

Sup. Ct. # 87785

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

GARY W. BLACK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Jasper County, Missouri
29th Judicial Circuit, Division 3
The Honorable Jon A. Dermott, Judge

APPELLANT'S REPLY BRIEF

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¹ Black maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

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JURISDICTIONAL STATEMENT

Black incorporates the Jurisdictional Statement from page 11 of his Opening Brief.

STATEMENT OF FACTS

Black incorporates the Statement of Facts from pages 12-28 of his Opening Brief.

ARGUMENT I

The State concedes that the trial court ignored well-established precedents of the United States Supreme Court and this Court when it refused Black's requests for self-representation (Resp. Br. 24). Yet the State argues that the *Faretta*² issue is not properly preserved for appeal, claiming that Black did not raise the issue enough times and that counsel should have objected after the court denied the requests (Res. Br. 19-21). The State argues that there was no plain error, because the denial of the right to self-representation was not outcome determinative and it made the result of Black's trial more reliable (Resp. Br. 24-27). The State is incorrect in each of these assertions.

The issue is properly preserved.

The State argues that Black did not preserve this issue, despite his repeated motions and the issue's inclusion in the motion for new trial (Resp. Br. 19-21). It argues that although Black asserted his right to self-representation at least five times and the court denied it at least three times, he should have asserted it even more times (Resp. Br. 19-20). The State also argues that even though Black properly moved for self-representation and got rulings on his numerous motions, his right was dependent upon defense counsel objecting further (Resp. Br. 21). The State cites no authority for its proposition that counsel, rather than the defendant, must assert the right to self-representation. The State's proposition is unfounded and flies in the face of well-established precedent and practice.

² *Faretta v. California*, 422 U.S. 806 (1975).

Generally, to properly preserve a constitutional challenge for appeal, the issue must be raised at the earliest opportunity. *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996). http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW7.01&referencepositiontype=S&serialnum=1996141402&fn=_top&sv=Split&tc=-1&findtype=Y&referenceposition=847&mt=Missouri&db=713&utid=%7bB2CF1937-8ACC-4CDB-A625-FA4EA23D154E%7d&vr=2.0&rp=%2ffind%2fdefault.wl&sp=mopub-1000The trial court must rule on it. *Miller v. Miller*, --- S.W.3d ----, 2007 WL 3032, at *10 (Mo. App. W.D., Jan. 2, 2007). It must be preserved at each step of the judicial process. *Id.* Finally, the point raised on appeal must be based upon the theory advanced at the trial court. *Id.* The purpose of the rule is “to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue.” *Call*, 925 S.W.2d at 847.

Here, Black repeatedly asserted his right to self-representation (L.F. 37-40, 45-47; Tr. 281). He raised it at the earliest time possible, even before counsel was appointed to represent him (L.F. 37-39). The court repeatedly denied Black’s motions (L.F. 41, 48, 1041; Tr. 282). The issue was included in the motion for new trial, and the same grounds are set forth in the point on appeal (L.F. 962-64). There was no surprise to the prosecutors, who had more than enough chance to respond. The issue was squarely before the court and is fully and properly preserved for appeal.

The State argues that the October 5th motion to dismiss counsel was not a motion for self-representation (Resp. Br. 16-17). It is true that the motion asked the court to dismiss counsel because of a conflict of interest (L.F. 680). But it is clear from the dialogue between the court and Black, that both considered it a motion to dismiss and allow self-representation:

The Court: I note that Mr. Black had filed on October 5, a Motion to Dismiss

Assigned Counsel. The – on that motion it’s the Court’s view that that motion ought to be overruled. Mr. Black, it appears to me that assigned counsel are working diligently on your behalf. They have benefit of law degrees and experience in criminal cases. It seems to the Court that you’re much better served by having counsel than not having counsel. And so for that reason I’m going to overrule the motion.

If you want to retain counsel of your choosing, why the Court would permit you to do that. But in the absence of retained counsel, the Court thinks you’re better served by having capable counsel. The Court will make a docket entry simply overruling that motion.

Mr. Black: In other words, you don’t think I’m qualified to represent myself, Your Honor?

The Court: That’s true. I think you’re less qualified than your attorney. As far as I know you have not been to law school and have not defended criminal cases, you’re not licensed to practice law, and so I would assume that assigned counsel is more capable than you of representing you.

(Supp. Tr. 1-2). By filing this motion, Black was taking a different tack to secure self-representation after his other attempts had failed. See *Dorman v. Wainwright*, 798 F.2d 1358, 1367 (11th Cir. 1986) (reversed: among Dorman’s other requests for self-representation, he “began civil proceedings against the Public Defender hoping to create a conflict of interest that would force the trial judge to discharge appointed counsel and allow Dorman to defend himself”).

The State asserts that the issue is not preserved because Black did not raise the issue at every pretrial hearing or conference, and counsel did not reiterate Black’s assertions or object after the court had denied them (Resp. Br. 19-21). Black raised the issue at least five times pretrial (L.F.37-41, 45-46; Tr. 281).³ Every time, the court either summarily denied the request, or denied it because it believed Black was not qualified to represent himself (L.F. 41, 48, 1041; Tr. 282). There was no point in raising the request additional times, since it was clear that the court was not going to grant the request, and Black could not change the fact that he was less qualified than counsel.

Decisions of this Court and those from numerous other jurisdictions demonstrate the error in the State’s contention that Black was required to do more to preserve the issue for appellate review. “The law does not compel the undertaking of a useless act for the lone aim of complying with a technical requirement.” *State v. Long*, 140 S.W.3d 27, 32, fn.7 (Mo. banc 2004), quoting *State v. Barnett*, 628 S.W.2d 917, 920 (Mo. App. E.D.

³ Black’s October 5th request should be considered an additional, sixth request to proceed *pro se*. (L.F. 41, 48, 1041; Tr. 282).

1982). A defendant need not “continually renew his request to represent himself even after it is conclusively denied by the trial court. After a clear denial of the request, a defendant need not make fruitless motions ... in order to preserve the issue on appeal.” *Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir. 1982)(en banc). “[O]nce a defendant has stated his request clearly and unequivocally and the judge has denied it in an equally clear and unequivocal fashion, the defendant is under no obligation to renew the motion. To impose such a requirement on defendants would lead to an absurd result: the constant burdening of district judges with fruitless motions designed to prove what has already been established – that the defendant desires to represent himself.” *United States v. Arlt*, 41 F.3d 516, 523 (9th Cir. 1994). Once the trial court denied the defendant’s timely and unequivocal request for self-representation, “the door was closed”:

The court’s ruling was categorical, and expressly relied on the advanced stage of proceedings and the defendant’s lack of education – obstacles that were not going to be removed before trial.... [E]ven a lawyer could not be faulted for failing to renew a motion under those circumstances.

Williams v. Bartlett, 44 F.3d 95, 101 (2d Cir. 1994). See also *Dorman*, 798 F.2d at 1367 (5th Circuit); *State v. Vann*, 127 P.3d 307, 316 (Kan. 2006); *People v. Dent*, 65 P.3d 1286, 1289 (Cal. 2003) (“We do not require trained counsel to repeatedly make a motion that has been categorically denied; how much more should we require of an untrained defendant seeking self-representation”).

The State argues that because Black asserted his *Faretta* right personally, instead of having counsel assert it for him, the issue is not properly preserved (Resp. Br. 21).

The State cites no authority for such a proposition, and indeed there is none. The State’s proposition is contrary to the basic principles of *Faretta*. The Supreme Court recognized that the right of self-representation is personal to the defendant. *Id.* , 422 U.S. at 819-20. The right “is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Id.* A defendant cannot be forced to accept counsel:

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.

Id. at 820; see also *id.* at 833 (State cannot “compel a defendant to accept a lawyer he does not want”); also *id.* at 821 (“An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction”). Because a defendant cannot be forced to accept counsel, it makes no sense that he would be required to rely upon counsel in asserting this personal right.

This is especially true in Black’s case. Black never requested that counsel be appointed. Even before counsel was appointed, he asked that he be allowed to represent himself (L.F. 37, 40). The court denied the request and appointed counsel (L.F. 41). Still, Black persisted in his wish for self-representation (L.F. 46-47, 680; Tr. 281). To say that Black’s repeated requests for self-representation – denied on the merits by the court – preserved nothing, is completely erroneous. The issue was squarely before the court.

The State criticizes defense counsel for failing to object to the trial court's ruling on Black's motions (Resp. Br. 21). But defense counsel would not have been adding anything that Black had not already stated. Black stated everything necessary to assert the right of self-representation. Additionally, counsel should not "engage the court in extended discussion once a ruling is made." *Maness v. Meyers*, 419 U.S. 449, 459 (1975). "Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge." *In re Coe*, 903 S.W.2d 916, 917 (Mo. banc 1995). See also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(stressing that "we do not presume acquiescence in the loss of fundamental rights"); *State v. Baker*, 103 S.W.3d 711, 717 (Mo. banc 2003) (no waiver of appellate review where "it was mutually understood that appellant did not intend to repudiate his prior objection").

The State reaches back to *State v. Wishom*, 578 S.W.2d 275, 277 (Mo. App. St.L. 1978) for its sole support for the proposition that the issue is unpreserved. But *Wishom* is completely distinguishable. There, after the defendant asked to represent himself, the court held a hearing, extensively questioned the defendant, and then allowed the defendant to represent himself. *Id.* at 276. On the day the case was called for trial, however, the defendant changed his mind and asked for counsel. *Id.* The court appointed counsel familiar with the case and proceeded to trial. *Id.* After voir dire, the defendant again changed his mind and asked that he be allowed to represent himself. *Id.* The court denied the request as untimely. *Id.* The defendant then failed to include the issue in the motion for new trial. *Id.* *Wishom's* second request for self-representation was both

untimely and, because it was not included in the motion for new trial, un-preserved. *Id.* at 277.

But here, the court failed to question Black regarding his desire for self-representation and failed to allow Black to represent himself. Black never vacillated, but always persisted in his desire for self-representation. Black's requests were timely and unequivocal, and he included the issue in his motion for new trial (L.F. 962-64). Black properly preserved the issue for review.

Reversal is automatic.

While the State concedes that the court failed to abide by *Faretta* and this Court's precedents, it argues that this Court should not find the error was structural, despite the mandate of *McKaskle v. Wiggins*, 465 U.S. 168, 177 fn. 8 (1984) (Resp. Br. 23-27). The State argues that Black should not receive a new trial, because the court's admitted error as to the fundamental right of self-representation was not outcome determinative (Resp. Br. 24-25). The State reasons that Black had capable counsel who likely did a better job than Black himself would have done and hence, the trial was more reliable than if Black had represented himself (Resp. Br. 25).

The State's entire argument is founded upon the notion that this issue is not preserved and hence should be reviewed for plain error. As explained above, the issue was fully preserved. At any rate, an outcome determinative or harmless error analysis has no place in a *Faretta* issue under any circumstances.

Denial of the right to self-representation is one of a very narrow class of errors that the Supreme Court has found to be structural and “thus subject to automatic reversal.” *Neder v. United States*, 527 U.S. 1, 7 (1999), citing *Johnson v. United States*, 520 U.S. 461, 468-69 (1997); *McKaskle*, 465 U.S. at 477, fn.8. It is a fundamental right, whose denial affects the framework within which the trial proceeds. *Johnson*, 520 U.S. at 468-69. Historically, the right of self-representation was seen as even more important than the right to counsel. *Faretta*, 422 U.S. at 829-30 (the “right to counsel was clearly thought to supplement the primary right of the accused to defend himself”).

When a defendant is improperly denied the right of self-representation, harmlessness is “irrelevant.” *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2564, fn.4 (2006). This follows from the obvious fact that any time a defendant chooses to represent himself, he will probably fare worse than if he had been represented by experienced, trained counsel. *Faretta*, 422 U.S. at 834 (“It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts”). Thus, in *McKaskle*, 465 U.S. at 177, fn. 8, the Supreme Court recognized that, “[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to “harmless error” analysis. The right is either respected or denied; its deprivation cannot be harmless.” See also *Myers v. Johnson*, 76 F.3d 1330, 1338 (5th Cir. 1996)(because counsel typically will “provide better legal representation than a pro se defendant, denial of a request to proceed pro se could rarely, if ever, be shown to have

been prejudicial”); *People v. Joseph*, 671 P.2d 843, 849 (Cal. 1983) (applying the harmless error standard would “erode the pro se right itself”).

The State also argues that this Court should not reverse, because denial of self-representation imbued the trial with greater reliability (Resp. Br. 25-26). The Supreme Court has rejected this idea, holding that the “inestimable worth of free choice” overrides the notion that counsel is essential to the fairness and reliability of criminal trials. *Faretta*, 422 U.S. at 833-34. Deciding *Faretta*, the Court considered the possibility that trials may not be as fair to the defendant, and hence the result not as reliable, if the defendant did not have counsel to safeguard his rights. *Id.* at 832-33. But it also recognized that “where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly.” *Id.* at 834. The Court concluded that while the Constitution grants the defendant safeguards for his protection, it also grants him the ability to dispense with those safeguards if he so chooses. *Id.* at 818-19. The defendant bears the consequences of conviction, and so he himself must be free to decide whether counsel is to his advantage. *Id.* at 834. “And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” *Id.*, quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring). The defendant’s freedom to choose to represent himself, to have *his* defense presented in *his* own voice, trumped the fear that self-representation would make trials less reliable.

This Court must reverse.

ARGUMENT II

The State asserts several incorrect propositions. First it alleges the court permitted defense counsel to elicit Copeland's prior inconsistent statements (Resp. Br. 29-30). The court, however, immediately repudiated its permission, as evidenced by (a) its insistence that defense counsel was wrong as a matter of law; and (b) the reaction of the parties. Second, the State argues that the denial of impeachment evidence was non-prejudicial, because the witnesses' prior statements were consistent with their trial testimony or otherwise were immaterial.

The trial court did not allow the impeachment.

During his direct examination of Michelle Copeland, defense counsel attempted to question her about a statement she had given in 1999 (Tr. 1055). The State objected and the following bench conference occurred:

Mr. Jacquinot⁴: If she's going to go south on her statement, I'm just laying a foundation. I'm not getting –

The Court: This is your witness.

Mr. Rouse: He's trying to impeach her.

Mr. Jacquinot: No, I'm just establishing a foundation.

The Court: You're stuck with whatever she says, it's your witness.

Mr. Jacquinot: I can still offer her prior inconsistent statement.

⁴ Mr. Jacquinot is defense counsel, and Mr. Rouse and Mr. Dankelson are prosecutors.

The Court: No, you can't. She's not a hostile witness.

Mr. Jacquinot: Well, let's –

The Court: You're trying to impeach your own witness?

Mr. Jacquinot: They impeached Tammy Lawson, their own witness, with her preliminary.

The Court: Well –

Mr. Jacquinot: I'm just –

The Court: – he's got an objection, the objection is sustained.

Mr. Jacquinot: Okay. I'm just, I was just responding to your inquiry, Judge.

(Tr. 1056-57).

Later, when defense counsel attempted to ask Copeland about testimony she had given last fall, the State again objected that defense counsel was impeaching his own witness (Tr. 1062). The court again sustained the objection (Tr. 1062). The following exchange occurred at the bench:

Mr. Jacquinot: Judge, I don't want to be argumentative. All I'm going to ask is that she renege and I'm going to be able to make a formal –

Mr. Rouse: What?

Mr. Jacquinot: I'm going to make a formal offer of proof this witness, well, one I might be able to prove bias and that she gave me sworn deposition testimony last fall that –

The Court: Well, you can ask her and she can respond.

Mr. Jacquinot: Well, you're saying I can't impeach her.

The Court: She's your witness and you're stuck with her answer.

Mr. Jacquinot: And –

The Court: I'll permit you to make a record.

Mr. Jacquinot: And that's what I'm saying - I want to ask - I want to do a formal offer of proof with her outside of the presence of the jury.

The Court: I will permit you.

(Tr. 1062-63).

After Copeland had finished testifying, the following exchange occurred at the bench:

Mr. Jacquinot: Judge, for the record, let me know if as the week wears on we all get a little tired, but as I recall when Gary's decision came back the last time, the defense called her, not the prosecution, and there is specific language in the mandate that his prior attorneys were ineffective for not impeaching their own witness at trial or offering her own testimony. So I think from a discretionary standpoint the limitations you've placed upon me are, you know, just in direct conflict with the mandate from the Supreme Court. And I'm not going to argue with you any more, but I'm asking you to reconsider and otherwise, if you don't want to reconsider, I'll just offer #556 and #557 as my Offer of Proof so she doesn't have to stick around any more. But I really –

Mr. Rouse: What is it you want from her? Maybe we can - what is it you want from her?

Mr. Jacquinot: I want to be able to – I mean, she owned her statement from 1999 to

the deposition and every part except that she did not, the point that she quibbled with was she never saw Jason completely out. But she admitted there was yelling, she admitted she heard the door popped open, she was still owning that statement as late as her deposition last fall. So whether it's memory, whether it's

–

Mr. Rouse: So is that the only issue is whether the door had popped open, is that the only?

Mr. Jacquinot: And whether she had heard yelling as she told the investigator.

Mr. Dankelson: I don't think those issues are that critical, Judge, but if he wants to ask her about those two things, we're not going to object on those two things.

The Court: Well, in view of the prosecutor's statements, I'll permit you to inquire.

My view is that she's your witness, she is not a hostile witness. If she's testified inconsistently to statements that you say she made, a prior statement she made in her deposition, you have asked her to refresh her recollection with those statements, she's read them, and she says that's not her recollection today.

You're asking her to say something inconsistent with what her recollection is today. If you say the Missouri Supreme Court says that you have a right to impeach your own witness who isn't hostile, who's recollection today is different from what she said earlier, then I'm going to permit you to make a record on that. But I disagree with your analysis of what Judge Wolfe said.

Mr. Jacquinot: I accept your - I'm just making my - and I'm not trying –

Mr. Rouse: Let him make his record.

Mr. Jacquinot: We're through with her. These are an Offer of Proof.

The Court: I'll accept them as an Offer of Proof.

Mr. Jacquinot: And the only thing I don't think she's trying to, I think she's just plain forgotten what she swore to and I don't know that I'm stuck with that, but if you say I am, I'm not here to argue with you.

The Court: Well, I'll permit your Offer of Proof.

Mr. Jacquinot: Okay. In lieu of having her testify further, are you willing to accept these two documents, #556 and #557?

The Court: They're admitted as an Offer of Proof. The Offer is refused.

(Tr. 1068-71).

Although the court stated that it would allow the defendant to inquire, it did not budge from its position that the defense could not impeach its own witness. The problem is that the term "make a record" was being used two different ways. The court was intending the term "make a record" to mean, make a record for appellate review, *i.e.*, state the objection and argument in support and make an offer of proof (Tr. 1063). The State, however, was using "make a record" to mean, present the evidence on the record in front of the jury (Tr. 1070).

Certain aspects of the exchange show that the court had not changed its mind as to how it would allow counsel to proceed. First, defense counsel stated that he would make the offer of proof only if the court did not change its mind (Tr. 1069). Second, the court stated it would allow defense counsel to inquire, but immediately re-asserted its view that, as a matter of law, counsel could not impeach his own witness with prior

inconsistent statements (Tr. 1070). It stated it would allow counsel to make a record on his interpretation of this Court's opinion from the postconviction appeal (Tr. 1070).⁵ There would be no reason for counsel to make such a record if the court were allowing counsel to proceed as he wished. Third, the State then urged the court, "[l]et him make his record" (Tr. 1070). The State would not have said this, if the State believed that the court had just given counsel permission to elicit the prior inconsistent statements. Fourth, after this lengthy discussion, if the court really had given counsel permission, the court would not have accepted the offer of proof, but instead would have said something akin to, "You don't need the offer of proof. I just told you to go ahead. You may elicit her prior inconsistent statements." When defense counsel again stated he disagreed with the court, the court would not have reiterated that it would accept the offer of proof (Tr. 1071), but again would have said, "I told you that you can elicit the prior inconsistent statements."

Another indicator that the court had not changed its ruling was defense counsel's later attempt to get the court to change its mind on its ruling and allow counsel to elicit Ronald Friend's prior inconsistent statements (Tr. 1090-91). The State itself suggests that "defense counsel simply assumed that the trial court would prevent him from asking Friend about any prior inconsistent statements" (Resp. Br. 32). Defense counsel would only make such an assumption, however, if he believed that the court had barred him from eliciting Copeland's prior inconsistent statements. Defense counsel stated, "[f]rom the Court's prior ruling, you're probably not going to let me do that, but I just wanted to

⁵ *Black v. State*, 151 S.W.3d 49 (Mo. banc 2004).

make that offer and give you the chance” (Tr. 1090). The court did not state, “I told you that you could elicit the prior inconsistent statements.” Instead, the court accepted the offer of proof (Tr. 1090, 1092). Defense counsel was giving the court the chance to allow impeachment with prior inconsistent statements but it refused (Tr. 1090, 1092).

The State faults defense counsel with never attempting to impeach Friend with his prior inconsistent statements (Resp. Br. 31-33). The situation is akin to a motion *in limine* that had been denied. In that situation, the attorney approaches the bench at the appropriate time, lets the court know his intention to elicit testimony relating to the topic, and asks the court to reconsider. Here, the court had ruled that defense counsel could not elicit the prior inconsistent statements of its witnesses, so defense counsel did not attempt to present the evidence in front of the jury. While Friend was still on the stand, defense counsel approached the bench (Tr.1090). He stated that he would not rehash the issue and referenced the court’s prior ruling (Tr.1090). He stated his belief that the court would not allow the defense to offer Friend’s statements, but he wanted to give the court the chance to change its mind (Tr.1090). The court refused (Tr.1090). Counsel’s actions were sufficient given the court’s prior ruling.⁶

Exclusion of this crucial impeachment evidence was extremely prejudicial.

The State argues that exclusion of Copeland’s prior inconsistent statements was

⁶ However, in the event that the Court finds that the issue is not preserved, Black requests review for plain error. Rule 30.20.

not prejudicial. First, it argues that Exhibit 555, Copeland's 1999 statement, was not part of the offer of proof (Resp. Br. 35). The court admitted Exhibits 556 and 557 as the offer of proof (Tr. 1071). Exhibit 557 was the deposition transcript of the investigator who had taken a statement from Copeland in 1999. Attached as a deposition exhibit was the statement itself, which was also separately marked as Exhibit 555 (D.Ex. 557). Thus, when Exhibit 557 was admitted as part of the offer of proof, Exhibit 555 was admitted as well.

Second, the State argues that the impeachment evidence would not have helped the defense, because it was too vague, the same evidence came out at trial, and/or it was immaterial (Resp. Br. 35-39). The State argues that Copeland's 1999 statement merely inferred, but did not affirmatively state, that Johnson was out of the truck before the fight began (Resp. Br. 35). Thus, it was possible that Copeland just did not see the fight (Resp. Br. 36). It argues that Copeland's statement was consistent with her trial testimony, because she testified that Johnson was out of the truck before the fight (Resp. Br. 36-37). Hence, according to the State, the impeachment would not have added anything (Resp. Br. 36-37).

But the transcript directly refutes the State's assertions – although there were a few similarities, Copeland's trial testimony radically differed from her 1999 statement on key points in contention. Copeland testified that she left before the fight started, while Johnson was still sitting in the truck (Tr. 1061, 1067-68). She testified that Johnson was talking or arguing with, but not yelling at, the person on the other side of the truck (Tr. 1053-55, 1057). She could not see the other person (Tr. 1057). As she backed away

from the truck, she could still see Martin, but couldn't recall if she still could see Johnson (Tr. 1058). She did not see Johnson attacked or bleeding in any way (Tr. 1059). She did not see Johnson get out of the truck (Tr. 1059, 1061, 1066-67). His door may have been slightly open, but she did not see him get out (Tr. 1061). She did not see anyone stand by the window or reach in the window (Tr. 1063-64). She testified that she must have left before the fight began (Tr. 1068).

In Copeland's 1999 statement, however, she stated "because of the yelling that [Johnson] was doing, she backed away from the truck" (Ex. 555, p.2). She then saw Johnson "open the passenger door and exit from the truck" (Ex. 555, p.2). "[A]s [Johnson] exited from the truck, he was continuing to yell" (Ex. 555, p.2). She still had not seen the person he was yelling at even though she was looking in that direction through the cab of the truck (Ex. 555, p.2). She stated she did not see Johnson attacked and did not see him sustain an injury (Ex. 555, p.2). As she watched him get out of the truck, she did not see him bleeding (Ex. 555, p.2).

To say that the impeachment would not have mattered is incredible. The State's theory of the case was that Black attacked Johnson as Johnson sat in the truck (Tr. 619, 621, 1278, 1286, 1290, 1327-29, 1331-32, 1334, 1336). The State argued that Black "stuck and run" and that Johnson was helpless. The defense theory was that this was a fight in the middle of the street and that Black stabbed Johnson in self-defense. The impeachment would have shown that less than a year after the events, Copeland vouched that Johnson was out of the truck before any fight began. In fact, Copeland never even saw Black, though she was looking through the cab of the truck.

The impeachment would have shown that Johnson was an aggressive participant in the fight. Copeland's testimony that Johnson was talking and/or arguing, but not yelling, downplayed Johnson's involvement. It played into the State's theory that Johnson was sitting in the truck minding his own business when he was attacked. The defense needed to show that Johnson was angry, aggressive, and ready to fight. Copeland's first statement showed that Johnson was aggressive, yelling such that the women felt they needed to back away from the truck five feet. As Johnson exited the truck, he continued to yell. Then, because of the yelling, the women left.

The State also contends that Friend's prior statement was consistent with his trial testimony (Resp. Br. 42-44). As with Copeland, the State is incorrect. Friend testified that Black got out of his car first and approached the truck, as Johnson was trying to get out (Tr. 1077-78, 1085-86). Friend then tells two stories. On direct, he testified that Johnson got out and he and Black stood close together buffaloing each other (Tr. 1078-79). He did not see any punch connect (Tr. 1080). On cross, however, he testified that as Johnson was exiting the truck, Black threw a punch at him, causing Johnson to move back (Tr. 1085-86). Black then fled back to his car, and Johnson threw the beer bottle at him (Tr. 1086-87).

Friend's 1999 statement told a different story. He knew there would be a fight from the yelling going on in the street (Ex. 556, p.2). Johnson started to get out first, but Black got out quicker; both were getting out of the car at the same time (Ex. 556, p.2,6,13). Black "may have swung at him when he was getting out of the truck but I don't think it was a swing myself, I don't know how to put it uh pointing at him like you

know he better not get out of that truck” (Ex. 556, p.6,13). They stood head to head “hollering” and “buffaloing each other” (Ex. 556, p.2). Friend glanced at the driver of the truck, who was looking the other direction, and glanced back a few seconds later, as the yelling continued (Ex. 556, p.3). He thought Black may have been pushed, and Black swung at Johnson (Ex. 556, p.3,14). Johnson leaned away from the punch, and Friend didn’t know if the swing connected (Ex. 556, p.3,14). Black jumped back in his car, and Johnson threw the beer bottle at him and tried to pull him from the car (Ex. 556, p.3,8). Friend thought that Johnson was either cut when Black punched at him in the street or when Johnson was trying to pull Black out of the car (Ex. 556, p.4).

The State suggests that because the evidence at this trial was different than the evidence presented at the first trial, the impeachment was unnecessary (Resp. Br. 40-42). It argues that at the first trial, there were two clear-cut versions of the events, but this time, the defense witnesses actually supported the State’s theory (Resp. Br. 41-42). It argues that Black needed affirmative evidence of his theory of defense, not impeachment evidence (Resp. Br. 42).

But this is precisely why the impeachment evidence was so crucial. Copeland and Friend had drastically changed their accounts, from supporting the defense, to helping the State. The jury should have known what the witnesses had stated when the events were fresh in mind, rather than eight years after the fact. That evidence supported the defense theory that Johnson was out of the truck before the fight began and that Johnson was angry and aggressive. The State overlooks that under §491.074, RSMo, the witnesses’ prior inconsistent statements were substantive evidence, and the defense could argue the

truth of those statements. This impeachment evidence was the defense. This Court must reverse.

ARGUMENT III⁷

The State argues that the best evidence rule does not apply because the content of Tammy Lawson's second statement was not disputed (Resp. Br. 49-50). But although the content of the tape was not disputed, Tammy Lawson's credibility was a crucial factor for the jury to consider. The best evidence of Lawson's statement was the audiotape itself, since only the audiotape would allow the jury to hear the emphasis Lawson gave her words, or the hesitation in her voice. Counsel's reading of the transcript of the statement was surely vastly inferior to the jury hearing Lawson herself give her statement.

The State also argues that the rule of completeness should not apply because it was Black who had presented part of the statement and then wanted the entire tape to be played (Resp. Br. 50). But the State has the sequence of events flipped. The defense had played to the jury Lawson's first statement (Tr. 769-70). The defense then requested to play her second statement (Tr. 770). It was only when the court denied counsel's request to play the audiotape in whole, that counsel was relegated to eliciting parts of the statement through the transcript.

⁷ In the event that the Court finds that the issue is not preserved, Black requests review for plain error. Rule 30.20.

ARGUMENT IV

The State must prove its case beyond a reasonable doubt. For first-degree murder, it must prove that Black coolly reflected upon killing Johnson. While the State shows that Black had time to deliberate (Resp. Br.55-56), it fails to show that Black actually did so in a cool state of mind.

ARGUMENT VI

The State argues that municipal convictions should not count as criminal convictions for purposes of impeachment because considering them as such would force municipal violators to suffer “various onerous consequences” in addition to impeachment (Resp. Br. 67-68). The State reasons that if municipal convictions are considered criminal, municipal violators would face possible exclusion from public programs, voting, jury duty and employment (Resp. Br. 68). This is not true, however, because distinctions are drawn between different levels of criminal convictions. For example, a person convicted of a felony cannot serve on a jury, but a person convicted of a misdemeanor may. §494.425(4), RSMo 2000. A person convicted of a misdemeanor may still vote, so long as the misdemeanor was not connected to voting or the right of suffrage. §115.133.2(3), RSMo 2000. Thus, considering municipal convictions as criminal convictions subject to impeachment would affect the person’s rights incrementally less than if he had been convicted of a misdemeanor.

The State also argues that municipal convictions should not be considered criminal, because people may not have challenged these offenses or may not have hired counsel, yet they will suddenly find themselves laden with convictions carrying “an onerous burden” (Resp. Br. 68). But as mentioned above, allowing impeachment through municipal convictions will not result in people being denied the right to vote or serve on juries. Employers will not treat municipal violators the same as convicted felons.

The State argues that that the fundamental difference between municipal violations and criminal violations are that municipal violations are civil in nature (Resp. Br. 68).

The “civil” designation, however, is not appropriate given the nature of many municipal convictions today. Municipal convictions can result in the loss of personal liberty. For example, as a result of Tammy Lawson’s municipal conviction for petit theft, she was given a jail term of ten days (D.Ex.559). This same conduct could have been punished in state court as a class A misdemeanor. See §82-47, Joplin Municipal Code (L.F. 836), and §570.030.1, RSMo 2000. Additionally, Lawson’s petit theft conviction can be used to enhance her sentence if she is ever convicted of stealing again. §570.040.2, RSMo 2000. Given these facts, the civil/criminal distinction makes no sense.

The trial court should have discretion to allow impeachment with municipal convictions, especially where the same conduct proscribed by the municipal ordinance is also proscribed by a state statute. Just as municipal convictions can be used to enhance a sentence, they should be a proper subject for impeachment.

ARGUMENT VII

In the event that the Court finds that the issue is not preserved, Black requests review for plain error. Rule 30.20.

CONCLUSION

For the foregoing reasons and those set forth in his initial brief, Gary Black affirms the Conclusion set forth on page 130 of his initial brief.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on February 9, 2007, two copies of the foregoing and a disk containing the foregoing were delivered to Shaun Mackelprang, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. This brief contains 6,864 words, which does not exceed the 7,750 words allowed for a reply brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated on July 28, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 9th day of February, 2007, to Shaun Mackelprang, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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