

## Completely Unguided Discretion: Admitting Non-Statutory Aggravating and Non-Statutory Mitigating Evidence in Capital Sentencing Trials

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### I. INTRODUCTION

As an attorney practicing exclusively in the area of death penalty defense at the trial level for the last ten years, my perspective on the problems inherent in the system seems vastly different from that presented in academic research and even in case law. While most of the recent changes in death penalty law have focused on the right of the defendant to have sentencing enhancing elements of an offense proven to a jury beyond a reasonable doubt,<sup>1</sup> much of the evidence presented in an actual death penalty jury trial is non-statutory aggravation and non-statutory mitigation. Generally, non-statutory aggravating evidence shows the impact of the crime on the victim's family or involves prior bad acts of the defendant. Non-statutory mitigating evidence involves the defendant's background, good character, and ability to adjust to a jail setting or anything about his involvement in the crime, which is mitigating. These types of evidence are admitted at the discretion of the trial judge, often without any instructional guidance for the jury. Little attention has been given to why it is constitutionally acceptable for the sentencing phase of a capital trial to be an evidentiary free-for-all and to whether this is an unconstitutional exercise of state power.

Statutory schemes requiring guided discretion in sentencing are standard in the federal government, as well as states that have a death penalty. Throughout this article, I refer to Missouri's death penalty scheme as an example when discussing the problems in admitting non-statutory aggravating and non-statutory mitigating evidence without any guidance. In this article, I will outline the procedure followed in sentencing a person to death and analyze problems with allowing juries to consider non-statutory

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1. Ring v. Arizona, 536 U.S. 584, 612 (2002).

aggravating and mitigating evidence without instructional guidance, which make the imposition of the death penalty unconstitutionally arbitrary.

## II. CONSTITUTIONAL FRAMEWORK FOR PENALTY PHASE AFTER DEFENDANT HAS BEEN CONVICTED OF MURDER

### A. *Statutory Aggravating Circumstances and the Death Eligibility Step*

When the U.S. Supreme Court determined that individual states could constitutionally reinstate the death penalty, they focused on procedural safeguards to make sure that the death penalty would not be applied in an arbitrary manner.<sup>2</sup> According to the Court, a statutory scheme for imposition of the death penalty is constitutional if it provides the sentencer with clear standards to determine when the death penalty should be imposed and avoids arbitrary and discriminatory application of the death penalty.<sup>3</sup> This has resulted in the creation of statutory aggravating, or special, circumstances that supposedly narrow the class of homicides in which the death penalty can be sought. Statutory aggravating circumstances are simply facts, delineated by statute, which, when proven beyond a reasonable doubt, can make a defendant eligible for the death penalty.<sup>4</sup> However, these circumstances do not, in fact, function as intended and are often unconstitutionally applied.

According to the Court, the characteristics of the individual offender and the individual offense must be considered as part of the sentencing decision.<sup>5</sup> Additionally, the law must allow the defendant to present any evidence in mitigation of punishment at the sentencing hearing.<sup>6</sup> Moreover, appellate review must be guaranteed to ensure that the death penalty is applied fairly and to ensure that the death penalty is not excessive or disproportional to the seriousness of the offense.<sup>7</sup>

The commands of the U.S. Constitution, as interpreted by the Supreme Court, have forced both the states and the federal government to set up fairly consistent procedures for determining when a criminal defendant can

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2. *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

3. *Kansas v. Marsh*, 126 S. Ct. 2516, 2524 (2006) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg*, 428 U.S. at 153).

4. *See, e.g.*, MO. REV. STAT. §§ 565.030, 565.032 (2000).

5. *Lockett v. Ohio*, 438 U.S. 586, 602–03 (1978).

6. *See Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (constitutionally acceptable statutory schemes for implementation of the death penalty must not limit mitigation evidence presented on behalf of the defendant); *Lockett*, 438 U.S. at 608.

7. *Gregg*, 428 U.S. at 194–95.

be sentenced to death.<sup>8</sup> The general death penalty procedure involves two steps. The first is the eligibility step.<sup>9</sup> The requirement that a state narrow the class of death eligible cases is satisfied by the state giving notice of, and proving an aggravating circumstance beyond a reasonable doubt.<sup>10</sup> Because aggravating circumstances are used as a sentencing enhancement, they must be proven beyond a reasonable doubt and must be decided by the jury.<sup>11</sup> In order for a defendant to be death eligible, a jury must unanimously decide that the state has proven an aggravating circumstance beyond a reasonable doubt.<sup>12</sup> If the jury finds that the eligibility step has been proven beyond a reasonable doubt, they can consider the second step.

The second step is the selection, or weighing, step. After an individual is considered death eligible, the jury must consider whether or not this particular individual in this particular case should be sentenced to die.<sup>13</sup> At this stage, the Constitution requires that the jury be able to consider evidence that mitigates punishment.<sup>14</sup> This is generally set up as a weighing of the evidence in aggravation of punishment against the evidence in mitigation of punishment.<sup>15</sup> Missouri's weighing step directs the jury to return a verdict of life if the evidence in mitigation of punishment outweighs the evidence in aggravation of punishment.<sup>16</sup>

Statutory aggravating factors are supposed to narrow the class of persons eligible for the death penalty. Missouri, for example, has seventeen statutory aggravating circumstances.<sup>17</sup> Most states and the Federal Death Penalty Act have aggravating circumstances that are substantially similar.<sup>18</sup>

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8. See, e.g., Federal Death Penalty Act, 18 U.S.C. §§ 3592(a)–(d) (2006) [hereinafter FDPA]; see also MO. REV. STAT. § 565.032 (2000).

9. See generally FDPA, 18 U.S.C. §§ 3592(a)–(d).

10. Ring v. Arizona, 536 U.S. 584, 612 (2002); see also Gardner v. Florida, 430 U.S. 349 (1977) (holding that defendant has a right to have notice of all aggravating evidence which the state may present).

11. Ring, 536 U.S. at 609.

12. *Id.*; see also MO. REV. STAT. § 565.030 (2000).

13. Kansas v. Marsh, 126 S. Ct. 2516, 2524–25 (2006).

14. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

15. See generally FDPA, 18 U.S.C. §§ 3592(a)–(d).

16. MO. REV. STAT. § 565.030.4(3) (2000).

17. *Id.* § 565.032. The seventeen statutory aggravating circumstances are:

1. The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;
2. The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;
3. The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;
4. The offender committed the offense of murder in the first degree 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;

However, upon reviewing the seventeen aggravating circumstances in Missouri, it is difficult to imagine a murder in the first degree in which the

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5. The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;
  6. The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;
  7. The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;
  8. The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;
  9. The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;
  10. The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;
  11. The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo (drug offenses);
  12. The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;
  13. The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;
  14. The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;
  15. The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo (drug offenses);
  16. The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo (drug offenses);
  17. The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.

*Id.*

18. See, e.g., FDPA, 18 U.S.C. § 3592 (2006); ALA. CODE § 13A-5-49 (1975); ARIZ. REV. STAT. ANN. § 13-703(F) (1973); ARK. CODE ANN. § 5-4-604 (1975); CAL. PENAL CODE § 190.2 (West 2001); COLO. REV. STAT. ANN. § 16-11-1-3 (West); CONN. GEN. STAT. § 53a-46a (1973); DEL. CODE ANN. tit. 11, § 4209(e) (1972); FLA. STAT. § 921.141(5) (2005); GA. CODE ANN. § 17-10-30 (1973); IDAHO CODE ANN. § 19-2515(3)(b) (1998); 720 ILL. COMP. STAT. 5/9-1(b) (1973); IND. CODE § 35-50-2-9(b) (1977); KAN. STAT. ANN. § 21-4625 (2006); KENT. REV. STAT. ANN. § 532-025(2)(a) (West 2001); LA. CODE CRIM. PROC. art. 905.4 (1976); MD. CODE ANN., CRIM. LAW § 2-303(g) (West 2002); MISS. CODE ANN. § 99-19-101(5) (1977); MONT. CODE ANN. § 46-18-303 (1977); NEB. REV. STAT. § 29-2523 (1973); NEV. REV. STAT. § 200.033 (1977); N.H. REV. STAT. ANN. § 630:5(VII) (1974); N.M. STAT. § 31-20A-5 (1979); N.C. GEN. STAT. § 15A-2000(e) (1977); OHIO REV. CODE ANN. § 2929.04 (2002); OKLA. STAT. tit. 21, § 701.12 (1976); OR. REV. STAT. § 163.150(1)(b) (1985); 42 PA. CONS. STAT. § 9711(d) (1974); S.C. CODE ANN. § 16-3-20(C)(a) (1974); S.D. CODIFIED LAWS § 23A-27A-1 (1979); TENN. CODE ANN. § 39-13-204(i) (1989); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1973); UTAH CODE ANN. § 76-5-202 (1973); VA. CODE ANN. § 19.2-264.2 (1977); WASH. REV. CODE § 10.95.020 (2003); WYO. STAT. ANN. § 6-2-102(h) (1982).

death penalty could not be charged. For example, one of the aggravating circumstances is that “the offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.”<sup>19</sup> On its face this seems to apply only to situations involving explosives or bombs that, by their nature, would “normally be hazardous to more than one person.”<sup>20</sup> However, this aggravating circumstance has been interpreted to include the use of a handgun when more than one person is in the vicinity.<sup>21</sup> Also, the aggravating circumstance which applies to “the murder of an individual who was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness”<sup>22</sup> by its plain language applies only when the victim is a witness or is going to be a witness in a pending criminal case or investigation. However, this has been extended to include situations in which the victim is considered to be a witness in the current case.<sup>23</sup> So a victim is considered to be a witness in the potential investigation of the victim’s own murder.<sup>24</sup> One can only try to imagine a case in which this aggravating circumstance could *not* be applicable. An overview of the other statutory aggravating circumstances shows that between the sheer number of aggravating circumstances available and lax interpretation by courts, virtually any murder in the first degree could conceivably be death eligible. This is left solely to the discretion of the prosecuting attorney.

The statutory aggravating circumstances are generally self-evident from the facts of the guilt phase of the trial. For example, that a victim was a police officer killed during his official duties, or because of his official duties, would be a fact presented in the guilt phase of the case.<sup>25</sup> If the

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19. MO. REV. STAT. § 565.032.2(3) (2000).

20. *Id.*

21. *State v. Kenley*, 952 S.W.2d 250, 275 (Mo. 1997) (en banc). The Missouri Supreme Court, upon rejecting the defendant’s argument in *Kenley*, stated “the aggravating circumstance in question is not constitutionally infirm because it does not apply to every death penalty candidate. It does not apply to defendants who do not use weapons or devices or to defendants who do not endanger more than one person.” *Id.* Although this interpretation of the statute may seem so broad as to render the narrowing function of the aggravating circumstance moot, Mr. Kenley did not get relief from the Eighth Circuit or the U.S. Supreme Court and has since been executed.

22. MO. REV. STAT. § 565.032.2(12) (2000).

23. *State v. Shafer*, 969 S.W.2d 719, 739 (Mo. 1998) (en banc).

24. *Id.* The Missouri Supreme Court in *Shafer* made clear that this aggravating circumstance applies if “a reasonable trier of fact can infer that the defendant foresaw an investigation and killed the victim to eliminate that threat.” *Id.* The Missouri Supreme Court in *Shafer* cited to another case, *State v. Copeland*, 928 S.W.2d 828, 850 (Mo. 1996) (en banc), which also interpreted this aggravating circumstance this broadly. One can assume since the U.S. Supreme Court denied certiorari in *Copeland* that the Court was not overly concerned about this interpretation either.

25. MO. REV. STAT. § 565.032.2(5), (8) (2000).

defendant is found guilty of murder in the first degree, what additional evidence would the state have to present—to prove beyond a reasonable doubt that the victim was a police officer? What possible defense could the defendant raise? Likewise, the fact that the defendant killed more than one person will be obvious from the guilt phase evidence.<sup>26</sup> What defense could be presented? Even statutory aggravating circumstances such as the defendant having a prior conviction for murder, while not being guilt phase evidence, can rarely be defended against.

Thus, statutory schemes which purport to require the state to prove an aggravating circumstance beyond a reasonable doubt do not, in fact, narrow the class of homicides for which individuals can be killed. U.S. citizens are not given fair trials simply because the evidence used to kill them is nothing more than the evidence used to convict them. Therefore, due process requirements are not met when the “additional” facts that the state must prove beyond a reasonable doubt in order to enhance a defendant’s punishment to death are all facts which are presented and decided against the defendant during the guilt phase. Nor is due process met when there are so many statutory aggravating circumstances that any homicide could be grounds for the death penalty.

#### B. *Statutory Mitigating Circumstances*

In contrast to statutory aggravating circumstances, the statutory mitigating circumstances are generally not as dependent upon the guilt phase evidence. In Missouri, as in most jurisdictions, they are more focused on the defendant’s characteristics and mental state at the time of the crime. There are only seven statutory mitigating circumstances in Missouri.<sup>27</sup> As previously noted, there are seventeen statutory aggravating circumstances.<sup>28</sup> Some of the statutory mitigating circumstances are rarely if ever

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26. *Id.* § 565.032.2(2).

27. MO. REV. STAT. § 565.032.3 (2000). Statutory mitigating circumstances include the following:

1. The defendant has no significant history of prior criminal activity;
2. The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3. The victim was a participant in the defendant’s conduct or consented to the act;
4. The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;
5. The defendant acted under extreme duress or under the substantial domination of another person;
6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
7. The age of the defendant at the time of the crime.

*Id.*

28. *Id.* § 565.032.2.

used. The statutory mitigating circumstance regarding the age of the defendant has been practically rendered obsolete by the U.S. Supreme Court's decision that the execution of juveniles is unconstitutional.<sup>29</sup> Certainly, the age of the defendant could be a statutory mitigating circumstance in any case (everyone has an age), but why one would choose to submit it to a jury in the trial of say a thirty-year old defendant is unclear. In the narrow class of cases where the defendant is between eighteen and twenty-one, this may still be of value.

It is also unclear how useful to the defense the statutory mitigating circumstance that the victim was a participant in the defendant's conduct, or consented to the act, is when applied.<sup>30</sup> I am unaware of any case in Missouri during the last ten years where this mitigating circumstance was applicable and submitted to a jury. My best guess at why this statutory mitigator is included, is that felony murder was considered first degree murder in Missouri until 1984 and was subject to the punishment of death.<sup>31</sup> Logically, this mitigator would apply in a situation where a co-defendant is killed by police during the commission of a crime and the defendant is prosecuted for the death of the co-defendant. It seems as though the legislature never got around to amending the statute. This should be a warning that there are serious problems with this system.

Since the Supreme Court's decision banning the execution of the mentally retarded, jurors are instructed to consider this in making their decision on punishment.<sup>32</sup> If the defense can show by a preponderance of the evidence that the defendant is mentally retarded, the jury cannot return a verdict of death.<sup>33</sup> This is not a statutory mitigating circumstance but is a bar to death eligibility.<sup>34</sup>

After reviewing the elements that are statutorily prescribed for the penalty phase of a capital trial, it becomes obvious that the majority of the evidence is not going to be related to proving an aggravating circumstance beyond a reasonable doubt. Unless the defense is putting on psychological evidence to support a statutory mitigating circumstance, it is clear that much of what will be presented by the defense may not be related to evidence specified by statute.

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29. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

30. MO. REV. STAT. § 565.032.3(3) (2000).

31. *Id.* § 565.003 (1978).

32. *Atkins v. Virginia*, 536 U.S. 304, 318–21 (2002); *see also* MO. REV. STAT. § 565.030.4(1).

33. MO. REV. STAT. § 565.030.4(1).

34. *Id.*

### III. THE WEIGHING STEP—SELECTION OF THIS DEFENDANT FOR THE DEATH PENALTY

The real heart of what is presented in the penalty phase of a capital trial is usually non-statutory aggravation and non-statutory mitigation. This type of evidence is usually considered by the jury in the “weighing step” of the process.<sup>35</sup>

So long as the qualification step requires the state to prove a statutory aggravating circumstance beyond a reasonable doubt, and state law sets up some procedure for a jury to consider mitigating evidence, the selection step can be set up any way the state decides.<sup>36</sup> It even seems permissible at this point to require the defendant to carry the burden of proving that miti-

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35. See, e.g., MAI CR-3d 314.44. MAI CR-3d reads as follows:

(As to Count \_\_\_\_,if) (If) you have unanimously found beyond a reasonable doubt that (one or more of) the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_ exists, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances (s) submitted in Instruction No. \_\_\_\_, and evidence presented in support of mitigating circumstances submitted in this instruction.

As (a circumstance) (circumstances) that may be in mitigation of punishment, you shall consider: *[Insert in indented paragraphs and, if more than one, list and number in separate paragraphs any one or more of the following “statutory mitigating circumstances” which are supported by the evidence and requested by the defendant. Omit this paragraph if there are no such circumstances to submit.]*

1. Whether the defendant has no significant history of prior criminal activity.
2. Whether the murder of [*name of victim in this count*] was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. Whether [*name of victim in this count*] was a participant in the defendant’s conduct or consented to the act.
4. Whether the defendant was an accomplice in the murder of [*name of victim in this count*] and whether his participation was relatively minor.
5. Whether the defendant acted under extreme duress or under substantial domination of another person.
6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
7. The age of the defendant at the time of the offense.

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

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant’s punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

*Id.*

36. *Kansas v. Marsh*, 126 S. Ct. 2516, 2525 (2006) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 172–74 (1983)).

gating circumstances outweigh aggravating circumstances.<sup>37</sup> The Supreme Court has never held that the Constitution requires a specific method for balancing aggravating and mitigating factors.<sup>38</sup>

In Missouri, the jury is instructed to consider whether “evidence in aggravation of punishment is not outweighed by evidence in mitigation of punishment.”<sup>39</sup> The jury is required to return a sentence of life only if its decision is unanimous—that the evidence in mitigation of punishment outweighs the evidence in aggravation of punishment.<sup>40</sup> However, even if eleven jurors believe that evidence in mitigation of punishment outweighs evidence in aggravation of punishment, and only one juror believes that aggravation outweighs mitigation, the jury can consider and even return a sentence of death.<sup>41</sup> Most statutory schemes are set up in a similar manner, although some place the burden of proof on the defendant to show by a preponderance of the evidence that evidence in mitigation of punishment outweighs evidence in aggravation of punishment.<sup>42</sup> Requiring a capital defendant to bear the burden of proof should be per se unconstitutional. Returning a verdict of death without unanimity of the jury also should be per se unconstitutional.

#### A. *Non-Statutory Aggravation*

Non-statutory aggravating evidence is any evidence that the state presents in the penalty phase of the trial that is not directly related to proving one of the statutory aggravating circumstances beyond a reasonable doubt. There are many types of non-statutory aggravating evidence that the state may choose to present. One of the most common is victim impact evidence. Victim impact evidence is testimony from people who knew the victim and can give the jury some idea of the victim’s life and can testify about how the death of the victim has affected them. The Supreme Court found that this type of evidence does not violate the Constitution but noted that it should be a “quick glimpse” of the victim in life.<sup>43</sup> However, this

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37. *Walton v. Arizona*, 497 U.S. 639, 645 (1990). The Court in *Marsh* relied extensively on *Walton* and found it controlling law. *Marsh*, 126 S. Ct. at 2527. However, the Court in *Marsh* noted that the Kansas statute in question did require the state to prove that evidence in aggravation of punishment outweigh evidence in mitigation of punishment beyond a reasonable doubt. *Id.*

38. *Id.* at 2524–25.

39. MAI-CR3d 313.44.

40. MO. REV. STAT. § 565.032.4(3) (2000); MAI-CR3d 313.44.

41. MAI-CR3d 313.44.

42. *See Walton*, 497 U.S. at 650 (finding that so long as states allow for the jury to consider mitigating evidence, they may place the burden on the defendant); *see also Manns v. Quarterman*, 236 Fed. Appx. 908 (5th Cir. 2007) (Texas law placing burden on defendant to prove mitigation outweighs aggravation is permissible).

43. *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (O’Connor, J., concurring).

“quick glimpse” has morphed into a full-length feature film in some cases.<sup>44</sup> Again, this is not about punishing what was done but to whom it was done. Killing a middle class white person becomes very different from killing a poor black person. This should be unconstitutional because a death sentence is supposed to be based solely on the specific facts of the crime and the individual characteristics of the defendant.<sup>45</sup> There is reason to believe that the victim’s race and socio-economic status seem to matter very much in capital sentencing.<sup>46</sup>

In Missouri, victim impact evidence is offered without any instructional guidance. There is no burden of proof for victim impact evidence. It is admitted completely at the discretion of the trial judge.<sup>47</sup>

Evidence of the defendant’s prior bad acts may also be admitted as non-statutory aggravating evidence.<sup>48</sup> This can include arrests, unadjudicated bad acts, pending cases that have yet to be adjudicated, and cases that have previously been tried and in which the defendant has been found not guilty.<sup>49</sup> This is basically character evidence—the proof of punishment based not on what was done but rather on who did it. Convicting by character is nothing more than “corruption of the blood” in modern form.<sup>50</sup>

Much of the non-statutory aggravating evidence the jury is allowed to hear would not normally be admitted as evidence in the guilt phase of the

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44. *State v. Storey*, 40 S.W.3d 898, 908–09 (Mo. 2001) (en banc). The Missouri Supreme Court held that it was not excessive to allow the state to present victim impact evidence that included photos of the victim’s tombstone, readings of poems written about the victim, photos and testimony about a memorial garden planted in the victim’s memory, photos of plaques commemorating the garden, copies of a special edition of the school newspaper about the victim’s death, reading of a eulogy from the victim’s funeral, photos of a balloon release in the victim’s honor, and photos of the victim with her entire school class. *Id.*

45. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978).

46. *See Ring v. Arizona*, 536 U.S. 584, 617 (2002) (Breyer, J., concurring) (discussing race and socio-economic factors as they relate to the death penalty).

47. MO. REV. STAT. § 565.030.4 (2000).

48. *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. 2006) (evidence of defendant’s character relevant as penalty phase evidence).

49. *State v. Clark*, 197 S.W.3d 598, 600 (Mo. 2006) (prior jury finding of not guilty does not bar prosecution from presenting facts of that incident in penalty phase of trial); *Forrest*, 183 S.W.3d at 224 (evidence of unadjudicated criminal acts permissible as penalty phase evidence); *State v. Middleton*, 995 S.W.2d 443, 468 (Mo. 1999) (evidence of pending homicides admissible in penalty phase of capital murder trial).

50. Corruption of the blood is a common law penalty that caused convicted felons to be unable to inherit or pass property on to their children. *See Lewis v. Grinker*, 111 F. Supp. 2d 142, 178–81 (E.D.N.Y. 2000) (discussing corruption of the blood and its treatment in the United States). Corruption of the blood has not been looked upon favorably by U.S. courts because it is “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.” *Id.* (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). Character evidence, like corruption of the blood, does not tie punishment to individual responsibility or wrongdoing but to the much less concrete concept of society’s perception of “bad” character.

trial.<sup>51</sup> Here, the rules of evidence, in what should be the most carefully scrutinized area of law, are entirely lax. The rationale for this has been that while capital punishment demands increased reliability, the admission of more, rather than less, evidence during the penalty phase enhances reliability.<sup>52</sup> This doesn't make any sense. If juries are not allowed to hear certain types of evidence because it is too prejudicial, or not probative of an individual's guilt, why does that same evidence somehow transform into being *more* reliable simply because it is being introduced in the penalty phase? If the guilt phase case against an individual is based solely on circumstantial evidence, or eyewitness identification, how would evidence of prior violent acts make a sentence of death more reliable? It seems that the opposite is true—that the sentence of death would be based more on past conduct than on the strength of the facts in the current case. This should not be acceptable if our constitutional standards truly require that the death penalty be applied in a rational and non-arbitrary way.

The admission of non-statutory aggravating evidence is at the discretion of the trial judge, and this discretion is given deference by appellate courts upon review. In Missouri there is no guidance for what, if anything, a trial judge should exclude other than the fact that the state must give notice of any non-statutory aggravating evidence they intend to submit.<sup>53</sup> Presumably, as long as the state has given notice, anything is admissible.

Currently there is no statutory provision or instructional provision concerning the admission of non-statutory aggravating evidence.<sup>54</sup> The jury is not instructed as to what, if any, burden of proof should apply to non-statutory aggravating evidence.<sup>55</sup> Under the Federal Death Penalty Act, a trial court has discretion to exclude evidence if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.<sup>56</sup> However, it is unclear what, if any, evidence is being excluded by trial court judges in federal court.

Some federal courts suggest a pre-trial hearing for the judge to determine if non-statutory aggravating evidence meets a preponderance of the evidence standard before submitting it to a jury.<sup>57</sup> Apparently, there is no

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51. Missouri does not have codified rules of evidence—they are almost strictly common law based. However, the FDPA for example, in section 3593(c), specifically authorizes the admission of evidence that would not be admissible under the Federal Rules of Evidence. FDPA, 18 U.S.C. § 3593(c). The Rules of Evidence do not apply to sentencing proceedings. FED. R. EVID. 1101(d)(3).

52. *United States v. Lee*, 374 F.3d 637, 648 (8th Cir. 2004).

53. *State v. Debler*, 856 S.W.2d 641, 657 (Mo. 1993).

54. *See* MO. REV. STAT. § 565.030 (2000); *see also* MAI-CR3d 314 series.

55. *Id.*

56. *United States v. Fulks*, 454 F.3d 410, 437 (4th Cir. 2006).

57. The trial judge should make a determination whether that evidence is “relevant, that the evidence supporting it is sufficiently reliable, and that the probative value of the evidence is not out-

standard procedure for dealing with the admission of non-statutory evidence.

Even previously adjudicated bad acts where the defendant was found not guilty are admissible in a sentencing phase.<sup>58</sup> The reasoning behind this is that an acquittal in a criminal charge “does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.”<sup>59</sup> Recent Missouri case law suggests that the burden of proof in a non-death-sentencing hearing—to admit facts of a case that previously resulted in a not guilty verdict—should be a preponderance of the evidence standard.<sup>60</sup> However, there are currently no instructions in Missouri given to juries in either non-capital or capital sentencing trials delineating a burden of proof.<sup>61</sup>

The fact that the admission of non-statutory aggravating evidence is done on a case-by-case basis, at the discretion of trial judges without any statutory guidance, illustrates that the constitutional requirement that the death penalty not be applied arbitrarily, cannot be met.

#### B. *Non-Statutory Mitigating Circumstances*

Non-statutory mitigating circumstances can be anything related to the defendant’s background, character, or experiences.<sup>62</sup> Interestingly, the most effective non-statutory mitigation may be related to the guilt phase evidence. Lingering doubt of the defendant’s guilt has been shown to be of the most persuasive evidence to capital jurors.<sup>63</sup> Although limiting the

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weighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” *United States v. Sampson*, 275 F. Supp. 2d 49, 101 (1st Cir. 2003).

58. *State v. Clark*, 197 S.W.3d 598, 600 (Mo. 2006) (en banc) (burden of proof preponderance in non-death case but no instructional guidance). The U.S. Supreme Court suggests that burden of proof should be preponderance.

59. *United States v. Watts*, 519 U.S. 148, 155 (1997) (per curiam).

60. *Clark*, 197 S.W.3d at 600.

61. See MAI CR3d 305.03, 313.44. However, MAI CR-3d 305.3 is applicable to the sentencing phase of a non-capital jury trial and reads as follows:

The law applicable to this stage of the trial is stated in these instructions and Instruction Nos. 1 and 2 that the Court read to you in the first stage of the trial.

In assessing and declaring the defendant’s punishment, you should consider the evidence presented in this case, the argument of counsel, and the instructions of the Court. (You may consider the evidence presented in either stage of the trial.)

You will be provided with forms of verdict for your convenience.

You cannot return any verdict as the verdict of the jury unless all twelve jurors agree to it, but it should be signed by your foreperson alone.

When you have concluded your deliberations, you will complete the applicable form(s) to which you unanimously agree and return (it) (them) together with all unused forms and the written instructions of the Court.

62. MO. REV. STAT. § 565.030.4 (2000).

63. Although there has long been evidence to show that lingering doubt is a mitigating circumstance that jurors often consider, see, e.g., William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life*

types of mitigating evidence that can be considered by a jury is prohibited by the U.S. Constitution,<sup>64</sup> the Missouri Supreme Court found that the trial court was not in error when it precluded the defense from arguing, in the penalty phase, that a sentence of death would be very traumatic for the defendant's family.<sup>65</sup>

In Missouri, the only instructions given to the jury regarding mitigating circumstances are that if the jury unanimously finds that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment then they must return a verdict of life.<sup>66</sup> They are also told that each juror does not have to agree on particular facts in mitigation of punishment.<sup>67</sup>

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*or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 21–22 (1987/1988), courts and legislatures have not formally recognized lingering doubt as a mitigating circumstance. See *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (disallowing lingering doubt about guilt to be considered as a mitigating factor). In *Guzek*, the defendant had been granted a penalty phase retrial. The defendant sought to introduce additional evidence of actual innocence which had not been presented at his guilt phase trial. *Id.* at 523. The Supreme Court held that the defendant could be limited to evidence that had been presented in the guilt phase of his first trial on the penalty phase retrial. *Id.* There was no due process right to present evidence of lingering doubt. *Id.* at 525.

64. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

65. *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. 2006) (en banc).

66. See MAI-CR3d 314.44, 314.48. MAI CR-3d 314.48 is a verdict-directing instruction and merely restates the process that the jury should follow in reaching a verdict. It reads as follows:

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

(As to Count \_\_, if) (If) you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of [name of victim in this count], your foreperson must complete the verdict form and write into your verdict (the) (all of the) statutory aggravating circumstance(s) submitted in Instruction No. \_\_ [Insert the number given to MAI-CR3d 314.40.] which you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of [name of victim in this count] by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of [name of victim in this count] by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

(If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. \_\_ [Insert the number given to MAI-CR3d 314.38.], then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.)

(If you are unable to unanimously find that the defendant was at least eighteen years of age at the time of the murder as submitted in Instruction No. \_\_ [Insert the number given to MAI-CR3d 314.40.], then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.)

The defendant in a capital trial should have the right to have all the steps determined against him by a “beyond a reasonable doubt” standard to satisfy the requirements of the Constitution. Requiring only that aggravating circumstances be proven beyond a reasonable doubt does not narrow the class of homicides subject to the death penalty and does not provide increased reliability in sentencing. Obviously these are determinations about facts and, moreover, the Constitution guarantees the right to trial by jury—not trial by judge—precisely so that the jury can protect the people from the tyranny of the state.

In *State v. Whitfield*, the Missouri Supreme Court implied that the weighing step is a fact finding step and, therefore, should be required to be proven beyond a reasonable doubt, and that the burden should rest upon the state.<sup>68</sup> Although this issue has been raised at the trial level subsequent to *Whitfield*, the court had declined to address this issue. Two other states, Colorado<sup>69</sup> and Nevada,<sup>70</sup> have also concluded that the weighing step is a factual finding by the jury, not merely discretionary weighing. Federal courts have not reached the same conclusion. The Ninth Circuit in *United States v. Mitchell*<sup>71</sup> held that the weighing process merely channels the

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If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No.\_\_\_\_ [Insert the number given to MAI-CR3d 314.40.], then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No.\_\_\_\_ [Insert the number given to MAI-CR3d 314.40.], and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict (the) (all of) the statutory aggravating circumstance(s) submitted in Instruction No.\_\_\_\_ [Insert the number given to MAI-CR3d 314.40.] the you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant’s punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

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

67. MAI-CR3d 314.44.

68. *State v. Whitfield*, 107 S.W.3d 253, 260 (Mo. 2003) (en banc).

69. *Woldt v. People*, 64 P.3d 256, 270 (Colo. 2003) (en banc).

70. *Johnson v. State*, 59 P.3d 450, 460–61 (Nev. 2002).

71. 502 F.3d 931, 993 (9th Cir. 2007).

jury's discretion and also that it does not result in a finding of essential fact.<sup>72</sup>

#### IV. CONCLUSION

Three decades of U.S. Supreme Court cases have sought to reduce arbitrariness in capital sentencing. However, by focusing on how the government narrows the class of homicides in which the death penalty may be sought, the Court has failed to appreciate how a capital trial works in practice. Rarely are the aggravating circumstances issues of fact that will be seriously contested. The courts and legislatures are failing to recognize that the bulk of evidence in capital sentencing trials is admitted without rules of evidence. This is appalling.

The reasoning that more evidence results in more reliability in sentencing is simply not true. Juries need to be given more guidance on how to use non-statutory aggravating and non-statutory mitigating evidence in the sentencing process. The burden of proof should be beyond a reasonable doubt for the weighing step. Juries are clearly making a factual determination when deciding if evidence in aggravation of punishment outweighs evidence in mitigation of punishment. Instructions that explain the burden of proof for non-statutory aggravating and non-statutory mitigating evidence need to be given to juries. Also, courts and legislatures need to make clear rules about what evidence can be admitted and what should be excluded. Hopefully, as capital jurisprudence evolves, courts will take a closer look at non-statutory evidence and take steps to correct these problems.

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72. *Id.*