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 BRIEF and APPENDIX

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JURISDICTIONAL STATEMENT

In 1999, Gary W. Black was convicted of first-degree murder, §565.020, and was sentenced to death.[1] His conviction and death sentence was affirmed on direct appeal. *State v. Black,* 50 S.W.3d (Mo.banc 2001). On appeal from the denial of Rule 29.15 postconviction relief, this Court reversed. *Black v. State,* 151 S.W.3d 49 (Mo.banc 2004). In 2006, Black was again convicted of first-degree murder and was sentenced to death. Notice of appeal was filed one day out of time by leave of the Court. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

[1] All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise noted.

STATEMENT OF FACTS[2]

In the sixteen-month period before trial, Gary Black requested five times that he be allowed to represent himself (L.F.37,40,45,46-47; Tr.281). The first request was made three weeks after the case was re-opened in Jasper County Circuit Court (L.F.37). In that request and subsequent ones, Black referred the court to *Faretta v. California*, 422 U.S. 806 (1975) (L.F.37,45). He asserted that he had never asked for counsel and that he did not wish to be represented by counsel (L.F.46). He acknowledged that he fully understood the legal consequences of self-representation and was waiving his right to counsel voluntarily and timely (L.F.46-47). He stated that he understood that he would receive no special treatment and that he would be bound by the same rules and policies as counsel (Tr.281). He stated that he understood he was waiving his right to appointment of counsel and his right to allege ineffectiveness of counsel (Tr.281). He requested an evidentiary hearing (L.F.40). Black renewed his request for the fifth time, two weeks before trial (Tr.281).

The court first rejected Black's request for self-representation as moot, because counsel had not yet been appointed (L.F.1041). The next time, the court rejected it without explanation (L.F.48). Next, it reasoned that counsel were working diligently on his behalf, and they "have benefit of law degrees and experience in criminal cases" (Supp.Tr.1). It opined that Black was "much better served by having counsel than not

[2] The Record on Appeal consists of a trial transcript (Tr.), a supplemental transcript (Supp.Tr.), a legal file (L.F.), a supplemental legal file (Supp.L.F.), and various exhibits.

having counsel" and that he was less qualified than his attorneys (Supp.Tr.1-2). The final time the court rejected Black's requests was because, again, he was not a practicing attorney, and he had capable and experienced counsel available at no expense to him (Tr.282).

Guilt Phase: The State's Case

On October 2, 1998, Andrew Martin and Jason Johnson met at Garfield's Bar shortly after Johnson got off work at 4:19 (Tr.886,945,1045). At about 7:00 or 7:30, they left the bar and drove to Johnson's house for Johnson to change clothes (Tr.887-88). They returned to Garfield's at about 8:00 (Tr.889). Johnson stayed outside in the parking lot for about fifteen minutes and then returned to the bar (Tr.655,889,951). Mark Wolfe, a friend of Martin's, arrived at the bar anywhere from 7:30 to 9:00 p.m. (Tr.654,847).

At about 9:30, Martin, Wolfe, and Johnson left the bar to drive to another bar in downtown Joplin (Tr.656). Martin claimed they only had two to four beers in the five hour period since Johnson got off work and were not drunk (Tr.887,890,947). Johnson's blood alcohol level, however, was .21 or .22, the equivalent of having 22-23 drinks (Tr. 989,1040,1042,1170-71). Wolfe thought Johnson and Martin were "buzzed" (Tr.690), and Johnson had been talking loudly in the bar (Tr.690, 938).

Martin and Johnson drove in Martin's truck, and Wolfe followed in his car (Tr. 657,666,891). They made an unplanned stop at the Snak-Atak convenience store, so Johnson could get some skoal (Tr.658,662,892,947). Wolfe and Martin rolled down their windows and talked while Johnson was inside the store (Tr.663).

Meanwhile, Tammy Lawson had driven to the convenience store with her new boyfriend, Gary Black (Tr.715-16). Even though Lawson estimated they had lived together 3-4 months, Lawson acknowledged that she first met Black when they worked together at the Salvation Army, 32 days before October 2nd (Tr.715,751-52). Black stayed in the car while Lawson went into the store (Tr.717). Inside, Lawson spoke with an old friend she hadn't seen for a while, Ervin Keith (Tr.717-18).

While Lawson was at the checkout counter, Johnson brushed up against her (Tr.720). It was 9:43 (Tr.734,736). A store camera shows that although Lawson's back is to Johnson, he is standing so close to her that their bodies touch and Johnson is craning his head around to try to look Lawson in the face (D.Ex.506). Lawson was "kind of upset" because she thought he was making a pass at her, and she may have told him to back off (Tr.721,729,733,739). She complained about it to Keith, telling him that he did not appreciate what Johnson had done (Tr.721,739).

In the car, Black noticed a marked change in Lawson's demeanor (Tr.739-40). She told him what had happened (Tr.722). She was "so mad" about Johnson's behavior toward her that "she was bitching about it" and cursing (Tr.740,755).

Johnson left the store at 9:44 and briefly stood in front of Wolfe's car before getting back in the truck (Tr.664,842,893-94). He carried a 40-ounce bottle of beer in a brown sack (Tr.695,860,896). Lawson pointed him out to Black (Tr.665,722,740,894-96).

From this point, the accounts of the various State witnesses will be summarized individually:

Tammy Lawson

Black followed Johnson to Fifth and Joplin (Tr.723-24). En route, he and Lawson continued to discuss what Johnson had done (Tr.741). At trial, she stated that Black stated that he would "hurt that nigger" and/or "kick [Johnson's] ass," although she told the police repeatedly in her second statement that Black's intent was merely to talk with Johnson (Tr.757,766, 774; D.Ex.518,p.11,12).[3] Black got increasingly angrier because he was having to race to catch the truck (Tr.741). He would catch up, and then the truck would speed ahead, making him angrier (Tr.741). When Black did catch up, Black and Johnson yelled back and forth at each other (Tr.742).

At Fifth and Joplin, the yelling back and forth got more intense (Tr.743). Black said something about what happened at the store and Johnson said, "what's the matter, you whore, you think you're better than me? You bitch, you think you're better than us? I mean they both started saying it and Gary got mad. And the guy asked Gary to get out of the car. He thought he was bad so Gary stepped out and the guy stepped out and the fight was on" (Tr.742-43,750,774-77; D.Ex.718,p.4,14). She saw Black's arm come up at the end of the fight, and afterwards Johnson hit Black twice in the head with the beer

[3] In Lawson's second statement to the police, the detectives asked her repeatedly if Johnson's race was an issue (D.Ex.517,518). Three times, Lawson stated that Johnson's race never was mentioned, before or after the fight (Tr.779). She stated that Black was angry because of what Johnson was calling her (Tr.779-80). She again denied that the fight had anything to do with race (Tr.780).

bottle (Tr.744,761). She did not see any punches thrown before Black stabbed Johnson (Tr.761). In her second statement to the police, however, she vouched that she did not know who hit whom first (Tr.776-78,780).

Back in the car, Black tossed a knife into her lap (Tr.724,744). He told her that he "got [Johnson] in the throat" and stated "one nigger down" (Tr.757,778). They drove away fast (Tr.725). On the way back to his house, Black threw the knife out the car window (Tr.725).

That night, Lawson and Black drove to Oklahoma (Tr.762). Lawson was scared because Black threatened to hurt her or her children (Tr.762-63). He told her to say that Johnson started the fight (Tr.762). In her second statement to the police, however, she stated that whenever she asked Black what they were going to do, he told her not to worry about it, that he would take care of it (Tr.779).

Lawson gave a statement to the police on October 5, 1998 (D.Ex.519). She stated that inside the Snak-Atak, Johnson put his whole body up against her (D.Ex.519,p.3). Outside, Johnson screamed at her, calling her a bitch and a whore and stating she thought she was better than him (D.Ex.519,p.3). She stated that Johnson and his friend chased them down the road (D.Ex.519,p.3). At the stoplight, they yelled for Black to get out, so he did (D.Ex.519,p.4). Johnson hit Black with the beer bottle twice, and Black hit Johnson with his fist (D.Ex.519,p.4). Black got back in the car, and they drove off (D.Ex.519,p.4). She denied seeing Black with a knife (D.Ex.519,p.5).

Lawson gave a second statement at 1:30 in the afternoon the next day (D.Ex.518). She admitted in this statement that parts of her first statement were untrue

(D.Ex.518,p.4). At the end of the second statement, Lawson asked for protection (Tr.799).

During Lawson's testimony, the court allowed defense counsel to play to the jury the audiotape of Lawson's first statement to the police (Tr.770; D.Ex.516,519). It was admitted into evidence for impeachment and as substantive evidence (Tr.768-69). When defense counsel moved to play the 35-minute tape of Lawson's second statement, on the same grounds, the State objected, arguing that it was not fully inconsistent (Tr.770). Defense counsel argued that the jury should hear the entire tape so they would to truly assess Lawson's credibility and to have the inconsistencies in context (Tr.770-71). The court stated that it would allow defense counsel to show the inconsistencies but not play the tape (Tr.771).

The court denied defense counsel's request to impeach Lawson with her municipal convictions (Tr.756). The court allowed Defense Exhibits 559-63 (documents showing Lawson's convictions for two counts of larceny, two counts of domestic assault, and one count of obstructing service of process/resisting an officer) to be marked as an offer of proof (Tr.1094).

Andrew Martin

Martin didn't notice anything unusual en route to Fifth and Joplin (Tr.897-98). At the intersection, they stopped at a light (Tr.923). He saw Michelle Copeland and another girl he knew walking down the sidewalk (Tr.898-900). As he spoke with the girls, Martin suddenly heard a loud bang, like metal hitting metal on his truck (Tr.901,913). He turned his head toward Johnson (Tr.902). Johnson had blood coming from the left

side of his neck and he had one foot out of the truck (Tr.902-903). Black stood in between the two vehicles (Tr.903). Martin had not heard Johnson yelling at anyone (Tr.901).

Johnson got out of the truck and threw the beer bottle at Black (Tr.903-904). It hit either Black's head or the car door (Tr.904). Johnson tried to hit Black as Black got in his car (Tr.904). Martin never saw Black punch Johnson (Tr.904-905).

After Black drove away, Johnson stumbled back to the truck (Tr.906-907). The blood "was just coming out" (Tr.911). Martin pulled into a parking lot and got help (Tr.907-908). People from a bar came out with towels and t-shirts to stop the bleeding (Tr.922).

At the scene, Martin told a reporting officer that both Black and Johnson had gotten out of their vehicles (Tr.1199). He stated that Black got out of the car and hit Johnson in the side of the head with a beer bottle (Tr.1199).

The next day, Martin told his father he saw Johnson get out of the truck and when he came back to the truck, blood was coming out of his neck, hitting the window (Tr.930-31).

Two days later, Martin told the police that when he turned after hearing the bang, Johnson was already out of the truck (Tr.913-14). He stated that Johnson "stumbled back to the vehicle and got into his vehicle and that is when he noticed all the blood spurting out of [Johnson]" (Tr.915). When asked to describe Black, he stated, "Yes, I really didn't, it happened so fast. And the next thing I know I looked up and the guy was already in his car and slamming the door" (Tr.934). When asked to describe Black's

clothing, he couldn't (Tr.936). When asked to describe Black's hair, he stated, "Well, I'm just going from what I heard. They said he had scraggly blondish browning hair" (Tr.936). He then stated he heard it from Wolfe (Tr.936). He stated that Wolfe was the one that saw Black "come through the window and it looked like he hit him but he came at him at a weird approach and I don't know nothing" (Tr.937).

Five days later, Martin spoke with another detective (Tr.938). He told him that Johnson was already out of the truck swinging the beer bottle when he first noticed the blood (Tr.940). Martin stated that Black's hand was going up to block a punch as he was sitting in his car, "and that's when I saw [Johnson] swinging the beer bottle and the blood coming out" (Tr.941-42). Martin never told the police that the blood was spurting out as Johnson was leaving the truck, because no one had asked him specifically when he first saw the blood (Tr.942-43,956).

Mark Wolfe

About halfway to the next bar, Wolfe noticed that Black's car was following right on his tail (Tr.667). Wolfe slowed down, and Black sped around him to the intersection (Tr.668). Black stopped beside Martin's truck at the stop light (Tr.669).

As Martin spoke with some girls out the driver's side window, Wolfe heard Black say something to Johnson (Tr.669,671). Johnson looked over at Black, and Black got out of his car (Tr.672). Black rushed to the window (Tr.673-74,880). Wolfe could see his hair, his profile, and his eyes, but could not tell if there was a knife in Black's hand (Tr.709). Black threw a punch or a jab through the window at Johnson as he sat in the truck (Tr.673-74).

Johnson got out, and the two struggled in the street (Tr.675). Johnson threw or swung a beer bottle at Black (Tr. 675). The bottle hit Black's arm or head (Tr.704). Black went to his car, and Johnson punched him in the car (Tr.676). Johnson walked back to the truck slowly (Tr.676). It all happened very, very fast (Tr.699).[4]

James Brandon

James Brandon worked as a bouncer at the Dolphin Club at Fifth and Joplin (Tr.992). He was standing a few feet inside the front door and heard some yelling outside, even louder than the music in the club (Tr.993,1011). Someone yelled "F-U" (Tr.1012). He saw Black get out of the car, take a few steps toward the truck, and lunge his right hand through the truck's window (Tr.994-95). Johnson's head snapped back like he was avoiding the punch (Tr.996). Black backed off, the truck door came open, and Johnson came out holding his 40-ounce bottle of beer in its brown paper bag (Tr.996-98). Black headed to his car, and Johnson swung at Black (Tr.997). They scuffled in the middle of the road, and Johnson either threw the bag down or tried to hit Black with it (Tr.998). The bag hit against the side of the car (Tr.998). Black retreated to the car; for a second he dropped below the roof of the car, but then he came back up and got into the car (Tr.998). Johnson held Black's shirt and was trying to pull him backwards (Tr.999).

[4] Later, Detective Gallup testified, over objection, to the content of Wolfe's prior consistent statement (Tr.879-81).

Black managed to get into the car and drive off, as Johnson held onto the door for a few steps (Tr.999). After the car sped off, Johnson wiped at his neck (Tr.1012).

Brandon told an officer at the scene that he saw two men outside their vehicles exchange blows (Tr.1006). He did not know who hit whom with what (Tr.1008). He stated he saw Black hit Johnson but did not recall stating he saw the punch connect (Tr.1007). He didn't know if he told the detective that he saw Black hit Johnson with a bottle (Tr.1007).

Other State Evidence

The distance between the Snak-Atak and Fifth and Joplin is 1.2 miles (Tr.821). At 35 miles per hour, the drive takes three minutes (Tr.821). Johnson walked out of the Snak-Atak at 9:44:23, and the fight took place at approximately 9:47 (Tr.843; D.Ex.506). The 911 call was made at 9:50 (Tr.844). Initial reports made to the police were that Johnson had been hit with the beer bottle (Tr.858).

Johnson was taken to the hospital, where he underwent surgery (Tr.968). His jugular vein had been completely cut and the carotid artery was about 75% cut (Tr.967). Johnson had a large stroke and died three days later (Tr.970,980). The cause of death was the single knife wound (Tr.971).

Black was arrested without incident several days later (Tr.812). His face was swollen and bruised (Tr.882; D.Ex.524,525,526).

Guilt Phase: The Defense Case

Michelle Copeland

Copeland testified that she and a friend were walking down the street when she saw Andy Martin in his truck stopped at the light (Tr.1051). She approached the truck and they chatted (Tr.1052). She saw Johnson in the passenger seat having a conversation with someone outside the truck (Tr.1052). He was arguing, but not yelling (Tr.1054-55). She admitted giving a prior statement on August 11, 1999, and she read it to refresh her recollection (Tr.1053-55). She again testified that Johnson was arguing, but not yelling (Tr.1055). Defense counsel then asked her more about her prior statement – the date it was given and to whom it was given (Tr.1055). The court sustained the State's objection to defense counsel's attempt to impeach his own witness (Tr.1055-57).

Copeland then testified that she could not recall whether Johnson had started to open the door before she walked away (Tr.1059). Defense counsel asked her if she had been deposed in the fall of 2005 (D.Ex.556; Tr.1059-60). The State again objected that the defense was trying to impeach its own witness (Tr.1060). Defense counsel stated that he was trying to refresh Copeland's recollection (Tr.1060). Copeland testified that when she last saw Johnson, he was still sitting in the truck and the door possibly was open a little bit, but not fully (Tr.1061-62). She did not recall if she heard the door make a "pop" sound as if it were popping open (Tr.1062). She stated that she never saw Johnson out in the street (Tr.1061). When counsel again asked her about her 2005 deposition, the State objected that counsel was trying to impeach his own witness, and the court sustained the objection (Tr.1062). The court admitted defense exhibit 556 (transcript of

Copeland's 9/22/05 deposition) and exhibit 557 (transcript of a deposition, with Copeland's 8/11/99 statement attached) as an offer of proof of prior inconsistent statements, but rejected their admission at trial (Tr.1071).

Ronald Friend

Ronald Friend was standing inside the front door of a bar at the intersection (Tr.1072,1074). He heard "hollering" and looked outside (Tr.1074-75). Black was out of his car and approached Johnson in the truck (Tr.1077,1085). As Johnson tried to get out of the truck, Black threw a punch, and Johnson moved back (Tr.1086-87). Friend could not tell if the punch actually connected (Tr.1087). He did not see Johnson throw any punch (Tr.1088). Black then headed back to his car (Tr.1086). He heard glass break as the car was driving away (Tr.1080). He could not see very well because of how the two men were situated (Tr.1076). After the fight, Friend asked Martin what happened, and Martin stated he didn't know because he was talking to some girls (Tr.1083-84). The court refused to admit Friend's prior statement and its inconsistencies, but allowed Defense Exhibit 558 (his statement of 5/11/99) and the accompanying tape recording to be marked as an offer of proof (Tr.1092-93).

Lawson Not Scared of Black

One of Black's neighbors in Oklahoma saw Black and Lawson in the days following the fight (Tr.1096). Lawson was very "lovey dovey" with Black all the time and couldn't leave him alone (Tr.1098-99). Lawson did not appear intimidated at all by Black (Tr.1099). She stated she was thinking about moving there permanently (Tr.1099).

The neighbor thought Lawson and Black had a typical boyfriend/girlfriend relationship (Tr.1100).

Medical Testimony

A pathologist, Thomas Bennett, testified that the wound injured only soft tissues, so it hadn't taken much force (Tr.1142). The knife went in and out in the same path, with no lateral movement (Tr.1181). Because the neck contains lots of nerves, Johnson would have felt the wound immediately (Tr.1148-50). The wound would not have affected his ability to walk, because it did not hit the spine (Tr.1151). He might not have been able to talk because of damage to the vocal cords, but he would have been able to make some sounds and could move his arms (Tr.1151,1180).

Johnson's debilitation came from blood loss (Tr.1151). There was immediate arterial spurt (Tr.1188). The wound bled profusely and bled out within three minutes (Tr.1144,1146). Johnson would have been conscious for at least 15 to 30 seconds, up to ten minutes (Tr.1153-54). The likely timeframe is several minutes (Tr.1154-55). Johnson had no defensive wounds and no injuries other than the stab wound (Tr.1159, 1178-79).

Blood Stain Expert

Stuart James, an expert in blood stain analysis, testified that the blood patterns on the street were too ill-defined to form any conclusions (Tr.1235,1241,1246). By contrast, he discerned evidence of arterial spurt on the truck bed, the inside panel of the door, and the dashboard (Tr.1213,1230-31,1249-50). Arterial spurt appeared low on the side of the truck bed, which indicated that Johnson had to be low, not standing, when his blood left

this pattern (Tr.1232-33,1253). The low spurt was consistent with Johnson getting back into the truck, or with him getting out of the truck crouched low (Tr.1234). While James could not come to a definitive answer on whether Johnson was stabbed in the truck or on the street, if Johnson had been struck in the truck, the pressure of the arterial spurt – and hence the volume of the blood – would be greatest there (Tr.1254). But the volume was greatest on the outside of the truck (Tr.1254).

Deliberations and Verdict

The court overruled Black's motion for judgment of acquittal at the close of all the evidence (Tr.1258-63). The State argued in closing that the instruction on deliberation did not require Black to be "cool and calm" (Tr.1284). During deliberations, the jury sent a note to the court asking for the previous testimony and this week's testimony of Martin, Wolfe, Brandon, Friend, and Lawson (L.F.934). The jury found Black guilty of first degree murder (Tr.1343).

Penalty Phase Evidence

In support of its one statutory aggravating circumstance – that Black had one or more serious assaultive criminal convictions – the State offered a certified copy showing that Black had been convicted of armed robbery and felony assault in Newton County for an event that happened in 1976 (Tr.1360; St.Ex.47). As nonstatutory aggravation, it offered a certified copy showing that Black had been convicted of burglary in Greene County in 1992 (Tr.1360; St.Ex.48).

The State presented the testimony of Jackie Clark (Tr.1360-71). On March 5, 1976, at about 9:00 at night, Clark was with his girlfriend in his car at a remote location

near Shoal Creek (Tr.1362-63). Clark was eighteen (Tr.1362). Another car pulled in and blocked Clark's car from leaving (Tr.1363). Black appeared at Clark's window with a sawed off shotgun (Tr.1363). He and another man identified themselves as police officers and demanded Clark's wallet and car keys (Tr.1364). They ordered him out of the car (Tr.1364). As Clark was spread-eagled against the car, Black shot him in the back (Tr.1364). Clark had damage to his spleen, a lung, a kidney, pancreas and intestine, and pellets remain in his body (Tr.1369). The trial court overruled defense counsel's objections that the State was eliciting too much detail about the incident (Tr.1365,1367).

Defense Case for Life

When Black was seven years old, he was riding a tractor with his grandfather (Tr.1383). Black loved being with his grandfather, who took time to do things with him and made him feel worthwhile (Tr.1383-84). As they rode the tractor, it turned over (Tr.1383). His grandfather threw Black clear, but could not save himself (Tr.1383). Black saw his grandfather crushed and killed (Tr.1383). Black lost the one person he felt close to, and he felt responsible for his grandfather's death (Tr.1383-85).

This accident caused much grief and resulted in an anxiety disorder (Tr.1380,1382). Black joined the military at a young age, further exacerbating his anxiety disorder (Tr.1383-84). Dr. William Logan concluded that Black also suffered from bi-polar disorder (Tr.1380,1382). Black now receives medication to treat his illnesses (Tr.1380-81).

Dr. Logan also reviewed Lawson's records (Tr.1390). She is emotionally volatile, abuses substances, and has a mood disorder (Tr.1390-91). She too had traumatic events

in her life (Tr.1390-91). As a result, Lawson looked for people to rescue her, and Black had fallen into that role (Tr.1392-93). Black was attracted to Lawson because of her children and his desire for a family (Tr.1393).

At the time of the fight with Johnson, Lawson had an emotional crisis (Tr.1390). Her volatility exacerbated Black's emotional state (Tr.1390). Black and Lawson fed off each other, neither could calm the other down (Tr.1394). At the time of the incident, Black was seriously emotionally disturbed (Tr.1394). He perceived that he himself was under attack (Tr.1394).

In early April 2006, Black had a stroke (Tr.1389). It was relatively minor and did not affect Black's cognitive abilities (Tr.1389). Later in the month, he had another incident where his blood pressure shot up and he had to be hospitalized briefly (Tr.1389).

The court failed to include the required instruction, modeled on MAI-CR3d 313.30A, that defines reasonable doubt, in the instructions read and given to the jury for their penalty phase deliberations. It also omitted mandatory language from Instruction 19, modeled on MAI-CR3d 313.40, advising that all twelve of the jurors must agree to the existence of the aggravating circumstance (L.F.954).

In closing, over objection, the State argued that Black himself, not the jurors, would be putting him to death (Tr.1404-05). In its rebuttal closing, the State argued that the prosecutor himself would sentence Black to death, and that the prosecutor himself had made the decision to seek death (Tr.1425). The prosecutor continued its argument even after the court sustained the objection (Tr.1425-26).

Death Verdict

The jury found a single aggravating circumstance of prior serious assaultive conviction and recommended a death sentence (L.F.961). The court imposed death (L.F.1034). Notice of appeal was filed one day out of time by leave of the Court (L.F.1039-40).

POINT I

The trial court erred in appointing counsel and in summarily overruling Black's repeated, timely, and unequivocal requests to proceed *pro se*, because the rulings deprived Black of his right to self-representation and to present his defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Black made a knowing, voluntary, and intelligent waiver of the right to counsel and should have been allowed to proceed *pro se.*

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

United States v. Arlt, 41 F.3d 516 (9th Cir.1994);

United States v. McKinley, 58 F.3d 1475 (10th Cir.1995);

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

Mo.Const.,Art.I,Secs. 10,18(a).

POINT II

The trial court erred and abused its discretion in sustaining the State's objections and in refusing to allow the defense to impeach defense witnesses Michelle Copeland and Ronald Friend with their prior inconsistent statements, because Black had the right to present the statements both as impeachment and as substantive evidence under Section 491.074, and the limitation violated Black's rights to due process, a fair trial, presentation of a defense, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the jury was barred from learning that Copeland and Friend made prior statements that were inconsistent with their in-court testimony on points of key importance in the jury's determination of whether Black acted with deliberation or in a fit of rage or out of self-defense.

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

State v. Blankenship, 830 S.W.2d 1 (Mo.banc 1992);

State v. Bowman, 741 S.W.2d 10 (Mo.banc 1987);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21; and

§491.074.

POINT III

The trial court erred and abused its discretion in sustaining the State's objections and in refusing to allow the defense to play the audiotape of Tammy Lawson's second statement to the police, because the statement was admissible under Section 491.074 as impeachment and also as substantive evidence and was the best evidence of Lawson's inconsistent statements, and thus the court's refusal violated Black's rights to due process, a fair trial, presentation of a defense, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the statement was inconsistent with Lawson's trial testimony, her first statement to the police, and her testimony at Black's preliminary hearing and thus the jury should have been allowed to gauge Lawson's credibility by hearing her own words with the emphasis and inflection she gave those words, and in their complete context, as the best evidence of Lawson's inconsistent statements.

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

State v. Bowman, 741 S.W.2d 10 (Mo.banc 1987);

State v. McClanahan, 202 S.W.3d 64 (Mo.App.S.D.2006);

State v. Neely, 979 S.W.2d 552 (Mo.App.S.D.1998);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21; and

§491.074.

POINT IV

The trial court erred in overruling Black's motion for judgment of acquittal at the close of all evidence, accepting the verdict, entering judgment against him for first-degree murder, and sentencing him to death, in violation of his rights to due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, because the State failed to prove an element of first-degree murder, that Black coolly reflected before stabbing Johnson, in that the evidence showed that in the brief interval between leaving the Snak-Atak and the fight, Black was suddenly provoked to anger and did not coolly reflect: sitting calmly in his car, Black was assailed by his furious girlfriend who, cursing and "bitching", told Black that she had just been sexually harassed in the store; Lawson continued to talk about it as Black hotly followed Johnson, trying his best to catch up to the truck, which would speed up as Black got closer; Black got increasingly angry as he followed Johnson; he indicated that he wanted to hurt Johnson, to "kick his ass," not to kill him; and, when he did catch up to Johnson at the stoplight, he and Johnson exchanged angry words, the last straw for the stressed and angry Black.

In re Winship, 397 U.S. 357 (1970);

State v. Black, 50 S.W.3d (Mo.banc 2001);

State v. O'Brien, 857 S.W.2d 212 (Mo.banc 1993);

U.S.Const.,Amends. V,VI,VIII,XIV; and

Mo.Const.,Art.I,Secs. 10,18(a),21.

POINT V

The trial court plainly erred and abused its discretion in overruling defense counsel's objection and in permitting Detective Gallup to restate Mark Wolfe's account of the events surrounding the fight, because allowing the recitation of Wolfe's account after Wolfe already testified about it violated Black's rights to due process and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Gallup's testimony was an inadmissible prior consistent statement that improperly bolstered Wolfe's credibility in a case where the credibility of the witnesses was paramount, thereby giving the State an unfair advantage.

State v. Bell, 936 S.W.2d 204 (Mo.App.W.D.1996);

State v. Clark, 711 S.W.2d 928 (Mo.App.E.D.1986);

State v. McClanahan, 202 S.W.3d 64 (Mo.App.S.D.2006);

State v. Seever, 733 S.W.2d 438 (Mo.banc 1987);

U.S.Const.,Amends. V,VI,,XIV;

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

Rule 30.20.

POINT VI

The trial court erred and abused its discretion in sustaining the State's objections and in refusing to allow the defense to impeach State witness Tammy Lawson with her municipal convictions, because barring this line of impeachment violated Black's rights to due process, a fair trial, presentation of a defense, confrontation, cross-examination, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the jury had the responsibility of assessing Lawson's credibility and should have known the true extent of her criminal involvement in evaluating her credibility and demeanor – that, in addition to her misdemeanor convictions for possession of marijuana and driving under the influence, Lawson had municipal convictions for two counts of theft, two counts of domestic assault, and one count of obstructing service of process/resisting an officer.

Meredith v. Whillock, 158 S.W. 1061 (Mo.App.Spr.1913);

Waller v. Florida, 397 U.S. 387 (1970);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21; and

§491.050.

POINT VII

The trial court erred in overruling counsel's objections to Jackie Clark's testimony, because it violated Black's rights to due process, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that, under *Shepard v. United States,* the State should not have been allowed to present the testimony of the victim of those crimes and instead, should have been limited to presenting the terms of the charging documents, and documents showing Black's assent to the factual basis for the plea (such as the transcript of the guilty plea hearing, the plea agreement, or other comparable judicial documents), to prove that Black's 1976 convictions were serious and assaultive.

Shepard v. United States, 544 U.S. 13 (2005);

State v. Ivy, 188 S.W.3d 132 (Tenn.2006);

U.S.Const.,Amends. V,VI,VIII,XIV; and

Mo.Const.,Art.I,Secs. 10,18(a),21.

POINT VIII

The trial court plainly erred when it failed to include MAI-CR3d 313.30A in the instructions read and given to the jury for their penalty phase deliberations and omitted vital, mandatory language from Instruction 19, modeled on MAI-CR3d 313.40, because the omission of crucial instructions and/or language required by the MAI-Cr3d deprived Black of due process, a fair and reliable sentencing trial, and freedom from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 21, and 22(a) of the Missouri Constitution, in that the jurors received no instruction in penalty phase as to what they should consider to be proof beyond a reasonable doubt; they were not told that if they were not firmly convinced that a proposition is true, they must give the defendant the benefit of the doubt and not find such proposition to be true; and they were not informed of the requirement that all twelve jurors must agree to the existence of the aggravating circumstance.

Deck v. State, 68 S.W.3d 418 (Mo.banc 2002);

State v. Goucher, 111 S.W.3d 915 (Mo.App.S.D.2003);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21,22; and

Rule 30.20.

POINT IX

The trial court plainly erred in submitting Instruction 19, patterned on MAI-Cr3d 313.40, to the jury, in accepting the jury's recommendation of death, and in sentencing Black to death, in violation of Black's rights to due process, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 21, and 22(a) of the Missouri Constitution, because the sole aggravating circumstance was submitted to the jury under a faulty instruction, in that Instruction 19 did not ensure unanimity in the jurors' finding – instead, it allowed the risk that some jurors would find that only one conviction was serious and assaultive and other jurors would find only the other conviction, such that they never unanimously found that one of Black's prior convictions was serious and assaultive.

State v. Carson, 941 S.W.2d 518 (Mo.banc 1997);

State v. Goucher, 111 S.W.3d 915 (Mo.App.S.D.2003);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21,22; and

Rule 30.20.

POINT X

The trial court erred and plainly erred in overruling defense counsel's objections to the State's guilt and penalty phase closing arguments, and failing to intercede *sua sponte*, because the State's repeated, improper and excessive comments violated Black's rights to due process, a trial before a fair and impartial jury, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that:

A. In guilt phase, the State misstated the law by urging the jurors to believe that Black need not be cool and calm in order to have coolly reflected, as long as he had time to deliberate;

B. In penalty phase, the State (1) diminished the jurors' sense of responsibility by arguing that it would not be them giving Black death, it would be Black; and (2) expressed the prosecutor's own personal opinion and implied knowledge of additional facts not on the record when it argued that the prosecutor himself would give death, and that the prosecutor himself had made the decision to seek death.

Berger v. United States, 295 U.S. 78 (1935);

Caldwell v. Mississippi, 472 U.S. 320 (1985);

Shurn v. Delo, 177 F.3d 662 (8th Cir.1999);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21; and

Rule 30.20.

POINT XI

The trial court erred in accepting the jury's death penalty verdict and in sentencing Black to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Black's sentence to life imprisonment without parole, based on the lack of evidence that Black acted with cool deliberation, the trial court's refusal to follow bedrock precedents affecting Black's fundamental rights, and skewed rulings which kept the defense from presenting its evidence, while allowing the State to present inadmissible evidence.

Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424 (2001)

State v. Chaney, 967 S.W.2d 47 (Mo.banc 1998)

State v. Ramsey, 864 S.W.2d 320 (Mo.banc 1993)

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21; and

§565.035.

POINT XII

The trial court plainly erred in submitting Instructions 20 and 20A, because the instructions violated Black's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that the instructions failed to instruct the jury that the State bore the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was not sufficient to outweigh the evidence in aggravation.

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

State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003);

U.S.Const.,Amends. V,VI,VIII,XIV;

Mo.Const.,Art.I,Secs. 10,18(a),21; and

Rule 30.20.

ARGUMENT I

The trial court erred in appointing counsel and in summarily overruling Black's repeated, timely, and unequivocal requests to proceed *pro se*, because the rulings deprived Black of his right to self-representation and to present his defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Black made a knowing, voluntary, and intelligent waiver of the right to counsel and should have been allowed to proceed *pro se.*

In the sixteen-month period leading up to his trial, Gary Black made crystal clear that he wanted to represent himself. Black's conviction had been overturned because his prior court-appointed attorneys were ineffective, failing to impeach key state witnesses. *Black v. State*, 151 S.W.3d 49 (Mo.banc 2004). Black repeatedly asserted his right to represent himself, even referring the court several times to the benchmark case, *Faretta v. California*, 422 U.S. 806 (1975). Yet the court denied Black the right to self-representation because he lacked legal education and qualifications and his attorneys were provided free of charge (Tr.282; Supp.Tr.1-2). The court's denial of Black's repeated requests for self-representation violated the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Black's Repeated Requests

On January 5, 2005, the Circuit Court re-opened the case after it was remanded for a new trial (L.F.1041). The first pleading was filed on February 10, 2005 – it was Black's motion for leave to represent himself, pursuant to *Faretta v. California*, 422 U.S. 806 (1975), accompanied by a *pro se* request for discovery (L.F.37-39). Five days later, Black filed another motion for an order granting him leave to represent himself (L.F.40). He alleged that he "unequivocally, intelligently, and voluntarily" wished to represent himself (L.F.40). He further asserted that he understood the case, the legal consequences of self-representation, and that he would be bound by the same rules and procedures as an attorney (L.F.40). He asserted that the right to self-representation was fundamental, cited *Faretta*, and asked the court to grant his request, or alternatively, to grant an evidentiary hearing on the motion (L.F.40).

On February 16, 2005, the court denied the motions (L.F.41). It ruled that they were moot and should be raised at the appropriate time by appointed counsel (L.F.1041). The court directed that counsel from the "Capital Murder Case" enter their appearance (L.F.1041). Counsel did so nine days later (L.F.1042).

On February 23, 2005, Black wrote to the court regarding his right to self-representation (L.F.45). He advised the court that on remand, he had never requested counsel, and in fact, he twice had moved to proceed *pro se* (L.F.45). He asserted that he had a clear right to self-representation under *Faretta* and again gave the court the full citation (L.F.45).

Black followed up on March 15, 2005, by filing a motion for an order dismissing appointed counsel and granting him leave to represent himself (L.F.46). He asserted that he had never asked for counsel and that he did not wish to be represented by counsel (L.F.46). He acknowledged that he fully understood the legal consequences of self-representation and was waiving his right to counsel voluntarily and timely (L.F.46-47). He again asserted that his right of self-representation was fundamental and asked for leave to represent himself (L.F.47). The judge denied the motion the following day, without explanation (L.F.48).

On October 5, 2005, Black filed a motion to dismiss appointed counsel because of a conflict of interest (L.F.680). He requested an evidentiary hearing (L.F.680). The court overruled the motion on October 18, 2005 (Supp.Tr.1-2). It reasoned that counsel were working diligently on his behalf, and they "have benefit of law degrees and experience in criminal cases" (Supp.Tr.1). The court opined that Black was "much better served by having counsel than not having counsel. And so for that reason I'm going to overrule the motion" (Supp.Tr.1). The court reiterated its earlier finding that Black was less qualified than his attorneys (Supp.Tr.2).

On April 18, 2006, Black again requested that he be allowed to represent himself (Tr.281). He stated that he understood that he would receive no special treatment and that he would be bound by the same rules and policies as counsel (Tr.281). He understood he was waiving his right to appointment of counsel and his right to allege ineffectiveness of counsel (Tr.281). The court noted Black's motion and held:

> The Court is of the firm opinion that because you're not a practicing attorney and because you have capable and experienced counsel available at no expense to you that your request will be denied.

(Tr.282). On May 1, 2006, jury selection began (Tr.283).

Preservation and Standard of Review

This issue is included in the motion for new trial (L.F.962-64) and thus is preserved for review. The trial court has no discretion to deny a timely, informed, voluntary and unequivocal request for self-representation. *State v. Herron*, 736 S.W.2d 447, 449 (Mo.App.W.D.1987); see also *State v. Hampton***,** 959 S.W.2d 444, 447 (Mo.banc 1997). An appellate court must review a claimed *Faretta* violation, a mixed question of law and fact, *de novo*. *United States v. Mentzos*, 462 F.3d 830, 838 (8thCir. 2006); U*nited States v. Erskine***,** 355 F.3d 1161, 1166 (9thCir.2004); *United States v. Kimball*, 291 F.3d 726, 730 (11thCir.2002).

The Court Should Have Allowed Black to Represent Himself

In *Faretta*, weeks before trial, the defendant requested that he be allowed to represent himself. *Id.* at 807,835. The defendant had once before represented himself, had a high school diploma, and did not want to be represented by an over-burdened public defender's office. *Id.* at 807. Initially, the trial court granted the request, but later revoked it. *Id.* at 808,810.

The Supreme Court held that a State cannot force a lawyer upon a defendant when

he insists he wants to conduct his own defense. *Id.* at 807. The Sixth Amendment right to the assistance of counsel implicitly embodies "a correlative right to dispense with a lawyer's help." *Id*. at 2530, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). "To thrust counsel upon the accused, against his considered wish, … violates the logic of the [Sixth] Amendment." *Faretta*, 422 U.S. at 820. The right to defend is personal to the defendant, since it is the defendant who must bear the consequences of a conviction. *Id.* at 834. The defendant, therefore, "must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* Unless a defendant has agreed to be represented by counsel, the defense presented "is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Id.* at 821.

This Court has echoed *Faretta*'s clear mandate that "a criminal defendant who makes a timely, informed, voluntary and unequivocal waiver of the right to counsel may not be tried with counsel forced upon him by the State." *Hampton***,** 959 S.W.2d at 447. Whether the waiver was voluntary, knowing and intelligent depends "in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Wilkins v. State*, 802 S.W.2d 491 (Mo.banc 1991), quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

Black has met this test. His requests were timely, each made well before trial, and the last, like Faretta's, made weeks before trial (L.F.37-40,45-47,680; Tr. 281-82; Supp.Tr. 2). Furthermore, his desire was truly for self-representation, not to delay the proceedings. In fact, when counsel told the court in October 2005, that he would need a

continuance into 2006 to prepare for trial, he disclosed that Black wanted the case tried in 2005 (Supp.Tr.57). Later, Black objected to a continuance of the March 2006 trial date (Tr.192). Lastly, on April 18, 2006, defense counsel opted not to seek a writ on an unfavorable ruling, because "it would delay the case and I'm sure that Mr. Black doesn't want to do that" (Tr.244).

Black's requests were voluntary and unequivocal. Right from the start, Black knew he wanted to represent himself, and he repeatedly and clearly requested that he be allowed to do so (L.F.37-40,45-47,680; Tr.281; Supp.Tr.1-2). He never wavered from this desire.

Additionally, Black made his requests with "eyes wide open." He understood the facts of the case, since he had been living with the case for the prior seven years, through one trial, one direct appeal, and one postconviction motion. He understood the legal consequences of self-representation, that he would be bound by the same rules and procedures as an attorney, that he would receive no special treatment, and that he was waiving his right to appointment of counsel and his right to allege ineffectiveness of counsel (L.F.40,46-47; Tr.281).

Once Black asserted his right to self-representation, the court had an affirmative duty to inform him of the consequences of that decision and to ensure that the decision was knowing, voluntary, and intelligent. See, e.g., *State v. Figueroa*, 897 A.2d 1050 (N.J. 2006) (when capital defendant unequivocally requested self-representation, trial court had duty to question him carefully; denial of hearing mandated reversal); *Hill v. Commonwealth*, 125 S.W.3d 221, 226 (Ky.2004) ("trial court must hold a hearing in

which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent"); *United States v. Hernandez*, 203 F.3d 614, 625 (9thCir.2000) ("Once the district court learned of [the defendant's] desire to proceed pro se, it was required to fully inform him in some manner of the nature of the charges against him, the possible penalties, and the dangers of self-representation"); *Hutchens v. State*, 730 So.2d 825, 826 (Fla.App.1999) (denial of defendant's pretrial request to proceed *pro se*, without conducting *Faretta* inquiry, was reversible error). The court never held such a hearing, despite Black's request for one (L.F.40). Its failure to do so was reversible error.

The court also clearly erred as a matter of law on the basis for its rejection of Black's *Faretta* demand. The court first rejected Black's request for self-representation as "moot," because counsel had not yet been appointed (L.F.1041). The next time the court rejected the request, it did so without explanation (L.F.48). The next time, it reasoned that counsel were working diligently on his behalf, and they "have benefit of law degrees and experience in criminal cases" (Supp.Tr.1). It opined that Black was "much better served by having counsel than not having counsel" and that he was less qualified than his attorneys (Supp.Tr.1-2). The final time the court rejected Black's requests was because, again, he was not a practicing attorney, and he had capable and experienced counsel available at no expense to him (Tr.282).

But the Supreme Court specifically rejected the notion that the right of self-representation hinges upon the defendant's legal knowledge or experience. *Faretta*, 422 U.S. at 835-36. It was enough that the trial record showed that Faretta was "literate, competent and understanding, and that he was voluntarily exercising his informed free

will." *Id.* at 835. The Court stressed that it did not need to consider whether Faretta understood the hearsay rule or other procedural issues, because "his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Id.* at 836; *see also Wilkins*, 802 S.W.2d at 501 ("a defendant need not have the skills and experience of a lawyer to competently and intelligently choose self-representation"). Although defendants are usually better off represented by counsel, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993) (emphasis in original.)

Other Courts Have Reversed in Similar Cases

Missouri courts have considered *Faretta* issues numerous times. Typically, these cases involve whether the defendant's request was untimely, unequivocal, or unknowing; whether the defendant was competent; whether the request was made to delay the trial; or whether a request to proceed *pro se* that was granted should not have been. But counsel has not found any Missouri cases where the trial court refused to grant a request for self-representation made timely, knowingly, voluntarily and intelligently by a competent defendant. In other words, counsel could not locate any Missouri cases where the trial court simply failed to abide by *Faretta*.

But there are a number of such cases from other jurisdictions. In *Hernandez*, 203 F.3d at 625, the defendant requested that he be allowed to proceed *pro se*. The request, made three weeks before trial, was based on the defendant's mistrust of his appointed

counsel. *Id.* at 621. Without attempting to determine if the defendant was waiving his rights knowingly, voluntarily and intelligently, the district court overruled the request, ruling that the defendant did not have the have the ability to put on a reasonable defense. *Id.* at 626. The Court of Appeals for the Ninth Circuit held that the district court had clearly violated the defendant's Sixth Amendment rights and remanded for a new trial. *Id.*

In *United States v. Arlt*, 41 F.3d 516, 519 (9thCir.1994), the defendant moved to proceed *pro se* six months before trial, even before counsel was appointed to represent him. Arlt persisted in his unsuccessful requests for self-representation. *Id.* at 517. Eventually, he moved for and received substitute counsel. *Id.* The Ninth Circuit reversed. *Id.* at 524. It held that the district judge erred as a matter of law in denying Arlt's request based on Arlt's lack of legal knowledge. *Id.* at 518. Because Arlt was competent to stand trial, he was competent to choose to represent himself at trial. *Id.*, citing *Godinez*, 509 U.S. at 399-400. He did not waive his request to go *pro se* by requesting substitute counsel, since the court had already made very clear that it would not allow him to go *pro se*. *Id.* at 522.

In *United States v. McKinley*, 58 F.3d 1475, 1477 (10thCir.1995), the defendant initially rejected appointed counsel and requested that a lay person serve as his attorney. The court refused, and a month later, the defendant filed a discovery request "in propia [sic] persona." *Id.* at 1478. He asked if the case was civil or criminal, and if criminal, whether the court proceeded under "common law jurisdiction" or under "the criminal aspects of admiralty jurisdiction." *Id.* At a hearing on the motion, four and a half months

before trial, the defendant demanded to represent himself. *Id.* at 1479-80. The court refused, citing lack of legal competence. *Id.* Several weeks later, the defendant again requested to represent himself, citing *Faretta*, and requested a hearing. *Id.* Again his request was denied. *Id.* The Tenth Circuit reversed, holding that the district court erred in relying on McKinley's lack of legal knowledge. *Id.* at 1481. It stressed that the district court should have held a hearing on the request. *Id.*

State courts are in accord. For example, in *People v. Dent*, 65 P.3d 1286, 1288 (Cal.2003), the California Supreme Court reversed the defendant's first-degree murder conviction and death sentence, because the trial court should have honored the defendant's timely, unequivocal, and knowing request for self-representation, "irrespective of how unwise such a choice might appear to be." In *State v. Figueroa*, 897 A.2d 1050 (N.J. 2006), the New Jersey Supreme Court remanded for a new trial based on the trial court's failure to conduct an inquiry after the defendant unequivocally requested self-representation. In *State v. Bakalov*, 862 P.2d 1354, 1355 (Utah 1993), the Utah Supreme Court also remanded for a new trial, because the trial court, without holding a hearing, rejected the defendant's request for self-representation based on his lack of legal knowledge.

The trial court's denial of Black's fundamental right to self-representation was structural error not subject to harmless error analysis. *McKaskle v. Wiggins*, 465 U.S. 168, 177 fn.8 (1984); *Johnson v. United States*, 520 U.S. 461, 469 (1997). This Court must reverse.

ARGUMENT II

The trial court erred and abused its discretion in sustaining the State's objections and in refusing to allow the defense to impeach defense witnesses Michelle Copeland and Ronald Friend with their prior inconsistent statements, because Black had the right to present the statements both as impeachment and as substantive evidence under Section 491.074, and the limitation violated Black's rights to due process, a fair trial, presentation of a defense, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the jury was barred from learning that Copeland and Friend made prior statements that were inconsistent with their in-court testimony on points of key importance in the jury's determination of whether Black acted with deliberation or in a fit of rage or out of self-defense.

In *Black v. State*, 151 S.W.3d 49, 51 (Mo.banc 2004), this Court held that defense counsel was ineffective for failing to impeach four key witnesses with their prior inconsistent statements. One of those witnesses was Michelle Copeland, a defense witness at both the first and second trials. *Id.* at 53. The Court held that after Copeland testified at the first trial that Johnson stayed in the pickup truck, counsel should have impeached her with her prior statement that "she saw and heard the victim yelling at someone, saw him open the passenger door and get out, and at that time she saw no

injury." *Id.* Citing Section 491.074, the Court noted that if this evidence had been admitted, it also would have been admissible as substantive evidence. *Id.* The Court found that the impeaching evidence regarding Copeland and the other witnesses "focused on the 'very root of the matter in controversy'" because it "related directly to the central issue of whether Mr. Black acted with deliberation or in a fit of rage or out of self-defense." *Id.* at 56, quoting *State v. Perry*, 879 S.W.2d 609, 613 (Mo.App.E.D.1994).

Yet, at this trial, when counsel attempted to impeach Copeland with her prior inconsistent statement, the State objected (Tr.1056,1060,1062).[5] The court sustained the objection, ruling that defense counsel could not expose his own witness' inconsistent statements unless the witness was hostile (Tr.1056). Because of the court's ruling regarding impeachment of one's own witness, the defense was also prevented from impeaching Ronald Friend regarding his prior inconsistent statements (Tr.1090-92).

Standard of Review

A trial court enjoys broad discretion in ruling on whether to allow impeachment of a witness by use of a prior inconsistent statement. *Black*, 151 S.W.3d at 55. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882, 883-84

[5] Ironically, the State itself had impeached one of its own witnesses, Tammy Lawson, with her prior inconsistent statements (Tr.759-61).

(Mo.banc 1997). The court's discretion, however, is not unlimited. *Black*, 151 S.W.3d at 55. It must be balanced against the defendant's need to exercise his fundamental, essential rights. *Id.* (court's discretion must be balanced against the defendant's essential right to cross-examine adverse witnesses).

A Criminal Defendant Must be Allowed to Present His Complete Defense and Confront Witnesses

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...." This right is applicable in state as well as federal prosecutions. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). A criminal defendant is guaranteed the right to a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986). The right to present the defendant's version of the facts is a fundamental element of due process. *Washington*, 388 U.S. at 19.

The Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right . . . made obligatory on the States by the Fourteenth Amendment." *Smith v. Illinois*, 390 U.S. 129 (1968), *quoting Pointer v. Texas*, 380 U.S. 400, 403 (1965); see also *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (right of confrontation is a "bedrock procedural guarantee"). The Clause's ultimate goal is to ensure reliability of evidence. *Id*. at 61. Confronting a witness is conducive to finding the truth. *Id*. at 61-

62. Here, Black was denied the right to confront Friend and Copeland with their prior inconsistent statements.

Missouri Law Clearly Allows for Impeachment of One's Own Witness with a Prior Inconsistent Statement

Section 491.074 provides that, "Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement."

Long ago, this Court confirmed that the statute abrogated the old common law rule against impeachment of one's own witnesses. *State v. Bowman*, 741 S.W.2d 10, 13-14 (Mo.banc 1987). "Inconsistent statements are available as substantive evidence, and may be used just as soon as the inconsistency appears from the testimony." *Id.* at 14; *State v. Blankenship*, 830 S.W.2d 1, 11 (Mo.banc 1992). "Whether an inconsistency exists between trial testimony and statements made prior to trial is to be determined by the whole impression and effect of what has been said and done." *Id.* at 9.

To establish the foundation for the prior inconsistent statements, the offering party merely needs to ask whether the witness made the statement and whether the statement is true. *Bowman*, 741 S.W.2d at 14. Any further foundational requirements would dilute the effect of the statute. *Id.* "If a witness professes not to remember if a prior statement was or was not made, a proper foundation has been laid to admit the prior inconsistent statement." *State v. Cravens*, 132 S.W.3d 919, 928 (Mo.App.S.D.2004).

Michelle Copeland

Copeland testified that she and a friend were walking down the street when she saw Andy Martin in his truck stopped at the light (Tr.1051). She approached the truck and they chatted (Tr.1052). She saw Johnson in the truck's passenger seat having a conversation with someone outside the truck (Tr.1052). He was arguing, but not yelling (Tr.1054-55). She admitted giving a prior statement on August 11, 1999, and she read it to refresh her recollection (Tr.1053-55). She again testified that Johnson was arguing, but not yelling (Tr.1055). Defense counsel then asked her more about her prior statement – the date it was given and to whom it was given (Tr.1055). The State objected that counsel was trying to impeach his own witness (Tr.1055-56). Defense counsel responded that he was laying a foundation to impeach Copeland with her prior inconsistent statement (Tr.1056). But because Copeland was not a hostile witness, the court sustained the State's objection (Tr.1056-57).

Copeland then testified that she could not recall whether Johnson had started to open the door before she walked away (Tr.1059). Defense counsel asked her if she had been deposed in the fall of 2005 (D.Ex.556; Tr. 1059-60). The State again objected that the defense was trying to impeach its own witness (Tr.1060). Defense counsel stated that he was trying to refresh Copeland's recollection (Tr.1060). Copeland testified that when she last saw Johnson, he was still sitting in the truck and the door possibly was open a little bit, but not fully (Tr.1061-62). She did not recall if she heard the door make a "pop" sound as if it were popping open (Tr.1062). She stated that she never saw Johnson out in the street (Tr.1061). When counsel again asked her about her 2005 deposition, the

State objected that counsel was trying to impeach his own witness, and the court sustained the objection (Tr.1062). Defense counsel asked to make a formal offer of proof (Tr.1062-63). The court told counsel that he could ask Copeland and she could respond, but that he was stuck with whatever answer she gave (Tr.1063).

Copeland again testified she did not recall if she heard the door pop open (Tr.1063). On cross, the State elicited numerous times that Copeland heard arguing between Johnson and Black, but it wasn't anything that concerned her (Tr.1066-67). She repeated several times that Johnson had not left the truck by the time she left, although the door may have been partially open (Tr.1067).

At the bench, defense counsel reminded the trial court of this Court's opinion reversing due to prior counsel's failure to impeach her own witness (Tr.1068). Defense counsel asked the court to reconsider its ruling, or alternatively, to consider defense exhibits 556 and 557 as an offer of proof (Tr.1069). Defense counsel explained that the exhibits showed that Copeland had previously stated that she heard yelling and she heard the door pop open (Tr.1069). The State said that it would not object if counsel asked about those two things (Tr.1069-70). The court stated that in light of the prosecutor's statement, he would allow defense counsel to inquire (Tr.1070). But it then immediately stated that Copeland was a defense witness, and she was not hostile; she had refreshed her recollection with the prior statements, yet those statements were not as she recollected the facts now (Tr.1070). The court stated, "[i]f you say the Missouri Supreme Court says that you have a right to impeach your own witness who isn't hostile, who's [sic] recollection today is different from what she said earlier, then I'm going to permit you to

make a record on that" (Tr.1070). Defense counsel argued that he was not stuck with whatever answer Copeland gave, as the court believed (Tr.1071). The court admitted defense exhibits 556 and 557 as an offer of proof but rejected the inconsistent statements' admission at trial (Tr.1071).

Exhibit 557 is the transcript of the deposition of James Wilburn, a private investigator hired by counsel prior to the first trial (D.Ex.557,p.11). He interviewed Copeland ten months after the fight, on August 11, 1999 (D.Ex.557,p.24). Copeland told him that she saw Johnson get out of the truck before any fight began (D.Ex.557,p.27).

Attached as a deposition exhibit to Wilburn's deposition was the full summary of Copeland's statement to him (D.Ex.557,p.1) (also separately referenced as D.Ex.555). Copeland told Wilburn that she could hear Johnson yelling at someone (D.Ex.555,p.2). Because of the yelling, she backed away from the truck about five feet (D.Ex.555,p.2). She saw Johnson open the door and exit the truck (D.Ex.555,p.2). He continued to yell (D.Ex.555,p.2). At that time, the light changed and because the yelling continued, she and her friend left (D.Ex.555,p.2). She did not see Johnson attacked at all in the truck and did not see any sort of injury or bleeding as Johnson got out of the truck (D.Ex.555,p.2).

Exhibit 556 is the transcript of the deposition Copeland gave in September 2005. In it, she stated that she heard Johnson arguing with someone (D.Ex.556,p.8). Initially, she stated that it was not hostile, yet later in the deposition she stated they were yelling (D.Ex.556,p.8,13). She stated that she didn't expect anything to happen, but she stepped back from the truck just in case (D.Ex.556,p.8). Yet she also stated that she did not recall

if she backed away from the truck because of the yelling (D.Ex.556,p.13). She stated that she saw the door come open halfway, but Johnson had not yet exited the truck (D.Ex.556,p.13-15). With the door half open, Johnson continued to yell (D.Ex.556,p.16).

Ronald Friend

Immediately after Copeland testified, the defense called Ronald Friend (Tr.1071). He testified that he was standing inside the front door of a bar at the intersection (Tr.1072,1074). He heard "hollering" from outside but did not recall that anyone yelled something like "do you want some of me" (Tr.1074-75). He read his statement of May 1999, but still did not recall hearing that statement (Tr.1075). He did not recall hearing doors pop open shortly after the yelling (Tr.1075). When he first looked out, Black was already out of his car (Tr.1077,1085). He saw Black approach Johnson in the truck (Tr.1085). As Johnson tried to get out of the truck, Black threw a punch, and Johnson moved back (Tr.1086-87). Friend could not tell if the punch actually connected (Tr.1087). He did not see Johnson throw any punch (Tr.1088). Black then headed back to his car (Tr.1086). He heard glass break as the car was driving away (Tr.1080). Friend did not recall if Johnson grabbed his neck after the car drove away (Tr. 1081). He could not see very well because of how the two men were situated (Tr.1076).

After the fight, Friend asked Martin what happened, and Martin stated he didn't know (Tr.1083). Friend did not recall Martin stating that he didn't see anything because he was talking to some girls (Tr.1083-84). After reading his prior statement, Friend

stated that Martin had told him he didn't see what happened because he was talking to some girls, but he added that Martin was in shock (Tr.1084).

At the end of Friend's testimony, defense counsel approached the bench and made an offer of proof of Friend's prior statement (Tr.1090). Defense counsel argued that Friend previously stated that it looked more like a point than a punch; he was unequivocal about Andy Martin's statement; he never before stated that Martin was in shock; and he stated that Black went down in the fight (Tr.1090-91). Defense counsel asserted that there were additional inconsistencies that he would list if the court gave him leave (Tr.1091). The court admitted defense exhibit 558 and the accompanying audiotape as an offer of proof, but rejected the inconsistent statements' admission at trial (Tr.1092-93).

Exhibit 558 was the transcript of a 40-minute interview Friend gave in May 1999, seven months after the fight. Friend stated that he heard hollering, looked outside the bar, and saw a guy in a car and a guy in a truck yelling at each other (D.Ex.558,p.2,12-13). He heard someone say something like "do you want some" (D.Ex.558,p.2). Both Black and Johnson popped their doors open, but initially no one got out (D.Ex.558,p.2).

Johnson started out first, but Black was quicker (D.Ex.558,p.2,6,13). As Johnson got out of the truck, Black pointed at him, gesturing like, "he better not get out of that truck" (D.Ex.558,p.6,13). Friend thought Black was quicker getting out since Johnson shut the door of the truck, whereas Black left his door open (D.Ex.558,p.6). Once out, they stood head to head yelling, "buffaloing" each other (D.Ex.558,p.2). No one had

been hit at this point (D.Ex.558,p.3). Johnson was not holding his neck or acting injured (D.Ex.558,p.13).

Friend looked over at Martin, and when he looked back, Black may have been pushed, and he swung at Johnson (D.Ex.558,p.3,14). Black only swung at Johnson once, in the middle of the street (D.Ex.558,p.14). That was the only time Black made contact with Johnson (D.Ex.558,p.16). Johnson leaned back away from the punch, and Black headed back to his car (D.Ex.558,p.3,15). Friend thought Black fled because he had swung at Johnson and the punch didn't even bother Johnson (D.Ex.558,p.8).

Johnson swung his arm and threw the beer bottle, which hit either Black or the car (D.Ex.558,p.3,15). He grabbed Black as Black got in his car and tried to pull him out of the car (D.Ex.558,p.4,15). Friend didn't know whether Johnson was cut when Black swung at him in the street or when Johnson was trying to pull Black out of the car (D.Ex.558,p.4,8).

After Black left, Johnson seemed dazed and then staggered over to the truck (D.Ex.558,p.8). He may have been holding his neck at that point (D.Ex.558,p.16). Friend stated that when the men were in the street, he could see Johnson without obstruction and could see Black from the mid-upper section upwards (D.Ex.558,p.4).

At the scene, Martin told Friend that Johnson had been hollering at Black, and they had been hollering back and forth at each other down the road (D.Ex.558,p.5). Martin stated that he figured a fight would happen, but he was talking with some girls and didn't see what happened (D.Ex.558,p.5).

Defense counsel included this issue in the motion for new trial (L.F.972-76).

The State Cannot Rebut the Presumption of Prejudice

The court abused its discretion in ruling that the defense could not impeach Copeland and Friend absent a showing that they were hostile. Under Section 491.074, the prior inconsistent statements of Copeland and Friend were admissible as both substantive evidence and for impeachment. The prior statements specifically related to a paramount issue and thus the court had no basis for preventing the impeachment. *Aliff v. Cody*, 26 S.W.3d 309, 320-21 (Mo.App.W.D.2000).

When a trial court excludes admissible evidence, prejudice is presumed, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo.banc. 2003). The State cannot meet that burden here.

"The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Yet here, vital facts were kept from the jury. The jurors were barred from learning how Copeland and Friend initially described the fight within ten months after the fight, when their memories were fresh and hence more accurate than almost eight years later at trial. The jurors were prevented from performing their crucial function of weighing all admissible evidence and determining issues of witness credibility. *State v. Rose*, 86 S.W.3d 90, 105 (Mo.App.W.D.2002).

In evaluating the credibility of Copeland's trial testimony that Johnson never got out of the truck, the jury should have been aware that less than a year after the event,

Copeland vouched that Johnson was fully out of the truck before any fight began (D.Ex.557,p.27; D.Ex.555,p.2). She vouched that she was so alarmed by the yelling that she backed away from the truck about five feet (D.Ex.555,p.2). She vouched that she saw Johnson open the door and exit the truck (D.Ex.555,p.2). She did not see any bleeding or injury (D.Ex.555,p.2). Out of the truck, Johnson continued to yell (D.Ex.555,p.2).

The jury should have learned that seven years after the event, Copeland's story had changed. By that point, she stated that Johnson had never left the truck – he remained in the truck with the door partially open (D.Ex.556,p.13-15). She stated she heard Johnson arguing with someone, but she wavered between describing it as yelling as opposed to an argument that was "not hostile" (D.Ex.556,p.8,13). She stated that she backed away from the truck, but wavered as to whether or not it was because of the yelling (D.Ex.556,p.8,13).

The jury also should have known that seven months after the fight, Friend gave a much different account than he gave at trial eight years later. Seven months after the fight, Friend stated that the fight took place in the middle of the road and that Black and Johnson had stood head to head "buffaloing" each other (D.Ex.558,p.2-3,14,15-16), whereas at trial, he testified that Black went directly to the truck window, jabbed at Johnson, and then immediately headed back to his car (Tr.1085-87). Seven months after the fight, he stated that Black only swung at Johnson once, in the middle of the street (D.Ex.558,p.14). In that early statement, he rejected the notion that Black swung at Johnson in the truck; instead, he thought Black merely pointed at Johnson, gesturing as if

warning Johnson not to get out (D.Ex.558,p.6, 13). Seven months after the fight, Friend stated that Johnson leaned back from the punch in the middle of the street; he did not lean back when Black pointed at him in the truck (D.Ex.558,p.3,15). Initially, Friend stated that Johnson and Black popped their doors open and yelled at each other before anyone got out, and that they both started out of their vehicles at the same time (D.Ex.558,p.2,6); but at trial, he stated that when he first looked outside, Black was already out, went directly to the truck, swung at Johnson, and headed back to his car (Tr.1077,1085-86).

As mentioned above, this Court has held that Copeland's prior inconsistent statement "focused on the very root of the matter in controversy." *Black*, 151 S.W.3d at 56. It "related directly to the central issue of whether Mr. Black acted with deliberation or in a fit of rage or out of self-defense." *Id.* at 56. The weight of the evidence on this "key issue in contention" was "central" to the case. *Id.* Furthermore, "no other evidence could more effectively have impeached [Copeland's] trial testimony than [her] own prior words." *Id.* at 57.

Because the defense was not allowed to elicit the prior inconsistent statements of Copeland and Friend, these two witnesses in effect became State witnesses. Thus, in closing argument, the State repeatedly argued how even the defense evidence supported the State's case (Tr.1328-30,1332,1334-35). The truth was kept from the jury.

As at the first trial, the record shows that the jurors were very concerned with whether Black had truly deliberated. The jurors sent a note asking for Friend's "previous testimony and this week's testimony" and that of Martin, Wolfe, Brandon, and Lawson (L.F.934) (emphasis in original). The request shows that the jurors were very much

interested in considering whether the witnesses had material inconsistencies in their statements and in evaluating which statements were more credible. *Id.* at 57-58; see also *Deck v. State*, 68 S.W.3d 418, 431 (Mo.banc 2002).

Ramifications of the error reached penalty phase too, and violated Black's rights under the Eighth Amendment, since the jury was required to consider the nature of the crime – and hence necessarily considered Copeland and Friend's testimony – in deciding whether Black would live or die. In *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987), the Court ruled that "states cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." Accordingly, jurors are told they can consider any evidence introduced in guilt phase on the issue of punishment (L.F.955-57). The defense should have been allowed to present relevant evidence disputing that Black deliberated and mitigating his culpability.

By refusing to allow the defense to reveal the prior inconsistent statements Copeland and Friend made, the court denied Black his due process right to rebut information that the jury considered and upon which it relied in its penalty phase deliberations. *Gardner v. Florida*, 430 U.S. 349, 359 (1997)(defendant was denied due process because "the death sentence was imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain"); *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994) (defendant was prevented from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death").

Especially in light of this Court's opinion in the postconviction case, the trial court's refusal to allow the jury to learn of the prior inconsistent statements made by Copeland and Friend is inexplicable. The statements went directly to the heart of the matter, whether Black acted with deliberation or in a fit of rage or out of self-defense. The court's ruling violated Section 491.074 and Black's rights to due process, a fair trial, presentation of a defense, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. A new trial is mandated.

ARGUMENT III

The trial court erred and abused its discretion in sustaining the State's objections and in refusing to allow the defense to play the audiotape of Tammy Lawson's second statement to the police, because the statement was admissible under Section 491.074 as impeachment and also as substantive evidence and was the best evidence of Lawson's inconsistent statements, and thus the court's refusal violated Black's rights to due process, a fair trial, presentation of a defense, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the statement was inconsistent with Lawson's trial testimony, her first statement to the police, and her testimony at Black's preliminary hearing and thus the jury should have been allowed to gauge Lawson's credibility by hearing her own words with the emphasis and inflection she gave those words, and in their complete context, as the best evidence of Lawson's inconsistent statements.

Tammy Lawson was a crucial witness in guilt phase. As the only person in the car with Black, she alone witnessed his alleged statements and demeanor before the fight and his alleged statements and conduct after the fight. Because she had given numerous conflicting statements, her testimony had the potential to hurt and help each side. It was in the State's interest to elicit a few key facts and get Lawson off the stand quickly; in contrast, it was in the defense's best interest to expose her many inconsistencies.

During cross-examination of Lawson, defense counsel exposed prior inconsistent statements from Lawson's testimony at Black's preliminary hearing (Tr.753-55). He then played to the jury an audiotape of Lawson's first statement to the police (Tr.770; D.Ex.519). Counsel moved to play the audiotape of Lawson's second statement to the police (Tr.770). The tape is approximately 35 minutes long (D.Ex.517). The State objected because some of the things stated on the tape were consistent with Lawson's trial testimony (Tr.770). Defense counsel countered that under Section 491.074, the entire tape was admissible not just for impeachment but as substantive evidence (Tr.770). He also argued that the jury could not assess the credibility of the statement unless it heard the entire tape, because the statements would be out of context (Tr.770-71). The court held that counsel could show the portions of the tape that were inconsistent (Tr.770,772). Counsel pointed out that the court was denying Black his constitutional rights for the sake of expedience, but the court did not change its ruling (Tr.772). Counsel then attempted to use the transcript of the taped statement to expose Lawson's inconsistent statements (Tr.772-81). Afterwards, counsel again moved to play the entire tape to the jury, but the court did not change its ruling (Tr.780-81). This issue is included in the motion for new trial (L.F.974).

Standard of Review

A trial court enjoys broad discretion in determining the admissibility of substantive evidence and in determining the extent and scope of cross-examination. *Black v. State*, 151 S.W.3d 49, 55 (Mo.banc 2004). A trial court abuses its discretion

when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882, 883-84 (Mo.banc 1997). The court's discretion, however, is not unlimited. *Black*, 151 S.W.3d at 55.

> It must be balanced against the fact that the right to cross-examination is essential and indispensable, and the right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege…. For this reason, a trial judge has no discretion to prevent any cross-examination at all on a proper subject, nor may that judge exclude relevant and material facts simply because counsel seeks to elicit such facts on cross-examination.

Id.

Constitutional Rights

Black has a Sixth Amendment right to present a complete defense and to confrontation. See *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), *Pointer v. Texas*, 380 U.S. 400, 403 (1965), and related cases discussed in detail in Point II, *supra*. Black also has an Eighth Amendment right to have the jury consider the circumstances of the crime that mitigate punishment. See *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987), also discussed in Point II.

The Jury Was Entitled to Hear the Entire Tape

to Gauge Lawson's Credibility

The jury should have been allowed to hear the entire 35-minute audiotape of Lawson's second statement to the police. As discussed in Point II above, Section 491.074 mandates that a prior inconsistent statement of any witness testifying in a criminal trial be received as substantive evidence and that the party offering the prior inconsistent statement may argue the truth of such statement. "Inconsistent statements are available as substantive evidence, and may be used just as soon as the inconsistency appears from the testimony." *State v. Bowman*, 741 S.W.2d 10, 14 (Mo.banc 1987). The jury makes the ultimate decision as to the credibility of the prior inconsistent statement. *State v. Lyons*, 951 S.W.2d 584, 594 (Mo.banc 1997).

In *Bowman*, the defendant complained that the State was allowed to play to the jury a videotaped, prior inconsistent statement of its key witness. 741 S.W.2d at 14. The court ruled that the prior inconsistent statement was admissible under Section 491.074 as substantive evidence. *Id.* at 13-14. This Court held that "[i]nasmuch as the statement constitutes substantive evidence, the jury should have it in the best form for judging its credibility." *Id.* at 14. Additionally, because the witness had stated that he had been abused and pressured by the officer taking the statement, the tape would help the jury assess that claim. *Id.*

So, too, in *State v. Neely*, 979 S.W.2d 552, 560 (Mo.App.S.D.1998), the Southern District echoed *Bowman*, holding that because the inconsistent statements constituted substantive evidence under Section 491.074, "the jury should have [the evidence] in the

best form for judging its credibility." The witness claimed that the police coerced him into making the statement, so the tape recording was the best means for the jury to resolve the issue. *Id.* Under Section 491.074, it was the duty of the jury to determine whether the witness was telling the truth in his taped statement or whether his later testimony was true. *Id.*

The court erred in accepting the State's argument that the tape should not be played because not everything on the tape was inconsistent with Lawson's in-court testimony. In *State v. McClanahan*, 202 S.W.3d 64, 69 (Mo.App.S.D.2006), the defendant alleged that the trial court abused its discretion in allowing the State to play the entire tape of a witness' statement to the police. The defendant argued that the tape contained statements that the State never asked the witness about, and so the statements were not shown to be inconsistent. *Id.* The Southern District rejected this argument. *Id.* at 70-71. It held that sufficient foundation was laid for admission of the tape under Section 491.074, and hence it was proper that the entire tape be played to the jury. *Id.*

The same result was justified here. Sufficient foundation was laid for admission of the tape. Lawson acknowledged that she made the second statement to the police (Tr. 767), and it was clear that the second statement contained numerous inconsistencies. The entire tape should have been played to the jury.

The audiotape was the best evidence of Lawson's statement. Missouri courts have long recognized that "the best evidence . . . which is within the power of the party to produce . . . must always be produced." *State v. King*, 557 S.W.2d 51, 54 (Mo.App.St.L. 1977). The best evidence "is generally the original of a document and it must be

produced if it is within the power of the party to do so." *State v. Baker*, 630 S.W.2d 111, 114 (Mo.App.E.D.1981). Secondary evidence may only be presented if (1) the original is unavailable; (2) the unavailability is not the proponent's fault, and (3) the secondary evidence is trustworthy. *Id.* The "best evidence rule" applies to sound recordings and generally requires a taped statement rather than a transcription of it be admitted. *State v. Strothers*, 798 S.W.2d 723, 724 (Mo.App.S.D.1990).

The best evidence rule required that the tape of Lawson's statement be played to the jury. The tape was present in court and ready to be played. There was no reason to resort to less probative, secondary evidence, *i.e.*, the transcript of the tape.

The rule of completeness also required that the entire tape be played. This rule seeks to ensure that a statement is not admitted out of context. *State v. Skillicorn*, 944 S.W.2d 877, 891 (Mo.banc 1997). The rule is violated when the statement is admitted "in an edited form [that] distorts the meaning of the statement or excludes information that is substantially exculpatory to the declarant." *Id.*; see also *State v. Francis*, 60 S.W.3d 662 (Mo.App.W.D.2001).

Counsel's recitation of portions of Lawson's assertions marred the true effect of this evidence, because it prevented the jury from hearing Lawson's own voice and her own inflection and emphasis in describing matters that conflicted with her trial testimony. It thus distorted the true and full meaning of the statement and prevented the jury from accurately assessing its import, precluding the jury from learning substantially exculpatory information. In deciding what parts of Lawson's first statement, second statement, preliminary hearing testimony, or trial testimony was true, the jury should

have been allowed to hear her second statement. The tape was only about 35 minutes long. Given the interests at stake, the jury should have been allowed to know not only what Lawson had said, but how she had said it. In gauging which of Lawson's multiple statements was the truth, the "how" was just as important, if not more so, than the "what."

Black was prejudiced by the court's refusal to allow the jury to hear the entire tape. Although defense counsel was able to expose inconsistencies through the transcript, he was incapable of re-producing Lawson's voice and the emphasis and inflection of her words. The following are examples of how the defense suffered when the court forced defense counsel to recite the inconsistencies rather than allowing the jury to hear the inconsistencies from Lawson's own mouth:

- At trial, Lawson denied that Black initially planned merely to talk to Johnson (Tr.774); yet in the tape of her second statement, she was insistent that Black stated he would talk to Johnson (D.Ex.517,p.11); that he was "just going to tell [Johnson] that [he] didn't appreciate him doing [Lawson] that way" (D.Ex.517,p.12); and that when they caught up to the truck, Black did in fact try talking to Johnson – Black "said something about what happened at the store" but Johnson intensified the situation by calling Lawson a bitch and a whore (D.Ex.517,p.14).
- At trial, Lawson testified that she did not recall Johnson calling her a bitch and a whore (Tr.742-43,749-50); yet in the tape, Lawson was emphatic on the point (D.Ex.517,p.4,14).

- At trial, Lawson downplayed how angry she was by Johnson's actions in the store (Tr.729); but in her second statement, four days after the fight, Lawson was still bristling, as evidenced by her tone of voice stating that she didn't like what "that black guy had done" and repeatedly stating that she did not appreciate it (D.Ex.517,p.8,11).
- At trial, Lawson testified that Black stabbed Johnson before Johnson had swung at Black (Tr.760-61); but in her taped statement, she insisted she did not know who hit whom first (D.Ex.517,p.5,14,17,28).
- At trial, Lawson stated that Black stated that he would "hurt that nigger" and that after the fight, he stated "one nigger down" (Tr.757); but in the tape, in response to persistent questioning by the detectives, Lawson denied four times that Johnson's race had anything to do with the fight and instead stated that Black was just angry because of the things Johnson had called her (D.Ex.517,p.25-26).

The jury also should have been allowed to take into consideration the detectives' manner of questioning Lawson and how it affected her answers. See *Bowman*, 741 S.W.2d at 14. The jurors should have been aware of the areas of questioning where Lawson quickly and assuredly answered the questions, volunteering information, and other areas where she hesitated and needed to be prodded. For example, initially, Lawson positively and assuredly stated that Johnson was out of the truck before the fight started. She explained that when Black tried speaking with Johnson, Johnson and Martin starting calling her a bitch and a whore, and Black got angry (D.Ex.518;517,p.14).

Johnson "asked [Black] to get out of the car, he thought he was bad. So, [Black] stepped out and the guy stepped out and the fight was on" (D.Ex.518;517,p.14). The detectives then tried to lead Lawson into backing off that statement (D.Ex.518;517,p.14). Detective Bebee asked if both men were completely out of their vehicles (D.Ex.518;517,p.14). Lawson stated that it looked like Johnson was (D.Ex.518;517,p.14). Then she stated she was "pretty sure" he was (D.Ex.518;517,p.14). When asked if she was positive, she stated she was "partially sure" (D.Ex.518;517,p.14). Since Lawson had given multiple conflicting statements, the jury should have been allowed to listen to this statement to gauge her demeanor and determine which statement, or which part of the statement, was true.

In closing arguments, the prosecutors emphasized Lawson's demeanor while testifying, as proof that she was telling the truth (Tr.1291). Discussing Lawson's testimony that Black intended to hurt Johnson, the prosecutor argued: "look at the way she was on the stand when she testified and think about how she said it and how strong she was when she said it. Can there be any doubt that that's what the defendant said?" (Tr.1291). The jury was denied the opportunity to gauge Lawson's demeanor – the emphasis of her words and insistence in her voice – regarding her taped statement. The defense suffered, because the jury would have seen that Lawson was strident on points beneficial to the defense, and thus the tape would have shown the jury that it could not trust Lawson's demeanor as a measure of her truthfulness. The State also asked the jury, "Where is the evidence that the defendant was just going to go talk with these guys?"

(Tr.1281). If the jurors had listened to the tape, it would have known that Lawson repeatedly and emphatically stated that Black initially was just going to have words with Johnson (D.Ex.518;517,p.11,12,14).

Finally, Lawson's credibility was clearly an issue for the jurors. They sent a note asking for Lawson's "previous testimony and this week's testimony" and that of several other witnesses (L.F.934) (emphasis in original). This Court has recognized that questions such as these are strong indicators of the focus of the jury's deliberations. *Black*, 151 S.W.3d at 57-58; see also *Deck v. State*, 68 S.W.3d 418, 431 (Mo.banc 2002).

The trial court's refusal to allow the jury to hear the 35-minute tape of Lawson's second statement to the police violated Section 491.074 and Black's rights to due process, a fair trial, presentation of a defense, confrontation, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court must remand for a new trial to allow the jury to consider all relevant admissible evidence in deciding which of this key witness' various conflicting statements to believe.

ARGUMENT IV

The trial court erred in overruling Black's motion for judgment of acquittal at the close of all evidence, accepting the verdict, entering judgment against him for first-degree murder, and sentencing him to death, in violation of his rights to due process, a fair trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, because the State failed to prove an element of first-degree murder, that Black coolly reflected before stabbing Johnson, in that the evidence showed that in the brief interval between leaving the Snak-Atak and the fight, Black was suddenly provoked to anger and did not coolly reflect: sitting calmly in his car, Black was assailed by his furious girlfriend who, cursing and "bitching", told Black that she had just been sexually harassed in the store; Lawson continued to talk about it as Black hotly followed Johnson, trying his best to catch up to the truck, which would speed up as Black got closer; Black got increasingly angry as he followed Johnson; he indicated that he wanted to hurt Johnson, to "kick his ass," not to kill him; and, when he did catch up to Johnson at the stoplight, he and Johnson exchanged angry words, the last straw for the stressed and angry Black.

The State's evidence, even in the light most favorable to the verdict, did not establish first-degree murder. The evidence did not show that Black caused Johnson's death after cool deliberation. Instead, it showed that Black intended merely to hurt

Johnson, to "kick his ass." The evidence showed that Black got angrier and angrier as he raced to catch up with him and did not have the opportunity for cool thought. The evidence did not prove the cool reflection required for deliberation and hence did not prove first-degree murder.

To support a criminal conviction, the State must prove, beyond a reasonable doubt, that the defendant committed all elements of the crime charged. *In re Winship*, 397 U.S. 357, 362 (1970); U.S. Const., Amends VI and XIV; Mo. Const., Art. I, Section 10. In reviewing the sufficiency of the evidence, this Court must determine whether there is substantial evidence from which a reasonable juror could find all of the elements beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo.banc 1993). This Court may not weigh the evidence or determine the credibility or reliability of witnesses. *State v. Sumowski*, 794 S.W.2d 643, 645 (Mo.banc 1990). It must review the facts in evidence and all inferences reasonably drawn from the evidence in the light most favorable to the verdict and must disregard all evidence to the contrary. *State v. Rhodes*, 988 S.W.2d 521, 525 (Mo.banc 1999).

A person commits first-degree murder when he "knowingly causes the death of another person after deliberation upon the matter." Section 565.020.1. Deliberation is "cool reflection for any length of time no matter how brief." Section 565.002(3). Without it, an intentional killing is second-degree murder. *State v. Glass*, 136 S.W.3d 496 (Mo.banc 2004). "Only first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation." *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo.banc 1993). A "deliberate" act is one made with a conscious

purpose, in a cool state of mind, "while not under the influence of violent passion suddenly aroused by some provocation." *State v. Baker*, 859 S.W.2d 805, 815 (Mo.App. E.D.1993). The defendant must have thought of the act for any length of time while in a cool frame of mind. *State v. Shaw*, 569 S.W.2d 375, 377 (Mo.App.St.L.1978).

On Black's initial appeal, this Court held that the State had presented sufficient evidence to support a conviction for first-degree murder. *State v. Black*, 50 S.W.3d 778, 788 (Mo.banc 2001). The Court held that reasonable jurors could infer deliberation from all the circumstances, because Black followed Johnson "for over a mile, for nearly 10 minutes, before getting out of his car, walking over to the victim, reaching through the window, and stabbing him in the neck." *Id.* The Court held that it was reasonable to infer that Black reflected for at least the time it took to reach Johnson. *Id.*

Judge Wolff vigorously dissented. He believed that while the facts supported a conviction of second-degree murder or voluntary manslaughter, they did not support a first-degree murder conviction. *Id.* at 796. The State had failed to show that Black had "coolly reflected," and hence the State failed to prove deliberation. *Id.* at 797. Although there was time for deliberation, time alone does not suffice to show "cool reflection." *Id.* Judge Wolff stressed that Lawson's testimony that Black wanted to "hurt" Johnson undercut the notion of premeditated murder and that "[h]ad such testimony been presented in the guilt phase of the trial it would have weakened an already virtually nonexistent case for first-degree murder." *Id.*

Judge Wolff's estimation of the absence of the State's evidence on deliberation – should Lawson testify in guilt phase – has proven true. Unlike the former trial, here,

Lawson did testify at the guilt phase for the State. She was key because she alone witnessed Black's statements and demeanor in the car on the way to the fight. Lawson's testimony showed that Black's intention was to hurt, not kill Johnson (Tr.757,766). Lawson's testimony also demonstrated that Black did not coolly reflect. Lawson admitted that she was angry, cursing and "bitching" about what had happened inside the store (Tr.729,755,740). Black was angry too, and as he struggled to catch up with the truck and the truck kept pulling away, Black got angrier and angrier (Tr.741). Lawson's testimony shows that Black never had the cool frame of mind required for deliberation. *O'Brien*, 857 S.W.2d at 218; *Baker*, 859 S.W.2d at 815; *Shaw*, 569 S.W.2d at 377.

Additionally, the evidence here showed a much shorter time frame compared to the first trial, between the departure from the Snak-Atak to the fight. At the first trial, the evidence showed a ten-minute time span between the events. *Black*, 50 S.W.3d at 788. In this trial, however, the evidence showed that Johnson walked out the door of the Snak-Atak at 9:44:23 (Tr.843; D.Ex.506). Outside, Johnson stood briefly in front of Wolfe's Camaro before getting back into the truck (Tr.664-65). The fight took place at 9:47 (Tr.843), and the call to 911 was made at 9:50 (Tr.844).

The State's entire case failed to prove that Black coolly reflected prior to stabbing Johnson. Black was sitting calmly in his car when his girlfriend Lawson went inside to buy cigarettes (Tr.716,728). When she returned, however, everything changed. Lawson was furious; she cursed, "bitched" and used the "f-word" (Tr.729,755,740). She told Black about how Johnson had brushed up against her, making a pass at her in the store (Tr.722,740). She pointed Johnson out to Black and continued to talk about the incident

(Tr.665,722,740-41). Black wanted to hurt Johnson, to "kick his ass" (Tr.757,766). He drove fast, trying to catch up to Johnson (Tr.667-68,741). Each time he got close, however, the truck would speed up (Tr.741). Black got angrier and angrier (Tr.741). At Fifth and Joplin, a busy, well-lit intersection, Black and Johnson exchanged angry words (Tr.705,743). Black "rushed" out of his car and stabbed Johnson once in the neck (Tr.674,880). But while Black may have stabbed Johnson knowingly, he did not do so deliberately.

Black was convicted of first-degree murder and sentenced to die for a crime that, at most, might be considered second-degree murder. The evidence was not sufficiently substantial to support the conviction, and thus violated Black's rights to due process of law, a fair trial, and to be free from cruel and unusual punishment. U.S. Const., Amends. V,VI,VIII,XIV; Mo. Const., Art. I, Secs.10,18(a), 21; *Jackson v. Virginia*, 443 U.S. 316 (1979). This Court must vacate Black's first-degree murder conviction and discharge him from his death sentence.

ARGUMENT V

The trial court plainly erred and abused its discretion in overruling defense counsel's objection and in permitting Detective Gallup to restate Mark Wolfe's account of the events surrounding the fight, because allowing the recitation of Wolfe's account after Wolfe already testified about it violated Black's rights to due process and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Gallup's testimony was an inadmissible prior consistent statement that improperly bolstered Wolfe's credibility in a case where the credibility of the witnesses was paramount, thereby giving the State an unfair advantage.

While the trial court prevented the defense from (1) impeaching its own witnesses with prior inconsistent statements and (2) playing a tape of the State witness' prior inconsistent statements, the court allowed the State to present the prior consistent statement of its witness Mark Wolfe through the testimony of Detective Darren Gallup. Gallup's recitation of Wolfe's prior consistent account of how the fight occurred served no purpose other than to bolster the State's case. Allowing the recitation of Wolfe's account violated Black's rights to due process and a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. In a case hinging on the credibility of

the witnesses, the improper repetition of Wolfe's account gave the State an unfair advantage resulting in manifest injustice.

Standard of Review and Preservation

A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005). Its rulings will not be overturned absent a clear abuse of discretion. *Id*. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882,883-84 (Mo.banc 1997).

Although defense counsel objected at trial, he did not include the issue in the motion for new trial. Thus, Black requests review for plain error. Rule 30.20. Reversal is warranted under plain error review when the error was evident, obvious, and clear and resulted in manifest injustice or a miscarriage of justice. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo.App.W.D.2000).

Presenting Wolfe's Prior Consistent Statement was Improper Bolstering

Due process, as guaranteed by the Fourteenth Amendment, requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485 (1984). Evidentiary rulings can deny a defendant due process if they are fundamentally unfair and deny him a fair trial. *State v. Burnfin*, 771

S.W.2d 908, 914 (Mo.App.W.D.1989) (court's evidentiary rulings revealed its hostility toward appellant and his attorney; such circumstances can lead to denial of due process).

The court applied inconsistent rulings, denying the defense the opportunity to put witnesses' statements before the jury, but allowing the State to do so without justification. "Improper bolstering occurs when an out-of-court statement of a witness is offered solely to duplicate or corroborate trial testimony." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo.banc 2006). When a witness testifies from the stand, the use of duplicative and corroborative extrajudicial statements is substantially restricted. *State v. McMillin*, 783 S.W.2d 82, 98 (Mo.banc 1990) (abrogated on other ground). After all, "[t]he party who can present the same testimony in multiple forms may obtain an undue advantage." *State v. Seever*, 733 S.W.2d 438, 441 (Mo.banc 1987); *McMillin*, 783 S.W.2d at 98 ("Allowing a witness to read prior consistent deposition testimony either before or after he testifies tends to give an unfair advantage to the offering party").

There is no improper bolstering if the out-of-court statement is offered for relevant purposes other than corroboration and duplication. *Forrest*, 183 S.W.3d at 224; *State v. Wolfe*, 13 S.W.3d 248, 257 (Mo.banc 2000). Thus, prior consistent statements are admissible to rehabilitate a successfully impeached witness. *State v. Ramsey*, 864 S.W.2d 320, 329 (Mo.banc 1993)(admissible to show that witness' statement was not fabricated to fulfill plea bargain); see also *State v. Christeson*, 50 S.W.3d 251, 267 (Mo.banc 2001) (where defense counsel's cross-examination showed contradictions in witness' statements and motive to fabricate, State may properly admit witness' prior consistent statement).

However, the use of the prior consistent statement should be limited "to the extent necessary to counter the subject on which the witness was impeached." *State v. Bell*, 936 S.W.2d 204, 206 (Mo.App.W.D.1996). The use of a prior consistent statement which exceeds the scope of the impeachment is incompetent and inadmissible. *State v. McClanahan*, 202 S.W.3d 64, 70 (Mo.App.S.D.2006), citing *State v. Clark*, 711 S.W.2d 928, 933 (Mo.App.E.D.1986).

Here, the State had no valid purpose for presenting Wolfe's prior consistent statement. Defense counsel impeached Wolfe regarding the time that Wolfe arrived at Garfield's, how much Johnson had to drink, and how long Johnson stayed in the parking lot with the girl (Tr.685-87,689). Defense counsel elicited that Johnson did not tell the first police officer (Beil) that Johnson had the bag in his hand during the fight; and he did not say who hit whom first (Tr.702-703). He elicited that Wolfe told Gallup that he didn't see what Johnson was hit with (Tr.699); that Johnson pushed the door into Black as the fight began; that Johnson threw the beer bottle at Black from 2-3 feet away; and that the bottle hit Black's head or arm (Tr.704).

Defense counsel's cross-examination of Detective Gallup only briefly touched on Wolfe. Defense counsel elicited that, investigating the case, Gallup had contact with Martin and Wolfe (Tr.843). Based on talking to them, he formed a rough estimate of what time the fight started (Tr.843). He testified that Wolfe told him that he got to Garfield's at 7:30 or 8:00 (Tr.847). He told Gallup that he saw Johnson drink four or five beers (Tr.847-48). Thus, the only points on which Gallup's testimony impeached Wolfe were the time that Wolfe stated he got to the bar and how much Johnson had to drink.

The State, however, was allowed to use Gallup to restate Wolfe's account of what happened at the fight. On re-direct, the prosecutor asked Gallup if defense counsel had questioned him about what Wolfe said to him on October 4th (Tr.878). He elicited that Gallup talked to Wolfe about what had occurred at the fight and then asked Gallup what Wolfe told him about it (Tr.878-79). After Gallup testified that Wolfe saw the white car from Snak-Atak pull up next to Martin's truck, defense counsel objected to the cumulative testimony (Tr.879). He argued that Gallup could not recite Wolfe's entire statement unless he was rehabilitating on a contested point from the statement (Tr.879). The court overruled the objection (Tr.879).

The prosecutor then handed Gallup his report and again asked him what Wolfe told him about the fight (Tr.879-80). Gallup related that Wolfe told him that Black and Johnson had words, but Johnson did not pay much attention (Tr.880). Black rushed out of his car and jabbed into the truck window, striking Johnson (Tr.880). Wolfe stated that Black was the first one to use words at the intersection, the first one out of his vehicle, and the first one to throw a punch or jab (Tr.880-81).

Allowing Gallup to restate Wolfe's account of the fight was error, because it did not deal with the topics on which Wolfe had been impeached. *Bell*, 936 S.W.2d at 206. Gallup's reiteration of Wolfe's account to him of the fight had nothing to do with what happened at Garfield's. It had nothing to do with what Wolfe told Officer Beil at the scene. Gallup's recitation did not counter Wolfe's admission that he didn't see what Johnson was hit with (Tr.699); or how close Johnson was to Black when he threw the bottle (Tr.704). Gallup's recitation did not deal with Johnson's pushing the truck door

into Black (Tr.704). Because the prior consistent statement exceeded the scope of Wolfe's impeachment, it was incompetent and inadmissible. *McClanahan*, 202 S.W.3d at 70; *Clark*, 711 S.W.2d at 933.

Black suffered manifest injustice by the State's use of a prior consistent statement to bolster Wolfe's credibility. The credibility of the witnesses – shown by their past and current statements – was crucial, as the jury's note indicates (L.F.934). Gallup's recantation of Wolfe's account covered the "same precise ground" as Wolfe's testimony. See *Seever*, 733 S.W.2d at 441. As in *Seever*, there were "sharply contested fact issues." *Id.* Wolfe was perhaps the strongest witness for the State, and the State repeatedly stressed his account in closing argument (Tr.1290,1325-26). In terms strongly resembling Gallup's reiteration, the State argued that according to Wolfe, "[t]he defendant was out of the car first, the defendant threw the first punch, he threw that punch through the window, [Johnson] was still in the truck" (Tr.1290; Tr.1325-26).

By repeating Wolfe's prior consistent statement of what happened at the fight, the State was allowed to present the same testimony in multiple forms and hence gained an undue advantage. Especially in light of the other limitations placed on Black's defense by the court, allowing the State to present Wolfe's prior consistent statement on key points in contention created manifest injustice. This Court must reverse.

ARGUMENT VI

The trial court erred and abused its discretion in sustaining the State's objections and in refusing to allow the defense to impeach State witness Tammy Lawson with her municipal convictions, because barring this line of impeachment violated Black's rights to due process, a fair trial, presentation of a defense, confrontation, cross-examination, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that the jury had the responsibility of assessing Lawson's credibility and should have known the true extent of her criminal involvement in evaluating her credibility and demeanor – that, in addition to her misdemeanor convictions for possession of marijuana and driving under the influence, Lawson had municipal convictions for two counts of theft, two counts of domestic assault, and one count of obstructing service of process/resisting an officer.

Black acknowledges that, under longstanding precedent, a witness may not be impeached with a municipal conviction. See, *e.g.*, *State v. Moore*, 84 S.W.3d 564, 567 (Mo.App.S.D.2002). He respectfully requests, however, that the Court reconsider this principle. Barring this impeachment makes little sense. The initial rationales for this rule, based on legislative and legal procedures in effect over 100 years ago, have eroded. Today, there is often no difference between misdemeanors and municipal offenses in the actual conduct punished. Municipal convictions can be used to enhance criminal

convictions, and many of the same procedures and protections applicable to misdemeanors and felonies also apply to municipal offenses. The rule is out-of-date and should be abrogated.

Preservation and Standard of Review

Pretrial, the defense asked the court to allow impeachment of Tammy Lawson with at least five known misdemeanor convictions prosecuted by the City of Joplin (L.F.825-38; Tr.227-38). The court denied the request (Tr.244). Defense counsel renewed his motion during Lawson's cross-examination, but the court again denied it (Tr.756). The court accepted counsel's offer of proof, but rejected admission at trial, of Defense Exhibits 559 (2005 larceny/petit theft conviction); 560 (2005 larceny conviction); 561 (2004 domestic assault conviction); 562 (1999 domestic assault conviction); and 563 (1999 obstructing service of process/resisting an officer conviction) (Tr.1094). The issue is included in the motion for new trial (L.F.966).

A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005). Its rulings will not be overturned absent a clear abuse of discretion. *Id*. But the trial court's discretion is not unlimited. As this Court recognized in *Black v. State*, 151 S.W.3d 49, 55 (Mo.banc 2004), "it must be balanced against the fact that the right to cross-examination is essential and indispensable, and the right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege.… For this reason, a trial judge has no discretion to prevent any cross-examination at all on a proper subject, nor may that judge

exclude relevant and material facts simply because counsel seeks to elicit such facts on cross-examination." *Id.*

Evolution of the Rule Barring Impeachment on Municipal Convictions

At common law, a person convicted of a felony or a crime involving dishonesty or false statement could not serve as a witness. 2 Wigmore, *Evidence in Trials at Common Law* §519, at 725 (2d ed.1979). The rationale was that a convicted person was untrustworthy and thus would not follow his oath, rendering his testimony useless. *Id.* at §519, at 726-27. But by 1900, most states had enacted legislation to allow people convicted of crimes to testify. *Id.* at §519, at 729.

In Missouri, prior to 1895, a witness could be impeached only by felony or petit larceny convictions. *Meredith v. Whillock*, 158 S.W. 1061, 1063 (Mo.App.Spr.1913). In 1895, however, legislation was passed that allowed impeachment by conviction of any criminal offense, felony or misdemeanor. *Id.* Although there have been a number of amendments to the statute since that time, it remains largely in effect today. The current statute is Section 491.050, which provides as follows:

> Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case….

Violation of a city ordinance is not considered a crime and hence cannot be used for impeachment. *Meredith*, 158 S.W. at 1063; *First Nat. Bank of Fort Smith v. Kansas City Southern Ry. Co.*, 865 S.W.2d 719, 737 (Mo.App.W.D.1993)(term "crime" as used in §491.050 does not include municipal ordinance violations). The municipal proceeding is a civil suit with a quasi criminal character. *Meredith*, 158 S.W. at 1063; see also *Strode v. Director of Revenue*, 724 S.W.2d 245, 247 (Mo.banc 1987).

The Term "Crime" Should Include Municipal Ordinance Violations

The rationales used to distinguish municipal convictions from misdemeanor or felony convictions have largely eroded. In the early 1900's, when the distinctions arose, municipal ordinances were mere by-laws or city regulations. *State v. Muir*, 65 S.W. 285, 286 (Mo. 1901). The conduct they regulated was conduct that was not necessarily prohibited on a statewide basis. *Id.* Thus, a situation could arise where two witnesses had engaged in the same conduct, yet one could be impeached in a state court proceeding and another, living in a different municipality, could not. In contrast today, municipal convictions like Lawson's – for larceny and assault – are prohibited on a statewide basis.

Additionally, in the early 1900's, a civil municipal judgment would not bar subsequent state criminal proceedings for the same offense. *Id.* Today, however, it would be barred by double jeopardy. *Waller v. Florida*, 397 U.S. 387, 394-95 (1970). A municipality "is created by the state sovereign and is an extension of the state." *State v. Rotter*, 958 S.W.2d 59, 63 (Mo.App.W.D.1997). Hence, once Lawson was convicted of

larceny or assault in the Joplin Municipal Court, she could not be prosecuted for the same conduct in the Jasper County Circuit Court. *Id.* at 63.

There is no longer any true distinction between misdemeanors and municipal offenses. Many times, the only difference is the party who files the charge – whether it be the city prosecutor or the county prosecutor – rather than any true difference in the offense itself. For example, Lawson was convicted of larceny in municipal court, but the state stealing statute proscribes the same conduct. Section 82-47 of the Joplin municipal code provides:

> a person commits the ordinance violation of larceny when such person:
>
> (1) Appropriates the property of another with the purpose to deprive the owner thereof either without the owner's consent or by means of deceit or coercion;
>
> (2) Appropriates the services of another ….

(L.F.836). The code references the state law provision for stealing, Section 570.030 (L.F.836). That provision contains almost identical language, just in slightly different form:

> A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

Section 570.030.1.

Municipal convictions, like misdemeanors, can be used to enhance criminal convictions. *Nichols v. United States*, 511 U.S. 738, 747 (1994). In Missouri, municipal convictions can be used to enhance convictions for stealing or driving under the

influence. See Sections 570.040.2 (stealing); 577.023.14 (D.U.I.). Potentially, if Lawson was convicted of stealing again, her sentence could be enhanced, since she already has two municipal stealing/larceny convictions. Because these convictions potentially could be used to enhance Lawson's sentence, they should also be available as impeachment in a criminal trial.

Many rights and procedures applicable to misdemeanors and felonies are also applicable to municipal ordinances. The writ of habeas corpus is available to a defendant under sentence from a municipal conviction. *State ex rel. Bennett v. Gagne*, 623 S.W.2d 87, 89 (Mo.App.W.D.1981). The municipal defendant can appeal his conviction. *City of Kansas City v. Piercy*, 97 S.W.3d 513, 514 (Mo.App.W.D.2002). A trial *de novo* in a municipal case is governed by the misdemeanor rules of criminal procedure**.** *City of Creve Coeur v. Order of Elks*, 136 S.W.3d 116, 117 (Mo.App. E.D.2004). Municipal judges may issue search warrants (see, *e.g.*, Joplin municipal code at L.F.837). These rights and procedures demonstrate that the distinction between municipal offenses and misdemeanor offenses for purposes of impeachment – a distinction which arose at a time when these rights did not exist – is out of date and should be eliminated.

A Ban on Impeachment using Municipal Convictions Violates Important Constitutional Rights

By barring impeachment with municipal convictions, courts impede the defendant's exercise of his fundamental constitutional rights to present a defense, to confront the witnesses against him, and to cross-examine witnesses. Without those

rights, the defendant's rights to due process, a fair trial, and freedom from cruel and unusual punishment also suffer.

Barring defense counsel from impeaching Lawson with her numerous municipal convictions hindered Black's ability to put on a defense, because it prevented him from showing the jury that Lawson was a common criminal, unworthy of belief. Yet Black is constitutionally guaranteed a right to a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

In the same manner, the limitation on impeachment hindered Black's exercise of his rights to confront Lawson and cross-examine her. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 U.S. at 294. The right to confront one's accusers is "essential to a fair trial in a criminal prosecution," *Pointer v. Texas*, 380 U.S. 400, 404 (1965), and, with the right to cross-examine the witnesses, "ensur[es] the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

The rules of evidence cannot stand in the way of constitutional rights. Thus, in *Green v. Georgia*, 442 U.S. 95, 97 (1979), the Court held that it was a violation of due process to exclude testimony that was highly relevant to a critical issue in the punishment phase of the trial, regardless of whether the proffered testimony came within the state rule against hearsay. In *Chambers*, the Supreme Court stressed that "where constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may

not be applied mechanistically to defeat the ends of justice." *Id*. So, too, in *Rock v. Arkansas*, 483 U.S. 44, 61 (1987), the Supreme Court held that "[a] State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."

The need for truth-finding and accuracy extends to sentencing. *See, e.g*., *Townsend v. Burke*, 334 U.S. 736, 741 (1948). This is especially true in the capital context. The Supreme Court has stalwartly supported the principle that because a death sentence is qualitatively different from any other sentence, there must be a corresponding difference in the need for reliability in the sentencing determination. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Eighth Amendment "requires provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.'" *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994)(Souter and Stevens, J.J., concurring). Because of the limitation on impeachment, Black was denied the ability to present evidence of Lawson's lack of credibility that would have engendered residual doubt and mitigated the facts of the crime.

A procedure that frustrates "the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring). The out-of-date rule against impeachment with municipal convictions is such a procedure and must be abrogated.

Reversal is Warranted

Black was prejudiced, because Lawson was a key witness and her credibility was of key importance. As mentioned previously in this brief, the jurors requested to see Lawson's prior testimony and her testimony from trial (L.F.934). They obviously were struggling with whom they should believe. The jurors should have learned that Lawson had at least five other, municipal convictions. The jury's verdict of guilt and its recommendation that Black receive a death sentence were based on half-truths and hence are unreliable. This Court must reverse for a new trial.

ARGUMENT VII

The trial court erred in overruling counsel's objections to Jackie Clark's testimony, because it violated Black's rights to due process, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that, under *Shepard v. United States*, the State should not have been allowed to present the testimony of the victim of those crimes and instead, should have been limited to presenting the terms of the charging documents, and documents showing Black's assent to the factual basis for the plea (such as the transcript of the guilty plea hearing, the plea agreement, or other comparable judicial documents), to prove that Black's 1976 convictions were serious and assaultive.

Black's death sentence hinges on one aggravating circumstance – whether he has one or more serious assaultive criminal convictions (L.F.954). The State, however, attempted to prove that aggravator using evidence that the Supreme Court held to be impermissible in *Shepard v. United States*, 544 U.S. 13 (2005). Without Clark's testimony, the State failed to present sufficient evidence of the aggravator. Black must be resentenced to life without parole.

At penalty phase, the State offered a certified copy of a judgment showing that Black had been convicted of armed robbery and felony assault in Newton County for an event that happened in 1976 (Tr.1360; St.Ex.47). As nonstatutory aggravation, it offered

a certified copy showing that Black had been convicted of burglary in Greene County in 1992 (Tr.1360; St.Ex.48). The State also presented Jackie Clark, the victim of the 1976 crimes, who testified in detail about the crimes and his injuries (Tr.1360-71). Defense counsel objected that the State was presenting too much detail about the prior crime and impermissibly presenting victim impact of the prior crime (Tr.1365,1367). The court allowed the State to proceed (Tr.1366). The State presented no further evidence.

Since defense counsel objected to Clark's detailed testimony, the issue is properly preserved. The trial court refused to put any limits on the testimony (Tr.1366). A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005). Its rulings will not be overturned absent a clear abuse of discretion. *Id*. A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown,* 939 S.W.2d 882,883-84 (Mo.banc1997).

Under the Sixth and Fourteenth Amendments, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584, 589 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

In *Shepard*, 544 U.S. 13, the Supreme Court considered what type of evidence a court may examine in determining whether an earlier conviction fit within certain characteristics that would allow for enhancement of sentence. The trial court refused to find, based on a police report, that the defendant's prior burglary conviction qualified as a

violent felony. *Id.* at 16. The Supreme Court held that the trial court was correct – "a later court determining the character of a crime to which the defendant pled guilty is limited to "examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16, 26.

In *State v. Ivy*, 188 S.W.3d 132 (Tenn.2006), the Tennessee Supreme Court held that the trial court erred in submitting Ivy's two prior convictions for aggravated assault to the jury in deciding punishment in a death case. Under *Shepard*, the trial court should not have relied on a certified affidavit of complaint to determine that the crime involved violence. *Id.* at 151. Tennessee's supreme court noted that although Ivy had pled guilty, "there is no plea transcript or other evidence indicating that he assented to the facts alleged in the affidavit of complaint." *Id.* at 152. It held the error harmless, however, because the State had proven other aggravating circumstances. *Id.*

Just as the court in *Shepard* could not consider the police report, and the court in *Ivy* could not consider the affidavit of complaint, the jury here could not consider the testimony of the victim. The inquiry must focus on what the defendant was convicted of, not what he might possibly have been convicted of given the police reports or the statements of the victim. The inquiry concerns the facts of the prior conviction, not the crime. The conviction potentially could be for a lesser crime than what the victim's testimony would suggest. For example, if a defendant was initially charged with burglary, but the defendant pled guilty to trespassing, the jury would be limited to the facts admitted by the defendant and found by the court regarding trespassing, not

burglary. The victim's testimony could describe a far different crime than what the conviction entailed. See also MAI-Cr3d 313.40, Note 3 (acknowledging applicability of *Shepard* to the determination of "serious assaultive conviction").

Thus, the State was limited to presenting the charging document, the transcript of the plea hearing, the plea agreement, or any comparable judicial document showing that the factual basis for the plea was confirmed by Black. *Shepard*, 544 U.S. at 16, 26. Clark's testimony prejudiced Black because the jury considered inadmissible evidence in determining whether he should live or die, and without that inadmissible evidence, there was insufficient evidence to support the sole aggravator. "Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case'" in penalty phase. *Bullington v. Missouri*, 451 U.S. 430, 444 (1981) (emphasis in original). If the State has not proven its case, the defendant is "acquitted" of the death penalty. *Id.* at 446. Here, the State did not prove its case, because the only evidence that Black's prior crimes were serious and assaultive was presented through inadmissible testimony.

Clark's testimony violated Black's rights to due process, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution. This court must vacate Black's sentence and impose a sentence of life without parole.

ARGUMENT VIII

The trial court plainly erred when it failed to include MAI-CR3d 313.30A in the instructions read and given to the jury for their penalty phase deliberations and omitted vital, mandatory language from Instruction 19, modeled on MAI-CR3d 313.40, because the omission of crucial instructions and/or language required by the MAI-Cr3d deprived Black of due process, a fair and reliable sentencing trial, and freedom from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 21, and 22(a) of the Missouri Constitution, in that the jurors received no instruction in penalty phase as to what they should consider to be proof beyond a reasonable doubt; they were not told that if they were not firmly convinced that a proposition is true, they must give the defendant the benefit of the doubt and not find such proposition to be true; and they were not informed of the requirement that all twelve jurors must agree to the existence of the aggravating circumstance.

Error results when the trial court fails to give a mandatory instruction. *State v. Westfall*, 75 S.W.3d 278, 284 (Mo.banc 2002). The prejudicial effect of such an error must be judicially determined. *State v. Storey*, 901 S.W.2d 886, 892 (Mo.banc 1995); Rule 28.02(f). The errors are presumed to prejudice the defendant unless it is clearly established by the State that the error did not result in prejudice. *State v. White*, 622 S.W.2d 939, 943 (Mo.banc 1981).

Here, the court failed to instruct the jury on a required penalty phase instruction, MAI-CR3d 313.30A. It also failed to include vital, mandatory language in Instruction 19, modeled after MAI-CR3d 313.40 (L.F.954). Because defense counsel did not object to the missing instruction and the omitted language from Instruction 19, Black requests plain error review. Rule 30.20; *State v. Wurtzberger*, 40 S.W.3d 893, 898 (Mo.banc 2001). For instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." *State v. Cline*, 808 S.W.2d 822, 824 (Mo.banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo.App.W.D.2000).

MAI-Cr3d 313.30A

For homicides committed on or after August 28, 1993, and before August 28, 2001, the first instruction to be read at the penalty phase proceedings is MAI-CR3d 313.30A. It provides the jury with guidance on how to assess whether evidence has established proof beyond a reasonable doubt, and it also reminds the jurors of the "presumption of innocence," *i.e.*, the duty even in penalty phase to give the defendant the benefit of the doubt if the State doesn't meet its burden of proof. The instruction is as follows:

> The law applicable to this stage of the trial is stated in these instructions and Instructions No. 1 and 2 which the Court read to you during the first stage of the

trial. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

In later instructions, you will be told that, in order to consider the death penalty, you must first find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

The reasonable doubt standard "is an ancient and honored aspect of our criminal justice system." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). It "plays a vital role in the American scheme of criminal procedure." *Cage v. Louisiana*, 498 U.S. 39, 39-40 (1990), quoting *In re Winship*, 397 U.S. 358, 363 (1970). This standard "is indispensable, for it

impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Winship*, 397 U.S. at 364. Thus, it "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363.

The reasonable doubt standard is so important that providing the jury with a deficient definition of reasonable doubt is constitutional error that cannot be considered harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). The jurors must not make a finding of guilt based on a degree of proof below that required by the Due Process Clause. *Cage*, 498 U.S. at 39-40.

The presumption of innocence originated in ancient times, was adopted through English common law, and has emerged as a bedrock principle of American jurisprudence. *Coffin v. United States*, 156 U.S. 432, 453-56 (1895). It is implicit in the right to a fair trial and is the "undoubted law, axiomatic and elementary" in a criminal trial. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

To be constitutional, a capital sentencing scheme must provide a basis for distinguishing between the few cases where death is imposed from the many cases in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980). The scheme must provide specific and detailed guidance to the jury, and make rationally reviewable the process for imposing a death sentence. *Id.* at 428. A vague standard which allows imposition of death violates the Eighth and Fourteenth Amendments. *Id.* "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter v. Kentucky*, 405 U.S. 288, 302 (1981).

The first step of Section 565.030.4 expressly requires the jury to find at least one aggravating circumstance beyond a reasonable doubt. *State v. Glass*, 136 S.W.3d 496, 521 (Mo.banc 2004). Yet the jury was given no guidance as to what they should consider to be proof beyond a reasonable doubt and they were not told that if they were not firmly convinced that a proposition is true, they must give the defendant the benefit of the doubt and not find such proposition to be true.

The reasonable doubt standard also should have played a crucial role at steps two and three.[6] See Argument XII, *infra*. At step two, the State had the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted death. Section 565.030.4(2); *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003); see also *Blakely v. Washington*, 542 U.S. 296, 301 (2004). At step three, the State had the burden of proving beyond a reasonable doubt that the evidence in mitigation of punishment did not outweigh the evidence in aggravation of punishment. Section 565.030.4(3); *Whitfield*, 107 S.W.3d at 258-61; *Blakely*, 542 U.S. at 301.

In *Bullington v. Missouri*, 451 U.S. 430, 436-37 (1981), the Supreme Court concluded that a capital penalty phase in Missouri "resemble[s] and, indeed, in all relevant respects [i]s like the immediately preceding trial on the issue of guilt or

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[6] Black acknowledges that this Court has held that the reasonable doubt standard does not apply to steps two and three of Section 565.030.4. See, e.g., *Glass*, 136 S.W.3d at 521. Black raises this argument anew, however, in light of *Burton v. Stewart*, S.Ct.05-9222, argued November 7, 2006.

innocence. It [i]s itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id*. at 438. By enacting a procedure that so closely "resembles a trial on the issue of guilt or innocence, … Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id*. at 444 (emphasis in original).

Because the penalty phase is a punishment "trial," the jury should have been instructed on reasonable doubt, just as it would have been in a guilt/innocence trial. So too, just as the jury is instructed on the presumption of innocence in the guilt phase, it must be instructed on the "benefit of the doubt" in penalty phase. See *State v. Mayes*, 63 S.W.3d 615, 636-37 (Mo.banc 2001)(reversal warranted based on trial court's failure to give "no-adverse inference" instruction in penalty phase, even though it had been given in guilt phase).

Black acknowledges that although the federal constitution requires that juries be instructed on the necessity that the defendant's guilt be proven beyond a reasonable doubt, it "neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). But although one may not have a "constitutional or inherent right" to a particular liberty interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The denial of a statutory right to jury sentencing also can constitute a violation of substantive due process. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

The penalty of death cannot be imposed in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Yet that is what happened here when Black was arbitrarily denied the right to have the jury properly instructed on reasonable doubt and the benefit of the doubt. Every other defendant in Missouri is given that right. The reasonable doubt instruction is a vital measure to reduce the risk of convictions resting on factual error, by impressing on the jury "the necessity of reaching a subjective state of certitude of the facts in issue." *Winship*, 397 U.S. at 363-64. Without the jurors being provided the correct definition of reasonable doubt, too great a risk exists that they applied an incorrect, lower standard of proof.

Instruction 19

The court's error was exacerbated by the additional omission of language from Instruction 19, patterned on MAI-Cr3d 313.40, which submitted the aggravator to the jury (L.F.954). The third paragraph read: "You are further instructed that the burden rests upon the state to prove the foregoing circumstance beyond a reasonable doubt" (L.F.954; see Appendix for full instruction). It omitted a second sentence: "All twelve of you must agree as to the existence of that circumstance." MAI-CR3d 313.40.

In *State v. Goucher*, 111 S.W.3d 915, 917 (Mo.App.S.D.2003), Judge Dermott failed to submit the unanimous verdict instruction, patterned on MAI-Cr3d 302.05. The Southern District noted that Article I, Section 22(a) "guarantees a fundamental right that an accused shall enjoy a trial by twelve people that unanimously concur in the guilt of the defendant before he or she can be legally convicted." *Id.* It found that Judge Dermott's

failure to instruct on unanimity was plain error affecting substantial rights. *Goucher*, 111 S.W.3d at 920; see also *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc 2002)(reversed for new penalty phase because counsel was ineffective for failing to object to omission of two paragraphs from MAI-CR3d 313.44A that told jurors they must consider circumstances in mitigation of punishment and need not be unanimous).

The State cannot meet its burden of rebutting the presumption that the missing instruction and the missing language from Instruction 19 prejudiced Black. The errors were especially egregious since the omissions occurred in a punishment trial where the sentence inflicted was death. The "qualitative difference between death and other penalties" calls for "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Because the court failed to provide the jury with a mandatory instruction in a capital punishment trial, on reasonable doubt and the duty to give the defendant the benefit of the doubt, and failed to include mandatory language on the requirement of unanimity, the death sentence is inherently unreliable and cannot stand. The court's failure deprived Black of due process, due process, a fair and reliable sentencing trial, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21,22(a). As in *Goucher* and *Deck*, this Court must grant relief.

ARGUMENT IX

The trial court plainly erred in submitting Instruction 19, patterned on MAI-Cr3d 313.40, to the jury, in accepting the jury's recommendation of death, and in sentencing Black to death, in violation of Black's rights to due process, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 21, and 22(a) of the Missouri Constitution, because the sole aggravating circumstance was submitted to the jury under a faulty instruction, in that Instruction 19 did not ensure unanimity in the jurors' finding – instead, it allowed the risk that some jurors would find that only one conviction was serious and assaultive and other jurors would find only the other conviction, such that they never unanimously found that one of Black's prior convictions was serious and assaultive.

The State's case for death was predicated on the jury finding that Black had one or more serious assaultive convictions (L.F.954); see *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo.banc 1992) (jury must find at least one statutory aggravating circumstance, and must be unanimous on each aggravating circumstance). Any lack of unanimity regarding the finding of this sole aggravating circumstance mandated a verdict of life without parole. *Id*. The requirement of unanimity is a fundamental right under Article I, Section 22(a) of the Missouri Constitution. *State v. Goucher*, 111 S.W.3d 915, 917, 920 (Mo. App. S.D. 2003)(failure to submit unanimity verdict instruction was plain error).

Yet the court submitted this aggravator to the jury using an instruction that failed to adequately instruct the jurors on the requirement of unanimity. The instruction asked the jurors to consider whether Black had been convicted of at least one serious assaultive criminal conviction (L.F.954). It then listed two convictions (L.F.954). Too great a risk exists that the jurors were not unanimous in finding the existence of the same conviction. Some jurors may have found that only the first listed conviction was serious and assaultive, and the remaining jurors may have found that only the second listed conviction was serious and assaultive.

Defense counsel did not object and hence Black requests review for plain error. Rule 30.20. For instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." *State v. Cline*, 808 S.W.2d 822, 824 (Mo.banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo.App.W.D.2000).

To be constitutional, a capital sentencing scheme must provide a basis for distinguishing between the few cases where death is imposed from the many cases in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980). The scheme must provide specific and detailed guidance to the jury, and make rationally reviewable the process for imposing a death sentence. *Id.* at 428. A vague standard which allows imposition of death violates the Eighth and Fourteenth Amendments. *Id.* "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter v. Kentucky*, 405 U.S. 288, 302 (1981).

"MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law." *State v. Carson*, 941S.W.2d 518,520 (Mo.banc 1997). "If an instruction following MAI-CR3d conflicts with the substantive law, any court should decline to follow MAI-CR3d or its Notes on Use." *Id*.

Instruction 19 conflicted with substantive law, and it was plain error to submit it to the jury. In addition to failing to include required language as to unanimity, see Point VIII, *supra*, it failed to instruct the jurors that they needed to be unanimous as to their finding on each conviction. The instructional error should be considered structural. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). But for the improper and incorrect direction given to the jury in Instruction 19, the outcome could have been quite different. The court's error in submitting the instruction violated Black's rights to due process, a fair sentencing trial, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 21, and 22(a) of the Missouri Constitution. For the foregoing reasons, the Court must order that Black be sentenced to life without parole.

ARGUMENT X

The trial court erred and plainly erred in overruling defense counsel's objections to the State's guilt and penalty phase closing arguments, and failing to intercede *sua sponte*, because the State's repeated, improper and excessive comments violated Black's rights to due process, a trial before a fair and impartial jury, a fair and reliable sentencing, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that:

C. In guilt phase, the State misstated the law by urging the jurors to believe that Black need not be cool and calm in order to have coolly reflected, as long as he had time to deliberate;

D. In penalty phase, the State (1) diminished the jurors' sense of responsibility by arguing that it would not be them giving Black death, it would be Black; and (2) expressed the prosecutor's own personal opinion and implied knowledge of additional facts not on the record when it argued that the prosecutor himself would give death, and that the prosecutor himself had made the decision to seek death.

Prosecutors have a sacred obligation "not merely to win a case, but to see that justice is done, that guilt shall not escape nor innocence suffer." *State v. Burnfin*, 771 S.W.2d 908, 914 (Mo. App. 1989), *citing Berger v. United States*, 295 U.S. 78, 88

(1935). A defendant is entitled to a fair trial and a prosecutor must ensure he gets one. *State v. Tiedt*, 206 S.W.2d 524, 526-27 (Mo.banc 1947).

Despite its sacred obligation, however, the prosecutors repeatedly reached outside the proper bounds of argument, destroying Black's right to a fair trial. In guilt phase, the prosecutors attempted to shore up its failing case for deliberation by confusing the jurors and misstating the law, urging the jurors to believe that Black need not be cool and calm in order to have coolly reflected (Tr.1284). In penalty phase, the prosecutors diminished the jurors' sense of responsibility by arguing that it would not be them, but Black himself, giving Black death (Tr.1404-05). The prosecutor also expressed his own personal opinion and implied knowledge of additional facts not on the record in arguing that the prosecutor himself would give death, and that the prosecutor himself had made the decision to seek death (Tr.1425-26).

While defense counsel objected to some of the improper arguments, he did not properly preserve all of these issues for appeal. To the extent the closing argument errors are not preserved, Black requests plain error review. Rule 30.20. For reversal under plain error review on closing argument, a defendant must establish that the argument was improper and that it had a decisive effect on the outcome of the trial and would amount to a manifest injustice or miscarriage of justice if the error were left uncorrected. *State v. Lyons*, 951 S.W.2d 584, 596 (Mo.banc 1997).

Guilt Phase

The State knew the weaknesses of its case. At the prior trial, the jurors struggled over whether Black had coolly reflected prior to stabbing Johnson. They sent a note asking the court to define "cool reflection" (1999 L.F.563). At this trial, the State's case was even weaker on deliberation. The jury heard that Black was angry as he raced to catch up to Johnson, and he got angrier and angrier on the way (Tr.741). The jury also learned that Black's intention was to "hurt" Johnson, to "kick his ass," not to kill (Tr.757, 766). The State's evidence showed that Black did not coolly deliberate prior to stabbing Johnson. See Point IV, *supra*.

To bolster its failing case for deliberation, the State misstated the law. It argued that Black need not be cool and calm to have coolly reflected, as long as he had the time to deliberate:

> Deliberation is defined for you in the instruction as cool reflection upon the matter for any length of time no matter how brief. It doesn't say cool and calm, it says no matter how brief.

(Tr.1284).

Misstatements of the law are impermissible during closing arguments. *State v. Storey*, 901 S.W.2d 886, 902 (Mo.banc 1995); *Drake v. Kemp*, 762 F.2d 1449, 1458-59 (11thCir.1985). The trial court has a "positive and absolute" duty to restrain the parties from making such arguments. *State v. Blakeburn*, 859 S.W.2d 170, 174 (Mo.App.W.D.1993). Counsel may not argue questions of law inconsistent with the jury instructions. *State v. Oates*, 12 S.W.3d 307, 312 (Mo.banc 2000). A party may call the

jury's attention to a segment of the instructions, only if the statement is correct and not in conflict with any instruction. *State v. Ramsey*, 665 S.W.2d 72, 75 (Mo.App.S.D.1984).

Although the State argued that Black did not need to be cool and calm, the words "cool" and "calm" are synonymous. The American Heritage Dictionary, 3d edition, defines "cool" as "marked by calm self-control." Webster's Ninth New Collegiate Dictionary defines "cool" as "marked by steady dispassionate calmness and self-control." The State's argument misstated the law by urging the jurors to believe that as long as Black had time to deliberate, he need not have a cool, calm state of mind. The jurors would know that cool and calm mean the same thing. If Black did not need to be calm, he did not need to be cool. The misstatement misled and confused the jurors on the most important issue of the case, whether the State had proven Black acted after cool reflection. The argument warrants a reversal, even under the plain error standard of review.

Penalty Phase

In penalty phase closing, the State committed two categories of error. First, it diminished the jurors' sense of responsibility, by arguing that Black, not the jurors, would be putting Black to death:

> Prosecutor: Keep in mind that you didn't put Gary Black in this position, Gary Black put himself in this position. If you decide that death is the appropriate punishment, it's not you putting Gary Black to death, it is Gary Black who put himself in that –

Defense Counsel: That is objectionable, Your Honor.

The Court: Overruled.

Prosecutor: It is Gary Black that has put himself into that position.

(Tr.1404-1405).

The State's argument was directly conflicted with *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985), where the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Exacerbating the situation, the court overruled defense counsel's objection and thereby gave the argument its stamp of approval. *State v. Barton*, 936 S.W.2d 781,788 (Mo.banc 1996). This Court must vacate the death sentence – it cannot conclude that the improper argument had no effect on the death verdict, and hence the jury's decision did not meet the standard of reliability that the Eighth Amendment requires. *Caldwell*, 472 U.S. at 341; *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (prosecutorial argument that misleads the jury by improperly describing its role and responsibilities violates the Eighth Amendment).

The prosecutor also repeatedly expressed his own personal opinion and implied knowledge of additional facts not on the record when it argued that the prosecutor himself would give death, and that the prosecutor himself had made the decision to seek death. The prosecutor continued his improper argument even after the Court sustained defense counsel's objection:

> I think there is one more thing that you need to know here this evening. I agree that the burden on you is a heavy burden, but I'd never asked someone else to do something that I wouldn't do myself.

(Tr.1425). Although the objection was sustained, the prosecutor immediately continued:

> And the State of Missouri says that it is the decision only of the Prosecuting Attorney to decide in any first degree murder case whether it's appropriate to stand up here and ask a jury to consider whether the death penalty is the appropriate punishment. That was my burden, I made that decision.

(Tr.1425-26). The objection again was sustained and yet the prosecutor would not leave the topic:

> I think it's important for you to know that as the elected prosecutor in this county, I'm asking you to impose the appropriate punishment in this case and that appropriate punishment is the death penalty.

(Tr.1426). Moments later, the prosecutor finished his closing (Tr.1426). Defense counsel did not request a mistrial.

"[E]xpressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *ABA Standards for Criminal Justice* 3-5.8 (3d ed.1993); see also *Berger*, 295 U.S. at 88.

This Court has stressed that it is highly prejudicial for a prosecutor to argue facts outside the record, because the jury is likely to give those assertions much weight when they should carry none. *Storey*, 901 S.W.2d at 900. Argument outside the record "essentially turns the prosecutor into an unsworn witness not subject to cross-examination. The error is compounded because the jury believes - properly - that the prosecutor has a duty to serve justice, not merely to win the case." *Id*. at 901; see also *Shurn v. Delo*, 177 F.3d 662, 665 (8thCir.1999)(improper for prosecutor to argue, "I'm the top law enforcement officer in this county and I'm the one that decides in which cases to ask for the death penalty and which cases we won't. . . . I'm telling you there's no case that could be more obvious"); *United States v. Skarda*, 845 F.2d 1508, 1510 (8thCir.1988) (improper for prosecutor to argue "we are doing the best we can to convict someone that obviously we feel in good faith should be prosecuted and convicted").

The court agreed that the argument was improper. It sustained defense counsel's objection, but the prosecutor persisted in his improper argument (Tr.1425-26). Since the prosecutor failed to heed the court's warning, his misconduct is clear. *State v. Bohlen*, 670 S.W.2d 119, 123 (Mo.App.E.D.1984). The argument came at the tail end of the State's closing, and so the jurors left to deliberate with these words ringing in their ears (Tr.1426).

The court had a duty to order a mistrial. This misconduct was so blatant and persistent that "[n]othing short of a mistrial can purge the prejudice." *State v. Harris*, 629 S.W.2d 399, 401 (Mo.App.E.D.1981). The trial judge has the responsibility of maintaining decorum in the courtroom. *United States v. Young*, 470 U.S. 1, 10 (1985).

He is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States*, 289 U.S. 466, 469 (1933). The trial court must exercise its discretion to control prosecutorial misconduct *sua sponte,* if need be, to ensure that every defendant receives a fair trial. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App.E.D.1992).

Closing arguments in capital cases must receive a "greater degree of scrutiny" than those in non-capital cases. *Caldwell*, 472 U.S. at 329. Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Prosecutorial misconduct may be so outrageous that it violates due process and the Eighth Amendment. *State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo.banc1999).

Here, the State's repeated, egregious violations during argument in both phases deprived Black of due process, a trial before a fair and impartial jury, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court must remand for a new trial.

ARGUMENT XI

The trial court erred in accepting the jury's death penalty verdict and in sentencing Black to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3(3). Pursuant to its independent duty to review death sentences under Section 565.035, this Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Black's sentence to life imprisonment without parole, based on the lack of evidence that Black acted with cool deliberation, the trial court's refusal to follow bedrock precedents affecting Black's fundamental rights, and skewed rulings which kept the defense from presenting its evidence, while allowing the State to present inadmissible evidence.

Section 565.035 allows this Court to set aside a death sentence when it believes that (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) the evidence does not support the aggravating factors; or (3) the sentence is disproportionate to the sentences imposed in similar cases, considering the crime, the strength of the evidence, and the defendant. The purpose of proportionality review is to provide "an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences." *State*

v. Ramsey, 864 S.W.2d 320, 328 (Mo.banc 1993). It safeguards against "freakish and wanton application of the death penalty." *Id.*

Similar Cases

This Court must "compare[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978). The Court should look at cases where the defendant has been sentenced to death for killing someone by stabbing. Uniformly, when a defendant receives the death sentence for a stabbing, he stabbed his victim multiple times; was a prison inmate; had numerous victims; or inflicted some other type of abuse. See, e.g., *State v. Strong*, 142 S.W.3d 702 (Mo.banc 2004) (defendant stabbed woman 21 times and her daughter 9 times); *State v. Cole*, 71 S.W.3d 163 (Mo.banc 2002) (multiple stab wounds and attack on second person); *State v. Barton*, 998 S.W.2d 19 (Mo.banc 1999) (multiple stab wounds and possible rape of 81-year-old woman); *State v. Smith*, 944 S.W.2d 901 (Mo.banc 1997) (choked and stabbed two victims); *State v. Feltrop*, 803 S.W.2d 1 (Mo.banc 1991) (stabbed girlfriend once in throat, dismembered her body). Counsel has been unable to find any other cases where the defendant has received a death sentence for a single stab wound unless the defendant engaged in other egregious conduct related to the crime.

The Court should also look at similar cases where the defendant did not receive death, or even were convicted of second degree murder. Similar non-death cases are as follows: *State v. Hudson*, 154 S.W.3d 426 (Mo.App.S.D.2005) (defendant stabbed victim, left to use bathroom, and returned to stab victim several more times); *State v. Morrow*, 41 S.W.3d 56 (Mo.App.W.D.2001) (defendant got in a fight with the victim and stabbed him once in the back; defendant convicted of second-degree murder); *State v. Burnett*, 931 S.W.2d 871 (Mo.App.W.D.1996) (in a fight that he started, defendant inflicted one fatal stab wound to the victim's heart; convicted of second-degree murder); *State v. Reyes*, 108 S.W.3d 161 (Mo.App.W.D.2003) (no evidence of any argument, but defendant stabbed victim 29 times; defendant convicted of second-degree murder).

Strength of the State's Evidence

One unique aspect of Missouri's proportionality statute is the Legislature's requirement that the Court consider the strength of the State's evidence. *State v. Chaney*, 967 S.W.2d 47, 60 (Mo.banc 1998). "It is clear from this mandate that the legislature intended for this Court, when reviewing the imposition of the death penalty, to go beyond a mere inquiry into whether the evidence is sufficient to support a conviction." *Id.*

In *Chaney*, the Court granted proportionality relief, holding that "[w]hile sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, the evidence here is not as strong as evidence in similar cases imposing the death penalty." *Id.* "After comparing the evidence in this and similar death penalty cases, we conclude that this case

falls within a narrow band where the evidence is sufficient to support a conviction, but not of the compelling nature usually found in cases where the sentence is death." *Id.*

The same result is compelled here. The State failed to present sufficient evidence of cool reflection. In Judge Wolff's dissent from the affirmance of Black's initial appeal, he emphasized that the evidence showed "rage, not cool reflection" and that "[a]t most the evidence showed that Black purposely injured Jason Johnson." *State v. Black*, 50 S.W.3d 778, 797 (Mo.banc 2001). He concluded that Black's crime was second degree-murder. *Id.* Judge Wolff stressed that Lawson's testimony that Black wanted to "hurt" Johnson undercut the notion of premeditated murder and that "[h]ad such testimony been presented in the guilt phase of the trial it would have weakened an already virtually nonexistent case for first-degree murder." *Id.*

In this trial, that testimony was presented in guilt phase. Lawson testified that Black's intention was to hurt Johnson, to "kick his ass," not kill him (Tr.757,766). Lawson admitted that she was angry, cursing and "bitching" about what had happened inside the store (Tr. 729,755,740). Black was angry too, and as he raced to catch up with the truck and the truck kept pulling away, Black got angrier and angrier (Tr.741). While Black had the time to deliberate, he did not have the cool state of mind required for deliberation.

The State's case in penalty phase was weak as well, compared to most death penalty cases. It rested on one aggravating circumstance – Black's prior convictions from 1976.

Skewed Rulings by Trial Court Created Arbitrary Results

In addition to the State's insufficient evidence of deliberation, other factors support proportionality relief. The conviction was obtained through blatant disregard of bedrock constitutional rights and well-established statutory rights. Despite the clear mandate of *Faretta v. California*, 422 U.S. 806 (1975), Black was forced to proceed to trial represented by counsel against his "considered wish" and thus he has been convicted and sentenced to die without having "his" defense presented to the jury. Despite Section 491.074 and the clear mandate of this Court in Black's postconviction appeal, the trial court refused to allow the defense to impeach its own witnesses with their prior inconsistent statements (even though the State had impeached its own witness, Lawson, with her prior inconsistent statements).

For the sake of expediency, the court barred the defense from presenting a 35-minute tape recorded statement of perhaps the most important witness at trial, Tammy Lawson. Yet the court allowed the State to present the prior consistent statement of Mark Wolfe, through the testimony of Detective Gallup. The court also refused to allow the defense to impeach Lawson with her multiple municipal convictions for larceny/stealing, assault, and obstructing service of process/resisting arrest.

In penalty phase, the court failed to include a required instruction and omitted language from another. As a result, the jury received no instruction in penalty phase on what to consider as reasonable doubt and that they must give the defendant the benefit of the doubt. The jury also did not receive mandatory language on the need to find the sole aggravating circumstance unanimously. Adding to the confusion was the possibility,

engendered by the improper language of the pattern MAI, that some of the jurors might have found that the first of Black's convictions was serious and assaultive, and the others found the other conviction as such, so that there was no unanimous finding that any one conviction was serious and assaultive.

De Novo Review

De novo review is appropriate in death cases. In *Cooper Industries v. Leatherman Tool Group Inc.*, 532 U.S. 424, 436 (2001), the Supreme Court held that appellate courts should apply *de novo* review to awards of punitive damages. It justified *de novo* review of these awards based on the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment, which is applicable to the States under the due process clause of the Fourteenth Amendment. *Id.* at 433-34. *De novo* review "helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id.* at 436; see also *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 584 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Black*, 50 S.W.3d at 793-99 (Wolfe, J., dissenting). Certainly, if this type of independent review is warranted in cases where only money is at stake, it must also apply when a human life is at stake.

Upholding a death sentence under these circumstances violates the Eighth Amendment's requirement of heightened scrutiny of a capital sentence. *Woodson v. North Carolina*, 420 U.S. 280, 305 (1976). It also violates Black's rights to due process and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and

21 of the Missouri Constitution. This Court must vacate Black's death sentence and resentence him to life without the possibility of parole.

ARGUMENT XII

The trial court plainly erred in submitting Instructions 20 and 20A, because the instructions violated Black's rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution, in that the instructions failed to instruct the jury that the State bore the burden of proving beyond a reasonable doubt that, respectively, (1) the aggravating facts and circumstances warranted death, and (2) the evidence in mitigation was not sufficient to outweigh the evidence in aggravation.

In *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003), this Court held that the findings required by subsections (1), (2), and (3) of Section 565.030.4 are death-eligibility factual findings that must be made by a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it must be found by a jury beyond a reasonable doubt." *Id.* at 257, *citing Ring v. Arizona*, 536 U.S. 584, 602 (2002). Moreover, the *State* bears the burden of proving, beyond a reasonable doubt, the existence of the facts required to prove a defendant eligible for death. *Bullington v. Missouri*, 451 U.S. 430 (1981). Despite this constitutional mandate, instructions 20 and 20A failed to instruct the jury that the State had the burden of proving steps two and three beyond a reasonable doubt (L.F.955-56;

See Appendix for text of instructions).[7] The trial court failed to instruct the jury in accordance with the substantive law. *State v. Carson*, 941 S.W.2d 518 (Mo.banc 1997).

Defense counsel did not raise this issue at trial, and Black therefore requests review for plain error. Rule 30.20. For instructional error to warrant reversal under plain error review, "the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice." *State v. Cline*, 808 S.W.2d 822, 824 (Mo.banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury's verdict. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo.App.W.D.2000).

The Supreme Court has recognized that failure to correctly instruct the jury that the State's burden of proof is "beyond a reasonable doubt" is structural, per se, reversible error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). Even under a manifest injustice standard, a new trial is warranted.

A substantial risk exists that the death sentences resulted from the jurors' incorrect belief that steps two and three were met if Black did not prove otherwise, or if the State met those burdens only by a preponderance of the evidence. The death sentences are not reliable and hence cannot stand. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Black was denied his rights to jury trial, presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII, XIV; Mo.Const., Art. I, §§10,18(a),21. His death sentence must be vacated, and he must be resentenced to life imprisonment.

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[7] But see *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004); see *supra*, Arg.VIII, fn.6.

CONCLUSION

Based on Arguments I, II, III, V, VI, Gary Black respectfully requests that the Court remand for a new trial. Based on argument IV, Black requests that the Court vacate his first degree murder conviction and discharge him from his death sentence. Based on Arguments VII, VIII, IX, XI, and XII, Black requests that the Court vacate his death sentence and order that he be resentenced to life without parole. Based on Argument X, he requests that the Court grant him a new trial based on guilt phase error, or alternatively, resentence him to life without parole for penalty phase error.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, to: The Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 22nd day of November, 2006.

_____
Rosemary E. Percival

Certificate of Compliance

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

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,208 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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