IN THE
MISSOURI SUPREME COURT

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

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

APPELLANT'S REPLY BRIEF

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Reply to Respondent's Argument 1A:

As at trial, the state on appeal again entirely fails to satisfy the requirements of *Dawson v. Delaware* concerning the use of evidence falling within the protections of the First Amendment.

Mike Tisius's enjoyment of - listening to - rap music, even rap music with

the lyrics "Mo' Murda," is an activity protected by the First Amendment, and under *Dawson* the admissibility at penalty phase of this rap music evidence depends upon the state first demonstrating its relevance to the sentencing proceeding.

Having failed at trial to present the argument that the rap music evidence was admissible to show state of mind -- or any other rationale for the admission of this evidence -- respondent attempts to cover the state's failure to sustain its burden of proving admissibility by misstating appellant's point and argument as "contend[ing] that the "mo' murda" song should not have been admitted because it was irrelevant to the issue of appellant's state of mind."

Instead of showing any connection between the music and the killing of the two county jailers that would make the music relevant to the sentencing proceeding, the state simply speculates -- but offers no proof -- that the defendant must have played the music because he was "preparing" or "psyching himself up" to kill the jailers.

If the state in the *Dawson* case could not use evidence of Dawson's membership in the Aryan Brotherhood prison gang -- from which the jury could have reasonably inferred that Dawson believed in, supported and engaged in gang activities such as violence against others -- without first connecting Dawson's gang membership to the murder in that case, that is, without demonstrating that Dawson himself supported those gang beliefs and

activities, then in the present case, the state may not bring in evidence that Mike played rap music with lyrics that included "mo murda" without proof that the music advocated murder of jailers or - at the very least - murder in general. The state has not shown – and the music itself doesn't show – that the music Mike listened to advocates killing or killing jailers or killing in a blaze of glory.

Completely aside from the admissibility requirements of ***Dawson v. Delaware***,[1] discussed *infra*, the state, as the proponent of the rap music evidence, had the burden of establishing its admissibility. ***Liebow v. Jones Store Company***, 303 S.W.2d 660, 665 (Mo. 1957); ***South Side Plumbing Co. v. Tigges***, 525 S.W.2d 583, 588 (Mo.App.St.L.D. 1975). But the state failed to do so. The sequence of events at trial was as follows: respondent moved (without explanation as to why it was admissible) to admit the rap music, the defense objected that admission of this evidence would violate Mike's First Amendment rights, and without argument by the state, the trial court overruled the defense objection (T1041).

Respondent's contention that the rap music evidence was admissible at penalty phase to prove Mike's state of mind was first raised on appeal. Perhaps to detract from the state's failure at trial to sustain its burden of demonstrating the admissibility of the rap music evidence, respondent commences its argument in

[1] 503 U.S. 159 (1992).

reverse order -- by first setting out the defense presented at guilt and penalty phase before discussing the state's case in chief.[2] One would think from the state's brief that the state presented the rap music at penalty phase in rebuttal of all the evidence presented previously by the defense. Lest there be any confusion, the state presented the rap music in its case in chief at penalty phase before the defense presented any penalty phase evidence (T1026-31; 1041; St.Ex. 67).

Respondent misstates appellant's point and argument claiming that appellant contests admission of the rap music "because it was irrelevant to the issue of appellant's state of mind" (Resp.Br. 22). Since at trial the state never presented any ground or argument whatsoever supporting the admissibility of this evidence (T1041), let alone an argument or rationale concerning mental state,[3] appellant

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[2] "The state disputed the defense account of appellant's state of mind and contended that appellant had made a conscious decision to kill the jail guards before he entered the jail, and therefore was deserving of a sentence of death…" (Resp.Br. 19-20; citing penalty phase portions of the transcript at T1256-57, 1287-89, 1292).

[3] Respondent's argument -- that the rap music evidence was relevant because it was proof of Mike's mental state at the time of the murders, that is, it proved that Mike decided to kill the jailers before entering the jail and 'support[ed] the state's inference that appellant was "psyching himself up" for killings that he had already decided to commit (Resp.Br. 19-20, 22-23) -- raises an interesting question: if the

had no opportunity at trial to contest this ground and had no reason in his initial brief on appeal to address "state of mind."

Adhering to its unsupported contention that the rap music evidence proved appellant's state of mind and was therefore relevant, respondent erroneously dismisses as "straw men" appellant's examples of the kind of connection between the constitutionally protected activity and the offenses that the state was required to prove to establish the admissibility of the rap music under ***Dawson v. Delaware***.[4] (Resp.Br. 23-24, 26-29).

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rap music showed that the murders were planned, why didn't the state introduce this evidence at the first phase of trial?

[4] 'Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim...

Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for

example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances. But the inference which the jury was invited to draw in this case tended to prove nothing more than the abstract beliefs of the Delaware chapter. Delaware counters that even these abstract beliefs constitute a portion of Dawson's "character," and thus are admissible in their own right under Delaware law... Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs. Cf. ***Texas v. Johnson***, 491 U.S. 397, 414, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1988) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. Because Delaware failed to do more, we cannot find the evidence was properly admitted as relevant character evidence.'

503 U.S. at 165-67.

Ignoring the ***Dawson*** requirements, respondent simply asserts that the music is relevant because appellant listened to it “over and over” while driving around before going to the jail with a gun to help his friend escape and also because appellant said he would go into the jail in a “blaze of glory” (Resp.Br. 23). Specifically, respondent claims these things somehow show that Mike played the music to “prepar[e] himself mentally to commit murderous acts” (Resp.Br. 23).

The problem with respondent’s argument is that it simply cites incidents that are temporally proximate but otherwise unrelated to the music and claims that these incidents demonstrate that the music is relevant to Mike's mental state (Resp.Br. 23).

Just as the Aryan Brotherhood evidence was not self-proving – did not establish its own connection to the murders in ***Dawson*** – in the present case, the fact that the song Mike enjoyed contained the lyrics “mo murda" is not enough to establish relevance. Respondent failed at trial and fails on appeal to offer any explanation as to how a rap music song describing the environment in which the musicians grew up gives any meaning to the “blaze of glory” statement. Respondent failed then and fails now to show how Mike’s enjoyment of Bone’s music mentally prepared him for the crime. Even though it is well-recognized that "gang involvement connotes unlawful or antisocial activity," ***State v. Goodwin***, 43 S.W.3d 805, 814 (Mo.banc 2001), in ***Dawson*** this connotation or inference was not enough did not demonstrate a connection between Dawson's First Amendment Aryan Brotherhood gang activity and the sentencing phase so as to establish the

Aryan Brotherhood evidence admissible.

Similarly, in the present case, even though respondent makes much of the forty-five (45) minute period in which Mike played the rap music before going into the jail (Resp.Br. 19, 21, 22, 23, 24), this shows only that Mike enjoyed the music.

The First Amendment protects Mike's right to enjoy his music -- even before a murder. Just as Dawson was not required to have renounced his Aryan Brotherhood membership prior to the murder in that case to avoid admission of the Aryan Brotherhood evidence at trial, Mike was not required to avoid playing music that he enjoyed (and had enjoyed and played for years) prior to the murders in the present case.

An example of a case in which the Court found that evidence of the defendant's own habits and behavior -- his sexual relations, drawings and expressions --"was sufficiently related to the issues at sentencing [and] to the crime committed to allow its admission during the capital sentencing phase of [defendant's] trial" is ***Boyle v. Johnson***, 93 F.3d 180, 184 (5th Cir. 1996). In ***Boyle***, evidence adduced by the state showed "that Boyle was obsessed with sex, and that his sexual expression had a violent component." ***Id***. at 185. "Unlike the situation in Dawson, where there was no connection between the evidence presented and the crime committed, Boyle was convicted for a murder which had a sexual component." ***Id***. The state in ***Boyle*** presented Boyle's lover who testified that he 'wrote her sexually explicit letters referring to her genitalia as "Miss Kitty" and to

his own as "Mr. Whipple."' ***Id***., n. 4. Boyle's 'letters contained statements such as, "I would unleash Mr. Whipple on you. Ha! Ha! I know you can handle him. He knows it too. At this very moment, I believe he knows I'm talking about him. He seems to be stirring. Oh, mama, do I need you." One letter states, "Miss Kitty is in some real trouble now. I may not be able to tear her up, but she will know Mr. Whipple has been there."' ***Id***. Boyle's former lover testified that Boyle "had a strong preference for oral and anal sex, that he put pressure on her to perform these acts, and that he sometimes held her down and pretended to choke her during foreplay." ***Id***., n. 5. An inmate who had been incarcerated with Boyle testified that "whenever another inmate mentioned trouble with women, Boyle would remark that, "If it was me, I'd slap her, throw her down on the floor and fuck her in the ass." ***Id***.

In contrast, the lack of a sufficient connection between the defendant's sexual history and the charged offense required reversal in ***Beam v. Paskett,*** 3 F.3d 1301 (9th Cir. 1993). In ***Beam***, the trial court relied on Beam's "long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger" to find the aggravating factor that Beam would pose a "continuing threat" to society.' ***Id***. at 1307-08. On appeal, the Ninth Circuit noted that the trial "court's finding amounted to a determination that Beam's prior sexual history, consisting exclusively of non-violent, consensual or involuntary conduct, provides a valid penological basis for separating him from other capital defendants and placing him in the small group

for which death is appropriate." ***Id***. at 1308.

In vacating Beam's sentence of death on the ground that Beam's prior sexual history was irrelevant to the sentencing issues, the Court of Appeals first noted that in ***Dawson***, "[t]he fact that associational evidence *might* be relevant to a defendant's future dangerousness was not, however, adequate to uphold its use in Dawson's case." ***Id***. at 1309. "Because the state had failed to introduce evidence demonstrating a link between Dawson's membership and future harmful conduct, there was a substantial danger that the sentencer had considered his membership solely because it found that membership "morally reprehensible." ***Id***. So, too, the Court said, the state had failed to prove a link between Beam's sexual behavior and issues at sentencing:

> We think the same is true when the state seeks to rely on a defendant's non- violent, consensual or involuntary sexual conduct as a basis for its decision to impose capital punishment. In such case, there is a substantial danger that the sentencer will be swayed by his own moral disapproval of the conduct and will not rationally and impartially consider the relevance of the conduct to the defendant's future dangerousness. To ensure that the conduct is properly considered, the state must introduce more than the mere facts of the defendant's sexual history; specifically, the state must, at the least, introduce evidence demonstrating a close link between that history and the defendant's future dangerousness.
>
> In Beam's case, there was no evidence before the trial court supporting

> the existence of a link, close or otherwise, between the facts that he was the victim of incest, had engaged in homosexuality, or had had abnormal sexual relations with women of ages different than himself and the finding of future dangerousness. The psychological evaluation of Beam introduced in the sentencing hearing by the prosecution contains no suggestion that his sexual history indicated that he was likely to commit future violent acts. Nor does the presentence report draw a link between Beam's sexual experiences and a likelihood of future violence. Finally, there was no testimony to that effect during the hearing. In short, the trial judge's decision to draw a link between Beam's sexual experiences and future dangerousness was not based on any evidence of record.

Id.

In the present case, as in ***Beam*** and ***Dawson***, the rap music evidence, without more, was not self-proving. The state, as in ***Beam*** and ***Dawson***, failed to provide the connecting link between Mike's enjoyment of Bone's rap music and the sentencing decision.

Finally, respondent claims that the music was not prejudicial because the jurors would have only heard the words “mo’ murda” and even if they heard the other lyrics, "appellant offers no plausible explanation as to why jurors would attribute the song's foul language and offensive references to appellant, let alone decide that appellant should be executed simply because he listened to rap music." (Resp.Br. 24). But this argument defies logic and common sense and is untenable.

First, the state's entire purpose in utilizing this evidence at trial was precisely so the jury would "attribute" the language "mo' murda" to Mike. The state encouraged the jury to use that the "mo' murda" music against Mike as a basis for sentencing him to death, but the state never told the jury to ignore the rest of the music (T1257). There is no reason to think that the jury would ignore the other words. Moreover, we cannot assume that the jurors did not hear the other words – why play the CD if that were the case when Tracie Bulington could have just testified that Mike listened to a song that contained the lyrics “mo’ murda?” Since the state chose to play the entire song -- rather than just play the "mo' murda" refrain or just have Tracie testify about the words "mo' murda," we can assume the state wanted the jury to hear everything on that sound track.

Further, because the state chose to play this rap song at penalty phase – and to highlight it in the penalty phase argument -- we can and must assume that it is prejudicial. *See* ***Miranda v. Arizona***, 384 U.S. 436, 477 (1966) ("If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution").

For the foregoing reasons, respondent's arguments must fail. Mike's sentence of death must be vacated and the cause remanded for a new penalty phase trial.

Reply to Respondent's Argument IB:

1) Disclosure of Tracie Bulington's identification of the song that Mike allegedly played "over and over" was required; respondent apparently has

overlooked Supreme Court Rule 25.03(A)(2) - which requires disclosure of "any oral statements made by the defendant or by a co-defendant..." and,

2) the defense was prejudiced in that had defense counsel known that Tracie could identify the song, the defense would have presented witnesses -- both to support of the defense efforts to exclude the music and to mitigate its effect in the event it was not excluded -- who would have testified that neither Bone nor their music advocated violence and that Mike did not listen to this music to "psych himself" for violence.

Respondent's argument -- that under Supreme Court Rule 25.03(A)(**1**), the state had no duty to disclose because Tracie's statement was not written or recorded (Resp.Br. 32) -- is of no avail because Tracie Bulington was a co-defendant (T955, 1015). the applicable rule is Supreme Court Rule 25.03(A)(**2**) which directs the state to disclose "any oral statements made ... by a codefendant..." As noted in appellant's initial brief (App.Br. 66), the state had a continuing obligation to disclose under Supreme Court Rule 25.03(A)(2) and failed to do so.

Respondent asserts that the ground of the defense objection to Tracie Bulington's changed statement at trial -- unfair surprise -- is different than the claim on appeal -- violation of the state's continuing duty to disclose (Resp.Br. 31). There is no difference. "Surprise" or "unfair surprise" is a regularly used, accepted method of objecting to late or non disclosure and discovery rules violations. *See, e.g.*, ***State v. Whitfield***, 837 S.W.2d 503, 507 (Mo.banc 1992). In ***Whitfield***, at the start of trial, the state belatedly advised the defense of three new

witnesses (of whom two testified) and one new exhibit - a coat with bullet holes. ***Id***. at 506, 508. One new witness was a police officer, Officer George, whose report had previously been disclosed to the defense. ***Id***. at 507. In reversing for a new trial, this Court found that the previous disclosure of the police report "does not prevent prejudice to the defense from his surprise testimony. " ***Id***.; emphasis added. Officer George was not listed as a witness; the defense attorney testified that she was not prepared to cross-examine him and was surprised by his testimony...") (emphasis added).

The same prejudice occurred in the present case. Prior to trial, at her deposition, Tracie had said that Mike played a song with the lyrics "mo' murda" (T1027-29). But because Tracie was a co-defendant, not just an ordinary witness, defense counsel could not simply go to the jail and reinterview her after locating the "CD" (T1029-30).

Because Tracie had previously said she did not know which song Mike played, the defense did not anticipate that the state would play a CD[5] with the song at trial.

[5] A question raised but never answered by the discussion at the bench is what became of the CD['s] or tape[s] that Mike and Tracie had listened to in Tracie's car. Presumably the tape or CD was seized from Tracie's car when Mike and Tracie were arrested, but the record of Mike's trial makes no reference to this matter. The prosecutor never explains why he had to "go to the internet and look

Accordingly, the defense was unprepared to meet and defend against this evidence. Had the defense known that Tracie could identify the song, the defense would have anticipated that the song might be admitted into evidence. At the very least, the defense could have found witnesses familiar with Bone's music -- rap music experts -- who could have testified that Bone did not advocate violence. The defense could have presented these experts both to exclude the rap music evidence and, if not successful, to mitigate its effect on the jury through testimony explaining that the group, although utilizing words of violence and profanity, did not advocate violence.

For the foregoing reasons, respondent's arguments must fail. Mike's sentence of death must be vacated and the cause remanded for a new penalty phase trial.

Reply to Respondent's Argument IIIB:

Respondent's reliance on *Pulley v. Harris* (and the continuing viability of that case) in support of its contention that proportionality review is not required by the Eighth Amendment must be considered in light of the Supreme Court's recent decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002).

In support of its argument that the Constitution does not require this Court to conduct a review of the proportionality of Mr. Tisius's sentence of death, respondent cites to ***Pulley v. Harris***, 465 U.S. 37 (1984). Appellant will not here

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it up" when, presumably, the actual tape or CD album was still in the possession of the prosecutor or of the law enforcement agency.

repeat the point and argument made in his initial brief: that recent decisions of the Supreme Court in civil punitive damage cases should apply to capital criminal cases and mandate proportionality review of a sentence of death under the Due Process Clause of the Fourteenth Amendment (App.Br. 27-28, 79-80, 85-87).

Subsequent to the filing of appellant's initial brief, the Supreme Court decided ***Atkins v. Virginia***, 122 S.Ct. 2242 (2002). In ***Atkins***, the Court reiterated that '[t]he Eighth Amendment succinctly prohibits "excessive" sanctions.' ***Id***. at 2246. Excessive punishments are prohibited by the Eighth Amendment because ' "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." ***Id***.; citation omitted. The "[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" [citation omitted] and '[p]roportionality review under those evolving standards should be informed by " 'objective factors to the maximum possible extent' " (citations omitted).

The Court's language in ***Atkins*** regarding the Eighth Amendment's prohibition of "excessive" punishment echoes the language of the Court's opinion in ***BMW of North America v. Gore***, 517 U.S. 559, 562 (1996):

that '[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ' " 'grossly excessive' " punishment on a tortfeasor.' ***Id***. at 562. *See also*, ***Honda v. Oberg***, 512 U.S. 415 (1994) (Due Process Clause mandates appellate review of jury's determination of punitive damages to ensure they are not excessive).

These recent cases cast doubt on the continuing viability of the holding of ***Pulley v. Harris***. Meaningful proportionality review, in which the Court must consider all other "similar" cases and not only those in which a sentence of death was imposed, is required by the Fourteenth Amendment and by the Eighth Amendment. ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc.***, 532 U.S. 424 (2001); ***BMW***, *supra;* ***Honda***, *supra*.

Truly meaningful proportionality review will require creation of a database accessible to the Court as well as to the Attorney General's Office and attorneys representing a death-sentenced appellant. Pending implementation of such a database, and an opportunity for further briefing on the issue of the proportionality of the sentence of death imposed upon Mike Tisius, the Court should suspend proceedings in the instant case. In the alternative, for the foregoing reasons, the Court must vacate Mike's sentence of death and sentence him to life imprisonment without probation or parole.

Reply to Respondent's Argument IV:

1) Although *Apprendi v. New Jersey* and *Ring v. Arizona* do not expressly hold that aggravating circumstances must be included in the charging indictment or information, those cases and their progeny are consistent with and support that contention;

2) Missouri's Constitution and case law requires a felony to be prosecuted by formal charge in an indictment or information which must include all

elements of the charged offense;

3) Contrary to the claim in respondent's brief, appellant is not challenging the constitutionality of Section 565.005.1; appellant's point is that failing to charge the statutory aggravator or aggravators in the indictment or information, and giving notice of the statutory aggravators under Section 565.005.1, does not satisfy the federal and state constitutional requirements that a felony be prosecuted only by information or indictment; the "notice" required is that provided by information or indictment.

As an initial matter, in Respondent's brief, opposing counsel correctly notes that in appellant's brief, appellant's counsel incorrectly quoted language from ***Apprendi v. New Jersey***, 530 U.S. 466 (2000) by substituting the "Fourteenth" Amendment for the "Fifth" Amendment (App.Br. 89) - without using brackets to indicate the substitution - as follows: In ***Apprendi v. New Jersey***, the Supreme Court held that ' "under the Fourteenth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime **must be charged in an indictment**, submitted to a jury, and proven beyond a reasonable doubt" ' (underline added for clarity). Undersigned counsel apologizes to both the Court and to opposing counsel for this error and wishes to thank opposing counsel for bringing this matter to her attention. The full quote from this portion of the ***Apprendi*** opinion may help to explain how appellant's counsel came to make this mistake:

Our answer to that question was foreshadowed by our opinion in ***Jones v.***

United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." ***Id***., at 243, n. 6, 119 S.Ct. 1215. **The Fourteenth Amendment commands the same answer in this case involving a state statute**.

530 U.S. at 476 (emphasis added).

Missouri's aggravating circumstances, 'setting the outer limits of a sentence, and of the judicial power to impose it, are the [alternate] elements of the crime [of "aggravated" first degree murder] for the purposes of the constitutional analysis.' ***Harris v. United States***, 122 S.Ct. 2406, 2419 (2002):

> A crime was not alleged, and a criminal prosecution not complete unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any "fact that ... exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" ... would have been, under the prevailing historical practice, an element of an aggravated offense...

Id. at 2417.

In ***Ring v. Arizona***, 122 S.Ct. 2428 (2002), the Supreme Court stated that

"Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' " ***Id***. at 2443 *citing* ***Apprendi***, 530 U. S., at 494, n. 19. The same is true in Missouri. Although the Supreme Court in the ***Ring*** case was not presented, and did not decide, the same claim raised here -- that statutory aggravating circumstances are elements of the "greater" offense of first degree murder and must be charged in the indictment or information -- the language of ***Ring***, and also of ***Harris***, ***Apprendi***, and ***Jones***, support appellant's point and argument that Missouri's statutory aggravating circumstances are elements of the Missouri offense of aggravated first degree murder and must be charged in an indictment or information. Missouri's Constitution, which provides "[t]hat no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies..." also supports appellant's argument. Art. I, § 17, Mo.Const. It would be odd, indeed, if in all other Missouri cases, the offense must be correctly charged by indictment or information, but in capital cases, something less were held to suffice.

Finally, respondent states that "[a]ppellant additionally asserts, without argument or citation of authority, that the notice provision in §565.005.1 conflicts with Article I, Sections 10 ("due process"), 14 (courts open to every person), 18(a) (right to demand nature and cause of accusation) and 21 (cruel and unusual punishments) of the Missouri Constitution (1945) (Resp.Br. 55). Undersigned counsel has been unable to find such a claim in appellant's brief and is fairly confident that no such claim was raised in appellant's brief.

The matter having now been brought to his attention, appellant has no quarrel with §565.005.1. But, as appellant's previous arguments should have already made clear, §565.005.1 is not a substitute for charging the statutory aggravating circumstances in the indictment or information.

> It is beyond question that to be sufficient, an information must adequately notify a defendant of the charge, ***State v. Tandy***, 401 S.W.2d 409 (Mo. 1966), and the elements of the offense charged must be pleaded with definiteness and certainty. ***State v. Cantrell***, 403 S.W.2d 647 (Mo. 1969). ***State v. Williams*,** 611 S.W.2d 26, 31 (Mo.banc 1981).

For the foregoing reasons, respondent's arguments must fail. Appellant's sentence of death must be vacated and he must be resentenced to life imprisonment without probation or parole.

Reply to Respondent's Point VI:

Although the defendant generally is not the party that wishes to admit statements of its co-conspirators and for that reason there will be few cases in which the issue is whether the trial court erred in refusing to allow defendant to present such evidence, there is really no good reason to restrict such evidence to the state for use against the defendant. Contrary to respondent's argument (Resp.Br. 66), at least one court has recognized the irrationality of such a rule. *See* ***Nettles v. State***, 683 So.2d 9, 12 (Ala.Cr.App. 1996) *citing* ***Carpenter v. State***, 404 So.2d 89, 95 (Ala.Cr.App. 1980) ("a co-conspirator's statement may

be admitted against the State, i.e., where the statement is exculpatory, as well as against the accused, i.e., where the statement is inculpatory").

'Any "disparity [in the treatment of co-conspirator statements when offered against the State and when offered against the accused] is odd if such evidence is trustworthy." ' ***Id***., *citing* 'Robert B. Humphreys, *In Search of the Reliable Conspirator: A Proposed Amendment to Federal Rule of Evidence 801(d)(2)(E),* 30 Am.Crim.L.Rev. 337, 351-52 n. 82 (1993) (discussing the "doctrinal incoherence" of the co-conspirator exemption of Fed.R.Evid. 801(d)(2)(E) and criticizing the federal courts' differing treatment of co-conspirator statements depending on whether the government or the accused is seeking to use them).'

Not only is it "odd" to condition admissibility of a co-conspirator's statement on whether it is the state or the defense that offers the statement, but "to give the benefit of the co-conspirator rule only to the State while denying that benefit to the accused would violate the appellant's due process right to present a defense ... fairness dictates that what is generally allowable to the State also ought to be generally allowable to the accused." ***Nettles***, 683 So.2d at 13.

The dearth of cases in which a defendant has been allowed to admit a co-conspirator's statement arises from the fact that it will be rare when a co-defendant's or co-conspirator's statement will be useful to the defendant. Yet, as ***Nettles*** explains, there are really no valid grounds for precluding the defendant from making use of a co-conspirators statement in the rare instance in which the defendant wishes to do so.

For the foregoing reasons, and the reasons already presented in appellant's initial brief, the trial court erred to Mike's prejudice in excluding the "Karl" letter. The cause must be reversed and remanded for a new trial or, in the alternative, for a new penalty phase proceeding.

CONCLUSION

For the foregoing reasons, appellant affirms the Conclusion of his initial brief and prays that this Court will reverse the judgment of the circuit court and discharge him, or in the alternative, remand for a new trial or a new penalty phase proceeding, or in the alternative, for imposition of a judgment of second degree murder and resentencing, or, in the alternative, for imposition of a sentence of life imprisonment without possibility of probation or parole for fifty (50) years.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 5,801.

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

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were delivered this ___ day of _____, 2002, to Mr. John M. Morris, Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109

_____

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