IN THE CIRCUIT COURT OF SAINT CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1611-CR00967-02
v.	)	
	)	Division 7
MARVIN RICE,	)	
	)	
Defendant.	)	

Motion for new trial

Marvin Rice, by and through counsel, files this motion for a new trial and/or a directed life sentence pursuant to Mo. Sup. Ct. R. 27.07 (c) and 29.11. On April 1, 2022, the court granted defense counsel's oral request for an additional 10 days to file the motion for new trial (Mo. Sup. Ct. R. 27.07 (c) and 29.11 (b) making this motion due on April 26, 2022 pursuant to Mo. Sup. Ct. R. 20.01(a)("the day of the act ... after which the designated period of time begins to run is not to be included.")

Counsel raises and preserves the following thirteen points of error for the trial court's consideration for a new trial, a directed life verdict and/or for preservation for Mr. Rice's appeal.

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POINT 1. The trial court erred when it did not grant defendant's request for a curative instruction to counter the state's misstatement of facts during death qualification of prospective jurors. Defendant objected to the state reciting facts not in evidence and/or mis-stating the facts regarding Rachel Casey and Annette Durham's conversations about keeping Aydon Rice for a few days rather than returning him to Marvin Rice the same day. The trial court sustained the objection but did not give a curative instruction to the jury to disregard the statements. This factual issue was critical to an accurate account of events. It was a critical for the jury to have a truthful understanding of the sequence of events that led Marvin Rice, impaired by his severe depression, to go to the Strotkamp residence that night in search of his son, Aydon Rice. The absence of a curative

instruction impacted the juror's thinking in a prejudicial manner for the remainder of the trial. The result is that the jury verdict of death sentence is questionable as it is based upon a false factual basis. The trial court's error violated Marvin Rice's rights to due process, a fair trial, a fair jury, reliable sentencing, equal protection of law and freedom from cruel and unusual punishment. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

POINT 2. The trial court erred when it did not sustain defendant's objection to the testimony of Sergeant Barret Wolters regarding the mental perceptions of Officer Curt Bohanan during the shooting in the Capital Plaza Hotel.

At the time of this trial in April 2022, Officer Bohanan was deceased. Consequently, the state intended to read the testimony of Officer Bohanan from the first trial. The state presented the live testimony of Sergeant Wolters first. Sergeant Wolters had been involved in an attempt to stop Mr. Rice from evading arrest during a police chase from the Salem, MO area to Jefferson City, MO. Sergeant Wolters placed spike strips at the intersection of US Highway 50 and Monroe Street in Jefferson City, MO. Mr. Rice's car hit the spike strips. Mr. Rice's disabled car then drove a few blocks to the Capital Plaza Hotel. Mr. Rice left his car and went into the hotel. Officer Bohanan had been in one of the police cars which were chasing Mr. Rice. Officer Bohanan got out of his car and went into the hotel in pursuit of Mr. Rice. Shots were fired by Mr. Rice and Officer Bohanan inside the hotel. A third officer who was working secondary as security for a social function at the hotel, Chris Suchanek, shot Mr. Rice and ended the incident. Sergeant Wolters arrived at the hotel after Mr. Rice had been shot and while the scene was being secured. Sergeant Wolters then spoke to Officer Bohanan at the scene.

At trial, the state asked Sergeant Wolters if Officer Bohanan feared for his life, The state also asked Wolters if Bohanan believed that Mr. Rice was shooting at his

(Bohanan's) head. Sergeant Wolters, however, cannot testify to Officer Bohanan's perception of events and his state of mind. Wolters' testimony involved speculation and relied upon hearsay. The trial court should have sustained the objection. The trial court's error violated Marvin Rice's rights to due process, a fair trial, a fair jury, reliable sentencing, equal protection of law and freedom from cruel and unusual punishment. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

POINT 3. The trial court erred when it denied defendant's objection to and request for a redaction to questions appearing in the transcript of Officer Bohanan's testimony from the first trial. As mentioned in point of error Number 2, *supra*, Officer Bohanan is deceased. At the re-trial of the penalty phase for murder of Annette Durham in March 2022, the state read Officer Bohanan's trial testimony from the first trial. The prior testimony included the following question and answer: "Q: Okay. And as soon as you heard the first shot you knew that is was aimed at you? A: Yes Sir." Transcript, Trial August 7, 2017, p. 1478, l. 5-7. Defense counsel objected to the reading of this testimony before the transcript was read. Defendant objected to speculation on the part of the witness. The trial court denied the objection. The trial court's error violated Marvin Rice's rights to due process, a fair trial, a fair jury, reliable sentencing, equal protection of law and freedom from cruel and unusual punishment. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

POINT 4. The trial court erred when it did not strike aggravator number 1 of supplemental notice of the death penalty and the basis for aggravator number 1 in jury instruction MAI-CR 4th 410.40 (instruction number 7). The aggravator read: "the

murder in the first degree was committed while the defendant was engaged in commission of another unlawful homicide" and was based on RSMO 565.032.2(2). Because the court had struck aggravator number 2 at the instruction conference, this was the only statutory aggravator submitted to the jury.

Defendant objected to aggravator number 1 in a written motion filed with the court and heard at a pre-trial hearing on March 9, 2022. The trial court denied the motion at the pre-trial hearing.

Defendant then raised the issue four times at trial. Each time defense counsel referenced and incorporated the previously filed written motion. The first objection was at the close of the state's evidence where the defense requested the trial court to sentence Mr. Rice to life imprisonment (*see infra* point 9, p. 50). The second was at the close of all of the evidence where the defense also requested the trial court to sentence Mr. Rice to life imprisonment (*see infra* point 10, p. 50). The third was at the instruction conference where defense counsel objected to the submission of MAI CR 4th 410.40 in its entirety due to defense counsel objections to aggravators 1 and 2 (the court did grant defense counsel's objection to the submission to aggravator number 2 of the amended information dated December 15, 2015 (based on RSMO 565.032(7)) (s*ee infra,* point 5, p. 14).

The fourth was when the jury returned an improper death verdict which listed non-statutory aggravators but did not list the sole statutory aggravator (aggravator number 1), "the murder in the first degree was committed while the defendant was engaged in commission of another unlawful homicide." After the trial court had sent the jury back to submit a verdict in accordance with the instructions, defense counsel renewed the objection that aggravator number 1 violated due process for all of the reasons stated in the previously filed written motion. Additionally, the erroneous jury verdict form was a clear indication that the defense had been correct in stating that submission of aggravator number 1 violated due process. Clearly, the jury had misapprehended and did not understand the instructions due to the inclusion of this aggravator. The confusion arose

because of the fact that one of the two murders in this case, that of Steven Strotkamp, had yet to be litigated in a guilt proceeding as required by Missouri law, due process and MAI_CR 4th 410.40. Despite the parties and the court repeatedly instructing the jury that Mr. Rice was guilty of murder in the first degree for the murder of Annette Durham ***only*** and that the the jury was empaneled to determine punishment for this murder ***only***, the jury was obviously confused about what was statutory aggravation in this case and how to follow the instructions. Hence, the jury listed non-statutory aggravators because the applicable aggravator -- "the murder in the first degree was committed while the defendant was engaged in commission of another unlawful homicide" -- held no significance for them. The jury must have taken the instructions to mean that the murder of Annette Durham, which had been determined to be murder in first degree, to also apply (erroneously) to the killing of Steven Strotkamp. Because the instructions given to the jury did not include a verdict director based upon MAI CR 3rd 314.02 for the "unlawful homicide", the jury was further confused about whether or not they needed to make a factual determination regarding the homicide to Steven Strotkamp. The language of MAI CR 4th 410.40 appeared to indicate that such a determination had already been made when in fact it had not.

In order to fully preserve this issue for appeal, defense counsel incorporates its previously filed written motion objecting to aggravator number 1 as follows:

Summary

Aggravator #1 of the November 25, 2013 first supplemental notice of the death penalty based on RSMO 565.032.2(2) references “another unlawful homicide.” The state proceeded on a capital penalty phase re-trial of the homicide of Annette Durham (count 1) when the conviction for the “other homicide,” the killing of Steven Strokamp (count

2), was reversed and remanded for a new factual determination with regard to murder in the second degree, voluntary manslaughter or an acquittal. *State v. Rice*, 573 S.W.3d 53 (Mo. banc 2019). Therefore, there was no other "unlawful homicide" for which 565.032.2(2) would apply. Using the untried murder of Steven Strotkamp as an aggravator violated due process and the prohibitions against cruel and unusual punishment for two reasons: (1) it prohibited the jury from fulfilling its fact-finding role regarding the aggravator itself, and; (2) it did not provide for a fair evaluation of the weight to be given to this aggravating evidence. By denying this objection before and during trial, the trial court erred and violated Mr. Rice's rights to due process, fair and reliable sentencing, right to a jury trial, freedom from cruel and unusual punishment and equal protection of law. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18(a), 19, 21.

Statement of facts

The state alleged that Mr. Rice committed murder in the first degree for the shooting death of Annette Durham (count 1) and murder in the first degree for the shooting death of Steven Strotkamp (count 2). *See* amended information dated December 11, 2015. Both shootings took place on December 10, 2011. *Id.* For both counts, the state also filed a notice to seek the death penalty which listed two statutory aggravators under RSMO 565.032.2. *See* amended notice to seek the death penalty dated November 25, 2013. The first alleged aggravator read: "the murder in the first degree was committed while the defendant was engaged in commission of another unlawful homicide." RSMO 565.032.2(2). Basically, the state alleged the murder of Steven Strotkamp (count 2) was an aggravator for capital punishment for the murder of Annette Durham (count 1) and vice -versa.

In its amended notice to seek the death penalty, state also pled a second aggravator RSMO 565.032.2(7)("depravity of mind").[1] It also pled non-statutory aggravators.

This case first proceeded to jury trial in August 2017. The trial court judge refused lesser included instructions for count 2 (Steven Strotkamp) for voluntary manslaughter. *Rice*, 573 S.W.3d at 62. The defense argued the instructions were required because there was evidence of an argument over child custody between Mr. Rice, Ms. Durham and Mr. Strotkamp **and** that Mr. Rice believed Mr. Strotkamp reached for a gun during the dispute. *Id*. at 62-66. The jury returned a verdict of murder in the first degree on count 1 (Annette Durham) and murder in the second degree on count 2 (Steven Strotkamp). In the penalty phase for count 1 -- the only count under consideration for capital punishment -- the jury hung. Trial Transcript, August 2017 at 2385-2392. The trial court then sentenced Mr. Rice to death. *Id.* at 2424-2433.

On appeal, the Missouri Supreme Court reversed on both counts 1 and 2. Count 1 was reversed and remanded for a capital penalty phase retrial due to improper arguments by the prosecution. *Rice*, 573 S.W.3d at 76. Count 2 was reversed due to the failure of the trial court to instruct on voluntary manslaughter (a new trial on the facts was ordered). *Id*. at 66.

The state elected to proceed on count 1, the penalty phase retrial regarding the homicide of Annette Durham, before a retrial on the facts of count 2, the alleged homicide of Steven Strotkamp.

Even after the death verdict for count 1 which this motion for new trial addresses, count 2 remains untried before a jury. There is as of yet no judicial determination that the death of Steven Strotkamp was an "***unlawful*** homicide" under RSMO 565.032(2). (emphasis added).

[1] This aggravator was truck by the trial court at the instruction conference was not included in instruction number 7 based upon MAI-CR 4th 410.40.

Argument

Aggravator #1 violated due process and prohibitions against cruel and unusual punishment because: (1) it prohibited the jury from fulfilling its fact-finding role regarding the aggravator itself, and; (2) it did not provide for a fair evaluation of the weight to be given to this aggravating evidence.

Aggravator #1 of the November 15, 2013 notice to seek the death penalty should have been stricken and a life sentence ordered due to violations of due process and prohibitions against cruel and unusual punishment. Because the alleged homicide of Steven Strotkamp has been reversed for a new factual finding, there is as of yet no other "unlawful homicide" which qualifies for statutory aggravation under RSMO 565.032.2(2).

Due process requires a factual finding on the murder of Steven Strotkamp before it can be submitted as a statutory aggravator under RSMO 565.032.2(2). Additionally, RSMO 565.032.2(2) is fundamentally flawed because neither the statute nor corresponding jury instructions (MAI 4th 414.40 et seq) provide for a fair evaluation of the weight to be given to the varying levels mental culpability for an "unlawful" homicide which are possible under this aggravator.

A. The plain language of RSMO 565.032.2(2) and MAI 4th 414.40 requires a prior finding of an "unlawful homicide."

The plain language of RSMO 565.032.2(2) indicates that this aggravator is only submitted when there has been a prior judicial finding of guilt on a homicide committed contemporaneously with the murder first degree conviction for which capital punishment is sought.

RSMO 565.032.2(2) reads as follows:

> the murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide.

The word "unlawful" is specifically used in the statute as a qualifier of "homicide." The plain meaning is that a judicial determination of an "unlawful homicide" has already been made.

Missouri statutory construction first refers to plain language. It then refers to context and harmonization with all the provisions of a statute. The "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *State v. Johnson*, 524 S.W.3d 505, 510 (Mo. banc 2017) (quoting *Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009)). "In interpreting statutes, we must both strive to implement the policy of the legislature, and also harmonize all provisions of the statute." *Care and treatment of Schottel v. State*, 159 S.W.3d 836, 842 (Mo. banc 2005) (citing *20th & Main Redevelopment P'ship v. Kelley,* 774 S.W.2d 139, 141 (Mo. banc 1989)). To ascertain legislative intent, the courts should examine the words used in the statute, *the context* in which the words are used and the problem the legislature sought to remedy by the statute's enactment. *Id*. at 841 (citing *State ex rel. Whiteco Indus., Inc. v. Bowers,* 965 S.W.2d 203, 207 (Mo.App. E.D.1998)).

The plain language of the corresponding jury instruction (MAI-Cr 4th 410.40) further demonstrate that a prior judicial finding of guilt is required for submission of RSMO 565.032.2(2). MAI-CR 4th 410. 40 is the jury instruction where the state lists the statutory aggravators. The notes on use require that the mental culpability of the "unlawful homicide" is defined with one definition only: murder first degree, murder second degree or voluntary manslaughter or involuntary manslaughter, etc. MAI -CR 4th 410.40 Notes on use 6 (7-1-18). The meaning is clear: the jury has found the defendant

guilty of a specific type of an "unlawful homicide" and that homicide is now defined and submitted as an aggravator in the penalty phase. That is why one and only one level of homicide must be selected for MAI -CR 4th 410.40. This plain reading is further supported by numerous references in the notes on use to "verdict directors" and "finding[s] of guilt in the first stage." *Id*. For example, MAI -CR 4th 410.40 requires inclusion of "mandatory terms used in the explanation of the unlawful homicide or any defense thereto … ***for definitions, see the appropriate language in the related verdict directors*** …" (emphasis added). MAI-CR 4th 410.40 note 6 . MAI-CR 4th 410.40 likewise excludes references to any defense which must have been rejected by the fact finder: "the defendant is not entitled to the following … present 'defenses' that are not supported by the evidence ***because of the finding of guilt in the first stage***, i.e. 'alibi.'" (emphasis added). *Id.*

The requirement for a prior factual finding is even more clear in light of the procedural posture of this case. The Supreme Court reversed count 2 because a voluntary manslaughter instruction was not given in the guilt phase of the first trial. *State v. Rice*, 573 S.W.3d 53, 66 (Mo. banc 2019). As to count 2, there currently exists an unanswered factual determination as to whether Mr. Rice is guilty of murder in the second degree, is guilty of voluntary manslaughter or is not guilty of any level of homicide. MAI-CR 4th 410.40, however, does not permit two definitions of "unlawful homicide" – i.e. one for murder second degree and one for voluntary manslaughter. The instruction requires one definition and one definition only. For this reason, any plain reading of RSMO 565.032.2.(2) and MAI-CR 4th 410.40 not only presumes but also requires a prior judicial finding of an "unlawful homicide" so that the relevant culpable mental state can be defined appropriately in the instruction.

There were only two remedies: (1) strike the aggravator, or; (2) order a trial on the facts of count 2 before conducting the re-trial of the penalty phase on count 1 which includes an aggravator under RSMO 565.032(2). Because the latter did not occur before

the penalty phase re-trial, the aggravator should have been struck and Mr. Rice sentenced to life.

B. Due process required a judicial finding of guilt as to an "unlawful homicide" before submitting such facts to the jury as an aggravator under RSMO 565.032.2(2).

Procedural due process applies to the penalty phase of a capital murder trial. *State v. Sloan*, 756 S.W.2d 503, 510 (Mo. 1988). The "fundamental principles of procedural fairness" require notice of the aggravating circumstance on which the death penalty will be sought, that the jury is properly instructed as to the elements of the circumstance, and that the circumstance must be unanimously found beyond a reasonable doubt, and the jury so finds the aggravating circumstance. *Id.* "These fundamental principles of procedural fairness apply with no less force at the penalty phase of the trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (quoting *Cole v. Arkansas*, 333 U.S. 196, 201-02 (1948).

Apprendi instructs that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000). The aggravating fact is an essential element of the aggravated crime, and must be found by the jury. *Id.* at 501.

In this case, the "element" that must be tested is the mental state of the "unlawful homicide" aggravator because it affects the sufficiency of the aggravator as well as the weight to be given to it. Missouri's statutory scheme and approved jury instructions -- at least in this situation of a penalty phase retrial where the alleged "unlawful homicide" per RSMO 656.032.2(2) was remanded and there is no concurrent finding of guilt -- do not provide the procedural due process required for the defendant to test the elements of the aggravator.

Therefore, aggravator #1 under RSMO 656.032(2) should have been struck and Mr. Rice sentenced to life.

C. RSMO 565.032.2(2) and MAI 4th 414.40 did not provide any means for guiding the jury on how to weigh differing levels of "unlawful homicide" and, therefore, violate due process and the prohibitions against cruel and unusual punishment.

Neither RSMO 565.032.2(2) nor MAI-CR 4th 414.40 provided any meaningful guidance for how a jury weighs an "unlawful homicide" in a manner which is not arbitrary and in violation of Eighth Amendment protections against cruel and unusual punishment. Under RSMO 565.032.2(2) and MAI-CR 4th 410.40, aggravating evidence of a homicide with a greater mental culpability is treated the same as one of lesser culpability. The result is that a lesser homicide – i.e. voluntary manslaughter -- is given the same weight in the instructions as those of a higher culpability – i.e. murder in the second degree. This does not make sense. A homicide of a lesser culpable mental state should be given less weight in aggravation than that of a higher culpable mental state. Missouri statutes and jury instructions, however, provide no such guidance. A lesser homicide carries the same effect as a greater homicide when determining the imposition of capital punishment.

The result is that RSMO 565.032.2(2) and MAI-CR 414.40 are functionally "arbitrary and capricious." Imposition of capital punishment is only permissible where due process protections are in place and cruel and unusual punishment is avoided. *Gregg v. Georgia,* 428 U.S. 153 (1976). A sentence of death remains unconstitutional if it is "inflicted in an arbitrary and capricious manner. *Gregg*, 428 U.S. at 188. "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at

189; *see also Godfrey v. Georgia,* 446 U.S. 420, 428 (1980). "Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons, 543 U.S. 551, 568 (2005).*

Because RSMO 565.032.2(2) and MAI-CR 414.40 lack any meaningful guidance as to how a jury is to weigh lesser versus greater levels mental culpability for a contemporaneous "unlawful homicide," there is no narrowing per *Gregg* and *Roper.* Likewise, there is no reliable method for determining "extreme culpability." Because RSMO 565.032.2(2) is "arbitrary and capricious," it violates due process and protections against cruel and unusual punishment. Aggravator number one should have been struck and Mr. Rice sentenced to life.

POINT 5. The trial court erred when it did not grant Mr. Rice's objection to MAI-CR 4th 410.40 (marked as instruction number 7) and sentence Mr. Rice to life imprisonment rather than submit the case to the jury. Defendant raised this objection at the instruction conference. Defendant also filed a written objection to the submission of MAI-CR 4th 410.40 in order to fully set out the grounds for the objection and preserve the issue for appeal.

At the instruction conference, defense counsel objected to MAI-CR 4th 410.40 (instruction number 7). The objection pertained to both aggravator number one based upon RSMO 565.032.2(2) and aggravator number 2 based on RSMO 565.032.2(7). The court struck aggravator number 2 for insufficient evidence, leaving aggravator number 1 as the sole statutory justification for the death penalty. The court then submitted, over defense counsel objection, MAI-CR 4th 410.40 with only aggravator number 1. Even with only aggravator number 1 remaining, the state had not submitted sufficient evidence in order for the court to deliver the case to the jury. Aggravator number 1 also violated

the constitution as detailed in defendant's pre-trial motion to strike this aggravator for multiple constitutional violations. *See supra*, point 4 p. 4. Additionally, reliance on aggravator number 1 violated the narrowing requirements of due process. The constitution requires that the death penalty is reserved for the worst of the worst. The death verdict in this case was for, unfortunately, a not too uncommon homicide resulting from a child custody dispute. The fact that the second killing upon which the death verdict is based, that of Steven Strotkamp, has yet to be adjudicated makes this death verdict even more questionable. When it is adjudicated, the killing of Steven Strotkamp may prove to have been provoked (a voluntary manslaughter) or committed in self-defense. Should this be the case, a death verdict for this factual scenario will clearly have elided the intended narrowing function of RSMO 565.032. The only factor which made this case eligible for the death penalty appears to be discretion of the local prosecutor. Had this incident occurred in another county in Missouri, or even another state, it is highly unlikely that the prosecutor would have filed a notice of intent to seek the death penalty. For this reason, this case clearly demonstrates Justice Breyer's objection to the constitutionality of the death penalty in his *Glossip* dissent. *Glossip v. Gross*, 135 S.Ct. 2726 (2015). The death penalty is unconstitutional because it is arbitrary. *Id*. at. 2760-62. Who is subject to capital punishment depends upon who is prosecuting the defendant. *Id.*

In order to fully preserve this issue for appeal, the seven objections to MAI-CR 4th 410.40 (instruction number 7) raised at the instruction conference are as follows:

1. The state submitted insufficient evidence to establish the existence of statutory aggravating circumstances to prove beyond a reasonable doubt that the defendant is deserving of the death penalty which is required by defendant's rights to due process of law, a fair trial, reliable sentencing and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States

Constitution; Article I, Sections 10, 18(a) and 21 of the Missouri Constitution; and Sections 565.030.4, 565.032, 565.035 RSMo. 1994.

2. At the instruction conference, defense counsel re-raised the motion for a directed verdict of a life sentence at the close of the state's evidence. The trial court should have rejected MAI-CR 4th 410.40 (instruction number 7) and sentenced Mr. Rice to life imprisonment. The state had submitted insufficient evidence to establish the existence of statutory aggravating circumstances to prove beyond a reasonable doubt that the defendant is deserving of the death penalty which is required by defendant's rights to due process of law, a fair trial, reliable sentencing and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10, 18(a) and 21 of the Missouri Constitution; and Sections 565.030.4, 565.032, 565.035 RSMo. 1994.

3. At the instruction conference, defense counsel re-raised the motion for a directed verdict of a life sentence at the close of all of the evidence. The trial court should have rejected MAI-CR 4th 410.40 (instruction number 7) and sentenced Mr. Rice to life imprisonment. The state had submitted insufficient evidence to establish the existence of statutory aggravating circumstances to prove beyond a reasonable doubt that the defendant is deserving of the death penalty which is required by defendant's rights to due process of law, a fair trial, reliable sentencing and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10, 18(a) and 21 of the Missouri Constitution; and Sections 565.030.4, 565.032, 565.035 RSMo. 1994.

4. Defense counsel re-raised its motion to strike aggravator number 1. Defendant incorporates by reference the entirety of the pre-trial motion. Defendant also incorporates by reference point 4, *supra*, of this motion into this point 5 for full preservation of appellate rights.

5. Defense counsel re-raised defendant's "motion to sentence Marvin Rice to life imprisonment due to the unavailability of defense mitigation witnesses" which was heard and denied by the court at a pre-trial hearing on March 9, 2022. Defendant incorporates by reference the entirety of the pre-trial motion. Defendant also incorporates by reference this issue as raised in point 6, *infra,* of this motion into this point 5 for full preservation of appellate rights.

6. Defense counsel re-raised defendant's "motion for sentence of life without parole because the death penalty is a cruel and unusual punishment in violation of the eight amendment" which was heard and denied by the court at a pre-trial hearing on March 9, 2022. Defendant incorporates by reference the entirety of the pre-trial motion. Defendant also incorporates by reference point 7, *infra*, of this motion into this point 5 for full preservation of appellate rights.

7. Defense counsel re-raised defendant's "motion to dismiss the state's notice of intent to seek the death penalty because Missouri's statutory scheme for the imposition of the death penalty fails to genuinely narrow the class of persons eligible for the death penalty" which was heard and denied by the court at a pre-trial hearing on March 9, 2022. Defendant incorporates by reference the entirety of the pre-trial motion. Defendant also incorporates by reference point 8, *infra*, of this motion into this point 5 for full preservation of appellate rights.

POINT 6. The trial court erred when it did not grant defendant's motion to sentence Marvin Rice to life imprisonment due to unavailability of defense mitigation witnesses" which was heard and denied by the court at a pre-trial hearing on March 9, 2022. Defendant raised this motion three times at trial. The first was at defendant's motion for a directed sentence of life imprisonment at the close of the state's evidence. The second was at defendant's motion for a directed sentence of life imprisonment at the close of all

of the evidence. The third was at defendant's objection to MAI-CR 4th 410.40 at the instruction conference. Each time defense counsel filed written objection which incorporated by reference the pre-trial motion. In order to fully preserve this issue for appellate review, defense counsel restates the written objection as follows:

Summary

The trial court erred when it did not grant Mr. Rices' motion to sentence him to life imprisonment without parole due to the unavailability of defense mitigation witnesses in the re-trial of a capital penalty phase for count 1. Unavailable mitigation witnesses violated Mr. Rice's due process rights to present a defense and to fundamental fairness. U.S. Const., amends. V. It also violated his rights to be free from cruel and unusual punishment. U.S. Const., amends. VIII. The proper remedy was to sentence Mr. Rice to life imprisonment. *Deck v. Steele*, 249 F. Supp. 3rd 991 (E.D. Mo. 2017)(ordering death sentence vacated and defendant sentenced to life due to unavailability of defense mitigation witnesses; reversed on other grounds by *Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020).

Facts

The state alleged that Mr. Rice committed murder in the first degree for the shooting death of Annette Durham (count 1) and murder in the first degree for the shooting death of Steven Strotkamp (count 2). *See* amended information dated December 11, 2015. The shooting took place on December 10, 2011. *Id.*

This case was first tried six years later in August of 2017. The jury returned a verdict of murder in the first degree on count 1 (Annette Durham) and murder in the second degree on count 2 (Steven Strotkamp). Trial Transcript, August 2017, p. 2081-

2082. In the penalty phase for count 1 -- the only count under consideration for capital punishment -- the jury hung. *Id.* at 2385-2392. The trial court then sentenced Mr. Rice to death. *Id.* at 2424-2433. On appeal, count 1 was reversed and remanded for a capital penalty phase retrial due to improper arguments by the prosecution. *State v. Rice*, 573 S.W.3d 53, 76 (Mo. banc 2019). Count 2 was reversed due to the failure of the trial court to instruct on voluntary manslaughter (a new trial on the facts was ordered). *Id*. at 66.

The second trial of the penalty phase for the murder of Annette Durham occurred for March 21, 2022 to April 1, 2022, nearly 11 years after the incident In the penalty phase of the first trial, the defense presented the testimony of Dakota Johnson (Mr. Rice's daughter), Derrick Rice (his son), Alan Loveless (his close friend) and Holly Loveless (his close friend). For the second trial, defense counsel was unable to produce these witnesses for trial. Alan Loveless had died. Holly Loveless was not willing testify. Derrick Rice was not willing to testify. Upon information and belief, Dakota Johnson was a patient in a psychiatric facility and was unwilling and/or unable to testify.

Dirk Alan Loveless was a close friend of Mr. Rice's for eight years prior to the homicide of Annette Durham. Mr. Loveless testified in both the guilt (Trial Transcript, August 2017, p. 1732-35) and penalty (*Id.* at 2280-89) phases of the prior trial as to nature of his relationship with Mr. Rice, Mr. Rice's character and the positive and meaningful impact of Mr. Rice on his, Mr. Loveless', life. Mr. Loveless died on January 18, 2018. *See* obituary https:/www.dignitymemorial.com/obituarituaries/del-city-ok/dirk-loveless-7732587 accessed February 17, 2022.

Holly Loveless was also a close family friend of Mr. Rice and is the wife of Mr. Loveless. Ms. Loveless testified in both the guilt (*Id*. at 1737-1741) and penalty (*Id.* at 2289-2294) phases of the prior trial as to nature of her relationship with Mr. Rice, Mr. Rice's character and the positive and meaningful impact of Mr. Rice on her life. It is defense counsel's belief that she was unwilling to testify due to the amount of stress she would experience if she did. This stress was particularly compounded by the fact that

her husband died within months of the completion of the first trial where the judge rendered a death verdict when the jury hung.

Derrick Rice is Mr. Rice's son. He testified in both phases of the trial (*Id.* at 1695-1708; *Id.* at 2311-2323). He testified to Mr. Rice's depressed mental state leading up to the incident. He testified to his father's struggles with mental illness. He testified to his father's positive impact on his life. He is unwilling to testify for the second trial. It is defense counsel's belief that the psychological stress of testifying at trial preventing him from testifying in the second trial.

As with Derrick Rice, Dakota Johnson was a critical mitigation witness. She is his Marvin Rice's daughter. Ms. Rice testified in the penalty phase. *Id.* at 2243-2254. She testified to her father's struggles with mental illness. She testified to her father's positive impact on her life. She was in an in-patient psychiatric facility and did not testify at the second trial due to the emotional stress.

At the second trial, defense counsel read trial transcripts of Dirk Loveless, Holly Loveless, Derrick Rice and Dakota Rice.

Argument

The disappearance of four substantial mitigation witnesses in this re-trial of a capital penalty phase violated Mr. Rice's rights to due process and fundamental fairness. The court should have sentenced Mr. Rice to life imprisonment rather than resolve the unavailability of witnesses with the reading of their prior testimony.

In *Deck v. Steele*, the federal district court ordered a death sentence converted to life imprisonment in a case where a defendant's mitigation witnesses did not testify in the re-trial of his capital sentencing phase. *Deck*, 249 F. Supp. 3rd at 1082. It should be noted that the 8th Circuit reversed the district's courts judgment on the basis that the rule it relied upon was not settled law at the time of the third trial upon which habeas corpus relief was requested. *Deck v. Jennings*, 978 F.3d 578, 584 (2020). The 8th circuit, in

dicta, criticized the district court's finding, but it did not overturn the underlying rule that delays and disappearance of mitigation witnesses can cause a due process violation. *Id.* 583-84. Regardless, at issue in both opinions was the disappearance of mitigation witnesses and/or their willingness to testify at the third trial of the penalty phase. *Id.* The underlying murders occurred in June 1996. *Id.* at 1013. The first trial, where a death verdict was returned, took place in 1998. *Id.* at 1014. A second re-trial f the penalty phase took place in 2003. *Id.* at 2015. A third penalty phase retrial took place in 2008, nearly twelve years after the underlying incident. *Id.*

By the time of the third trial, many mitigation witnesses who had testified in the first and second trials refused to cooperate with defense counsel. *Id.* at 1082. Several witnesses refused to testify, including the defendant's mother and father. *Id.* at 1077. The district court concluded that the inability of the defense to present mitigation evidence – for a variety of reasons – made the proceeding fundamentally unfair:

> "[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious." (*citing Barker v. Wingo*, 407 U.S. 514, 532 (1972)). Here, prejudice resulting from the delay weighs heavily in favor of Deck [the defendant]. As described above, his inability to present substantial mitigation evidence at his third penalty-phase trial was directly attributable to the passage of many years' time. Witnesses who previously cooperated and provided favorable testimony were no longer available, either because of their unknown location, changed and hostile attitudes, illness, or even death. These witnesses provided mitigation testimony at earlier trials that the Missouri Supreme Court itself found "substantial"—indeed to the extent that it found that without constitutional error, a reasonable probability existed that the jury would not have voted for death.
>
> *Deck*, 249 F. Supp. 3rd at 1082

The Rice re-trial presented the same problem as *Deck*. In both cases, more than a decade passed between the underlying crime and the re-trial of the penalty phase. As in *Deck*, mitigation witnesses who provided substantial testimony in the first trial are now

deceased or unwilling to testify. While the court could have ordered a continuance for the defense to make further efforts to persuade these witnesses to testify, those efforts would have been unlikely to be successful. Unavailable mitigation witnesses violated Mr. Rice's due process rights to present a defense and to fundamental fairness. U.S. Const., amends. V. It also violated his rights to be free from cruel and unusual punishment. U.S. Const., amends. VIII. The proper remedy was to sentence Mr. Rice to life imprisonment. *Deck v. Steele*, 249 F. Supp. 3rd 991 (E.D. Mo. 2017)(ordering death sentence vacated and defendant sentenced to life due to unavailability of defense mitigation witnesses; reversed on other grounds by *Deck v. Jennings*, 978 F.3d 578 (8th Cir. 2020).

POINT 7. The trial court erred when it did not grant defendant's "motion for a sentence of life without parole because the death penalty is a cruel and unusual punishment in violation of the eighth amendment" which was heard and denied by the court at a pre-trial hearing on March 9, 2022. Defense counsel filed a written motion. Defense counsel re-raised the issue three times at trial. Each time defense counsel filed a written motion and incorporated by reference the pre-trial motion. The first was at defendant's motion for a directed sentence of life imprisonment at the close of the state's evidence. The second was at defendant's motion for a directed sentence of life imprisonment at the close of all of the evidence. The third was at defendant's objection to MAI-CR 4th 410.40 at the instruction conference.

In order to fully preserve this issue for appellate review, defense counsel restates the written objection as follows:

Summary

The trial court erred when it overruled the defense objection to death penalty as possible punishment because the death penalty is a cruel and unusual punishment. Its imposition,

in general and specifically as applied to Mr. Rice, violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 21 of the Missouri Constitution.

Support

In support of this objection defense counsel states:

1. Mr. Rice is charged by amended information with two counts of murder in the first degree. This case was tried in August of 2017 where a jury returned a murder in the first degree verdict for count 1 and a murder in the second degree verdict for count 2. Count 1 proceeded to a capital penalty phase where the jury did not reach a verdict; the trial court subsequently imposed a death sentence. The verdicts were appealed. Count 1 was remanded for a new penalty phase only. *State v. Rice*, 573 S.W.3d 53 (2019). Count 2 was remanded for a new trial in guilt and penalty. The penalty phase retrial for count 1 occurred from March 21, 2022 to April 1, 2022.

The Death Penalty Violates the Eighth Amendment Because it is a Cruel and Unusual Punishment

2. The Eighth Amendment provides that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court has instructed that, in determining whether a punishment is cruel and unusual, "courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 560 U.S. 48, 58 (2010), quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotations omitted).

3. Since 2008, various Supreme Court justices have pointed out the inequities of the death penalty system and called for its reconsideration. Justice Stevens, relying on his years on the bench, concluded that imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any

discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

4. In their dissent in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), Justices Breyer and Ginsberg also called for re-examination of the death penalty. Picking up on several criticisms of the death penalty mentioned by Justice Stevens, they addressed four particular areas in which the death penalty is especially problematic.

A. The Death Penalty is a Cruel Punishment Because it Lacks Reliability

5. Because the death penalty is such a severe and irreversible punishment, the procedures for obtaining death sentences must be the most reliable. *Riceson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion).

6. Yet despite this fundamental principle, death sentences routinely suffer from lack of reliability. Not only have at least four innocent people been wrongfully executed, but anywhere from 115 to 154 people who had been sentenced to death were later exonerated. *Glossip*, 135 S.Ct. at 2756-57 (Breyer, J., dissenting) (citing authority). In addition, capital defendants are much more likely than non-capital defendants to be wrongfully convicted. *Id*. at 2757-58. This imbalance is caused by numerous factors, including the complexity of the legal procedures and the closer scrutiny that capital cases receive. *Id*. at 2757. But it may also reflect a greater likelihood of an initial wrongful conviction, since capital cases routinely include the following factors:

- Intense pressure on the police and other elected officials to solve these typically horrendous murders quickly, and pressure on the jurors to convict;
- Death qualification, which skews juries toward guilt and death; and
- Flawed forensic testimony.

Id. at 2757-58. In cases where capital defendants have been exonerated, the following factors have been present:

- shortened police investigations;
- false confessions;
- mistaken eyewitness testimony;
- untruthful jailhouse informants;
- ineffective defense counsel; and
- an overly zealous prosecutor.

Id. at 2758. The bottom line is that as many as 4% of defendants sentenced to death are actually innocent. *Id*.

7. In addition to outright exonerations, the number of death penalty reversals also exposes a serious problem with reliability. *Id*. at 2759. A 2004 law review article concluded that 47% of capital cases were overturned on direct or post-conviction appeal in state court. Gelman, Liebman, Werst & Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. Empirical L. Studies 209, 232 (2004). Such research suggests "there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime." *Glossip*, 135 S.Ct. at 2759 (Breyer, J., dissenting).

B. The Death Penalty is a Cruel Punishment Because it is Arbitrary

8. In 1972, the death penalty was found to be unconstitutional, in part, because it was arbitrarily administered. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). Justice Stewart concluded that the Georgia death sentences at issue were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id*. at 309-310 (Stewart, J., concurring). Of those people who commit first-degree murder, many who commit just as reprehensible crimes do not receive death sentences. *Id*. Those who receive death sentences are "a capriciously selected random handful." *Id*. The Eighth and Fourteenth Amendment forbid such wanton and freakish imposition of the death penalty. *Id*. at 310. As Justice White recognized, the death penalty "is exacted with great infrequency even for the most atrocious crimes and ... there is no meaningful

basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id*. at 313 (White, J., concurring).

9. When the death penalty was reinstated, the Justices recognized that the death penalty would be unconstitutional if inflicted arbitrarily and capriciously. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). To limit arbitrary decision-making, the death penalty is intended to be reserved for the "worst of the worst," *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting), those offenders who "commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

10. In reality, the death penalty is imposed arbitrarily. In Missouri, the death penalty is not reserved for the worst of the worst, because there are so many statutory aggravating circumstances that it is the rare murder that is not eligible for the death penalty. *See* Defendant's "Motion for Sentence of Life without Parole Because Missouri's Statutory Scheme for the Imposition of the Death Penalty Fails to Genuinely Narrow the Class of Persons Eligible for the Death Penalty," filed on March 8, 2022 concurrent with the filing of this motion.

11. Second, there is no consistency in the manner in which the death penalty is imposed. Similar crimes with similar mitigation or aggravation do not obtain similar results. *Glossip*, 135 S.Ct. at 2760 (Breyer, J., dissenting). Factors that should affect the imposition of the death penalty – such as the egregiousness of the crime – often do not, while other factors that should play no part, often do. *Id*.

12. Race and gender should play no part, but studies show that people accused of murdering white victims are more likely to receive the death penalty than people accused of killing black or other minority victims. *Id*. at 2760-61. The gender of the victim or gender of the defendant also may make a difference. *Id*. at 2761.

13. Geography improperly plays a role. *Id*. Between 2004 and 2009, half of all death sentences imposed across the entire nation came from just 29 counties. *Id*.

14. Nowhere is this lack of consistency more obvious than in the St. Louis area. Death sentences from St. Louis County account for 8 of Missouri's 22 current pending death sentences. *See* Appendix. Yet, just next door, St. Louis City did not have a death verdict from 2001 to at least 2008, and none of the current death sentences arose in St. Louis City. The difference? When they were in office, St. Louis County Prosecutor Robert McCullough favored the death penalty, while St. Louis City Circuit Attorney Jennifer Joyce did not. Thus, even though more murders typically occur in St. Louis City than St. Louis County, *See, e.g.*, St. Louis area homicide map 2016, at http://www.stltoday.com/news/multimedia/special/st-louis-area-homicide-map/html_de6b77ba-d238-5afa-9ef5-492e72e86ade.htm; lhttp://www.stltoday.com/news/multimedia/special/st-louis-area-homicide-map/html_de6b77ba-d238-5afa-9ef5-492e72e86ade.html. St. Louis City rarely, if ever, sought the death penalty while St. Louis County led the State in death verdicts. Notably, no county has more than one of the current pending death sentences, yet St. Louis County has eight. *See* Appendix filed with the pre-trial motion.

15. Other than prosecutorial discretion, geographical discrepancies may arise from differences in the availability of resources for defense counsel, the counties' racial composition, and political pressures on judges, who are elected in some counties and appointed in others. *Glossip*, 135 S.Ct. at 2761-62 (Breyer, J., dissenting).

16. Practice and studies have shown that there is "no principled way to distinguish" those cases where a death sentence is imposed from the many in which it is not. *Id*. at 2763 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)). Imposition of the death penalty is capricious, random, and arbitrary, and hence unconstitutional.

C. The Death Penalty is a Cruel Punishment Because of Excessive Delays

17. The death penalty is unconstitutional because of the long delay between imposition of a death sentence and execution of that sentence. *Glossip*, 135 S.Ct. at 2764 (Breyer, J., dissenting). Even when capital inmates are not held in isolation, the lengthy delay subjects them to years, perhaps decades of uncertainty as to whether the death

sentences will be carried out. *Id*. at 2765-66. In some cases death warrants are issued, revoked, and reissued several times. *Id*. at 2766. Some inmates, later exonerated, have come within days or even hours of being executed. *Id*.

18. The death penalty contains a fatal Catch-22. *Id*. at 2764, 2772. In order to ensure reliability in capital sentencing determinations, lengthy delays must occur; yet those delays defeat the purposes of the death penalty, *i.e.*, deterrence and retribution. *Id*. at 2770-72.

19. Proponents of the death penalty claim that it deters criminal conduct and provides retribution for victims' families and the community at large. *Id*. at 2767. But any deterrent effect a potential death sentence may have is dramatically reduced by the fact that very few death-sentenced inmates will actually be executed. *Id*. at 2768. Even if they are, it is typically 15-20 years after the crime. *Id*. Meanwhile, anyone contemplating murder would know he faces life imprisonment without parole. *Id*. If the possibility of serving the rest of one's life in a maximum security prison does not serve as a deterrent, the death penalty will not deter criminal conduct either.

20. The lengthy delays also vastly diminish the retributive purpose of the death penalty. *Id*. at 2769. Can "a community's sense of retribution … find vindication in a death that comes, if at all, only several decades after the crime was committed[?]" *Id*. (quoting *Valle v. Florida*, 564 U.S. 1067, 132 S.Ct. 1, 2 (2011) (Breyer, J., dissenting from denial of stay) (internal quotations omitted)). After all, over that lengthy period of delay, the community, the victims' families, and the defendant have likely experienced significant change. *Glossip*, 135 S.Ct. at 2769 (Breyer, J., dissenting). Feelings of anger or outrage may have subsided, especially where the defendant has become a changed person. *Id*. Fears of future dangerousness that prompted the death sentence may have been shown to be unfounded.

21. Because the death penalty fails to deter criminal conduct and to vindicate the community's feelings of outrage, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment."

Atkins v. Virginia, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 798 (1982). "[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, concurring).

22. Recently, a federal district court has held that a ten-year delay violated the defendant's right to be free from cruel and unusual punishment. In *Deck v. Steele*, --- F.Supp.3d --- , 2017 WL1355437 (8th Cir. Dist. Ct., Apr. 13, 2017), the federal district court held that the ten-year delay from Deck's conviction to his final sentencing trial "deprived Deck of his constitutional right to present mitigation evidence, thereby rendering his final trial fundamentally unfair." *Id*. at *60. Because of the inordinate delay and "witness fatigue," the jury at Deck's third sentencing trial was not able to hear and consider the same substantial mitigating evidence as the first jury. *Id*. at *60, 62. Thus, imposition of the death penalty violated Deck's right to be free from cruel and unusual punishment. *Id*. at *60.

D. The Death Penalty is an Unusual Punishment Given its Rare Imposition

23. Imposition of the death penalty is becoming an increasingly unusual punishment. *Glossip*, 135 S.Ct. at 2772 (Breyer, J., dissenting). Since 1996, the number of persons sentenced to death has been in decline nationally. *Id*. From the peak of 315 death sentences in 1996, the number of death sentences imposed nationwide dropped to just 30 in 2016. *See* Death Penalty Information Center (DPIC). *See*http://www.deathpenaltyinfo.org/death-sentences-year-1977-present. Missouri itself has had only one new death sentence since November 2013 which is this case. In the first trial, the judge imposed death after eleven jurors voted for life.

24. The number of people actually executed also has dropped. See Fact sheet, DPIC. *See* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. Thirty-one states currently have the death penalty. *Id*. But of those, only 19 have executed anyone. Nineteen states have abolished the death penalty, and another eleven have not had an execution since 2009. *Glossip*, 135 S.Ct. at 2773 (Breyer, J., dissenting) (citing DPIC,

States With and Without the Death Penalty). See http://www.deathpenalty info.org/states-and-without-death-penalty. Thus, 30 states have statutorily or effectively abolished the death penalty. *Id.*

25. In addition, the number of executions are getting increasingly concentrated in a smaller number of the death penalty states. From 2009 to 2016, thirty-eight percent of all executions occurred in Texas. See DPIC, Searchable Execution Database. *See* http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2016&sex=All&state%5B%5D=AL&state%5B%5D=AR&state%5B%5D=AZ&state%5B%5D=CA&state%5B%5D=CO&state%5B%5D=CT&state%5B%5D=DE&state%5B%5D=FE&state%5B%5D=FL&state%5B%5D=GA&state%5B%5D=ID&state%5B%5D=IL&state%5B%5D=IN&state%5B%5D=KY&state%5B%5D=LA&state%5B%5D=MD&state%5B%5D=MO&state%5B%5D=MS&state%5B%5D=MT&state%5B%5D=NC&state%5B%5D=NE&state%5B%5D=NM&state%5B%5D=NV&state%5B%5D=OH&state%5B%5D=OK&state%5B%5D=OR&state%5B%5D=PA&state%5B%5D=SC&state%5B%5D=SD&state%5B%5D=TN&state%5B%5D=TX&state%5B%5D=UT&state%5B%5D=VA&state%5B%5D=WA&state%5B%5D=WY&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply. In 2016, 80% of all executions occurred in just two states, Texas and Georgia. *Id.* The following table shows the decrease in number of executions, from a decreasing number of states, from 2009 through 2016:

2009	2010	2011	2012	2013	2014	2015	2016
52	46	43	43	39	35	28	20
11 states	12 states	13 states	9 states	9 states	7 states	6 states	5 states

Id. In Missouri, the death penalty is getting increasingly focused in St. Louis County, which accounts for 36% of all the currently pending death sentences. *See* Appendix filed with the pre-trial motion.

28. In conclusion, the death penalty is a cruel and unusual punishment and therefore unconstitutional. It is imposed arbitrarily, through procedures that are not reliable, creating results that are not worthy of confidence. The death penalty does not further its goals of deterrence or retribution. Its imposition, in general and specifically as applied to Mr. Rice, would violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 21 of the Missouri Constitution.

POINT 8. The trial court erred when it did not grant defendant's "motion to dismiss the state's notice of intent to seek the death penalty because Missouri's statutory scheme for the imposition of the death penalty fails to genuinely narrow the class of persons eligible for the death penalty" " which was heard and denied by the court at a pre-trial hearing on March 9, 2022. Defense counsel filed a written motion. Defense counsel re-raised the issue three times at trial. Each time defense counsel filed a written motion and incorporated by reference the pre-trial motion. The first was at defendant's motion for a directed sentence of life imprisonment at the close of the state's evidence. The second was at defendant's motion for a directed sentence of life imprisonment at the close of all of the evidence. The third was at defendant's objection to MAI-CR 4th 410.40 at the instruction conference.

In order to fully preserve this issue for appellate review, defense counsel restates the written objection as follows:

Summary

The trial court erred when it did not strike the State's notice of intent to seek the death penalty. Missouri's statutory scheme for imposing the death penalty is unconstitutional because it fails to genuinely narrow the class of persons eligible for the death penalty, as required by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United

States Constitution and Article I, Sections 2, 10, 18(a), and 21 of the Missouri Constitution.

In support, Mr. Rice states as follows.

1. In 2012, the American Bar Association issued a report that summarized its analysis of all aspects of the death penalty system in Missouri. Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report, American Bar Assn. (Feb. 2012).[2] It assessed Missouri's compliance with expected standards and made recommendations to bring Missouri up to acceptable levels.
2. The assessment team was comprised of eight members: three professors of law, two lawyers (one, the former president of The Missouri Bar), and three current or former judges. Two of the judges, the Honorable Nanette Laughrey and the Honorable Stephen Limbaugh, are current federal court judges. The third judge, the Honorable Harold Lowenstein, sat on the Missouri Court of Appeals, Western Division.
3. One area that every member of the assessment team concluded was most in need of reform was Missouri's aggravating circumstances. The assessment team concluded:

> Missouri should substantially revise its aggravating circumstances, such that only a "narrow category of the most serious" murder cases are eligible for the death penalty, as required by the U.S. Supreme Court. Such revisions would substantially reduce the risk that the death penalty will be arbitrarily applied …
>
> *Assessment Report*, Page v.

[2]The Assessment Report may be viewed at the following website: https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf

4. In Missouri, of the 22 cases that proceeded to a capital penalty phase for crimes that occurred after August 21, 2001, the death penalty was imposed an astounding **77%** of the time. *See* attached Appendix (Analysis and Commentary Regarding the Twenty-Two Jury Trials Conducted Pursuant to the Current (3-step) Death Penalty Statute).
5. To show how far Missouri has gone astray, undersigned counsel will set forth the Supreme Court precedents mandating that statutory provisions be narrowly tailored to ensure that the death penalty is reserved for the "worst of the worst." Counsel will then demonstrate how Missouri's statutory provisions have become so expansive that, as the assessment team noted, prosecutors have "the discretion to pursue the death penalty in virtually any first-degree murder case." *Assessment Report*, Page 141. Counsel will then discuss the three major ways in which Missouri's death penalty provisions fail to satisfy the Supreme Court's mandates:

    (1) the number of eligibility factors has grown exponentially;
    (2) individual eligibility factors are interpreted very broadly; and
    (3) an essential step of the narrowing process has been eliminated.

    <u>*Furman* and its Progeny Demand Aggravators that Genuinely Narrow the Class of People Eligible for the Death Penalty</u>

6. In 1972, the United States Supreme Court held that the Georgia death penalty could not stand under the sentencing scheme then in place. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972). Georgia sentencing procedures improperly allowed juries to "reach a finding of the defendant's guilt and then, without any guidance or direction, decide whether he should live or die." *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (discussing *Furman*). Too great a risk existed that death sentences were being imposed in an arbitrary and

capricious manner. *Furman*, 408 U.S. at 276-77, 295, 309-10 (plurality opinion).

7. Four years later, the Supreme Court examined Georgia's amended death penalty statute. *Gregg v. Georgia*, 428 U.S. 153 (1976). By plurality opinion, the Court held that the sentencing statute passed constitutional muster. *Id*. at 207, 226. Georgia's statute did not violate the Eighth Amendment, because it narrowed the class of murder defendants subject to the death penalty by requiring that one of ten statutory aggravating circumstances be found by the jury beyond a reasonable doubt before a defendant was eligible for the death penalty. *Id*. at 196-97 (opinion of Stewart, Powell, and Stevens, JJ.). The Court held that Georgia now had a "meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." *Id*. at 198, *quoting Furman*, 408 U.S. at 313 (White, J., concurring).
8. The Court again considered the Georgia statute in *Godfrey v. Georgia*, 446 U.S. 420 (1980). In *Godfrey*, the jury returned a death verdict based on a finding of just one aggravating circumstance, *i.e.*, that the murder was "outrageously or wantonly vile, horrible and inhuman." *Id*. at 426 (plurality opinion). The Court held that this aggravating circumstance failed to narrow the jury's discretion so as to avoid the arbitrary and capricious infliction of the death penalty. *Id*. at 428. Any person "could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id*. at 428-29. The defendant's death sentence could not stand, as "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id*. at 433.
9. Yet again the Georgia sentencing statute came under fire in *Zant v. Stephens*, 462 U.S. 862 (1983). There, the jury found three aggravating circumstances, but one was subsequently found unconstitutional by the state court. *Id*. at 866.

The question for the Supreme Court was whether the death sentence could stand when one of the aggravating circumstances was found invalid.

10. The Court noted that it had upheld Georgia's death penalty statute in *Gregg* only because the statute required the jury to find at least one statutory aggravating circumstance and the state supreme court reviewed each death sentence to determine if it was arbitrary or capricious. *Id*. at 876. Every statutory aggravator still had to meet the constitutional standards set forth in *Furman*. *Id*. Otherwise, a state "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Id*. at 877, *quoting Gregg*, 428 U.S. at 195, fn. 46. To withstand constitutional scrutiny, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877.

Missouri's Procedural Safeguards Have Been Eroded to Such an Extent that They Do Not Genuinely Narrow the Class of People Subject to the Death Penalty

A. Too Many Ways a Defendant Can Be Death-Eligible

11. Missouri's first attempt to resolve the problems discussed in *Furman* was to enact a statute that made the death penalty mandatory for all first-degree murder

convictions. §559.009.3, RSMo Supp. 1975. But such statutes were struck down as unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

12. Ironically, Missouri has come full circle. Currently, Missouri's aggravating circumstances cover virtually every first-degree murder imaginable. As the assessment team noted, "many of Missouri's aggravating circumstances are so broadly written that they are applicable to an overwhelming proportion of first-degree murder cases." *Assessment Report*, Page 141. Thus, "a Missouri prosecutor is able to pursue the death penalty in virtually any case where there is probable cause to believe the defendant committed intentional homicide." *Id.*, Page 142.

13. But it wasn't always this way. In 1977, Missouri's death penalty statute listed only ten possible statutory aggravators. §565.012.2, RSMo 1977. In 1983, the legislature overhauled the murder statute and, among other changes, added four new statutory aggravators. §565.032.2, RSMo Supp. 1983. In 1989, the legislature broadened the eligibility factors further still. §565.032.2, RSMo Supp. 1990. It added two more statutory aggravating circumstances. *Id*. In 1994, the legislature again expanded the range of aggravating circumstances, adding another statutory aggravating circumstance and bringing the total to a staggering seventeen statutory aggravating circumstances. §565.032.2, RSMo 1994.

14. As the assessment team noted, Missouri has more aggravating circumstances than most other capital jurisdictions. *Assessment Report*, Page 141. Most of the States bordering Missouri have far few aggravators:

Arkansas	10	Ark. Code Ann. § 5-10-101 (West 2011)
Kansas	8	Kan. Stat. Ann. § 21-6624 (West 2011)
Kentucky	8	Ky. Rev. Stat. Ann. § 532.025(2)(a) (West 2011)
Nebraska	9	Neb. Rev. Stat. § 29-2523(1) (2011)
Oklahoma	8	Okla. Stat. tit. 21, §701.12 (2011)

15. Making matters even worse, Missouri's "depravity of mind" aggravator can be applied in any of ten different ways. This, in practice, expands the number of aggravating circumstances to 26, because each subset of the "depravity of mind" aggravator is the functional equivalent of a different aggravating circumstance. In addition to the 17 statutory aggravating circumstances, the State can seek to make the defendant "death eligible" through the depravity of mind aggravator, if any of the following ten circumstances exists:

[1] The defendant inflicted physical pain or emotional suffering on the victim for the purpose of making the victim suffer before dying; or

[2] The defendant committed repeated and excessive acts of physical abuse upon the victim, making the killing unreasonably brutal; or

[3] The defendant killed the victim after he was bound or otherwise rendered helpless and the defendant thereby exhibited a callous disregard for the sanctity of all human life; or

[4] The defendant killed the victim knowing that the victim was physically disabled and helpless and the defendant thereby exhibited a callous disregard for the sanctity of all human life; or

[5] The defendant, while killing the victim or immediately thereafter, purposely mutilated or grossly disfigured the victim's body by acts beyond that necessary to cause death; or

[6] The defendant, while killing the victim or immediately thereafter, engaged in sexual acts with the body; or

[7] The defendant killed the victim as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life; or

[8] The defendant's selection of the person he killed was random and without regard to the victim's identity and the killing thereby exhibited a callous disregard for the sanctity of all human life; or

[9] The defendant killed the victim for the purpose of causing suffering to another person and thereby exhibited a callous disregard for the sanctity of all human life; or

[10] The defendant killed the victim for the sole purpose of deriving pleasure from the act of killing and thereby exhibited a callous disregard for the sanctity of all human life.

MAI-CR3d 314.40.

16. Because of the sheer number of possible ways that defendants can be eligible for the death penalty, Missouri fails to provide any "meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." *Gregg*, 428 U.S. at 198, *quoting Furman*, 408 U.S. at 313 (White, J., concurring). In Missouri, most first degree murder defendants – not just the "worst of the worst" – are subject to the death penalty. Because the vast majority of murders can fall within one of the 26 aggravating circumstances, Missouri does not narrow the class of people eligible for the death penalty and thus violates the Eighth Amendment of the United States Constitution and Article I, Section 21 of the Missouri Constitution.

B. Eligibility Factors that are Too Broad

17. As if it weren't bad enough that Missouri has an excessive number of aggravating circumstances, those aggravators are interpreted extremely broadly. The U.S. Supreme Court has repeatedly held: "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*

v. Simmons, 543 U.S. 551, 568 (2005), *quoting* *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

18. "If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. The State must "define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Gregg*, 428 U.S. at 196, n.47. The State must employ "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." *Godfrey*, 446 U.S. at 428.

19. When a sentencing body is told to weigh a vague and imprecise aggravating factor, it invites arbitrary and capricious application of the death penalty in violation of the Eighth and Fourteenth Amendments. *Godfrey*, 446 U.S. at 428; *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988).

20. In *Maynard v. Cartwright*, 486 U.S. 356, 358-59 (1988), one of the two aggravators found by the Oklahoma jury was that the murder was "especially heinous, atrocious or cruel." The Supreme Court held that the aggravator was overbroad, in that any "ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Id*. at 364. The aggravator failed to adequately inform the jurors "what they must find to impose the death penalty and as a result [left] them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman*…" *Id*. at 361-62 (citation omitted). A "fundamental constitutional requirement" is that the jury's discretion in imposing the death penalty be channeled and limited to minimize the risk of wholly arbitrary and capricious action. *Id*. at 362, *citing Gregg*, 428 U.S. at 189.

21. After evaluating Missouri's statutory aggravating circumstances, the assessment team concluded that many of the aggravating circumstances "are so

broadly drafted as to qualify virtually any intentional homicide as a death penalty case." *Assessment Report*, Page v. The assessment team noted:

A recent study of 247 Missouri cases in which the defendant could have been charged with intentional homicide found … the "murder for the purpose of receiving money" aggravating circumstance would apply to 45% of the sampled cases; the "wantonly vile" aggravating circumstance would apply to more than 90% of the cases; and the "engaged in a felony" aggravating circumstance would apply to more than 50% of the cases.

Assessment Report, Page 141, *citing* Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-eligible Cases*, 51 Ariz. L. Rev. 305, 321-25 (2009).

22. The statutory aggravators apply so broadly that they fail to limit or channel the jury's discretion at all, instead keeping "run-of-the-mill" murders subject to the death penalty. For example, the first statutory aggravator listed in Section 565.032.2 asks the jury to consider whether the defendant has a prior conviction for first degree murder or has one or more serious assaultive criminal convictions. §565.032.2(1), RSMo 2000.

23. But the term "serious assaultive" is interpreted so expansively that it covers any felony conviction. In *State v. Brown*, 998 S.W.2d 531, 551 (Mo. banc 1999), the defendant's conviction for fondling a 12-year-old in a "rude or insolent manner" qualified as a serious assaultive conviction. The Missouri Supreme Court held that a crime is a "serious" assaultive offense if it is a felony; if just a misdemeanor, then it would not be "serious." *Id.*, *quoting State v. Brown*, 902 S.W.2d 278, 293-94 (Mo. banc 1995).

24. A prior conviction for second degree assault, a class C felony, also qualified as a serious assaultive conviction even though the victim had suffered mere physical injury, not serious physical injury. *State v. Kinder*, 942 S.W.2d

313, 332 (Mo. banc 1996). "Physical injury" is defined as "physical pain, illness, or any impairment of physical condition." §566.061(20), RSMo 2000.

25. A prior conviction for a run-of-the-mill felony should not make a defendant eligible for the death penalty. The fact that a defendant had at one time in his life fondled a pre-teen or that sometime in the past he committed a class C felony assault does not make him "the worst of the worst." As interpreted by the Missouri Supreme Court, this aggravator does not limit and channel the jurors' discretion; instead, it allows the State to pull a wide range of defendants into the reach of the death penalty.[3] It is also unconstitutional per se and as potentially applied here.

26. One statutory aggravator asks the jury to consider whether the defendant committed murder "for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another." §565.032.2(4). This aggravator is routinely used when the defendant also robbed the victim. *E.g.*, *State v. Kenley*, 952 S.W.2d 250,276 (Mo. banc 1997) ("The murder for money circumstance has been held applicable to a murder committed during the course of a robbery"); *State v. McDonald*, 661 S.W.2d 497 (Mo. banc 1983). As stated above, this aggravator was used in 45% of the sampled cases. *Assessment Report*, Page 141. Its wide use demonstrates that a murder after a robbery does not make the defendant "the worst of the worst."

27. In this case in particular, an overly broad statutory aggravator is alleged against Mr. Rice. It is the "depravity of mind" aggravator, which presents its own

[3] Another problem exists with the use of this aggravator. The aggravator asks the jurors to consider whether the defendant has "one or more" serious assaultive convictions. §565.032.2(1) (emphasis added). Thus, the aggravator should be submitted to the jury just once, whether the defendant has one conviction or several. But trial courts often submit this aggravator to the jury multiple times, one for each prior conviction. This transforms what should be just one aggravator into multiple aggravators and skews the jury's weighing of the aggravating and mitigating evidence.

set of problems. This aggravator allows someone to be put to death if he commits a murder in a way that is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." § 565.032.2(7). As the assessment team found, the depravity of mind aggravator can apply in 90% of murder cases. *Assessment Report*, Page 141.

28. This statutory language is so broad that it fails to provide notice of the actual conduct that is deemed so despicable as to merit the death penalty. Any "person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Godfrey*, 446 U.S. at 428-29.

29. Missouri has attempted to cure the vagueness problem by requiring that the jury also find a limiting factor, *i.e.*, one of the ten factors set forth in Paragraph 14, *supra*. But "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression" in order to give notice to all persons that a crime exists and that there is a specific punishment for that crime. E.g. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983).

30. When a law is so vague that people of ordinary intelligence differ as to its application, the statute "violates the first essential of due process of law." *Lanzetta*, 306 U.S. at 453. This notice requirement has recently been extended by the United States Supreme Court to include sentencing enhancements for already defined criminal conduct. *See Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). *Johnson* held that imposing an increased sentence based on the statutory aggravator of "otherwise involv[ing] conduct that presents a serious risk of physical injury to another" was too vague to conform to the basic requirements of due process. *Id.* at 2557-58 (the statute's aggravator "produces more unpredictability and arbitrariness than the Due Process Clause tolerates").

31. Although the depravity aggravator, accompanied by the limiting instruction, has passed constitutional muster[4], actual due process requires more. *See Johnson*, 135 S.Ct. at 2556-57 ("[V]agueness in criminal statutes . . . violates the first essential of due process; [t]hese principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."). Judicial construction of a criminal statute cannot save it from impermissible vagueness or from lack of notice to the public. *Id.*

32. Moreover, notice is not the primary problem with vague statutes; the even more important aspect of the vagueness doctrine is not actual notice, but the requirement that "the legislature establish minimal guidelines" to guide enforcement and limit prosecutorial discretion. *Kolender*, 461 U.S. at 358 ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."). A vague law which carries death as a possible penalty should not be tolerated, as it may enable "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

33. To allow the legislature to create a wide enough set of aggravating circumstances to catch all possible offenders and leave the task of selective enforcement to the courts impermissibly "substitute[s] the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875) (cited with approval by *State v. Vaughn*, 366 S.W.3d 513, fn. 6 (Mo banc 2012) (invalidating a vague section of a harassment statute)).

[4] *See State v. Cole*, 71 S.W.3d 163, 171-72 (Mo. banc 2002); *see also Kolender*, 461 U.S. at 355 (federal courts must "consider any limiting construction that a state court or enforcement agency has proffered").

34. Moreover, even the limitations applied to the depravity aggravator suffer from vagueness or overbreadth. Take, for example, the ninth limitation: The defendant killed the victim for the purpose of causing suffering to another person and thereby exhibited a callous disregard for the sanctity of all human life. This "limitation" is so vague that a jury could find it in every first degree murder case, many second degree murder cases, and probably even some manslaughter cases. A person typically embroils himself in a fight because he is angry at the victim and wants to make the victim suffer. He does not necessarily wish to kill the person, nor is he necessarily acting with depravity of mind. Any killing would cause someone some amount of suffering, whether it be the suffering of the victim, his mother, his friends, etc. Sentencing someone to die based upon the finding that he killed to cause some amount of suffering to some person, is completely arbitrary and capricious. That "limitation" on the depravity of mind aggravator does nothing to limit or channel the jury's discretion. Instead, it serves as a catch-all for all murders that otherwise would not fit within a viable category.

35. Invalidating the application of capital statutes because of vagueness predates the Constitution; the framers of the Constitution and early courts were particularly wary of vague capital laws. *See* Blackstone, 1 Commentaries of the Laws of England 88 (1765); *see also Johnson*, 2015 WL 2473450 at *15 (Thomas, J., concurring) ("Courts . . . refus[ed] to apply vague capital-offense statutes to prosecutions before them"). Missouri courts must take action to cure the vagueness problems within its death penalty statute.

C. Missouri Has Eliminated An Essential Step in the Narrowing Process

36. In 1983, the Missouri Legislature imposed a four-step process for the jury to follow whether the State sought death. §565.030, RSMo Supp. 1983 (effective 10-1-84). A sentence of life without parole would result if:

(1) the jury failed to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt;
(2) the jury did not find beyond a reasonable doubt that the evidence in aggravation warranted the death penalty;
(3) if the jury found that the evidence in mitigation outweighed the evidence in aggravation; or
(4) if the jury decided under all the circumstances not to impose a death sentence. §565.030, RSMo 1984.

37. Steps One, Two, and Three of §565.030.4, RSMo 1984, were death-eligibility steps that had to be found by the jury beyond a reasonable doubt. *State v. Whitfield*, 107 S.W.3d 253, 258 (Mo. banc 2003). If the jury lacked unanimity as to Step One or Step Two, the jury was required to return a verdict of life without parole. *State v. Thompson*, 85 S.W.3d 635, 639 (Mo. banc 2002) (reversed on other ground); *State v. Ramsey*, 864 S.W.2d 320, 337 (Mo. banc 1993).

38. Both Step One and Step Two were intended to narrow the circumstances by which the death penalty could be imposed, by making sure that the crime was truly one of the "worst of the worst" so as to justify the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008), *citing Godfrey*, 446 U.S. at 428 ("requiring a State to give narrow and precise definition to the aggravating factors that warrant its imposition"). The Missouri Supreme Court held that Step Two, in particular, "erects a barrier, in favor of the defendant, which must be surpassed before the jury can even begin to consider whether it should impose the death penalty under the specific facts of the defendant's case they are deciding." *State v. Tokar*, 918 S.W.2d 753, 771 (Mo. banc 1996); *State v. Johnson*, 244 S.W.3d 144, 163 (Mo. banc 2008).

39. Step Two was an especially important narrowing step. Not only did the jury have to find a statutory aggravator, but the jury had to find that the evidence in aggravation was significant enough to justify the most extreme of punishments.

40. But in 2001, the Missouri Legislature amended §565.030.4, RSMo, and removed Step Two. The new (current) statute provides as follows:

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 finds by a preponderance of the evidence that the defendant is intellectually disabled; or

(2) 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; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

§565.030, RSMo Supp. 2001.

41. No longer does Missouri require the jury to assess whether the State has presented sufficient evidence in aggravation to warrant the death penalty as a death-eligibility step. Without Step Two, Missouri's death penalty process completely fails to require that the class of persons eligible is limited to the "worst of the worst." Instead, virtually any first-degree murder case can become a death penalty case, in violation of U.S. Supreme Court precedent and the Eighth Amendment.

42. In addition, by removing step two – whether the death penalty is warranted – Missouri has made it exponentially easier for the prosecution to obtain death sentences. Under the former statute, at the second step, if even <u>just one</u> juror

believed the death penalty was not warranted, a verdict of life without parole was required. Under the current statute, the jury must still assess whether the death penalty is warranted, but now does so through its final decision of whether to impose a death sentence or life without parole. No longer does one juror's conclusion that a death sentence is not warranted require a sentence of life without parole. Now, even if eleven jurors believe that a death sentence is not warranted, a sentence of life without parole is not required. Now, if even just one juror believes that a death sentence is warranted, against the views of eleven other jurors, the case is propelled onward to a deadlock verdict and then, in all likelihood, a judge-imposed death sentence.

43. Missouri is an extreme outlier by its continual broadening of the State's ability to obtain death sentences, while other jurisdictions are narrowing the State's ability to do so or abolishing the death penalty outright. Since 2007, seven states have abolished the death penalty: New York (2007), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Delaware (2016). See Death Penalty Information Center, States with and without the Death Penalty as of November 9, 2016, at https://deathpenaltyinfo.org/states-and-without-death-penalty. Four other states have imposed a gubernatorial moratorium: Oregon (2011), Colorado (2013), Washington (2014), and Pennsylvania (2015). *Id.*

44. Even staunch death penalty states like Florida and Arkansas are making it harder for the State to obtain death sentences. The Florida Supreme Court recently held that a jury must make each of the following determinations unanimously and beyond a reasonable doubt: (1) that aggravating circumstances exist; (2) that the aggravating circumstances are sufficient; (3) that the evidence in aggravation outweighs the evidence in mitigation; and (4) ultimately, that the defendant should receive the death penalty. *Hurst v. State*, 202 So.3d 40, 44, 53-54 (Fla. 2016). The Alabama legislature amended its death penalty statute to ban judicial override

of jury verdicts of life without parole. See Lawmakers Bar Alabama Judges from Overriding Juries, https://www.usnews.com/news/best-states/alabama/articles/2017-04-04/alabama-house-to-vote-on-ending-judicial-override. Missouri must reverse its slide and make drastic changes to bring its procedures in line with other jurisdictions and the mandates of the United States Supreme Court.

The Notice of Intent to Seek the Death Penalty Must Be Stricken

45. As a result of the problems with Missouri's death sentencing procedures, the assessment team urged that Missouri "substantially amend its statutory aggravating circumstances such that the death penalty is only applicable to a narrow category of first-degree murders." *Assessment Report*, Page 147. It further noted that, "[w]ithout narrowly-defined aggravating circumstances, it is nearly impossible for individual prosecutors in Missouri to consistently and fairly exercise their capital charging discretion in all cases, even when applicable written policies are in place." *Id.*

46. Missouri's failure to strictly enforce the Supreme Court's mandate that the sentencer's discretion be limited and channeled raises doubts as to the constitutionality of the death penalty itself. *See, e.g., Glossip v. Gross*, 135 S.Ct. 2726, 2760-64 (Breyer, J., and Ginsberg, J., dissenting); *Baze v. Rees*, 553 U.S. 35, 82-86 (2008) (Stevens, J., concurring); *Furman*, 408 U.S. at 310-14 (White, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting from the denial of cert.).

47. Because these statutory problems will not be corrected before Mr. Rice's trial, the court must strike the State's Notice of Intent to Seek the Death Penalty. Otherwise, far too great a risk exists that any death sentence imposed would be arbitrary and capricious.

48. Finally, Mr. Rice notes that this motion is reinforced by the facts to be established at the evidentiary hearing on his "Motion to Dismiss the Death Penalty on the Ground that the Death Penalty Statute is Unconstitutional Due to the Failure to Meet Minimum Constitutional Standards Set forth in *Furman v. Georgia* and its Progeny." That motion was filed on June 20, 2017. Both the motion and the evidence to be offered in support of it are herein incorporated by reference. While this motion deals with one specific aspect of Missouri's statute (its failure to narrow the class of death-eligible offenders), the *Furman* motion was based upon national research which surveyed individuals who had served as jurors on capital cases. These research studies were conducted as part of the Capital Jury Project, and the studies remain ongoing. Individuals who served on Missouri juries participated in the Capital Jury Project.

49. The Capital Jury Project focuses on seven critical factors involving areas where the sentencing approach created in *Furman v. Georgia* has failed. These factors are as follows: premature juror decision-making, the failure and biasing effect of death qualification, juror inability to comprehend and follow penalty phase instructions, an erroneous juror belief that a death sentence is required, an erroneous juror belief that the jurors are not responsible for the punishment decision, an erroneous juror belief that individuals sentenced to life without parole are prematurely released, and racism. Missouri's death statute's failure to narrow the death-eligible class, standing alone, makes it unconstitutional; however, the data and evidence from the Capital Jury Project adds even more persuasive weight to the argument that the statute is unconstitutional.

Wherefore, for the foregoing reasons, Mr. Rice respectfully requests the Court strike the State's Notice of Intent to Seek the Death Penalty on the basis that Missouri fails to abide by the Supreme Court's mandate that the statutory aggravating circumstances must genuinely narrow the class of persons subject to

the death penalty to ensure that the death penalty is reserved for the worst of the worst offenders and crimes.

POINT 9. The trial court erred when it denied defendant's motion for a life verdict at close of the state's evidence. The state submitted insufficient evidence to establish the existence of statutory aggravating circumstances to prove beyond a reasonable doubt that the defendant is deserving of the death penalty which is required by defendant's rights to due process of law, a fair trial, reliable sentencing and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10, 18(a) and 21 of the Missouri Constitution; and Sections 565.030.4, 565.032, 565.035 RSMo. 1994.

POINT 10. The trial court erred when it denied defendant's motion for a life verdict at close of all of the evidence. The state submitted insufficient evidence to establish the existence of statutory aggravating circumstances to prove beyond a reasonable doubt that the defendant is deserving of the death penalty which is required by defendant's rights to due process of law, a fair trial, reliable sentencing and freedom from cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10, 18(a) and 21 of the Missouri Constitution; and Sections 565.030.4, 565.032, 565.035 RSMo. 1994.
Motion for life verdict at close of all evidence.

POINT 11. The court erred when it did not sustain defendant's objection to the removal of juror 39 and the replacement of her by alternate juror 316. The court should have retained juror 39. On Thursday morning, March 31, 2022, the court informed counsel for both parties that juror number 39 had contacted two deputy sheriffs who were monitoring the jury during sequestration at the hotel. The deputies documented the encounter and

delivered it to the judge the next morning. Essentially, juror 39 had left her hotel room, contacted sheriff personnel and informed them she thought she could not remain on the jury. The judge brought the juror into the courtroom. Juror 39 said she could not render a death verdict. This statement was made after the state had finished its evidence and after the defense had presented one day of evidence. However, juror 39's statement did not rise to the level as where she needed to be removed. Her statements, though leaning toward a life verdict, included enough commitment to be fair to both parties and keep an open mind toward both possible verdicts. By removing juror 39 over defense objections, the trial court violated Mr. Rice's rights to due process, a trial by jury, fair and reliable sentencing, prohibitions against cruel and unusual punishment and equal protection of law. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

POINT 12. The trial court erred when it did not grant defendant's motion for a mistrial and/or suspension of proceedings when the defendant had indicated to defense counsel that he had suicidal ideation on Friday, April 1, 2022. The court also erred by not ordering a mental evaluation pursuant to RSM 552.020 at defense counsel's request.

Before court started on Friday, April 1, 2022, Mr. Rice indicated to jail staff that he would not come to court. Defense counsel went to the jail and met with Mr. Rice. Mr. Rice indicated suicidal ideation to defense counsel. This specifically included that he would have suicidal thoughts if he had to be in the courtroom when he wife, Kelly Rice, testified for the defense that morning. Mr. Rice indicated that he would come to court but that he wanted to sit in the holding cell outside of the courtroom when his wife testified. He also did not want to watch a video feed of his wife's testimony from the holding cell. Defense counsel moved for a competency evaluation and mistrial or suspension of the proceedings. Defense counsel referenced the prior competency proceedings which had taken place between the first and second trials. The trial court's denial of a competency evaluation pursuant to RSMO 552.020 and suspension of

proceedings and/or declaration of a mistrial violated Mr. Rice's rights to due process, a trial by jury, fair and reliable sentencing, prohibitions against cruel and unusual punishment and equal protection of law. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

POINT 13. The trial court erred when it denied defense counsel's motion for a mistrial when the jury returned a death verdict which listed non-statutory aggravators but not the sole statutory aggravator in instruction number 7 (based on MAI-CR 4th 410.40 and objected to by the defense). The improper verdict form had been preceded by two questions which indicated that the jury could not understand much less follow the instructions. The first at 6:50 pm asked the court to provide a list of aggravating and mitigating circumstances. The second at 10:56 pm asked the court if mitigating factors could be listed of the verdict form if the jury returned a death sentence The jury's inability to follow the court's instructions and the court's denial of a request for a mistrial violated Mr. Rice's rights to due process, a trial by jury, fair and reliable sentencing, prohibitions against cruel and unusual punishment and equal protection of law. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

Additionally, defense counsel re-raised its objections to the submission of MAI-CR 4th 410.40 (instruction number 7) and the inclusion of aggravator number 1 based on RSMO 565.032.2(2). As preserved in point 4, *supra* page 4-14, the inclusion of aggravator number 1 in jury instruction 7 violated due process because it: (1) it prohibited the jury from fulfilling its fact-finding role regarding the aggravator itself, and; (2) it did not provide for a fair evaluation of the weight to be given to this aggravating evidence. It also confused the jury so as to violate the due process rights of Mr. Rice. The confusion was evidenced in the first verdict form. In a trial where the jury was instructed that the defendant was guilty of murder in the first degree for the shooting of

Annette Durham (count 1), the jury also believed -- obviously and erroneously -- that this instruction also encompassed the killing of Steven Strotkamp (count 2) for which no finding of guilt had been made and for which was the basis for the sole statutory aggravator at trial. The confusion in that first verdict form also highlighted the inadequacy of the state's arguments that aggravator number 1 did not violate due process or *Apprendi* and its progeny. Clearly, the jury paid no attention to aggravator number 1 during deliberations because it erroneously believed that it was not in dispute nor needed to be proven beyond a reasonable doubt. It cannot be said enough. The jury must have believed, erroneously, that count 2 had been established as a finding of guilt prior to this trial as much as count 1 had. For this reason, the entire trial was tainted with violations of due process.

In order to preserve this issue for appeal, defendant incorporates by reference point 4, *supra* page 4-14. This is the objection to aggravator number 1 based upon RSMO 565.032.2(2) which was raised in a written motion filed with the court and heard at a pre-trial hearing on March 9, 2022. The trial court denied the motion at the pre-trial hearing. Defense counsel then re-raised this issue four times at trial, the last being the objection to first jury verdict and request for a mistrial. By denying this motion, the trial court violated Mr. Rice's rights to due process, fair and reliable sentencing, right to a jury trial, freedom from cruel and unusual punishment and equal protection of law. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18(a), 19, 21.

POINT 14. The court erred when it overruled defendant's objection to the state's request to remove Juror 57. The court should have sustained defendant's objection to the strike and retained Juror 57. On Monday morning, March 21, 2022, the court began death qualification voir dire in small panels. Juror 57 was in the first death qualification panel voir dired by the parties. Juror 57 had indicated that she had an elderly mother who was living in a nursing home. Juror 57 indicated that her mother had dementia and had recently fallen and broken a hip. Juror 57 clearly indicated that while she was

understandably concerned about her mother's well-being, those concerns would not interfere with her ability to focus on Defendant's case. At one point Juror 57 asked whether or not she would be able to check on her mother's well-being in the evenings. The court explained to Juror 57 that this shouldn't be a problem insofar as jurors would be permitted brief phone calls, monitored by the St. Charles County Sheriff's Department. Shortly thereafter, Juror 57 indicated that it would be ideal if she could also have a "check-in" phone call with the nursing home over their lunch hours, and she inquired as to whether this was possible. Neither the court nor the parties answered Juror 57's question. Significantly, Juror 57 at no point indicated that she would be unable to focus or concentrate on Defendant's case if she was not permitted lunch-hour "check-ins" . . . she was merely asking whether it would be permitted. Juror 57 conveyed nothing to reflect that this "hardship" would interfere with her ability to focus and concentrate on Defendant's case or otherwise impede her ability to be a fair and impartial juror. By removing Juror 57 over defense objections, the trial court violated Mr. Rice's rights to due process, a trial by jury, fair and reliable sentencing, prohibitions against cruel and unusual punishment and equal protection of law. U.S. Const., amends. V, VI, VIII, XIV; Mo. Const., art. 1, secs. 2, 10, 18a, 19 and 21.

WHEREFORE, for all of the foregoing reasons, Marvin Rice requests this court to sentence him to life imprisonment or, in the alternative, grant a new penalty phase trial for count 1.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of this motion was e-mailed on this 14th day of April, 2022, served electronically through the Missouri E-filing System as provided in Rule 103.08, Mo. Supreme Court Rules.

/s/ *Stephen Reynolds*
Stephen Reynolds