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No. SC96650

In The Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

vs.

THOMAS OATES,

Appellant.

Appeal from the St. Louis County Circuit Court
Twenty-First Judicial Circuit, Division 14
Case No. 14SL-CR05018-01
The Honorable Kristine A. Kerr, Judge

APPELLANT'S SUBSTITUTE BRIEF

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Section 563.074.1 provides that a person who uses force as described in § 563.031 "is justified in using such force and such fact shall be *an absolute defense to criminal prosecution*." Under § 563.031.1(3), a person can use force, including deadly force, to defend himself unless he "was attempting to commit, committing, or escaping after the commission of *a forcible felony*."

Oates' underlying felony (attempted distribution of drugs) was not a forcible felony, and the trial court found that the evidence supported self-defense. But the court refused to instruct on that defense as to felony murder because the court believed that self-defense was not available for any felony murder. Thus, the issue presented in this case is:

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PRIMARY ISSUE PRESENTED:

Section 563.074.1 provides that a person who uses force as described in § 563.031 "is justified in using such force and such fact shall be *an absolute defense to criminal prosecution*." Under § 563.031.1(3), a person can use force, including deadly force, to defend himself unless he "was attempting to commit, committing, or escaping after the commission of *a forcible felony*."

Oates' underlying felony (attempted distribution of drugs) was not a forcible felony, and the trial court found that the evidence supported self-defense. But the court refused to instruct on that defense as to felony murder because the court believed that self-defense was not available for any felony murder. Thus, the issue presented in this case is:

Whether self-defense is an available defense to felony murder when the underlying felony is not a forcible felony?

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JURISDICTIONAL STATEMENT

Appellant Thomas Oates was convicted by a St. Louis County jury of two counts of felony murder (counts 1 and 3), and two counts of armed criminal action (counts 2 and 4). He was sentenced by the Honorable Kristine A. Kerr to concurrent prison sentences of 15 years, 5 years, 10 years, and 5 years. After an appeal was filed, a division of the Eastern District Court of Appeals issued a unanimous opinion that would have reversed the judgment and remanded for a new trial because Judge Kerr refused to submit self-defense as a basis for negating criminal liability for the felony murder charges even though she had found that the evidence supported self-defense. *State v. Thomas Oates*, No. ED104327 (Mo. App. E.D. 2017) (Dolan, J.; Sullivan, P.J., Richter, J., concurring). But after the State of Missouri filed a rehearing motion, the Chief Judge of that court issued an order transferring the case to this Court pursuant to Rule 83.02.[1] Thus, this Court has jurisdiction. Article V, §§3, 4 and 10, Mo. Const. and Rule 83.02.

[1] The record on appeal contains a legal file (LF), and a transcript (Tr.). Statutory references are to the Revised Statutes of Missouri RSMo 2000, unless otherwise noted, except that all references to §§ 563.011, 563.031, and 563.074 are to RSMo Supp. 2013. Rule references are to Missouri Supreme Court Rules (2016).

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STATEMENT OF FACTS

The Evidence

On May 21, 2014, Latonya Gray was working at a Phillips 66 gas station (Tr. 350, 352). Around 5:00 p.m., Gray heard the screeching sounds of a car (Tr. 356). She looked outside and saw a car speeding across the parking lot at a high rate of speed with Thomas Oates' legs hanging out of the car's window (Tr. 356-59, 481-82). The car stopped on the opposite side of the street near an old nightclub (Tr. 357, 482). Gray went outside to see what was happening (Tr. 358).

Christopher Hopper was in the drive-thru at a nearby Church's Chicken when he noticed a "ruckus going on" at the Phillips 66 parking lot (Tr. 387-88). He saw a white car zipping through the parking lot and then across the street with a person's feet hanging out of the driver's side window (Tr. 388, 390, 391, 395). A few seconds after that person got into the car, it screeched to a halt (Tr. 388-389, 396-97). A second or two after that, there were two shots (Tr. 359, 389, 395-96, 402, 404-06).

After the shots, Oates exited the passenger side door and ran away (Tr. 358-59, 391-92, 397). He was holding two guns (Tr. 360). He told Gray something like, "You didn't see nothing" (Tr. 360, 430, 441).

Oates then ran back to his vehicle where his girlfriend, Maret Taylor, was in the back seat because earlier she had gotten into an argument with Oates (Tr. 476-77, 479). He got into the driver's seat (Tr. 484). He was shaking and crying

(Tr. 484). He had two guns; one was a revolver and the other was black (Tr. 485). He told Taylor, "I just saved my life" (Tr. 487).

Oates and Taylor drove to Taylor's mother's home (Tr. 444-46, 486). On the drive there, Oates was still crying and said that two people had tried to rob him and that one of them had a gun (Tr. 491). He said that he shot them because they were trying to kill him (Tr. 491).

While at Taylor's mother's home, Oates borrowed some clothes from Taylor's nephew because he had blood on his shirt (Tr. 445-46, 454, 488, 534). Oates was still shaky and crying (Tr. 446). He said something to Taylor's nephew about someone trying to rob him (Tr. 455). Oates then hid his clothes and the two guns in the garage (Tr. 534).

In the meantime, police had responded to the Phillips 66 gas station and found Darrah Lane and Leon Davis dead in the white car (Tr. 435-36, 536). Lane was in the driver's seat and Davis was in the passenger's seat (Tr. 361, 366-67). On the passenger floorboard were 12 small baggies of marijuana and a Tupperware container (Tr. 439, 624-25, 627, 631-34).

Gray called the gas station manager, O'Dell Schipp, and told him about the shooting (Tr. 412). From her description of the suspect, Schipp believed that the suspect was a person he knew as "TJ," so he gave TJ's phone number to the police (Tr. 412-14, 460-61). Police officers entered TJ's phone number into the Crime Matrix System and came up with Oates' name (Tr. 461-62). Schipp later identified Oates as being TJ (Tr. 415, 419, 463).

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Oates was arrested outside of Taylor's residence (Tr. 463-66, 495-96, 566-68, 591-92). In the backseat of Taylor's and Oates' vehicle was a backpack, and inside the backpack was a container that had 23 small baggies of marijuana in it (Tr. 636-41, 647).

At Taylor's mother's residence, officers found Oates' bloody clothes and two handguns hidden in the garage (Tr. 576-78, 580, 582-86). One handgun was a .9 millimeter handgun with a clip; it was loaded with 14 live cartridges (Tr. 585, 694-95). The other was a .38 caliber revolver, which was loaded with two spent cartridge casings and four live cartridges (Tr. 586, 683, 688).

An autopsy revealed that Lane and Davis each died from a gunshot wound to the neck, which caused injuries to their spinal cords (Tr. 546, 548-50, 552, 557-58). The entrance wound to Davis was on the left side of the neck and the exit wound was under the right ear (Tr. 548-50). The entrance wound to Lane was on the right side of the neck, almost at the top of the shoulder; there was no exit wound (Tr. 552-53). Toxicology reports revealed that they both had active amounts of marijuana in their systems (Tr. 560).

City of Florissant Detective Shawn Reiland interviewed Oates (Tr. 709-11). Oates told Reiland that he was attempting to buy marijuana from Davis, and that there was another male in the backseat of the car who got into an argument with Davis and shot Davis, and then after Oates got out of the car, that other person shot Lane too (State's Exhibit No. 44). The first interview ended when Oates requested an attorney (Tr. 721).

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Oates was left in the unlocked interview room (Tr. 673, 675). According to Officer Sweeso, Oates left that interview room and got Sweeso's attention and asked to speak to Reiland (Tr. 673, 721).

During Reiland's second interview with Oates, Oates still maintained that he was buying marijuana from Davis, but he finally admitted that he shot Davis after Davis attempted to shoot him first, and that he shot Lane when he saw her reaching for something (State's Exhibit No. 45).

Subsequently, Oates was indicted for the conventional second-degree murder of Lane (count 1), a related armed criminal action charge (count 2), the conventional second-degree murder of Davis (count 3), and a related armed criminal action charge (count 4) (LF 13-14). Later, the State filed a notice informing Oates that, as to both homicides, should the State submit felony murder instructions under § 565.021.1(2), they would be based on the deaths being caused as the result of the attempted perpetration of felony Distribution of a Controlled Substance, § 195.211, committed by Oates (LF 26).[2]

At a jury trial, Oates testified that on the day before the shootings, he met Davis at the gas station (Tr. 760). Davis wanted to buy some marijuana, and Oates

[2] Oates filed a motion to strike that notice because the felony murder counts were not charged in the indictment (LF 78-79). That motion was overruled by the trial court (Tr. 88-89). See Point II.

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told Davis that he had some to sell (Tr. 761). Davis got Oates' phone number and said that he would call Oates later (Tr. 761).

On the day of the shootings, Oates received a phone call from a girl who called herself "Mia" and said that she had met Oates the day before when she was with Davis, and that she wanted Oates to meet her at the Phillips 66 station to sell her some marijuana (Tr. 762, 766).

Oates and Taylor drove their vehicle to the Phillips 66 station (Tr. 757, 763). He brought a .38 caliber Smith & Wesson handgun with him for protection (Tr. 759, 764). He also brought ten or eleven $10 bags of marijuana in a Tupperware container (Tr. 765).

"Mia" called Oates when she arrived (Tr. 764). She parked across from Oates' car in the corner of the gas station lot (Tr. 765). Oates first walked to the passenger side of the car, where Davis was sitting (Tr. 766). Davis pointed to the other side of the car where Lane was sitting (Tr. 766).[3]

Lane rolled down her window and asked Oates what he had (Tr. 766). Oates took the lid off the Tupperware container and handed the marijuana to her (Tr. 766). She smelt it and handed it to Davis (Tr. 767). Davis smelt it and "started fiddling with the bags" (Tr. 767).

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[3] Oates testified that "Mia" was not the same girl who was with Davis the day before (Tr. 766). "Mia" will be referred to as Lane since that is her true identity.

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Lane asked Oates if that was all he had, and he told her that it was all he had with him (Tr. 767). Davis wanted to know if Oates would sell him half an ounce, and Oates said that he was selling the bags individually (Tr. 768). Davis asked if Oates would at least sell him a quarter of an ounce, and Oates again said that he was selling the bags individually (Tr. 768).

Oates began to feel that something was not right, so he said, "Let me see what I can do for you," and reached for the Tupperware of marijuana, but Lane stepped on the gas pedal and the car shot off (Tr. 769). Oates was caught in the window of the car, so he jumped in the window because he was afraid that he was going to get run over (Tr. 769).

After he fell into the car, Lane hit the brakes, causing Oates to fall into the radio, but the car rocked backwards, and Oates fell into the back seat (Tr. 770). Davis told Oates to calm down (Tr. 770).

Davis then reached under his seat, and grabbed a pistol (Tr. 770-71). Davis accidentally dropped his pistol, but he picked it up again, and pointed it towards Oates (Tr. 771, 793). Oates believed that Davis was going to kill him, so he took out his own gun and shot Davis before Davis could shoot him (Tr. 771, 786-87, 794).

Lane then reached for Davis' gun (Tr. 772, 794, 808). Oates shot her before she could grab the gun (Tr. 772). Oates testified that he shot her defending himself; he shot her because he believed that she was going to shoot and kill him (Tr. 787, 794, 810).

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Oates then crawled over Davis and exited the car (Tr. 772). When Oates started to run, he heard something drop (Tr. 772). It was Davis' gun, so Oates picked it up so that he could prove why he had shot them (Tr. 772-73). Oates left the marijuana in the car, and ran to his car (Tr. 773).

As Oates was heading towards his car, he saw Gray and he told her that she did not see anything, and that they had tried to kill him (Tr. 774). Oates got into his car and left; Taylor was in the back seat (Tr. 774). Taylor asked him what had happened, and he told her that he had just saved his life (Tr. 775).

Oates had blood on his shirt, so he changed his clothes (Tr. 776). He hid his bloody clothes and the two guns in a garage (Tr. 776-77). Later, he got his hair cut (Tr. 778).

When he went home, he had his book bag that contained the rest of his marijuana (Tr. 778). He put it in his vehicle (Tr. 779). Immediately after he had done that, however, police cars arrived and he was arrested (Tr. 779).

The instruction conference, argument, and verdict

During the instruction conference, the trial court gave Oates' self-defense instruction as it related to conventional second-degree murder, as well as to the lesser-included offenses of voluntary and involuntary manslaughter; but the court refused to instruct on self-defense as to the felony murder instructions (LF 82-83, 91, 93-95, 101, 103-05; Tr. 817).

Oates objected to the trial court's refusal to submit self-defense as to the felony murder instructions, *citing State v. Starr*, 998 S.W.2d 61 (Mo. App. W.D.

1999), which Oates believed held that self-defense was allowed as to felony murder (Tr. 818). Oates further objected that the intervening felony of attempted robbery committed by Lane and Davis allowed Oates to defend himself (Tr. 818). Oates argued that he should not have been required to allow Lane and Davis to murder him during the course of *their* robbery without being allowed to defend himself merely because earlier he had been attempting to sell marijuana to them (Tr. 819).

The trial court disagreed with Oates and believed that felony murder was a "strict liability" offense, and ruled that self-defense was not available for felony murder (Tr. 821). The court agreed that self-defense was available as to the instructions for conventional second-degree murder, voluntary manslaughter, and involuntary manslaughter, but it refused to instruct on self-defense as to felony murder (Tr. 821). Thus, the court ruled that Oates would be deprived of the opportunity to offer self-defense as to the felony murder instructions (Tr. 821). See Point I.

During argument, the prosecutor told the jury that it could not consider felony murder unless it did not find Oates guilty of conventional second degree murder, and as to that offense, "it's either a self defense case or not" (Tr. 826, 855). He argued: "[Y]ou don't get to Felony Murder Second Degree until you already consider Murder Second Degree. And the only way he beats those is with self defense, okay? And that's the only way you get to Felony Murder." (Tr. 855).

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The prosecutor further argued that although this was a self-defense case, self-defense did not apply to felony murder (Tr. 825-26, 829). The prosecutor reminded the jury that there was no cross-reference paragraph to self-defense in the felony murder instructions, unlike the other homicide offenses (Tr. 832).

On March 17, 2016, the jury found Oates guilty under the two felony murder instructions, the only two homicide instructions that did not contain a cross-reference to self-defense, and two dependent counts of armed criminal action (LF 122-125; Tr. 862). Oates was granted 25 days to file his motion for new trial (LF 10).

Post-trial matters

On April 11, 2016, Oates timely filed his motion for new trial (LF 129-132). Paragraph 1 argued that the trial court erred in denying Defendant's Motion to Strike the State's Notice to Submit Felony Murder Second Degree Instruction and also erred in subsequently allowing felony murder instructions to be submitted to the jury, because Oates was indicted on conventional second-degree murder, and neither a superseding indictment nor an information in lieu of indictment pleading felony murder had been filed (LF 29). The claim noted that felony murder is not a lesser-included offense of conventional murder because it has an additional element (the commission of a felony) that is not included in conventional murder (LF 129-130). Paragraph 2 claimed that the trial court erred in refusing to submit self-defense as to felony murder (LF 130).

On April 26, 2016, the trial court overruled the motion for new trial, and sentenced Oates to concurrent prison sentences of 15 years, 5 years, 10 years, and 5 years (LF 134-138; Tr. 868-870).[4] On May 2, 2016, Oates filed a Notice of Appeal after he had been allowed to appeal *in forma pauperis* (LF 139-141). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

[4] The jury had not recommended punishment because, although Oates did not have any prior convictions, he waived his right to jury sentencing (Tr. 331-32, 780).

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POINTS RELIED ON

I.

The trial court erred in refusing to instruct on self-defense as to felony murder, because this violated Oates' rights to due process of law, to present a defense, and to a fair trial before a fairly-instructed jury, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, and Art. I, §§ 10 and 18(a) of the Mo. Constitution, and § 563.031, in that there was substantial evidence that Oates reasonably believed that deadly force was necessary to protect himself against death, serious physical injury, or any forcible felony; the trial court found that the evidence supported that Oates was acting in self-defense, but erroneously believed that self-defense was not available for felony murder; however, under §§ 563.011, 563.031, and 563.074.1, Oates was entitled to have the jury instructed on self-defense as to the felony murder counts because he was not alleged to have committed a forcible felony. Further, because the armed criminal action counts were dependent upon convictions for second-degree felony murder, the armed criminal action convictions must also be set aside.

State v. Starr, 998 S.W.2d 61 (Mo. App. W.D. 1999);

State v. O'Neal, 618 S.W.2d 31 (Mo. 1981);

State v. Whipple, 501 S.W.3d 507 (Mo. App. E.D. 2016);

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992);

U.S. Const., Amend. VI and XIV;

Mo. Const., Art. I, §§ 10 and 18(a);

§§ 195.211, 563.011, 563.031, 563.074, and 565.021, RSMo; and

Black's Law Dictionary (10th ed. 2014).

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II.

The trial court erred in denying Oates' Motion to Strike the State's Notice to Submit Felony Murder Second Degree Instruction, and in subsequently allowing felony murder instructions to be submitted to the jury, because this violated his rights to due process and to be tried for the offenses with which he is charged, as guaranteed by the 14th Amendment to the U.S. Constitution, and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that Oates was indicted on two counts of conventional second-degree murder, and a superseding indictment or information in lieu of indictment pleading felony murder was never filed; second-degree felony murder is not an included offense of conventional second-degree murder, §§ 556.046 and 565.025.2(2); and, although § 565.021.3, provides that in any charge of second-degree murder, "the jury shall be instructed on … any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court," a statute cannot constitutionally do away with Oates' right to be prosecuted criminally only by indictment or information. Further, because the armed criminal action counts were dependent upon convictions for second-degree felony murder, the armed criminal action convictions must also be set aside.

Russell v. United States, 369 U.S. 749 (1962);

State v. Ladner, 613 S.W.2d 951 (Mo. App. E.D. 1981);

State v. Hasler, 449 S.W.2d 881 (Mo. App. St. L. App. 1969);

In re J.L.T., 441 S.W.3d 184 (Mo. App. E.D. 2014);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §§ 10, 17, and 18(a);

§§ 195.211, 556.046, 565.021, 565.025, RSMo; and

MACH-CR 13.04 (10-1-98).

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ARGUMENT

I.

The trial court erred in refusing to instruct on self-defense as to felony murder, because this violated Oates' rights to due process of law, to present a defense, and to a fair trial before a fairly-instructed jury, as guaranteed by the 6th and 14th Amendments to the U.S. Constitution, and Art. I, §§ 10 and 18(a) of the Mo. Constitution, and § 563.031, in that there was substantial evidence that Oates reasonably believed that deadly force was necessary to protect himself against death, serious physical injury, or any forcible felony; the trial court found that the evidence supported that Oates was acting in self-defense, but erroneously believed that self-defense was not available for felony murder; however, under §§ 563.011, 563.031, and 563.074.1, Oates was entitled to have the jury instructed on self-defense as to the felony murder counts because he was not alleged to have committed a forcible felony. Further, because the armed criminal action counts were dependent upon convictions for second-degree felony murder, the armed criminal action convictions must also be set aside.

Introduction and Issue Presented:

There is no issue about whether the evidence supported a self-defense instruction. It did. The trial court gave self-defense instructions (one for each decedent), and the court included cross-references to those self-defense

instructions in the verdict directors for conventional second-degree murder, voluntary manslaughter, and involuntary manslaughter. But the court refused to instruct on self-defense as to felony murder.

During argument, the prosecutor told the jury: "[Y]ou don't get to Felony Murder Second Degree until you already consider Murder Second Degree. And the only way he beats those is with self defense, okay? And that's the only way you get to Felony Murder." (Tr. 855). The prosecutor further argued that although this was a self-defense case, self-defense did not apply to felony murder, and he emphasized there was no cross-reference paragraph to self-defense in the felony murder instructions, unlike the other homicide instructions (Tr. 825-26, 829, 832).

As a result, the jury found Oates guilty under the only homicide instructions that did *not* contain a cross-reference to self-defense – felony murder. The jury apparently found that Oates acted in self-defense – at least where it was given that option – but it was unable to give effect to that finding as to the felony murder counts.

Section 563.074.1 provides that a person who uses force as described in § 563.031 "is justified in using such force and such fact shall be *an absolute defense to criminal prosecution*." Under § 563.031.1(3), a person can use force, including deadly force, to defend himself unless he "was attempting to commit, committing, or escaping after the commission of *a forcible felony*." Oates' underlying felony (attempted distribution of drugs) was not a forcible felony.

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Thus, the issue presented is a legal one:

Whether self-defense is an available defense to felony murder when the underlying felony is not a forcible felony?

Facts and Preservation:[5]

Witnesses saw Lane's and Davis' car speeding through the parking lot with Oates's feet hanging out of the driver's side window before he was able to crawl into the car (Tr. 356-59, 388, 390, 391, 395, 481-82). A few seconds after he got into the car, it screeched to a halt (Tr. 388-89, 396-97). A second or two after that, two shots were fired (Tr. 359, 389, 395-96, 402, 404-06).

After the shots, Oates exited the passenger side door and ran away (Tr. 358-59, 391-92, 397). He was holding two guns (Tr. 360). After Oates ran back to his vehicle, he told his girlfriend, Maret Taylor, "I just saved my life" (Tr. 487). He was shaking and crying (Tr. 484). Oates told Taylor that two people had tried to rob him and that one of them had a gun (Tr. 491). He said that he shot them because they were trying to kill him (Tr. 491).

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[5] When the claim concerns a self-defense instruction, this Court must view the evidence and reasonable inferences in the light most favorable to Oates. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002); *State v. Whipple*, 501 S.W.3d 507, n. 1 (Mo. App. E.D. 2016).

On the drive to Taylor's mother's home, Oates was still crying and said that two people had tried to rob him and that one of them had a gun (Tr. 491). He said that he shot them because they were trying to kill him (Tr. 491). While at Taylor's mother's home, Oates was still shaky and crying (Tr. 446). He said something to Taylor's nephew about someone trying to rob him (Tr. 455).

During a subsequent interrogation, Oates told Detective Reiland that he shot Davis after Davis attempted to shoot him first, and that he shot Lane when he saw her reaching for something (State's Exhibit No. 45).

Oates' trial testimony also supported that he acted in self-defense. He testified to the following:

While Oates was talking to Lane, she stepped on the gas pedal, the car shot off causing him to get caught in the window of the car, so he jumped in the window because he was afraid that he was going to get run over (Tr. 769). After he fell into the car, Lane hit the brakes, and Oates landed in the back seat (Tr. 770). Davis then reached under his seat, and grabbed a pistol (Tr. 770-71). Davis dropped the pistol, picked it up again, and pointed his gun towards Oates (Tr. 771, 793). Oates believed that Davis was going to kill him, so he took out his gun and shot Davis before Davis could shoot him (Tr. 771, 786-87, 794). Lane then reached for Davis' gun, but Oates was able to shoot her before she could grab it (Tr. 772, 794, 808). Oates testified that he shot her because he was defending himself and he believed that she was going to shoot and kill him (Tr. 787, 794, 810).

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The trial court understandably found that this evidence supported self-defense, giving a self-defense instruction as to each homicide, and it also submitted verdict directors for conventional second-degree murder, voluntary manslaughter, and involuntary manslaughter that included cross-references to the self-defense instructions (LF 82-83, 91, 93, 94, 95, 101, 103, 104, 105; Tr. 817). But the court refused to submit self-defense as to felony murder, based on the State's objection that self-defense is not available for felony murder, and thus did not include cross-references to self-defense in the felony murder instructions (LF 93, 103, 104).

Oates objected to the trial court's refusal to submit self-defense as to the felony murder instructions, *citing State v. Starr*, 998 S.W.2d 61 (Mo. App. W.D. 1999), and argued that *Starr* held that self-defense is allowed as to felony murder (Tr. 818). Oates further objected that the intervening felony of attempted robbery committed by Lane and Davis allowed Oates to defend himself (Tr. 818). Oates argued that he should not have been required to allow Lane and Davis to murder him during the course of *their* robbery attempt without being allowed to defend himself merely because he had earlier been attempting to sell them marijuana (Tr. 819).

The trial court disagreed with Oates and believed that felony murder was a "strict liability" offense, and thus ruled that self-defense was not available for felony murder (Tr. 821). The court agreed that self-defense was available as to the instructions for conventional second-degree murder, voluntary manslaughter, and

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involuntary manslaughter, but it refused to instruct on self-defense as felony murder (Tr. 821). Thus, the court ruled that Oates would be deprived of the opportunity to argue self-defense as to the felony murder instructions (Tr. 821).

During argument, the prosecutor told the jury that it could not consider felony murder unless it did not find Oates guilty of conventional second degree murder, and as to that offense, "it's either a self defense case or not" (Tr. 826, 855). He argued: "[Y]ou don't get to Felony Murder Second Degree until you already consider Murder Second Degree. And the only way he beats those is with self defense, okay? And that's the only way you get to Felony Murder." (Tr. 855).

The prosecutor further argued that although this was a self-defense case, self-defense did not apply to felony murder (Tr. 825-26, 829). The prosecutor reminded the jury that, unlike the other homicide offenses, there was no cross-reference paragraph to self-defense in the felony murder instructions (Tr. 832).

The jury found Oates guilty under the two felony murder instructions -- the only two homicide instructions that did not contain a cross-reference to self-defense -- and the two dependent counts of armed criminal action (LF 122-25; Tr. 862). The jury could not have reached the felony murder instructions unless it did not find Oates guilty of conventional second-degree murder (LF 93, 103). Thus, it

is clear that the jury believed that Oates had been acting in self-defense, and thus was not guilty of conventional second-degree murder.[6]

In Oates' timely motion for new trial, he claimed that the trial court erred in refusing to submit self-defense as to felony murder (LF 130). Thus, this issue was properly preserved for appellate review.

Standard of Review:

This Court reviews a trial court's refusal to give a requested self-defense instruction *de novo*. *State v. Whipple*, 501 S.W.3d 507 (Mo. App. E.D. 2016). Further, statutory interpretation is a question of law that is subject to *de novo* review. *Id*.

Self-defense generally:

A defendant is entitled to an instruction on any theory that the evidence and the reasonable inferences therefrom tend to establish. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002). Instructing a jury as to all potential defenses is essential to ensure due process and a fair trial. *Id*. at 281.

For instance, the court is required to instruct on self-defense if there is *any* substantial evidence putting that defense in issue. *State v. Weems*, 840 S.W.2d 222, 226 (Mo. banc 1992). "Failure to submit such an instruction constitutes

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[6] After trial, the court received a letter from a juror, who expressed discontent with the felony murder guilty verdict "being out of line with the self defense verdict" (LF 126).

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reversible error." *Weems*, 840 S.W.2d at 226; *State v. Avery*, 120 S.W.3d 196, 200-201 (Mo. banc 2003). Even if a self-defense instruction is not requested or was requested but not in the proper form, the trial court must instruct the jury as to self-defense if there is substantial evidence to support it. *Westfall*, 75 S.W.3d at 281; *State v. Whipple*, 501 S.W.3d 507 (Mo. App. E.D. 2016).

In determining whether there was substantial evidence, this Court must consider the evidence and all reasonable inferences drawn therefrom in the light most favorable to the defendant. *Weems*, 840 S.W.2d at 22. If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it. *Westfall*, 75 S.W.3d at 280. Any conflict in the evidence is to be resolved by a jury properly instructed on self-defense. *State v. Zumwalt*, 973 S.W.2d 504, 507 (Mo. App. S.D. 1998).

Analysis:

The issue is not whether the evidence supported a self-defense instruction. The trial court found that it did, the prosecutor did not contest that fact, and the jury's verdict reflected that it believed that Oates acted in self-defense. Instead, the issue is a legal one: Whether self-defense is an available defense to felony murder when the underlying felony is *not* a forcible felony?

Self-defense is a person's right to defend himself against attack. *State v. Chambers*, 671 S.W.2d 781, 783 (Mo. banc 1984). That right is codified in § 563.031.1**,** which provides that "[a] person may . . . use physical force upon another person when and to the extent he … reasonably believes such force to be

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necessary to defend himself … from what he … reasonably believes to be the use or imminent use of unlawful force by such other person ....” A person may use deadly force upon another if he reasonably believes that deadly force is necessary to protect himself against death, serious physical injury, or any forcible felony. § 563.031.2(1). In resisting an assault, a person is not required to determine with absolute certainty the amount of force required for that purpose. *Chambers*, 671 S.W.2d at 783.

Section 563.074.1 provides that “a person who uses force as described in section[ ] 563.031… is justified in using such force and such fact shall be *an absolute defense to criminal prosecution*.…” (Emphasis added). Clearly, felony murder a “criminal prosecution.” So, if Oates used force as described in § 563.031, which the trial court found that he did, then he had an “absolute defense” to his “criminal prosecution” for felony murder.

Under § 563.031.1(3), a defendant can use force to defend himself unless he “was attempting to commit, committing, or escaping after the commission of *a forcible felony*.” (Emphasis added).[7] This language makes it clear that self-defense applies to felony murder, *unless* the underlying felony is a “*forcible felony*.” The legislature unmistakably intended to only prohibit the use of self-defense in a felony murder case when the defendant committed or attempted to commit a “forcible felony.” This Court must presume every word, sentence or clause in a

[7] This language was added in 2007. L.2007, S.B. Nos. 62 & 41, § A.

statute has effect. *In Matter of Verified Application & Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 524–25 (Mo. banc 2015). "This Court assumes that the legislature does not intend to perform a useless act." *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 317 (Mo. banc 2011). "It is presumed that the legislature did not insert superfluous statutory language." *City of St. Peters v. Roeder*, 466 S.W.3d 538, 545 (Mo. banc 2015).

A "forcible felony" is "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnaping, assault, and any forcible sexual offense." § 563.011(3). The felony that Oates was alleged to have committed was "attempt to commit distribution of a controlled substance." (LF 112). That is not a forcible felony. It did not involve the use of physical force or violence on his part. It also did not involve the threat of physical force or violence.[8] Under the cannon of construction of *ejusdem generis*, when a general word or phrase follows or precedes a list of specific words, the general word or phrase will be construed to include only items of the same type or similar in nature to those listed. *State v. William*, 100 S.W.3d 828, 833 (Mo. App. W.D. 2003); *Standard Operations, Inc.*,

[8] "Threat" is defined as: "A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another[.]" Black's Law Dictionary (10th Ed.2014).

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v. Montague, 758 S.W.2d 442, 444-445 (Mo. banc 1988) ("a document referring to 'horse, cattle, sheep and other animals' will usually be construed as including goats, but not bears or tigers."). Under this cannon of construction, "attempt to commit distribution of a controlled substance" (LF 112) is not of the same type or similar in nature to "murder, robbery, burglary, arson, kidnaping, assault, and any forcible sexual offense." § 563.011(3).

Thus, Oates was not precluded under § 563.031.1(3), from relying upon self-defense as to felony murder. Therefore, under § 563.074.1, he was "justified in using such force and such fact [is] an absolute defense to criminal prosecution." Contrast § 562.071.2, which expressly provides that the defense of duress is "not available" "[a]s to the crime of murder" and "when the defendant recklessly places himself or herself in a situation in which it is probable that he or she will be subjected to force or threatened force described in subsection 1 of this section."

Some of this Court's earlier cases seemed to indicate that self-defense was not available as a defense to felony murder. For instance, in *State v. Newman*, 605 S.W.2d 781, 786 (Mo. 1980), this Court held that self-defense was not a defense to a homicide committed in the perpetration of arson, rape, burglary, robbery or other felony, noting that there was no such provision in the applicable MAI instruction in existence at the time. But the Western District of this Court in *Starr*, 998 S.W.2d at 64-65, in an opinion authored by Judge Breckenridge, noted that the new MAI instructions did not preclude a self-defense instruction being submitted for felony murder, and thus the rationale of *Newman* was no longer viable.

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Starr also noted that this Court's holding in *Newman* was also based on *State v. Burnett*, 365 Mo. 1060, 293 S.W.2d 335 (1956), which the *Newman* Court, 605 S.W.3d at 786, cited for the general principle that self-defense is not a defense to a homicide committed in the perpetration of a felony. *Starr*, 998 S.W.2d at 65. But *Starr* further noted that this rule of law was later called into question by this Court's opinion in *State v. O'Neal*, 618 S.W.2d 31, 38 (Mo. 1981), where this Court stated that a person could be convicted of felony murder "even though he did not intend to kill someone, *unless the death is excusable or justifiable*." (Emphasis added by the *Starr* court). And since a killing is justifiable if the perpetrator acted in self-defense, the *Starr* court believed that the *O'Neal* opinion was "at odds with" *Newman*. *Starr*, 998 S.W.2d at 65. *In accord, State v. Peal*, 393 S.W.3d 621, 634 n. 11 (Mo. App. W.D. 2013) ("the rationale in *Newman* is no longer viable").

Further, the cases cited by *Burnett* for the general principle that self-defense is generally not a defense to a homicide committed in the perpetration of a felony involved forcible felonies such as robbery and kidnapping, where the evidence was clear that the defendant was also the initial aggressor in the course of events. Thus, those defendants were not entitled to rely upon self-defense because by being the initial aggressors, the defendants lost the right to invoke self-defense. This decisional history suggests that the rationale for the general rule expressed in *Burnett* is that the nature of the underlying felony (usually robbery or kidnapping) marks the defendant as being the initiating aggressor. The present case, however,

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does not fit within that general rule since it did not involve a forcible felony, like robbery or kidnapping, and it also did not involve a situation where Oates was the initial aggressor; Lane and Davis were the initial aggressors when they attempted to forcibly rob Oates.

Conclusion

The evidence unquestionably supported a jury finding that Oates acted in self-defense. The trial court thought as much, and the jury's failure to find Oates guilty of conventional second-degree murder shows that it believed he was acting in self-defense.

But in Missouri, self-defense is not a defense to felony murder only when the defendant committed or attempted to commit a "forcible felony," such as murder, robbery, burglary, arson, kidnaping, assault, and any forcible sexual offense. Oates was not alleged to have committed or attempted to have committed a forcible felony. His underlying felony, attempting to sell marijuana, was not a forcible felony. Thus, the jury should have been instructed that it could not find Oates guilty of felony murder unless it found that he did not act in self-defense. As a result, Oates' convictions for felony murder must be reversed. See *State v. Beeler*, 12 S.W.3d 294, 301 (Mo. banc 2000) (where "it is clear that the jury's acquittal of defendant on the second degree murder charge was based on the theory of self-defense" that verdict forecloses any further trial on the homicide).

Further, Oates is also entitled to have his convictions for armed criminal action set aside because a reversal of the felony murder offenses necessitates a

reversal of the dependent armed criminal action counts. *State v. Weems*, 840 S.W.2d 222, 228 (Mo. banc 1992).

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II.

The trial court erred in denying Oates' Motion to Strike the State's Notice to Submit Felony Murder Second Degree Instruction, and in subsequently allowing felony murder instructions to be submitted to the jury, because this violated his rights to due process and to be tried for the offenses with which he is charged, as guaranteed by the 14th Amendment to the U.S. Constitution, and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that Oates was indicted on two counts of conventional second-degree murder, and a superseding indictment or information in lieu of indictment pleading felony murder was never filed; second-degree felony murder is not an included offense of conventional second-degree murder, §§ 556.046 and 565.025.2(2); and, although § 565.021.3, provides that in any charge of second-degree murder, "the jury shall be instructed on … any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court," a statute cannot constitutionally do away with Oates' right to be prosecuted criminally only by indictment or information. Further, because the armed criminal action counts were dependent upon convictions for second-degree felony murder, the armed criminal action convictions must also be set aside.

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Issue Presented:

When a defendant is indicted for conventional second-degree murder, is the State allowed to submit a felony murder instruction under § 565.021, without ever charging felony murder in an indictment or information, merely because the State gave written notice that such an instruction might be requested, when felony murder is not a lesser-included offense of conventional second-degree murder, and it is constitutionally required that that a defendant can only be prosecuted criminally by indictment or information?

Facts and Preservation:

Thomas Oates was indicted for the conventional second-degree murder of Darrah Lane (count 1), a related armed criminal action charge (count 2), conventional second-degree murder of Leon Davis (count 3), and a related armed criminal action charge (count 4) (LF 13-14).

Later, the State filed a Notice of Intention to Submit Murder Second Degree – Felony (LF 26-27). That notice informed Oates that, as to both homicides, should the State submit felony murder instructions under § 565.021.1(2), the instructions would be based on the deaths being caused as the result of the attempted perpetration of felony Distribution of a Controlled Substance, § 195.211, committed by Oates (LF 26).

Subsequently, Oates filed a Motion to Strike the State's Notice to Submit Felony Murder Second Degree Instruction (LF 78-79). That motion asserted:

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(1) Oates was indicted for two counts of conventional second-degree murder; (2) the State filed a notice of its intent to submit second-degree felony murder; (3) felony murder requires an additional element that is not part of the charge of conventional murder; (4) a new charge cannot be submitted without it being in an information or indictment; (5) *State v. Kohser*, 46 S.W.3d 108 (Mo. App. S.D. 2001) was inapposite because in that case the defendant was charged with first-degree murder, and thus both felony and conventional second-degree murder could be submitted in that case; (6) an information or indictment puts the defendant on notice of all offenses included in the charged offense; and, (7) felony murder is not a lesser-included offense of conventional murder (LF 78-79).

The trial court overruled Oates' Motion to Strike, but the court allowed the objection to felony murder being submitted to "stand throughout the course of the trial to the nature of the two different opposing charges on the grounds of your motion" (Tr. 88-89).

In Oates' timely motion for new trial, he argued that the trial court erred in denying Defendant's Motion to Strike the State's Notice to Submit Felony Murder Second Degree Instruction and it also erred in subsequently allowing felony murder instructions to be submitted to the jury, because Oates was indicted on conventional second-degree murder, and the State never filed a superseding indictment or information in lieu of indictment pleading felony murder (LF 29). Oates noted that felony murder is not a lesser-included offense of conventional murder because it has an additional element (the commission of a felony) that is

not included in conventional murder (LF 129-130). This Point is properly preserved for appellate review.

Standard of Review:

Questions of law and the interpretation of statutes are subject to *de novo* review. *State v. Justus*, 205 SW3d 872, 878 (Mo. banc 2006).

Constitutional Provisions Involved:

The Fifth Amendment to the U.S. Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury … nor be deprived of life, liberty, or property, without due process of law…"

The Fourteenth Amendment to the U.S. Constitution provides, "…nor shall any State deprive any person of life, liberty, or property, without due process of law…."

Article I, § 18(a) of the Missouri Constitution provides that: "in criminal prosecutions the accused shall have the right …to demand the nature and cause of the accusation ...."

Article I, § 17 of the Missouri Constitution provides that: "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information.…"

Oates was convicted of an uncharged crime:

"An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). Convicting a

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defendant of a distinct offense for which he was not specifically charged violates the accused's due process rights. *J.D.B. v. Juvenile Officer*, 2 S.W.3d 150, 156 (Mo. App. W.D. 1999). "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole v. State of Ark.*, 333 U.S. 196, 201 (1948). *Also see*, Notes on Use No. 2 to MACH-CR 13.04 (10-1-98) (conventional second-degree murder), which requires that if felony murder is to be submitted in addition to conventional murder, it is necessary to add a paragraph to the indictment or information giving notice of that fact, including listing the specific underlying felony.

The notice requirement of the Due Process clause is satisfied, however, where the accused is charged with a greater offense but convicted of an uncharged lesser-included offense. *T.S.G. v. Juvenile Officer*, 322 S.W.3d 145, 149 (Mo. App. W.D. 2010); *State v. Hagan*, 79 S.W.3d 447, 454 (Mo. App. S.D. 2002). "In such cases, the defendant is deemed to have notice of the uncharged offense, because the charged offense contains all of the legal and factual elements of the uncharged offense." *In re J.L.T.*, 441 S.W.3d 184, 186 (Mo. App. E.D. 2014).

As noted above, Article I, § 17 of the Missouri Constitution provides that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information." This is consistent with the Fifth Amendment to the Federal Constitution, which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury." Here, the indictment did not charge Oates with felony murder. Thus, his felony murder convictions violate both the Missouri and Federal Constitutions.

It is true that in Missouri, § 556.046.1 allows a person to be convicted of an offense that is included in an offense charged in the indictment or information. An offense is so included when: (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or, (2) It is specifically denominated by statute as a lesser degree of the offense charged;[9] or (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein. § 556.046.1.

Felony murder is *not* an included offense of conventional second-degree murder. It is *not* established by proof of the same or less than all the facts required to establish the commission of conventional second-degree murder since it has an element that is not included in conventional second-degree murder (e.g., the commission or attempted commission of the underling felony). It is *not* specifically denominated by statute as a lesser degree of the offense charged (they

[9] Thus, *State v. Kohser*, 46 S.W.3d 108 (Mo. App. S.D. 2001) and *State v. Blankenship*, 830 S.W.2d 1, 13 (Mo. banc 1992), are inapposite, because in those cases, the defendants were charged with first-degree murder, and under § 556.046.1 and § 565.025.2(2), felony murder *is* an included offense of first-degree murder.

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are on equal footing as they are both second-degree murder). *See* § 565.025.2(2), which lists the lesser-included offenses of second-degree murder as being only voluntary and involuntary manslaughter. And it is *not* an attempt to commit conventional second-degree murder.

It is true that § 565.021.3, provides that, "[n]otwithstanding section 556.046 and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on … any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court." But a statute cannot constitutionally do away with the right of the accused to demand the nature and cause of the accusation made against him. *State v. Mace*, 357 S.W.2d 923, 925 (Mo. 1962) *citing* Art. I, § 18(a) of the Missouri Constitution. "If there be conflict, the statute rather than the Constitution, must fall. *State ex rel. Elsas v. Missouri Workmen's Comp. Comm'n.*, 318 Mo. 1004, 1017, 2 S.W.2d 796, 801 (Mo. banc 1928).

It is a "basic principle" "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him." *Russell v. United States*, 369 U.S. 749, 766 (1962). Not only must the language of the statute charging the offense be included, but also, "the language of the statute must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hamling*, 418 U.S. 87, 117 (1974). Those

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constitutional requirements were not fulfilled here, and § 565.021.3 cannot supplant those constitutional guarantees.[10]

It is also true, that the State gave Oates written notice that it might submit felony murder instructions if the case went to trial (LF 26). But the State did not include any allegation concerning felony murder in an indictment or information even after Oates filed his motion insisting that such a charge must be included in an indictment or information for it to have any validity (LF 78-79). A motion, such as that filed by the State, is not sufficient to satisfy the constitutional requirement that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information." Article I, § 17 of the Missouri Constitution.

In an analogous situation, the United States Supreme Court, the Eighth Circuit Court of Appeals, this Court, and other Missouri appellate courts have all

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[10] Appellant recognizes that in *State v. Hendren*, 524 S.W.3d 76 (Mo. App. W.D. 2017) the court held that a conviction after a bench trial for the uncharged offense of felony second-degree murder, rather than the charged offense of conventional second-degree murder, did not violate the defendant's due process right to notice of the charges against him when the underlying felony (burglary) was also charged in the information. Appellant believes that case was wrongly decided; further, it is distinguishable because both second-degree murder (albeit conventional) and the underlying felony were charged in the information.

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held that a deficiency in an indictment cannot be cured by a bill of particulars. *Russell*, 369 U.S. at 769-770; *State v. Ladner*, 613 S.W.2d 951, 954 (Mo. App. E.D. 1981) ("a bill of particulars cannot validate an information that fails to allege the essential elements of the crime charged"); *State v. Hasler*, 449 S.W.2d 881, 885-886 (Mo. App. St. L. App. 1969) (a defendant is tried on the indictment or information, not on the bill of particulars, even where the bill of particulars supplies the defendant with the specifics of his conduct prior to his trial); *State v. Dale*, 775 S.W.2d 126, 132 (Mo. banc 1989); *U.S. v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976). Logically, if a bill of particulars cannot cure a deficiency in an indictment, a motion such as that filed by State here similarly cannot do so.

The indictment did not charge Oates with felony murder or the elements of that offense. As a result, Oates' felony murder convictions violate the guarantee in Article I, § 17 of the Missouri Constitution that "no person shall be prosecuted criminally for felony …otherwise than by indictment or information.…" They are also contrary to the guarantees in the Fourteenth Amendment and Article I, § 18(a) of the Missouri Constitution that a person should not be deprived of his liberty without due process of the law. Thus, this Court must reverse the findings of guilt and the judgment and sentence as to the felony murder offenses.

Further, Oates is also entitled to have his convictions for armed criminal action set aside because a reversal of the felony murder offenses necessitates a reversal of the dependent armed criminal action counts. *State v Weems*, 840 S.W.2d 222, 228 (Mo. banc 1992).

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CONCLUSION

The evidence supported a jury finding that Oates acted in self-defense. In fact, the trial court found that the evidence supported such a defense, giving such a self-defense instruction as to all degrees of homicide except felony murder, and the jury agreed with that determination when it did not find Oates guilty of conventional second-degree murder as a result of that defense.

Section 563.074.1 provides that a person who uses force as described in § 563.031 "is justified in using such force and such fact shall be *an absolute defense to criminal prosecution*." Under § 563.031.1(3), a person can use force, including deadly force, to defend himself unless he "was attempting to commit, committing, or escaping after the commission of *a forcible felony*."

Oates' underlying felony, attempting to sell marijuana, was not a forcible felony. Thus, the jury should have been instructed that it could not find Oates guilty of felony murder unless it found that he did not act in self-defense. Because the jury was not so instructed, Oates' convictions for felony murder must be reversed. *Beeler*, 12 S.W.3d at 301. Further, he is also entitled to have his convictions for armed criminal action set aside because a reversal of the felony murder offenses necessitates a reversal of the dependent armed criminal action counts (Point I).

The indictment did not charge Oates with felony murder or its elements. As a result, his felony murder convictions violate the guarantee in Art. I, § 17 of the Missouri Constitution that "no person shall be prosecuted criminally for felony

…otherwise than by indictment or information.…" They are also contrary to the Due Process guarantees in the Fourteenth Amendment and Article I, § 18(a) of the Missouri Constitution. This Court must reverse the findings of guilt and the judgment and sentence as to the felony murder offenses. Oates is also entitled to have his convictions for armed criminal action set aside because a reversal of the felony murder offenses necessitates a reversal of the dependent armed criminal action counts (Point II).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10,189 words, which does not exceed the 31,000 words allowed for an Appellant's Substitute Brief. And, on this 4th day of October, 2017, electronic copies of Appellant's Substitute Brief, and Appellant's Substitute Brief Appendix, were sent through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

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