vote to impose the death penalty.

Ms. Grant was not "irrevocably committed, before the trial ha[d] begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." ***Witherspoon***, *supra*, 391 U.S. at 522 n. 21. The record demonstrates that Ms. Grant could consider and vote for death and that she was improperly excluded because she was opposed to the death penalty. It was reversible error to do so, and the cause must be remanded for a new penalty phase trial. ***Gray v. Mississippi***, 481 U.S. 648, 662-68 (1987).

As to Point Three: The trial court erred in overruling Mike's motion for judgment of acquittal at the close of all evidence and entering judgment against him for first degree murder and sentencing him to death. This violated his rights to due process of law, reliable and proportionate sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII; Mo.Const., Art I, §§ 10, 14, 18(a) and 21; Mo.R.S., §565.035.3(3). As reflected in the prosecutor's argument, there was no evidence that Mike deliberated on killing Officers Acton and Egley. The evidence was of a plan to get Vance out of jail by intimidating the jail guards with a gun. Neither Mike's statement nor Tracie's testimony includes any evidence showing that Mike deliberated on the shooting or on killing Officers Acton and Egley. Further, numerous errors in the admission and exclusion of evidence at penalty phase, plus the lack of evidentiary support for the element of deliberation

and substantial mitigating evidence concerning Mike himself, undermine confidence in the reliability of the death verdict and require that it be vacated.

The evidence, when viewed in the light most favorable to the verdict, ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993), did not prove beyond a reasonable doubt that Mike ever coolly reflected, deliberated, on shooting jailers Leon Egley and Jason Acton. What the evidence showed was a plan to intimidate the jailers -- a plan gone from bad to terribly worse, terribly wrong.

"A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." §565.020.1. Deliberation "sets first degree murder apart from all other forms of homicide." ***State v. O'Brien***, 857 S.W.2d 212, 217-18 (Mo.banc 1993). "Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." ***Id***. at 218. Deliberation may be inferred, ***State v. Malady***, 669 S.W.2d 52, 55 (Mo.App.E.D. 1984), but must still be proved beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 316 (1979).

An intended killing done with knowledge but without "cool reflection" is not first degree murder. ***State v. Baker***, 859 S.W.2d 805, 815 (Mo.App.E.D. 1993). Absent evidence of deliberation, an intentional killing is second degree murder. ***State v. Snow***, 293 Mo. 143, 238 S.W. 1069 (Mo. 1922); §565.021.1 (one who "knowingly causes the death of another person" commits the offense of murder in the second degree). A person who acts "knowingly" acts with the awareness "that his conduct is practically certain to cause that result." §562.016.3(1).

Merely acting with knowledge that an act (shooting someone) is practically certain to cause a certain result (death) is not the same as acting with knowledge ***plus*** coolly reflecting (deliberating) before the act. Knowing that death is practically certain to follow from shooting someone is second degree murder. Knowing that death is practically certain to follow from shooting someone ***plus*** acting ***only after*** coolly reflecting on the matter is first degree murder.

Both jailers were shot and killed, but the evidence fell short of establishing coolly reflected, deliberated killings. Mike freely and truthfully admitted his responsibility for shooting and killing Officers Acton and Egley (T826-43; 845-54, 879). He told Sgt. Platte that the plan was to put the guards into a cell - not to shoot the guards (T855). Mike said that he didn't tell the guards to do anything (T856). He said that the guards didn't deserve to die (T859). When asked who was to blame, Mike said he, himself, was to blame for the killings (T859). When asked if Tracie was to blame, Mike said Tracie just drove him to the jail (T860). When asked about Roy Vance, Mike said Vance '"planned it"' (T860). When asked if anyone said anything when he "pulled the gun," Mike said, "Nobody said nothing. I couldn't talk. I just started shooting." (T860). When Sgt. Platte asked Mike what he would do different if he could go back to June 21st and start over, Mike said he would shoot himself and call his mother and ask her total forgiveness and to come home (T867). When Sgt. Platte asked Mike why he started shooting (Mike had said that he hoped Tracie would stop him but she didn't -T875), Mike answered, "I don't know why. I don't know why I did it. I know why I went in there. I didn't tell them to do nothing." (T876-77). Mike said that after the shooting, Tracie was

screaming to get Roy out (T877). In his statement, Mike also said,

> I know what I have done was wrong and will never be fixed. No I don't believe they deserved it. An Officer asked me if I could go back and do it all over what would I do. I said I would kill myself to save the lives. I know I deserve what ever I get and got coming to me."

(StEx61).

This is not evidence of a deliberated murder. It is evidence of a very stupid, very botched plan to effect the escape of Roy Vance from jail by intimidating the jailers with a gun and using the gun to put them into a cell. There is evidence that Mike knew he was shooting the guards but not evidence of even a brief period of cool reflection on shooting the guards. The offense Mike committed may have been a felony murder - for a murder that occurred in the course of helping Vance to escape - and it may have been a conventional second degree murder - for knowingly shooting the guards - but it was not a cool, reflective, deliberated, first degree murder.

Even if the Court should disagree, reject the foregoing argument, and conclude that the state made a sufficient case to support a verdict of guilt, there are substantial reasons for reducing Mike's sentence to life imprisonment without probation or parole. First, as shown above, the evidence of deliberation is not sufficiently strong to serve as a reliable and valid basis for a sentence of death. In addition, the risk that serious and prejudicial errors occurring at both the guilt and penalty phases of trial improperly influenced the sentencing verdicts is too great to be confident in the outcome of the trial and the reliability of the verdicts of death. Finally, the evidence shows that Mike himself - the

defendant - is not a person who should be put to death. For these reasons, the sentence of death must be vacated and Mike re-sentenced to life imprisonment without probation or parole.

Numerous errors pervaded the trial. Even if the Court should find that the errors themselves do not warrant reversal of the conviction or sentence, the Court must consider their effect on the reliability of the verdict of death. Some, but not all of these errors are listed below.

Erroneous jury selection -- in which the jury was chosen by excluding a qualified juror who could vote for death in an appropriate case even though she was not in favor of the death penalty -- tainted the entire penalty phase trial and undermines confidence in the death verdicts. Irrelevant and highly prejudicial evidence of rap music -- filled with vulgar, profane, and violent references and images -- that Mike listened to was admitted as aggravating evidence at penalty phase and played for the jury. Repeatedly, the prosecutor reminded the jury of the rap music ("Mo Murda") and urged the jury to rely on the music and lyrics as a reason to sentence Mike to death. Evidence of a letter written by one of the co-conspirators that would have supported the defense that the plan was to lock up the jailers, not to kill them, was excluded. Evidence from defense witness Dr. Taylor -- that would have defended against and rebutted the state's evidence and argument that Mike was likely to be dangerous in the future -- was excluded. Mike's mother was not permitted to testify that Mike was remorseful when he called her after he shot the jailers.

Even if this Court should decide that these errors do not rise to the level of reversible

error, they are factors that the Court may and should consider in evaluating the reliability and proportionality of the verdict of death. ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc***., 532 U.S. 424, 441-43 (2001). Further, state statute and the Due Process Clause mandate that the Court also determine whether the verdict of death is proportionate to the sentence imposed in similar cases. ***Cooper Industries***, *supra*, ***BMW of North America, Inc. v. Gore***, 517 U.S. 559 (1996); ***Honda Motor Co., Ltd. v. Oberg***, 512 U.S. 415 (1994); ***Ford v. Wainwright***, 477 U.S. 399, 428 (1986) (O'Connor, J., conc'g and diss'g); ***Wolff v. McDonnell***, 418 U.S. 539, 557-58 (1974); ***Harris v. Blodgett***, 853 F. Supp. 1239 (W.D.Wa. 1994); and ***Wilkins v. Bowersox***, 933 F. Supp. 1496 (W.D.Mo. 1996); §565.035.3(3) ("With regard to the sentence, the supreme court shall determine … Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant"); ***State v. Chaney***, 967 S.W.2d 47, 60 (Mo.banc 1998). "Similar" cases should include cases with similar facts regardless of sentence. ***BMW***, 517 U.S. at 583-85.

This Court must also consider the defendant. §565.035.3(3). A very brief review of the evidence adduced at trial shows that Mike had never been in serious trouble before (SLF28, 34). This was, unfortunately, a mitigating fact disparaged and belittled by the prosecutor in his closing argument: "He went straight to the worst crime on the books" (T1258). As a teenager, Mike had attempted to get himself help for his problems (T1101, 1168). Mike was only nineteen when the offense occurred (T1062). Mike's father, who wanted a baby girl, rejected Mike at birth and refused to have any part in Mike's life

(T1065-94).

Mike accepted responsibility for his actions (StEx61). In his statement to Sgt. Platte, Mike said that the guards did not deserve to die (T859). In his written statement, Mike said he knew what he had "done was wrong and will never be fixed" (StEx61). Mike said he would kill himself "to save the lives" (StEx61). And he said, "I know I deserve what ever I get and got coming to me" (StEx61).

But the sentence of death imposed on Mike is excessive and he should not be put to death. The legislature has decreed that a sentence of life imprisonment without probation or parole is, in the appropriate case, an adequate and sufficient sentence for first degree murder. For the foregoing reasons -- Mike's very young age, the circumstances of his life, his complete acceptance of responsibility for his actions, and a regret for his actions, a regret that runs so deep and sincere that he expressed a wish that he had taken his own life instead of Jason Acton's and Leon Egley's -- the Court should find that Mike's sentence of death is disproportionate and re-sentence him to life imprisonment without the chance of probation or parole.

<u>As to Point Four</u>: The trial court erred in overruling Mike's motion to quash the information and exceeded its jurisdiction in sentencing Mike to death for counts I and II. This violated his rights to due process of law and freedom from cruel and unusual punishment, U.S.Const. Amend's XIV and VIII; Mo.Const., Art I, §§ 10, 14, 18(a) and 21; Section 565.030.4(1). Missouri's statutory scheme authorizes a sentence of death only upon a finding of at least one of the seventeen statutory aggravating circumstances comprising both alternate elements of the offense of

"aggravated first degree murder" and facts of which the prosecution must prove at least one to increase the punishment for first degree murder from life imprisonment without probation or parole to death. As the information in the present case failed to plead any aggravating circumstances as to the two charged offenses of first degree murder, the offenses actually charged against Mike were unaggravated first degree murder for which the only authorized sentence is life imprisonment without probation or parole. The trial court thus lacked jurisdiction to sentence Mike to death, and the death sentences imposed for the charged offenses were not authorized. The judgment must be reversed and Mike's sentences of death vacated.

Prior to trial Tisius moved to quash the Information for failure to comply with ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and ***Jones v. United States***, 526 U.S. 227 (1999) (LF224-27). At a pretrial hearing on the motion, defense counsel renewed the motion arguing that ***Apprendi*** and ***Jones*** required that the state "in its charging documents, information or an indictment must plead all, all of the elements of the offense" (T 124). Counsel argued that under ***Apprendi***, the aggravating circumstances were additional elements of an offense of first degree murder punishable by death that must be pleaded and proved at a preliminary hearing (T124-25). The trial court denied Mike's motion; he preserved the point by including it in the motion for new trial (T125; LF241).

In ***Apprendi v. New Jersey***, the Supreme Court held that '"under the Fourteenth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime **must be**

charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" 530 U.S. at 476 *citing* ***Jones v. United States***, 526 U.S. at 243, n. 6 (emphasis added).

Missouri has expressly provided by statute that life imprisonment 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), RSMo. (2000) ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor: (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032…."); *see*, *e.g.*, ***State v. Taylor***, 18 S.W.3d 366, 378 n. 18 (Mo.banc 2000) ("once a jury finds one aggravating circumstance, it may impose the death penalty"); ***State v. Shaw***, 636 S.W.2d 667, 675 (Mo.banc 1982) *quoting* ***State v. Bolder***, 635 S.W.2d 673, 683 (Mo.banc 1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence").

Missouri's statutory aggravating circumstances function as facts that increase "the maximum penalty for a crime" - first degree murder - from life imprisonment without the possibility of probation or parole to the ultimate penalty of death. ***Id***. Thus, although §565.020 ostensibly establishes a single offense of first degree murder for which the punishment is either life without probation or parole or death, the combined effect of §§565.020 and 565.030.4 is to establish two kinds of first degree murders in Missouri. One is "unenhanced" first degree murder, established by proving a killing done

knowingly and with deliberation, for which the punishment is life without probation or parole. The second is "aggravated" or "capital" first degree murder which requires proof beyond a reasonable doubt of the additional element of at least one aggravating circumstance listed in §565.032.2[7] and for which the authorized punishment increases to include not only life without probation or parole but death also.

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[7] Missouri's 17 statutory aggravating circumstances provide 17 alternate (but not mutually exclusive) elements of the offense of aggravated first degree murder. They do not create 17 distinct offenses but different or alternate methods by which a defendant may commit the single offense of aggravated first degree murder.

The use of alternate elements that provide different methods of committing a single offense occurs throughout Missouri's criminal code. *See*, *e.g.*, ***State v. Lee***, 841 S.W.2d 648 (Mo.banc 1992) (569.020, RSMo 1986, "provides that a person can commit robbery in the first degree by one of several different methods"); ***State v. Davison***, 46 S.W.3d 68, 76 (Mo.App.W.D. 2001) ('This statute creates the single crime of "receiving stolen property," which may be committed in different ways"); ***State v. Barber***, 37 S.W.3d 400, 403-04 (Mo.App.E.D. 2001) (different means of committing offense of unlawful use of a weapon); ***State v. Pride***, 1 S.W.3d 494, 501 (Mo.App.W.D. 1999) ("Forgery is a crime which may be committed in several ways"); ***State v. Jones***, 892 S.W.2d 737, 738 (Mo.App.W.D. 1994) ("a person may commit the crime of third-degree assault of a law enforcement officer in five different ways); ***State v. Burkemper***, 882 S.W.2d 193, 196 (Mo.App.E.D. 1994) (two different ways to commit crime of trespass).

The information filed in this case charged Mike with two counts of murder in the first degree for knowingly killing Leon Egley (Count 1) and Jason Acton (Count 2) "after deliberation" (LF13). No aggravating circumstances were pled in the information (LF13-14).

"An indictment must set forth each element of the crime that it charges." ***Almendarez-Torres v. United States***, 523 U.S. 224, 228 (1998). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." ***Jackson v. Virginia***, 443 U.S. 307, 314 (1979) *citing* ***Cole v. Arkansas***, 333 U.S. 196, 201 (1948); ***Presnell v. Georgia***, 439 U.S. 14 (1978). "[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense." ***State v. Parkhurst***, 845 S.W.2d 31, 35 (Mo.banc 1992) *citing* ***Montgomery v. State***, 454 S.W.2d 571, 575 (Mo. 1970). 'The indictment or information must actually charge that a crime has been committed and '"[t]he test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense."' ' ***State v. Stringer***, 36 S.W.3d 821, 822 (Mo.App.S.D. 2001) *quoting* ***State v. Haynes***, 17 S.W.3d 617, 619 (Mo.App.W.D. 2000) *quoting* ***State v. Pride***, *supra*, 1 S.W.3d at 502.

The failure to plead information any aggravating circumstances means that Mike was charged with, and convicted of, "simple" first degree murder - an offense punishable only by life imprisonment without probation or parole. As the death penalty is authorized only for the offense of "aggravated first degree murder" - a crime of which Mike was neither

charged nor convicted - the judge had no authority or jurisdiction to sentence him to death. The sentences of death imposed upon him are thus unauthorized and violate his rights to due process of law and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV and VIII. The judgment must be reversed and Mike's sentences vacated.

As to Point Five: The trial court erred at the penalty phase trial in sustaining the state's objections and refusing to allow the defense to elicit from Patty Lambert, Mike's mother, that he expressed remorse over his actions. This violated defendant's rights to due process of law, to fundamental fairness, to present a defense, to meaningful access to the courts, and to freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI, VIII; Mo.Const., Art. 1 §§10, 14, 18(a), and 21.

Lambert's testimony was admissible to defend against the state's aggravating evidence and to show Mike's state of mind because facts pertaining to remorse are relevant to jury's decision as to what would be the appropriate punishment and, ultimately, to this Court's determination of the proportionality of the sentences of death imposed on Mike.

At penalty phase, the final witnesses the state called were Donna Harmon (T1002-14) and Tracie Bulington (T1014-63). Harmon, a Chariton County deputy Sheriff testified that she was in the jail booking someone on July 2, 2000, and Mike Tisius was in a cell approximately 15 to 20 feet away (T1002-04). Seeing "some movement" in Mike's she looked over and saw that Mike had "his hands in a position of holding a pistol doing

motions of a shooting" towards her (T1004). He repeated the motions three or four times (T1005).

Tracie testified that Mike kept trying to find a gun bigger than the one she had taken from her parents' house (T1018-19, 1043-44, 1052-53). The prosecutor elicited from Tracie that Mike had spoken of going into the jail in a "blaze of glory" (T1031-32) and he had listened "over and over" to a rap song (T1026-27). At the end of Tracie's testimony, the prosecutor played this rap song in which the chorus "Mo Murda, Mo Murda," and expressions of violence, profanity and of sexual and racial disparagement were prominently featured (T1041; StEx67).

Subsequently, Patty Lambert, Mike's mother, testified for the defense at penalty phase (T1064-1125). Defense counsel asked about a phone call Mike had made to her from jail after his arrest for shooting the jailers:

Q. [Defense Counsel] Did Michael express to you remorse for what he had done?

MR. AHSENS [Prosecutor]: Objection. Hearsay.

THE COURT: Sustained. Proceed.

MR. KENYON [Defense Counsel]: May we approach the bench, please.

(Counsel approached the bench and the following proceedings were had:)

MR. KENYON: Your Honor, I would anticipate that one of the big things the State is hitting on here and what they're going to focus on in their closing argument is they're going to try and show that Mike lacked remorse for what happened here. And I think that is certainly relevant in order for us to be able to put on a defense we have to be able to demonstrate that there was remorse.

THE COURT: Well, just tell me what the exception is. I didn't make the rules. The rules say that statements made out of court are hearsay. Just tell me what the exception is.

MR. KENYON: Okay, the exception is this. What I would anticipate. I would like to make this as an offer of proof. As an offer of proof I would say that if Mrs. Lambert would answer that question, that Michael was crying on the phone and said "I'm sorry, mom. I'm sorry." And he said it in tears and then hung up the phone. And that's it. And I think that's relevant. And I think --

THE COURT: How can she tell us that he's in tears?

MR. KENYON: She could hear him sobbing.

THE COURT: She could hear a noise.

MR. KENYON: She could hear crying. I think we can recognize crying over the phone.

MR. AHSENS: Well, perhaps.

MR. KENYON: Present sense impression, exception to the hearsay.

THE COURT: The court will adhere to the ruling. The objection is sustained. Let's proceed.

(T1110-12). The trial court permitted defense counsel to elicit from Patty Lambert that when Mike called her shortly after his arrest he was crying (T1112). the defense included this ruling in the motion for new trial (LF254).

Excluding Patty Lambert's testimony -- that in a phone call after his arrest Mike told his mother he was sorry -- left the jury to wonder why Mike was crying. Was he

unhappy because his plan had not worked? Was he crying because he had been arrested? Excluding the words "I'm sorry" prejudiced Mike because it would have explained that he was crying because he was sorry --remorseful -- for what he had done.

This evidence was admissible because it was relevant to defend against both Donna Harmon's testimony (suggesting Mike was not sorry about what he had done) and the rap music evidence (suggesting that Mike glorified "murda" and had committed the killing in cold blood. Excluding it requires reversal because it violated his federal and state constitutional rights to due process, to present affirmative evidence to rebut and defend against the charges and the state's aggravating evidence both of which placed his state of mind at issue, and to reliable sentencing. If the state may present aggravating evidence at penalty phase tending to show that the defendant was cold and not remorseful, surely the defendant must be allowed to rebut and defend against that evidence.

An out of court statement offered to prove the declarant's state of mind is sometimes held admissible because it is not hearsay, ***State v. Brown***, 998 S.W.2d 531, 546 (Mo.banc 1999) and other times admitted as a hearsay exception, ***State v. Shaw,*** 14 S.W.2d 77, 81 (Mo.App.E.D. 1999). Either way, Mike's statement to his mother, "I'm sorry, mom," was admissible to show his state of mind. Even the self-serving, hearsay statement of a defendant may be admitted if necessary to give the jury a complete picture of the circumstances of the offense. ***State v. Williams***, 673 S.W.2d 32, 35 (Mo.banc 1984); *see also* ***State v. Clark***, 646 S.W.2d 409, 412 (Mo.App.W.D. 1983) ('where either party introduces part of an act, occurrence, or transaction, ... the opposing party is entitled to introduce or to inquire into other parts of the whole thereof, in order to explain or rebut

adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary, or prove his version with reference thereto... This rule has been held to apply ... even though the evidence was in the first place illegal..." 22A C.J.S. Criminal Law § 660(c), pp. 655, 657, 658. ***State v. Odom***, 353 S.W.2d 708, 711 (Mo. 1962)').

The final reason that Patty Lambert should have been allowed to testify that Mike told her he was sorry is that this statement was an expression of remorse. If "a prosecutor may comment during the punishment phase on the lack of evidence of a defendant's remorse, to show the nature of his character," ***State v. Anderson***, 2002 WL 985755 (Mo.banc 2002) *13, then the defendant should be allowed to present evidence showing the existence of the defendant's remorse.

Moreover, '[a] defendant's expression of remorse is relevant to this Court's determination of "whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering the crime, the strength of the evidence, and the defendant."' ***State v. Black,*** 50 S.W.3d 778, 793 (Mo.banc 2001).
See also, ***State v. Worthington***, 8 S.W.3d 83, 92 (Mo.banc 1999) (discussion concerning defendant's proposed testimony, which would include his remorse, indicates that remorse is fair subject for testimony).

Because remorse is a factor in this Court's review of the proportionality of a sentence of death, then whether defendant was remorseful is an issue in every case in which the defendant has been sentenced to death. Evidence regarding Mike's expression of remorse

would have been admissible even if the state had not opened the door through Donna Harmon and Tracie Bulington.

There was plenty of evidence from which the jury and this Court could infer that Mike was a cold, heartless, unremorseful, person. In light of the abundance of such aggravating evidence that the state was allowed to admit, it was prejudicial, reversible, constitutional error to withhold from the jury evidence that the defendant was sorry for his actions. For all the foregoing reasons, the cause must be reversed and remanded for a new penalty phase trial.

<u>As to Point Six</u>: The trial court erred in sustaining state objections and excluding a letter from codefendant Roy Vance to "Karl" - offered first as DefEx3 and subsequently as DefEx9 - soliciting Karl to assist in breaking Vance out of jail. This violated Mike's rights to due process of law and fundamental fairness, to present a defense, to meaningful access to the courts, and to freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI, VIII; Mo.Const., Art. 1 §§10, 14, 18(a), and 21. Excluding the letter prejudiced Mike at both the guilt and penalty trials because it was relevant to defend against and rebut the state's case as to 1) the critical issue of intent, i.e., whether there was a plan to kill the jailers or whether the plan was to intimidate them and put them in a cell to effect Roy Vance's escape, 2) the relative culpabilities of the codefendants and whether Tracie was taking directions from Mike or whether Vance was the mastermind of the plan and was directing both Tracie and Mike. Excluding the letter prejudiced Mike because he admitted shooting the jailers, and the letter was

critical to his degree of culpability - an issue occurring at both the guilt and penalty trials. The letter would have demonstrated that Vance and Tracie were involved in the planning, that Vance was directing the operation, and that Mike was doing what Vance told him.

Twice the defense attempted to offer a letter that codefendant Roy Vance had written to "Karl" that was seized from Tracie Bulington's car after she and Mike were arrested (T869-74, 1057-58; LF259; A49). The first time, during the testimony of Sgt. Platte, the trial court reviewed the letter and sustained the state's "hearsay" objection (T870-71; A49). The defense argued that the letter fell within the "statement by a co-conspirator in furtherance of the conspiracy" exception (T870-71). The court stated that the defense had not laid a sufficient foundation since there was no showing that Sgt. Platte had knowledge that Roy Vance had actually written the letter (T873-74).

Subsequently, the defense laid the necessary foundation through Tracie Bulington and again moved to admit the letter into evidence as a co-conspirator statement in furtherance of the conspiracy (T1057-58). The trial court once more reviewed the letter before sustaining the state's objection on the grounds of "relevance, materiality ... hearsay" (T1058). The defense preserved this point by including it in the motion for new trial (LF253-54).

> The trial court enjoys broad discretion in determining the relevancy of evidence. The relevancy of evidence depends upon whether the evidence tends to confirm or refute a fact in issue or to corroborate evidence which is relevant and pertains to the primary issue in the case.

State v. Ray, 945 S.W.2d 462, 467 (Mo.App.W.D. 1997) (citations omitted).

Where claims of error concerning the admission of testimony are preserved, the appellate court reviews to determine if the trial court abused its discretion. ***State v. Simmons***, 955 S.W.2d 729, 737 (Mo.banc 1997). An appellate court "will find an abuse of discretion only if the trial court ruling clearly offends the logic of the circumstance or appears arbitrary and unreasonable." ***State v. Strughold***, 973 S.W.2d 876, 887 (Mo. App.E.D. 1998).

> Discretion means the option that a trial judge has in doing or not doing that which a litigant does not have the absolute right to demand. *(Citation omitted.)* Of course, an untenable judicial act that defies reason and works an injustice constitutes abuse of discretion. *(Citation omitted*). When the trial court's ruling clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable, the appellate court will find an abuse of discretion. *(Citation omitted.)*

State v. Jack, 813 S.W.2d 57, 60 (Mo.App.W.D. 1991).

"The statement of one conspirator is admissible against another under the coconspirator exception to the hearsay rule even when, as here, the defendants have not been charged with conspiracy." ***State v. Pizzella***, 723 S.W.2d 384, 388 (Mo.banc 1987). "[C]onclusive evidence" of a conspiracy is not required "to invoke the co-conspirator exception to the hearsay rule." ***State v. Clay***, 975 S.W.2d 121, 131 (Mo.banc 1998).

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" ***Crane v. Kentucky***, 476 U.S. 683, 688 (1986) (citation omitted).

"The denial of the opportunity to present relevant and competent evidence negating an essential element of the state's case may, in some cases, constitute a denial of due process." ***State v. Copeland***, 928 S.W.2d 828, 827 (Mo.banc 1996).

"As a general rule, evidence explaining evidence previously introduced or showing that the inference arising or sought to be drawn therefrom is not warranted, is admissible." ***State v. McCoy***, 69 S.W.3d 482, 484 (Mo.App.S.D. 2000) (citation omitted). "This rule is especially applicable where the accused seeks to explain incriminating evidence introduced by the State." ***Id***.

Vance's letter to Karl, which the trial court read (T870-71, 1058) before ruling that it would not be admitted, was as follows:

> Karl,
>
> I know what Tracie is talking to you about sounds crazy but if done right it could be really simple with at least an hour or two to get away. There's no button for help and the cameras don't record anything so they wouldn't even have a clue who did it. Under normal circumstances I would never ask but we're family me, you, and Tracie and need to be together as one. There isn't any of them that work here with enough heart to play hero as long as it's done right. I hate to even ask but it isn't anything that I wouldn't do for you and Carl with your situation with Betty they wouldn't give you any warning. You'd just be arrested and never see daylight again. Why let that happen when we could all be together. Think about it and if you decide to Tracie will explain the lay out.
>
> Love Ya My Brother,

Roy

P.S. Keep your head up and your heart strong.

(DefEx9; LF259; A49). There is no doubt that this is a statement by a co-conspirator, Vance, in furtherance of a conspiracy - to break Vance out of jail. As such, it was admissible as an exception to the hearsay rule. ***State v. Clay***, *supra*, ***State v. Pizzella***, *supra*. The question is whether the error in sustaining the state's objection and excluding it as irrelevant prejudiced Mike (T1058).

Tracie testified that Vance wrote the letter to Karl to recruit him into the conspiracy, and that she was present when Mike gave the letter to Karl (T1057-58). A key part of the letter, that the jury did not hear, was that the plan to break Vance out of jail would be really simple "if done right" (DefEx9).

This was crucial because there was no dispute over the fact that Mike killed the jailers; the real issue at the guilt stage of trial was whether the offense was first degree, "deliberated" murder or second degree, "knowing" murder (T912-13, 921, 940). The "if done right" phrase in the letter supported the defense that there was no plan to kill the jailers. Because the state argued at guilt phase that Mike had planned to kill the jailers and therefore deliberated (e.g., T916-18, 919, 940-41, 943) the letter was important at guilt phase to rebut this evidence and argument and to establish the defense of the plan to confine -- not kill -- the jailers. The letter was written before anyone was arrested and, therefore, before anyone (Tracie, Vance, or Mike) had a motive to "lessen" their culpability. The letter corroborated not only Mike's written statement (StEx61; A47-48) and his statement to Officer Platte (T855), but also Tracie's post-arrest, plea-bargain

testimony (T1018), that the plan for breaking Vance out of jail was not to kill the jailers but to do it "right" - meaning, to use a gun to put them in a cell. The letter, which was written before anything occurred, was evidence of a different nature than Mike's and Tracie's post-arrest statements and testimony and therefore is not cumulative. ***State v. Harris***, 64 S.W.2d 256, 258, 334 Mo. 38 (Mo. 1933).

At penalty phase, to persuade the jury that the appropriate punishment as to each count was death, the prosecutor argued that Mike went into the jail planning to kill both Jason Acton and Leon Egley (T1256, 1257). Again, as at guilt phase, the letter from Vance to Karl would have been valuable evidence to defend against this argument and to corroborate Mike's statements and Tracie's testimony that the plan was to intimidate the jailers - not to shoot them.

Additionally, the letter would have provided a means of establishing that Vance and Tracie were the primary planners and that Vance was directing the plan. It would, thus, have been evidence rebutting the prosecutor's argument criticizing, and disputing the existence of evidence to support, the mitigating circumstance that Mike was acting under "extreme duress or substantial domination of another person" (T1258; SLF28, 34). The prosecutor argued:

> I'm not sure who that refers to. Defense I'm sure will tell us. He brought the plan to Tracie Bulington, didn't he? She apparently didn't have it. So I guess he wasn't under the substantial domination of Tracie Bulington. We have nothing to suggest that she was leading the charge. He was. So I guess it must be Roy Vance. Well, he must have a heck of a reach, making that substantial domination from inside a

jail cell...

(T1258). Without the letter, there was no evidence other than Mike's own statements, to rebut and defend against this argument. The letter would have showed that Vance, not Mike, was directing the plan and that Tracie, not Mike, was operating directly under Vance because even though Mike was the one who gave Karl the letter (T1057), the letter said the Tracie would "explain the lay out" to Karl (DefEx9; LF259). The letter would have also rebutted Tracie's testimony that Vance had told her that Mike would "fill [her] in on the rest of the plan that Mr. Vance hadn't filled [her] in on" (T1017) and that Mike had done so (T1054).

> Direct evidence of a particular culpable mental state is rarely available ... "Intent is a state of mind and it may be inferred from all the circumstances" ... It may be demonstrated with evidence of, and inferences from, the defendant's conduct before the act, the act itself, and the defendant's conduct after the act...

State v. Ray, *supra*, 945 S.W.2d at 468 (citations omitted).

If the state is allowed to introduce evidence of a plan to break Roy Vance out of jail, the defense should be allowed to adduce further evidence of that plan. It may serve the state's interests to limit the extent of the plan to discussions between Vance, Tracie, and Mike, but it does not provide a full and complete picture of all the circumstances of this case or an accurate representation of the objectives of the plan and the key players.

The oft-repeated rule quoted above, that direct evidence of a particular culpable mental state is rarely available, is true in this case. The jury was entitled to receive all evidence bearing on intent not just that helpful to the state. Evidence of a letter written

by Roy, for whom and by whom the plan was conceived, was a key piece of evidence bearing on purpose, intent, and who was in control of the plan, that the jury did not get to see.

Excluding the letter was error and a violation of Mike's federal and state constitutional due process rights, his rights to present a defense and to freedom from cruel and unusual punishment. Trial court error, timely preserved, creates the presumption of prejudice. ***State v. Rhodes***, 988 S.W.2d 521, 529 (Mo.banc 1999) (citations omitted). For the foregoing reasons, the cause must be reversed and remanded for a new trial, or in the alternative, for a new sentencing trial.

As to Point Seven: The trial court erred and plainly erred in overruling Mike's objections and giving the jury Instructions 24 and 29, as to Counts I and II, respectively. This violated his 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., Amend's V, VI, VIII, and VIII; Mo.Const., Art. I, §§ 10, 18(a), 19, and 21. Mike's death sentences must be vacated and the cause remanded for him to be re-sentenced to life imprisonment without probation or parole or, in the alternative, or for a new penalty phase trial in that

1) as to Instruction 24:

a) there was no evidence to support the aggravating circumstance based on §565.032.2(7) -- depravity of mind -- because there was no evidence that Mike killed Egley as part of his plan to kill more than one person and the aggravator is

unconstitutionally vague as applied in this manner,

b) "the plan to kill more than one person" aggravator was duplicative of the aggravator, also submitted in Instruction 24, based on §565.032.2(2) - Leon Egley's murder was committed while the defendant was engaged in the commission of another unlawful homicide - because the same facts and conduct were used to support and prove both aggravating circumstances, and

2) Instructions 24 and 29 violated *Apprendi v. New Jersey* and *Jones v. United States* and were fatal variances from the information that submitted new, uncharged offenses to the jury in that none of the aggravators were pled in the indictment.

Two weeks before trial -- nine months after filing the information charging Mike Tisius with first degree murder -- the state finally gave "notice" of its proposed statutory aggravators[8] (T15, 21, 128; LF187-88). These included §565.032.2(7): that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind" (LF187).

On July 30, 2001, the defense filed several written motions challenging the aggravator

[8] The state filed an information charging Mike Tisius with first degree murder on September 29, 2000 (LF 13-15). Five months later, on March 2, 2001, at a pretrial hearing on a defense motion to compel disclosure of statutory aggravating circumstances (LF64), the state conceded it had not yet disclosed the aggravating circumstances it planned to prove at trial (T15). Twice at that hearing the state promised disclosure would occur "shortly" (T15, 21).

based on §565.032.2(7) and seeking a bill of particulars (LF196-209). The motions were based on U.S.Const., Amend's, VI, VIII, and XVIII and Mo.Const., Art. 1, §10, 18(a), and 21, and raised, among other grounds, that §565.032.2(7) was unconstitutionally vague in that it provided no guidelines as to the specific evidence required to support such an aggravating circumstance and therefore was contrary to MAI-CR 3rd 313.40's requirement of specificity and failed to narrow the class of persons eligible for the death penalty (LF 196-205). Also, the state had failed to give notice as to the "limiting factors" it would rely on (LF199), and there was no evidence to support the submission of an aggravator based on §565.032.2(7) (LF204-05). The state failed to specify in what way the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind; defendant moved the court to order the state to provide a Bill of Particulars specifying the limiting construction and factors the state intended to use with regard to this aggravator (LF213-14).

At the penalty phase instruction conference, the defense objected to Instruction 24 - MAI-CR 3d 313.40 - on the grounds that there was no evidence to support inclusion of the paragraph based on §565.032.2(7); specifically, there was no evidence of a plan to kill more than one person at any point (T1246). The court responded by noting that it had declined to give that aggravator in Instruction 29 as to the homicide of Jason Acton (T1246). The court's reasoning was that "Acton in Count II was shot once" whereas Mike fired at Leon Egley on two different occasions: first, before going to the cellblock to free Vance and second, upon returning to the front of the jail after the unsuccessful attempt to free Vance (T1247). The court reasoned this evidence did not support giving

this aggravator as to Acton but did support giving it as to Egley (T1247). Counsel referred the court to the grounds in the pretrial motions concerning this aggravator and requested rulings; the court denied the motions (T1247-48).

As to Count I, the court gave Instruction 24 comprising three aggravators: ① whether Egley was murdered while defendant was engaged in the homicide of Acton, §565.032.2(2), ② whether Egley's murder was part of a "plan to kill more than one person," §565.032.2(7), and ③ whether Egley was murdered while engaged in his official duty as a peace officer, §565.032.2(8) (SLF26; A26).

As to Count II, the court gave the jury Instruction 19 comprising two aggravators: ① whether Acton was murdered while defendant was engaged in the homicide of Egley, §565.032.2(2), and ② whether Acton was murdered while engaged in his official duty as a peace officer, §565.032.2(8) (SLF 32; A32). The jury returned verdicts finding the three aggravators submitted as to Count I and the "official duty" aggravator as to Count II (SLF39-40).

The defense preserved as error for appellate review the court's rulings regarding lack of evidence to support the "plan to kill more than one person" aggravator submitted as to Count I by including them in the Motion for New Trial (LF239-41). At trial, appellant did not object to Instruction 24 on the grounds that the "plan to kill more than one person" aggravator duplicated the aggravator that Egley was murdered while defendant was engaged in the homicide of Acton. Nor did appellant raise at trial the fatal variance claim raised in this Point: submitting aggravators not charged in the information. Appellant therefore respectfully requests that the court review these claims for plain

error. Rule 30.20.

A meaningful basis must exist for distinguishing the few cases where death is imposed from the many where it is not. ***Maynard v. Cartwright***, 486 U.S. 447, 462 (1984); ***Furman v. Georgia***, 408 U.S. 238, 313 (1972). Statutory aggravators guide the jury's discretion and narrow the class eligible for the death penalty. ***Zant v. Stephens***, 462 U.S. 862, 877 (1983).

"The basic principle applicable to the submission of instructions is that they should not be given if there is no evidence to support them." ***State v. Daugherty***, 631 S.W.2d 637, 639 (Mo.banc 1982) (*citation omitted*). "Instructions must be supported by substantial evidence and reasonable inferences to be drawn therefrom." ***Id***. (*citations omitted*).

In Missouri, a sentence of death is not authorized unless the state proves beyond a reasonable doubt that at least one aggravating circumstance exists. ***State v. Taylor***, 18 S.W.3d 366, 378 n. 18 (Mo.banc 2000); Mo.R.S. §§565.030.4(1), 565.032.1(1). "'[T]he relevant question [concerning the existence of statutory aggravating circumstances] is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements ... beyond a reasonable doubt.'" ***Kinder v. Bowersox***, 272 F.3d 532, 549 (8th Cir. 2001) *quoting* ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979).

In the present case, there was no evidence of a "plan to kill more than one person" and thus no evidence to support submitting Instruction 24 to the jury. Rather, the evidence showed a plan to "take [a gun] into the jail and intimidate the guards, put them in a

holding cell, get the keys and let everybody open all the cell doors and let them all out" (T1018). The purpose of the gun was to intimidate the jailers and to get them into a holding cell (T767, 774-75, 777-78, 835, 842; StEx61; A47-48).

Acting on Roy Vance's directions, Tracie took a .22 from her parents' home to use to intimidate the jailers; Mike wanted a bigger gun because a bigger gun would be more intimidating (T1018-19, 1043-44, 1052-53). And, Mike wanted to wait until Jason Acton was on duty to carry out the jail break because Mike thought Jason would be easily intimidated - he wouldn't have enough "heart to play hero" (T1021-22).

On June 19th & June 20th, two of the three times that Mike and Tracie went to the jail before attempting to break Roy out, Mike had the gun (T1022-23). While driving with Tracie on the 21st, Mike held the gun out of the car window and shot it once in the air (T1023). He did not practice shooting at targets (T1058).

Tracie neither testified nor made any statements that the plan involved shooting anyone and she did not expect any shooting (T1048). Acquaintances of Tracie and Mike who overheard them discussing the plan to break Roy out of jail never heard any mention of shooting the jailers (T775, 777, 786-87, 792, 803). On direct examination, Tracie initially testified that Mike had said "that he was going to go in and just start shooting and that he had to do, had to do what he had to do" (T1031). But when the prosecutor asked Tracie, "Did he say shooting or did he just say he had to do what he had to do?" Tracie retracted her initial testimony and clarified that Mike never mentioned shooting: "one point he said he'd go in with a blaze of glory" (T1031). Tracie confirmed her retraction on direct exam (T1032). On cross exam, Tracie said "at one point it came down to he'd

do what he had to do" (T1055).

If, in connection with the killings of the two jailors, Egley and Acton, there had been a "plan to kill more than one person," it would necessarily have been a plan to kill both Egley and Acton. But the trial court found that the evidence did not support this aggravating circumstance as to Jason Acton (T1246-47).

The prosecutor argued that Mike's "blaze of glory" and doing "what he had to do" statements meant that he planned to kill more than one person (T1256). But this is a conclusion founded on speculation -- not an inference from evidence.

In fact, in his opening penalty phase argument, the prosecutor himself tacitly conceded that there was no "plan" to kill more than one person:

> With both of them sitting there, do you really think he was going to shoot just one? Even if he hadn't planned it up to that point to kill them both, once he killed Jason Acton, he had to kill Leon Egley, didn't he? Why? He had to do it. Did he plan to do it? Sure. He not only shot him immediately after he shot Jason Acton. He went down to the jail cell. Tried to get Roy Vance out. Came back and Leon Egley, has the audacity to still be alive so he shoots him again.

(T1256; emphasis added). But this argument is not based on *evidence* of a plan. It is bootstrap argument that uses the fact that two people were killed as proof that there was a plan to kill more than one person. It argues that because he killed them both, there must have been a plan, and there must have been a plan because he killed them both.

In his closing penalty phase argument, the prosecutor argued that proof of first degree murder was all the jury needed to find the aggravator of a plan to kill more than one

person:

> Let's talk about how we know there was a plan. Because there was. And remember this. Cool reflection upon the matter for any length of time no matter how brief is all that is necessary for one to be convicted of murder in the first degree. Planning is not required. The formulation of the intent to do so in an instant is all it takes to have the gun to stand there, to pull it out of your belt, to hold it at your side, to raise the gun, to fire at a person within only a very few feet away, of course he deliberated. You've already found that if you stop and think about it. We're past that. That's a smoke screen, folks. That's a smoke screen.
>
> We all know that these aggravating circumstances are proven. Step one.

(T1289).

Argument is not evidence, and proof of deliberation is not a sufficient, meaningful basis for finding a "plan to kill more than one person" and for imposing a sentence of death. If proof of deliberation sufficed to make a person eligible for death, then any first degree murder would be "death eligible.' If any first degree murder were "death eligible," it would violate the Missouri statutes, §§565.030.4(1) & 565.032, and Missouri case law, *e.g*., ***State v. Shaw***, 636 S.W.2d 667, 675 (Mo.banc 1982) *quoting* ***State v. Bolder***, 635 S.W.2d 673, 683 (Mo.banc 1982) ("The jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence").

If, as the prosecutor told the jury, a finding of deliberation is a finding of a plan to kill more than one person, this would also completely abolish the meaningful distinction

between the few cases where death is imposed from the many where it is not. ***Maynard v. Cartwright***, *supra*; ***Furman v. Georgia***, *supra*. There would be nothing to guide the jury's discretion and narrow the class eligible for the death penalty. ***Arave v. Creech,*** 507 U.S. 463, 470-71 (1993); ***Zant v. Stephens***, *supra*. If the prosecutor is correct, then the "plan to kill more than one person" is unconstitutionally vague. ***Tuilaepa v. California,*** 512 U.S. 967, 972 (1994); ***Arave v. Creech***, *supra*. If the prosecutor's construction is correct, this aggravator provides no clear guidance to the jury and violates the Eighth and Fourteenth Amendments.

A second reason that the court erred in giving Instruction 24 and should have rejected the "plan to kill more than one" aggravator is that it duplicated another aggravator given in Instruction 24 based on §565.032.2(2): "whether the murder of Leon Egley was committed while the defendant was engaged in the commission of another unlawful homicide of Jason Acton" (SLF26). These aggravators were duplicative because they relied on the same set of facts - that two people were killed (see state's penalty phase arguments at T1255-56) - for their proof. Instruction 24 prejudiced Mike by "padding" the state's case for death with duplicative statutory aggravators and aggravating evidence.

The instruction expressly required the jury to twice consider the same aggravators and aggravating evidence -- the state's *sine qua non* for obtaining a death verdict. This double consideration, counting and weighing of the same conduct -- albeit submitted as separate aggravating circumstances -- improperly and unreliably skewed the sentencing process toward death and violated Mike's rights to due process of law, fair trial, freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's VI,

VIII, and XIV; Mo.Const., Art. 1, §§ 10 and 21.

Appellant acknowledges that the Court has previously rejected similar arguments - most recently in ***State v. Anderson***, No. SC83680, 2002 WL 985755 (Mo.banc May 14, 2002). But in ***Anderson***, as in previous cases, the Court's rationale was that even if "some duplicativeness occurred with regard to the first and third submitted statutory aggravators, it would not have been prejudicial" since there remained another, valid statutory aggravator. 2002 WL 985755 *15.

Appellant respectfully requests that the Court reconsider this rationale in that it is inconsistent with cases in which the Court has found error at penalty phase and declines to affirm the death verdict simply because the jury found one or more valid statutory aggravating circumstances. For example, in ***State v. Storey***, 986 S.W.2d 462 (Mo.banc 1999), in finding that the trial court's error in failing to give a "no adverse inference" instruction was not harmless, the Court recognized that the jury had found one aggravating circumstance "based on physical evidence." ***Id***. at 464. But the Court said this did not end its evaluation of prejudicial effect:

> The evaluation of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt. Moreover, under no circumstance must the jury impose a sentence of death." ***State v. Johnson***, 968 S.W.2d 686, 701 (Mo.banc 1998). Under Missouri law, the jury has discretion to assess life imprisonment even if mitigating factors do not outweigh aggravating

factors. ***State v. Brooks***, 960 S.W.2d 479, 497 (Mo.banc 1997); *Section 565.030.4(4), RSMo. 1994*.

Id. at 464-65.

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 (SLF28). 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.banc 2002), the Court should reverse and remand for a new penalty phase proceeding as to Count I based on the invalid aggravating circumstances Instruction.

Appellant's final challenge to the aggravating circumstances concerns both Instruction 24 and Instruction 29. The trial court plainly erred in submitting both Instruction 24 and 29 because they were fatally at variance with the offenses of first degree murder charged in Counts I and II (LF13-15).

"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***, *supra*, 631 S.W.2d at 639-40. 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.E.D. 1989). A variance must be material, and defendant must be prejudiced, to warrant reversal. ***Id***. "Variances are material when they affect whether the accused received adequate notice; variances are prejudicial when they affect the defendant's ability to defend against the charges." ***State v. Whitfield,*** 939 S.W.2d 361, 366 (Mo.banc 1997).

Appellant recognizes that ordinarily issues involving variances arise during the jury's determination of the defendant's guilt or innocence and involve differences between the charging document and the verdict directing instruction(s). *See, e.g.*, ***Id***.; ***State v. Madison***, 997 S.W.2d 16, 19-20 (Mo.banc 1999). But in a death penalty case, with regard to the aggravating circumstances - the facts necessary for a verdict of death - there is no occasion to determine whether the information or indictment conforms to the pleadings because the jury does not receive instructions concerning the aggravators unless and until the jury returns a verdict finding the defendant guilty of first degree murder. It is through penalty phase instructions submitting aggravators that the jury is asked to determine if a defendant is guilty of aggravated murder. *See* ***Apprendi v. New Jersey***, 530 U.S. 466 (2000); ***Jones v. United States***, 526 U.S. 227 (1999).

In the present case, the state failed to plead any aggravating circumstances in the information filed (LF13-15). It is the addition of aggravating circumstances to first degree murder that increases the range of punishment from life imprisonment to death. Sec. 565.030.4(1), RSMo. (2000); *see also*, *e.g*., ***State v. Taylor***, 18 S.W.3d 366, 378 n. 18 (Mo.banc 2000); ***State v. Shaw***, 636 S.W.2d 667, 675 (Mo.banc 1982); ***State v. Bolder***, 635 S.W.2d 673, 683 (Mo.banc 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.

Applying the rules concerning variances to the present case, compels the conclusion that the instructions submitting the aggravating circumstances varied fatally and materially from the information charging Mike Tisius with first degree murder. The

instructions submitted a new and greater offense than that charged in the information, and the information gave Mr. Tisius no notice whatsoever that he was being charged with the greater offense of aggravated first degree murder.

Since "the penalty of death is qualitatively different from a sentence of imprisonment, however long," there exists a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. ***Woodson v. North Carolina***, 428 U.S. 280, 304-05 (1976). Thus, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." ***Gardner v. Florida***, 430 U.S. 349, 358 (1977).

For the foregoing reasons, as to Count I, the trial court erred by submitting an aggravator not supported by the evidence and by submitting duplicative aggravators. As to both Counts I and II, the trial court erred by submitting instructions concerning aggravators that varied fatally from the information. The sentencing trial failed to satisfy federal and state constitutional guarantees of due process of law, freedom from cruel and unusual punishment and reliable sentencing. The Court must reverse and remand for a new penalty phase trial or, alternatively, order that Mike's death sentence be vacated and that he be sentenced to life imprisonment without probation or parole.

As to Point Eight: **The trial court erred in overruling Mike's objection to cameras in the courtroom which was made just before opening statements when defense counsel first learned that there would be cameras in the courtroom and Mike's subsequent request for a mistrial when the prosecutor announced in open**

Court that witness Heather Graham did not wish to be videotaped. This violated Mike's rights to due process of law, trial by fair and impartial jury, freedom from cruel and unusual punishment, and reliable sentencing, U.S.Const., Amend's XIV, VI, and VIII, Mo.Const., Art. I, §§ 10, 14, 18(a), and 21, and it violated this Court's Operating Rule 16. Mike was prejudiced in that the lack of notice denied him a meaningful opportunity to present to the judge, and be heard on, his objections: that cameras in the courtroom would subject the jury to pressure to convict the defendant and to sentence him to death and that the witnesses would be able to see the coverage and could change their testimony based on what they might see. Unless Operating Rule 16's requirement of notice to parties is gratuitous and meaningless, it must mean that the parties shall have a meaningful opportunity to be heard.

The defense first learned that there would be cameras recording the courtroom proceedings when counsel walked into the courtroom on the morning that the evidence phase was to begin (T544). Defense objections to cameras in the courtroom were based on the prejudice to the defendant - "when the jury sees that cameras are in the courtroom, I think that there is additional pressure that is placed on them to not only convict the defendant but to sentence him to death" - and on the lack of notice contrary to the requirements of Supreme Court Operating Rule 16.03(b) (T544; A43-46).

After reviewing the court files, the judge acknowledged that he had entered an order authorizing the videotaping, but the defense had not been notified (T545-46). The judge found that "[t]he video people have done what they're supposed to do" (T546). Counsel

pointed out that the Rule required the media coordinator to give notice and no notice has been given (T546-47). Counsel explained that cameras in the courtroom, absent a jury, were not a concern whereas cameras in the courtroom with a jury present would put "undue pressure" on the jury (T548). The trial court overruled defense objections and ruled the proceedings could be videotaped (T549-53).

Later that morning, in open court, after calling Heather Douglas to the witness stand, the prosecutor announced, "Your Honor, this witness has requested that she not be videotaped" (T762). At the bench, defense counsel moved for a mistrial noting that that very morning, at an in-chambers conference, he had "expressed to the court on the record my concerns, that the fact that that there are cameras in the courtroom not be highlighted to the jury" (T763). Counsel expressed concern that Mr. Ahsens had said "loudly enough for the jury to hear" that "this witness did not want to be videotaped" (T763). "Completely contrary" to what counsel had requested of the court, the prosecutor had brought the cameras to the attention of the jury (T763). The trial court denied the request for a mistrial (T763).

The next incident involving cameras in the courtroom occurred at penalty phase during the testimony of defense witness John Reichle. Shortly after defense counsel's direct examination began, he paused to advise the judge, at the bench, that "this witness in particular is very uncomfortable about having himself videotaped" (T1163). The court declined to listen saying, "Not now" (T1163). Defense counsel resumed questioning of Mr. Reichle.

In ***Estes v. Texas***, 381 U.S. 532 (1965), in holding that televising and broadcasting

Mr. Estes' trial had violated his Fourteenth Amendment due process rights, the United States Supreme Court discussed the prejudice arising from the presence of cameras in the courtroom and the broadcasting of the proceedings:

> The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused.

Id. at 535. Another problem was that "[t]he quality of the testimony in criminal trials will often be impaired." ***Id***. at 547. "The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable." Cameras in the courtroom might also have an adverse, prejudicial effect on the defendant, the attorney-client relationship, and the effectiveness of counsel:

> Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental--if not physical--harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before

him--sometimes the difference between life and death--dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses.

Id. at 549.

The Supreme Court revisited this issue in ***Chandler v. Florida***, 449 U.S. 560 (1981) and "conclude[d] that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances." ***Id***. at 573. Declining to adopt a *per se* rule prohibiting cameras and media in the courtroom, the Court stated, "[t]he risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case--be it printed or broadcast-- compromised the ability of the particular jury that heard the case to adjudicate fairly. ***Id***. at 575.

The Court in ***Chandler*** held that the defendant's remedy was "the right on review to show that the media's coverage of his case--printed or broadcast--compromised the ability

of the jury to judge him fairly. ***Id***. at 581. "To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters." ***Id***. "Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process." ***Id***.

Applying the guidelines set out in ***Chandler*** to the present case demonstrates that the presence of the media in the courtroom violated Mike's right to due process of law. First, the presence of the cameras was expressly brought to the attention of the jurors thus implicating the concerns voiced in ***Estes*** that this would "conscious[ly] or unconscious[ly]" have an "effect on the juror's judgment..." 381 U.S. at 535.

The jury would have been aware that at least one witness did not wish to be videotaped. Whether the jury would have, "conscious[ly] or unconscious[ly]" have felt sympathy for the witness, empathized with her plight in having to testify before a camera, and attributed her predicament and discomfort to Mike is unknown. But the presence of the cameras in the courtroom and the resulting discomfort of at least this one witness could certainly have "conscious[ly] or unconscious[ly]" prejudiced the jury against Mike.

The jury in the present case deliberated at guilt phase for approximately six and one-half hours before returning verdicts finding Mike guilty of first degree murder on both counts (T945-48); at penalty phase, the jury deliberated for almost nine hours before returning verdicts sentencing Mike to death on both counts (T1296-97). In these circumstances, it is not possible to rule out the possibility that the media presence had both "a direct bearing on [the jury's] vote as to guilt or innocence" and their decision to

impose death sentences. ***Id***.

Further, the lack of compliance with this Court's Operating Rule 16 is not only troublesome, but it is also the source of prejudice. Had the rule been followed, the defense would have known, well before trial began, that the media wished to be present and record the proceedings. Counsel would have been able to present defense objections to the judge, and the judge would have had time to consider them ***before*** the media were actually present in his courtroom and intent on recording the proceedings. The judge, having an opportunity to consider the matter well in advance of trial, would have been able to warn the prosecutor not to make statements highlighting the presence of media cameras in the courtroom and to ensure that the prosecutor knew to refrain from any such comments.

The parties, and the judge, could have voir dired the jury -- or at the very least, considered whether they wished to voir dire the jury -- on whether the presence of cameras in the courtroom would affect them. *See*, ***Chandler***, *supra*, 449 U.S. at 581-82. The defense could have asked whether the discomfort of a witness who did not wish to be videotaped would cause them to be prejudiced against the defendant.

Further, the parties would have had an opportunity to determine whether any of their witnesses (e.g., state witness Heather Graham, defense witness John Reichle) did not wish to be videotaped. This could have been brought to the judge well in advance of trial thus, again, hopefully avoiding the prosecutor's statement in front of the jury that Heather Graham did not wish to be videotaped. The judge would have had an opportunity to determine what should be done when a witness did not wish to be videotaped. Instead,

when he learned that John Reichle did not wish to be videotaped -- presumably because defense counsel had just learned that from Mr. Reichle -- the judge simply brushed off the witness's concerns and declined to address the problem: "Not now" (T1163).

In the present case, the cameras in the courtroom, particularly in the absence of notice to the defense, prejudiced the defendant and violated his federal and state constitutional rights to due process of law, fair jury trial and reliable sentencing. For the foregoing reasons, the cause must be reversed and remanded for a new trial.

As to Point Nine: The trial court erred in sustaining the state's objections and refusing to allow defense counsel to elicit Dr. Shirley Taylor's opinion that Mike would not be a danger to others in prison if sentenced to imprisonment for life without probation or parole. This violated defendant's rights to due process of law, to fundamental fairness, to present a defense, to meaningful access to the courts, and to freedom from cruel and unusual punishment and reliable sentencing. U.S.Const., Amend's XIV, VI, VIII; Mo.Const., Art. 1 §§10, 14, 18(a), and 21.

Notwithstanding the trial court's ruling that prosecutor could not "argue" future dangerousness, future dangerousness had already been put in issue by the very nature of offense: shooting two jail guards. Future dangerousness was also raised by the state's evidence of Mike's behavior and statements after his arrest plus state's repeated refrain, "how many officers does he have to shoot before he gets the death penalty?" Mike was prejudiced and his sentence must be vacated and a sentence of life imprisonment without probation or parole imposed or, alternatively, the cause reversed and remanded for a new penalty phase trial because the court's ruling

meant that the defense could not present any evidence to defend against, counter, and rebut state evidence and arguments suggesting Mike would be dangerous in prison if sentenced to life imprisonment without probation or parole and, therefore, death was the appropriate sentence.

Mike Tisius was charged with, and tried for, two counts of first degree murder for shooting two guards at the Randolph County Jail in Huntsville, Missouri (LF13). In his penalty phase opening statement, the prosecutor told the jury about the three different evidentiary matters that the state would present. Initially, the jury would hear victim impact testimony (T954). But the final two witnesses[9] would present aggravating evidence. Tracie Bulington would tell the jury" about how [Mike] played a song by Bone's, Thugs 'n Harmony, a rap group which included the lyrics over and over again of *Mo Murda, Mo Murda, Mo Murda"* (T955). The final witness would be Chariton County deputy sheriff Donna Harmon who would tell the jury of "an incident" when Mike sat in his holding cell "with his hands together and his fingers pointed as though it were a gun and making movements and noises as though he were shooting the officers" (T955).

The prosecutor capitalized on this evidence in his opening penalty phase argument to

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[9] Evidence elicited from Tracie Bulington and the rap music disc, StEx67, have been discussed, *supra*, in the portion of the argument pertaining to Point One. Deputy Harmon's testimony was discussed, *supra*, in the portion of the argument pertaining to Point Eight. To avoid repetition, appellant respectfully directs the Court and opposing counsel to those portions of appellant's brief.

persuade the jury to sentence Mike to death by inviting the jury to consider the possibility that Mike could kill other jail guards in the future:

> Does all of the evidence in this case suggest the death penalty is warranted? How many policemen do you have to kill to deserve the death penalty? For that matter how many human beings of any kind?

(T1256).

> It was planned. It was a jail break. Sitting out in that car *Mo Murda, Mo Murda.* Go in with a blaze of glory.
>
> You know, how many police officers do you have to kill before a person is deserving of the death penalty?

(T1257).

> Ladies and gentlemen, how many policemen do you have to kill before you deserve the death penalty? How many lives do you have to shatter before yours should be forfeited?

(T1259).

In his closing penalty phase argument, the prosecutor returned to his theme of future murders: "How many police officers do you have to kill before you're deserving of the death penalty?" (T1287). "[A] person who is willing to kill a police officer is willing to kill anybody" (T1291). "If this is not the time for a death penalty, when would it ever be? How many policemen do you have to kill?" (T1295).

Dr. Shirley Taylor, a psychologist, testified for the defense at penalty phase (T1207). At the very end of her testimony, the following transpired:

Q. And were you able to make an assessment of what type of a future danger Michael might present in the penitentiary?

MR. AHSENS [prosecutor]: I'm going to object to that. I think that's clearly improper, Your Honor. Calls for a conclusion. I don't think anybody can predict.

MR. KENYON [defense counsel]: Well, if, may we approach the bench on that, please, Your Honor.

(Counsel approached the bench and the following proceedings were had:)

MR. AHSENS: Your Honor, if I touch future dangerous, he would be screaming mistrial. That's inappropriate evidence.

MR. KENYON: I mean psychologists all the time have to make assessments of future dangerousness in terms of whether somebody gets a, somebody has committed into a mental facility part of the process of getting them out is having psychologists evaluate them. Make some kind of a decision as to whether or not they present --

THE COURT: What does this question have to do with the decision that this jury has to make?

MR. KENYON: Well, I think that, I think future dangerousness, I think future dangerousness is something that the prosecuting attorney is going to argue in the penalty phase.

MR. AHSENS: I don't think I'm allowed to.

THE COURT: He's not allowed to argue such a think that I know of. If you don't kill him, he will be dangerous.

MR. KENYON: If Mr. Ahsens is willing to stipulate that he's not going to get up

in the closing argument and say you know you need to sentence this man to death because he's going to be in the penitentiary some day, if you sentence him to life in prison, some other inmate is going to manipulate him into doing something horrible. If he's not going to make that argument then I'm fine.

THE COURT: He's not going to make that argument. He may plan to make that argument but he's not going to make that argument...

(T1228-29). Defense counsel asked no further questions of Dr. Taylor and presented no additional witnesses.

The defense included the trial court's ruling as a point of error in the motion for new trial (LF255). By saying "I'm fine," defense counsel indicated that he would not ask the question of Dr. Taylor as long as the prosecutor would not argue future dangerousness. Appellant acknowledges that this point may not be preserved, even though it was included in the motion for new trial. But because the issue of future dangerousness is, as illustrated by the above-quoted portion of the transcript and the issue was significant in this case at penalty phase, appellant respectfully requests that the Court review for plain error. Rule 30.20.

The trial court's assurance that future dangerousness would not be injected into this case came too late. Future dangerousness was at issue from the start. The very nature of the case -- the shooting of two jail guards -- implicates questions of future dangerousness. To an even greater extent than the prosecutor's argument, the state's evidence placed defendant's future dangerousness at issue. For this reason, even if the prosecutor had neither emphasized the future dangerousness evidence in his opening statement nor in his

argument asked the jury to think about how many more policemen -- or humans -- (or jail guards) Mike would have to kill before he should be sentenced to death, future dangerousness would have been at issue.

Future dangerousness is put at issue by the evidence. ***Kelly v. South Carolina***, 534 U.S. 246, 122 S.Ct. 726, 731-32 (2002) ("[e]vidence that Kelly took part in escape attempts and carried a shank," placed his future dangerousness at issue). "Evidence of future dangerousness under ***Simmons*** [***v. South Carolina***, 512 U.S. 154 (1994)] is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms."

In the present case there can be no dispute that the evidence introduced in the present case at the penalty phase was aggravating evidence. It was intended to convince the jury to sentence Mike Tisius to death. Even assuming that some Tracie Bulington's and Donna Harmon's testimony, and the "Mo Murda" evidence was relevant to support a specific statutory aggravator, it did not lose its character as evidence of future dangerousness. ***Id***.

Nor does the trial court's statement that the prosecutor would not be allowed to argue future dangerousness eliminate the manifest injustice in not allowing the defense to ask Dr. Taylor about Mike's future dangerousness. For one thing, the trial court was wrong. As this Court has previously noted, "Character and future dangerousness evidence is admissible at penalty phase." ***State v. Chambers***, 891 S.W.2d 93, 107 (Mo.banc 1994) (citations omitted). "[S]ince ... [such evidence is] ... admissible, the trial court committed

no plain error in permitting the prosecutor to argue it." ***Id***. And, as shown, *supra*, the prosecutor argued "future dangerousness even though he never used those words.

The court here was wrong in thinking that the solution was to prevent the prosecutor from making a future dangerousness argument. The future dangerousness horse was out of the barn, the court made it worse by shutting the door on the defendant's attempt to catch up. Manifest injustice occurred because future dangerousness played so large a role in the state's penalty phase case. For this reason, and all of the foregoing reasons, Mike's sentences stand in violation of his federal and state constitutional rights to due process of law, fair jury trial and reliable sentence; his sentences must be vacated and the cause remanded for a new penalty phase proceeding.

<u>As to Point Ten</u>: The trial court erred in overruling defense objections to Instruction No's 28 and 33 (MAI-CR3d 313.48A), submitting these instructions to the jury, and sentencing Mike to death on Counts I and II. This violated Mike's rights to due process of law, trial by a correctly instructed jury, present a defense, reliable sentencing and freedom from cruel and unusual punishment. U.S. Const., Amend's XIV, VI, and VIII. These instructions prejudiced Mike by failing to include all the steps that the jury must follow in the sentencing process. Specifically, they omitted the essential "third step" in the weighing process: that if each juror determined that there were facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then the jury must return a verdict of life imprisonment without the possibility of probation or parole.

At the penalty phase instruction conference, defense counsel objected to Instructions

28 and 33 as being "incomplete" in that they failed to include "the third step of the penalty phase process, the third step that is, that should refer to 313.44(a) the weighing of aggravating and mitigating circumstances..." (T1248-50). The trial court overruled the objection and the defense included this ruling in the motion for new trial (LF255).

Instructions 28 and 33, MAI-CR3d 313.48A, read[10]:

INSTRUCTION NO. [28] [33]

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of [Leon Egley / Jason Acton], your foreperson must write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. [24][29] which you found beyond a reasonable doubt, and sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of [Leon Egley / Jason Acton] by imprisonment for life by the Department of Corrections

[10] Instructions 28 and 33 were identical save for the Instruction number and the cross references to other instructions.

without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. [24][29], or if you are unable to unanimously find that there are aggravating circumstances which warrant the imposition of a sentence of death, as submitted in Instruction No. [25][30], then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. [24][29], and [25][30], but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

(SLF30-31, 36-37).

Appellant acknowledges that in recent cases, *i.e.*, ***State v. Cole***, 71 S.W.3d 163, 175-76 (Mo.banc 2002), the Court has considered and denied similar claims. Appellant includes this point here to preserve it for federal review because the federal courts have not yet ruled on this point.

A claim that an MAI instruction fails to comply with the substantive law is reviewed for error. ***State v. Carson***, 941 S.W.2d 518, 520 (Mo.banc 1997). Instructions 28 and 33, MAI-CR3d 313.48A, which gave the jury directions for reaching a verdict, failed to comply with the substantive law, §565.030.4(3), in that they failed to include what the "third step" of the deliberation process. The instructions failed to tell the jury that if, after finding at least one statutory aggravating circumstance, each juror determined that the mitigating circumstances outweighed the aggravating circumstances, the jury must sentence the defendant to a term of life imprisonment without the possibility of probation or parole. The instructions did not comply with the statutory law. §565.030.4(3).

Instructions 28 and 33, MAI-CR3d 313.48A, took the jury, step by step, through the deliberation process. Accordingly, the absence of the step requiring the jury to weigh the mitigating evidence against the aggravating evidence rendered the sentencing process unreliable and violated the Eighth Amendment.

The "qualitative difference between death and other penalties" calls for "a greater degree of reliability when the death sentence is imposed." ***Lockett v. Ohio***, 438 U.S. 586, 602 (1978). The Supreme Court has steadfastly construed the Eighth Amendment to require that nothing preclude the sentencer "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." ***Id***. at 604; *see, e.g.*, ***Skipper v. South Carolina***, 476 U.S. 1 (1986); ***Eddings v. Oklahoma***, 455 U.S. 104 (1982).

When ambiguity in an instruction creates "a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence," the instruction violates the Eighth Amendment. ***Boyde v. California***, 494 U.S. 370, 380 (1990). Although the Eighth Amendment does not require a jury to be instructed on mitigating evidence, any instructions given may not 'preclude the jury from being able to give effect to mitigating evidence,' or create '"a reasonable likelihood that the jury has applied the challenged instructions in a way that prevents the consideration of constitutionally relevant evidence."' ***Buchanan v. Angelone***, 522 U.S. 269, 276 (1998) quoting ***Boyde v. California***, *supra*, 494 U.S. at 380 (1990).

The Eighth Amendment requires that a jury must be allowed to consider, and must consider, all "relevant mitigating evidence." ***Eddings v. Oklahoma***, *supra*, ***Penry v. Lynaugh***, 492 U.S. 302, 319-28 (1989); ***Hitchcock v. Dugger***, 481 U.S. 393, 398-99 (1987). MAI-CR3d 313.48A fails to implement this requirement because it omits the "third step" of weighing of mitigating circumstances against aggravating circumstances.

In the present case, the defect in Instructions 28 and 33 meant that the jury's sentencing determination on each count was fundamentally flawed. As given, the instructions created a substantial likelihood that the jury failed to consider relevant mitigating facts and circumstances. In this area of the law, where life hangs in the balance, the Court may not approve the failure of the MAI instruction to comply with the

constitutionally critical step of full consideration of all mitigating facts and circumstances and weighing of aggravating and mitigating circumstances. Sanctioning such erroneous procedures not only amounts to revising the statute, it incurs the very real risk that the procedures followed in imposing these death sentences were arbitrary and capricious.

The trial judge had the authority and obligation to decline to submit MAI-CR3d 313.48A to the jury. ***State v. Carson***, *supra*. This Court must not excuse the trial court's failure to do so.

No assurances of reliability exist here. The submission of these defective penalty phase instructions left the jury without an accurate description of the steps they were obligated to follow in making their sentencing decisions. The sentences of death here violated Mike's state and federal constitutional rights to due process of law, fair trial by a correctly instructed jury, reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amend's XIV, VI and VIII. The sentences of death must be vacated and the cause remanded for a new penalty phase proceeding.

Conclusion

Wherefore, for the foregoing reasons, as to Point 8, appellant respectfully requests that the Court reverse the judgment and sentences and remand for a new trial. As to Point 6, appellant respectfully requests that the Court reverse the judgment and sentences and remand for a new trial or, in the alternative, for a new penalty phase trial. As to Point 3, appellant respectfully requests that the Court vacate his judgment and sentences and remand for him to be re-sentenced for second degree murder or, in the alternative, that the Court reduce his sentences to life imprisonment without probation or parole. As to Points 1, 2, 4, 5, 7, 8, 9, and 10 appellant requests that the Court reverse, vacate his sentences of death and remand for a new penalty phase trial.

Respectfully submitted,

Deborah B. Wafer, Mo. Bar No. 29351
Attorney for Appellant
Office of the State Public Defender
Capital Litigation Division
1221 Locust Street; Suite 410
St. Louis, Missouri 63103
(314) 340-7662 - Telephone
(314) 340-7666 - Facsimile

CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 31,059 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were delivered, this ___ day of _____, 2002, to the Office of the Attorney General, Missouri Supreme Court Building, 207 West High Street, Jefferson City, Missouri 65101.

_____
Attorney for Appellant