

Sup. Ct. # 88497

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

KENNETH BAUMRUK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of St. Charles County, Missouri
11th Judicial Circuit, Division 3
The Honorable Lucy D. Rauch, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Kenneth Baumruk was convicted of first-degree murder, §565.020, in the Circuit Court of St. Charles County, after a change of venue from St. Louis County.¹ He was sentenced to death. Notice of appeal was timely filed. 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 FACTS²

Kenneth Baumruk was charged with first-degree murder and seventeen other felony counts regarding events that occurred on May 5, 1992 at the St. Louis County Courthouse (L.F.55-68). He was tried on the murder count, convicted, and sentenced to death (L.F.28-29). On appeal, this Court remanded for a new trial, instructing the St. Louis Circuit Court to grant a change of venue (L.F.69)(see Appendix).

St. Louis County Circuit Judge Mark Seigel ordered a change of venue to St. Charles County and ruled he would preside over the re-trial (5/15/04-Tr.25). In a writ proceeding, defense counsel challenged whether Judge Seigel could accompany the case (L.F.315). At oral argument on the writ, the State volunteered five times that although the trial could be held in the St. Charles County Courthouse, it would be improper to have a St. Charles County jury (L.F.271,273-74,277-78).

Later, when defense counsel moved for a venire from outside St. Charles County, the State opposed the motion (L.F.314-24). It argued that the experience

² The Record consists of a trial transcript (Tr.); a 2005 competency transcript (CompTr.); various pre-trial hearing transcripts, for example (1/17/07-Tr.); the transcript of the 2001 trial (1stTr.); the legal file from the 2001 trial (1stL.F.); and exhibits from the 2005 competency hearing (Comp.Ex.). Counsel has filed a motion asking the Court to take judicial notice of the Record from the prior trial.

of the first trial showed that a fair jury could be seated in St. Charles County; that this Court, in reversing for a new trial, misinterpreted polling data on pre-trial publicity; and that the case was well-publicized throughout the state (L.F.318-23). Defense counsel sought leave to secure polling information to show that the residents of St. Charles County were biased against Baumruk (10/3/05-Tr.16-17). Judge Rauch denied the motion for change of venire and the request to obtain polling data to demonstrate bias (L.F.371).

In June, 2005, Judge Rauch held a hearing on Baumruk's competence to stand trial. The expert witnesses agreed that Baumruk could read and recall recently-learned information and that he understood the court proceedings (Tr.246-47). They agreed that Baumruk suffered brain damage from being shot in the head and the resulting surgeries (Comp.Tr.267). The experts disagreed, however, on whether Baumruk suffered from amnesia for the time period immediately before and during the shooting (L.F.247). Three defense experts testified that Baumruk's memory loss rendered him unable to assist in his defense, since he could not relate his motives, intent, and mental state at the time of the shooting (Tr.246). Two State experts believed that Baumruk exaggerated his memory loss and was competent (Comp.Tr.97,100). Judge Rauch found Baumruk competent to stand trial, believing that Baumruk could review the facts of the incident to accurately reconstruct his actions if his memory was lacking (L.F.235-52).

On November 6, 2006, Baumruk advised his attorneys that he wanted to represent himself (L.F.527). Three weeks later (58 days before jury selection), he moved to discharge his attorneys, but Judge Rauch refused (11/27/06-Tr.21-22). On December 7th, he attempted to appeal the ruling (L.F.492-95). The next day, he sent the prosecutor a motion to discharge his attorneys (L.F.501). On December 19th, he filed a motion to discharge his attorneys, asserting that he was acting as his own attorney (L.F.510). Counsel wrote to Judge Rauch on January 9, 2007, reiterating that Baumruk wanted to represent himself (L.F.523,527). Between November 21, 2006, and January 9, 2007, Baumruk filed four *pro se* motions or notices (L.F.488,496,511-12,522).

On January 17, 2007, the court again heard Baumruk's motion to discharge counsel and again overruled it (1/17/07-Tr.38-47). The court was not convinced that Baumruk possessed the ability to perform the tasks of an attorney; she also noted that extensive proceedings had occurred, counsel had performed well, the case was complex, Baumruk claimed to be incompetent, and the request was untimely (1/17/07-Tr.51-52).

Defense counsel asked the court to reconsider Judge Seigel's denial of the suppression motion prior defense counsel had filed (L.F.512;1/17/07-Tr.53). That motion asked that the court suppress Baumruk's statement to Officer Glenn, which resulted from Glenn's investigation of Baumruk's report that someone stole his newspapers (1stTr.825-26). In the secretly-recorded statement, Glenn prompted Baumruk to talk about the charged crimes (1stTr.825-28,844-45,852-53).

Although the State denied that Glenn acted improperly, it advised that it would not offer the statement into evidence, but that its experts might testify about it (1/17/07-Tr.55-57). Baumruk argued that the State could not use the statement at all, even through expert witnesses, but the court allowed the expert testimony (1/17/07-Tr.56-58).

Voir Dire

Voir dire involved the questioning of 153 veniremembers in two panels (L.F.670-73). The 92 veniremembers who had heard about the case were questioned individually (L.F.108). Again moving for change of venire, defense counsel advised that of the 76 jurors they had yet questioned, 56 knew about the case, and many knew Baumruk had been convicted and sentenced to death (Tr.653). Judge Rauch agreed to remove venirepersons who knew about the sentence, but not those who knew Baumruk had been convicted (Tr.652,658-59). She again denied a change of venire (Tr.652,658-59).

Defense counsel asked to explore the jurors' ability to consider a sentence of life without parole given the critical fact that Baumruk not only killed his wife, but also committed other assaults (1/17/07-Tr.15,20). Counsel argued that the aggravators alleged eight attempted homicides and thus the assaults were a critical fact (1/17/07-Tr.20-21). The court ruled that counsel could reveal only that Baumruk shot four other people (1/17/07-Tr.18).³

³ The court later overruled defense counsel's renewed motions (Tr.383-86,782-83).

Venireperson Ronald Matlock knew the facts of the crime, knew that it prompted the advent of security systems in public buildings and believed that Baumruk had been convicted (Tr.506-08). He did not think he could set aside that knowledge, judge the case just on the evidence, or presume Baumruk innocent (Tr.508). He did not know if he could acquit if the State did not meet its burden of proof (Tr.509). Although Matlock stated on his questionnaire that he could not consider the death penalty, he concluded that he could consider it (Tr.509-13,517). Neither side moved to strike Matlock for cause, and he served on the jury (Tr.926-28). Four other jurors also had heard about the case but vouched that they had no opinion as to guilt or innocence (Tr.275-76,289-91,297-99).

State's Evidence

Kenneth and Mary Baumruk had been married for fifteen years when Mary filed for divorce in August, 1990 (Tr.1118,1120,1155-56).⁴ Gary Seltzer represented Baumruk, and Scott Pollard represented Mary (Tr.1154,1162-63). The case was scheduled for resolution on May 5, 1992 (Tr.1163-65,1345).

On January 23, 1992, Baumruk, who was living in Washington state, bought two .38 caliber revolvers and ammunition (Tr.1223-24,1301-1303). He told co-workers that the divorce upset him and he worried he would lose his house (Tr.1141). He warned co-workers that if things did not go his way, he would

⁴ For ease of reference, Kenneth Baumruk will be referred to as “Baumruk” and Mary Baumruk will be referred to as “Mary.” No disrespect is intended.

shoot his wife and the lawyers, but then assured them he was joking (Tr.1142-48,1226-27,1232). Before returning to St. Louis, he asked a coworker to tell his boss he was sick and asked another to watch his vehicles until he returned (Tr.1146,1150-51,1228).

A few days before May 5th, Pollard realized that he had previously represented Baumruk and therefore had a conflict of interest in representing Mary (Tr.1168-69). On May 5th, the parties arrived in Division 38 of the St. Louis County Courthouse (Tr.1020). Pollard alerted Seltzer to the conflict, and Seltzer told Baumruk (Tr.1351). Seltzer and Pollard met with Judge Hais in chambers to discuss the problem (Tr.1050-51,1171-72,1244,1350-51). Seltzer told them that Baumruk knew about the conflict and was willing to waive it (Tr.1173, 1352-53,1381-82,1391). Judge Hais agreed that the case could proceed that day if both Baumruk and Mary were willing to waive the conflict on the record (Tr.1174, 1197,1245-46,1353).

The attorneys and judge returned to the courtroom (Tr.1066). Baumruk was at counsel table next to Seltzer, and Pollard sat across the table (Tr.1079-80, 1174). Mary sat next to Pollard and directly across from Baumruk (Tr.1080). After Mary and Baumruk were sworn in, Pollard started to question Mary about the conflict (Tr.1034,1052,1175,1249).

Baumruk reached into his briefcase, pulled out a gun, and shot Mary once in the neck (Tr.1035,1127,1129,1176-77,1249,1355). With shaking hands, he shot Pollard in the chest (Tr.1067,1177,1205,1356). As Pollard moved away, Baumruk

shot Seltzer several times (Tr.1068,1180,1208,1356-57). He then shot Mary again (Tr.1737).

With a gun in each hand, Baumruk pursued Judge Hais into the back hallway (Tr.1036-37,1055, 1249,1251,1357-58). A lawyer pulled Hais into an office and locked the door (Tr.1249). Proceeding down the hall, Baumruk came up behind bailiff Fred Nicolay (Tr.1482-83). As Nicolay turned, his hand hit Baumruk's hand, the gun fired, and a bullet struck Nicolay in the shoulder (Tr.1483-84). Baumruk then stepped around a corner and shot at Officer Steve Salamon, missing him (Tr.1401). He shot at, and missed, Officer Paul Neske (Tr.1507).

Baumruk arrived at the prisoners' elevator as Officer Rufus Whittier opened the door (Tr.1531-35). Baumruk asked where the elevator went (Tr.1535). Whittier told him it moved prisoners up and down, and Baumruk continued down the hall (Tr.1536,1544).

Baumruk encountered an attorney who urged him to surrender (Tr.1548). Baumruk told him to get out of his way, that he had no quarrel with him (Tr.1548). After reloading the guns, he shot at and missed James Hartwick, an investigator for the prosecutor's office and a licensed police officer (Tr.1550,1568-70). A few minutes later, Baumruk fired a shot through the door of the office into which Hartwick had ducked (Tr.1572).

When Baumruk emerged into the main hallway, officers alerted each other and took cover (Tr.1512-13,1524-25,1583). Baumruk ran back toward Division

38, firing both guns (Tr.1513,1583,1586). He struck security officer Wade Dillon in the leg, and then he was shot nine times, including two shots to the head (Tr.1513, 1587,1597,1661-62).

As Officer Salamon checked him for weapons, Baumruk asked if he had killed Mary (Tr.1407-09,1514). He told an emergency room doctor that he shot Mary because of the divorce (Tr.1657-58).

Mary died from two gunshot wounds to the neck (Tr.1725,1740). One struck her second vertebrae, breaking her neck and paralyzing her (Tr.1728,1732-33). The second wound was immediately fatal, hitting the spinal cord and lodging in the brain (Tr.1733-35,1737).

Defense Evidence

Baumruk conceded that he shot Mary, but claimed to lack responsibility (Tr.1003-1009). He presented the testimony of Dr. Elizabeth Nettles, a clinical psychologist, and Dr. Moisy Shopper, a psychiatrist, who concluded within a reasonable degree of medical certainty that Baumruk suffered from a mental disease – delusional disorder, persecutory type – at the time of the crime and that as a result, he lacked the capacity to know and appreciate the nature, quality, or wrongfulness of his conduct (Tr.1860-63,1890,1948-49,2000). There was a sizable break in Baumruk’s appreciation and evaluation of reality (Tr. 1949). He was hyper-vigilant and suspicious, misperceived events, and formed mistaken impressions of people and what their actions signify (Tr. 1853-54). He believed

that “the system” was corrupt and would treat him malevolently (Tr. 1813, 1835, 1988).

Baumruk’s actions before the shooting showed he was gradually losing hold of himself (Tr.2063). He believed that his prior divorce attorney was breaking his agreement by asking for additional money, so he verbally and physically attacked him (Tr.1816-17,1879,1965,2013,2042). Baumruk also falsely believed that Mary was having an affair with one of the lawyers and that they would cheat him out of his money (Tr.1817,1964).

Other facts demonstrated his delusion. Baumruk was absolutely certain that Judge Hais would rule against him even though the judge had had no prior contact with him and had issued no rulings (Tr.1814-15,1961,1972-73). He did not try to shoot everyone in the courthouse, only those who he felt had wronged him (Tr.1860-62,1900-2000). Baumruk bought a round trip ticket from Seattle and asked a co-worker to cover for him until he returned to work (Tr.1969). Delusional, he believed that he could shoot Mary and the lawyers and then return to his life in Seattle (Tr.1969,2093,2109).

Like many others with delusional disorder, Baumruk developed irritable or negative, sad moods in reaction to his delusional beliefs (Tr.1838-39,1998). He had the constant sense that he was not being treated fairly and that others were not responsive to him (Tr.1999). Anger and violent behavior can accompany the persecutory type of delusional disorder (Tr.1839,1988). Baumruk assaulted a jail nurse he believed was not following the doctor’s orders regarding changing his

bandages (Tr.1819-20). Litigious behavior is also common with delusional disorder, persecutory type, and Baumruk filed three lawsuits, seeking large sums of money for trivial matters (Tr.1839-46,1989,1992-94).

State's Rebuttal

The State presented rebuttal testimony by two psychiatrists, Dr. Jerome Peters and Dr. John Rabun, who concluded that Baumruk had no mental disease or defect (Tr.2165,2170,2181,2200). Between 1996 and 2003, Baumruk received no psychiatric treatment and no anti-psychotic medication, and none of his doctors during that time noticed any delusional thinking (Tr.2178). Planning for the shooting showed methodical, not delusional, thinking (Tr.2190). By shooting at some people but not others, Baumruk was goal-directed and thinking logically (Tr.2197). By attempting to exit the courthouse, he had a will for self-preservation and recognized his conduct was wrong (Tr.2199).

The State experts believed that Baumruk's claimed memory loss was either exaggerated or entirely feigned (Tr.2220-21,2268,2397-98). Despite his prior diagnosis of amnesia, Dr. Rabun now believed Baumruk remembered the shooting because of comments he made to people at the jail, including Officer Glenn (Tr.2396-2402). He believed that Baumruk remembered "neutral" events leading up to the shooting, so should have remembered the shooting itself (Tr.2403).

The jury found Baumruk guilty of first-degree murder (L.F.750).

Penalty Phase Evidence

In penalty phase, the State presented victim impact testimony through Mary's sister, father, and two daughters (Tr.2837-43,2849-65). It also presented testimony that Baumruk had assaulted a nurse at the jail, hitting her several times, because she had not changed his bandages when she was supposed to (Tr.2803-10). Later, when a corrections officer asked him why he did it, Baumruk stated that he killed once and would do it again (Tr.2830).

The defense presented the testimony of Baumruk's relatives, friends, and a nurse from his mother's nursing home. As a child and teenager, Baumruk was friendly, easy-going, and smart, with a good sense of humor (Tr.2875-76). A high school friend described him as a very good athlete and "a good person to be with" (Kouba Depo.,Tr.2906-07).

Baumruk served in the Coast Guard from 1957-1963 and received an honorable discharge (Tr.2879,2943-44). After receiving his associates' degree, he worked at McDonnell Douglas, eventually becoming a quality control supervisor (Tr.2881-82,2945). He worked full-time and took evening classes, receiving his B.S. in 1985 (Tr.2882,2945-46). Because of Baumruk's repeated encouragement, one of his friends pursued his education when he otherwise wouldn't have (Tr.2914-15).

Baumruk was "the type of guy you wanted to be around" (Tr.2928). He was smart, witty, friendly, and gentle (Tr.2923-24). He loved to talk about his

classes and tell interesting stories about his travels with the Coast Guard (Tr.2924). He would take walks around the neighborhood with his nephew or Mary and loved to stop to chat with neighbors (Tr.2909,2924). He once saw a neighbor trying to cut down a tree with a hand saw, so he returned home, retrieved a power saw, cut the tree down, and cut the wood into lengths short enough for the neighbor's fireplace (Tr.2912-23).

When Baumruk's mother, Helen, was placed in a nursing home, he visited her often (Tr. 2935). He was very patient and calm with his mother (Tr.2935). Although Helen's dementia agitated her so much that she would scream until sedated, Baumruk could calm her with his voice and by putting his hand on hers (Tr. 2934-38). He typically visited at dinnertime, sometimes with Mary, and he fed Helen himself and afterwards pushed her in her wheelchair around the facility (Tr. 2935-37). He brought her a snack every time he visited and occasionally brought cookies to the staff too (Tr. 2936-39). He advocated for his mother with the staff and was always friendly and polite (Tr. 2937,2939). Baumruk continued to visit his mother even when she did not recognize him, and he never grew frustrated with her (Tr. 2939-40). Helen died in early 1990, the same year Mary filed for divorce (Tr. 2889).

In closing, the prosecutor argued that Baumruk wanted to become "one of the biggest murderers we've ever seen" (Tr.3043). The prosecutor pondered why, whenever someone commits a horrible act, he claims to be mentally ill (Tr.3070-71). He also argued repeatedly that the jury by its verdict must send the "right

message” to the community; to the police officers, to show that the jurors “appreciate what you do, that your sacrifices, you’re willing to take risks, that we appreciate that and we understand”; and to Mary’s family, to show that the jurors understood what they had been through (Tr.3077-79).

The jury recommended a death sentence (L.F.778). It found that the crime involved depravity of mind in that Baumruk planned to kill more than one person; that Baumruk attempted to kill eight others; and that he knowingly created a great risk of death to more than one person (L.F.770-76,778). The court imposed death (Sent.Tr.5). Notice of appeal was timely filed (L.F.865).

POINT I

The trial court erred in overruling Baumruk’s timely and unequivocal requests to discharge counsel, because the rulings deprived Baumruk of his right to self-representation, U.S. Const.,Amends.VI,XIV;Mo.Const.,Art.10, 18(a), in that Baumruk 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);

Godinez v. Moran, 509 U.S. 389 (1993);

State v. Artis, 146 S.W.3d 460 (Mo.App.S.D.2004);

State v. Black, 223 S.W.3d 149 (Mo.banc 2007);

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

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

POINT II

The trial court abused its discretion in overruling Baumruk’s motions for a jury from a county other than St. Charles County and in proceeding to trial with jurors from St. Charles County, because the rulings deprived Baumruk of due process, a fair and impartial jury, and a reliable sentencing determination, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10,18(a),21;§494.505;and Rule32.09, in that the venirepanel’s responses demonstrated that the citizens of St. Charles County were subjected to the same massive media blitz regarding the crime as those in St. Louis County, the retrial engendered a fresh spate of publicity, the State strenuously and repeatedly insisted that a St. Charles County jury would not satisfy this Court’s prior mandate, and at least one juror knew Baumruk had previously been convicted of first-degree murder and could neither set aside that knowledge nor presume Baumruk innocent.

Irvin v. Dowd, 366 U.S. 717 (1961);

Murphy v. Florida, 421 U.S. 794 (1975);

Patton v. Yount, 467 U.S. 1025 (1984);

State v. Baumruk, 85 S.W.3d 644 (Mo.banc 2002);

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

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

§494.505; and

Rule 32.09.

POINT III

The trial court plainly erred and abused its discretion in failing to *sua sponte* strike for cause Juror 198, Ronald Matlock, denying Baumruk due process, a fair and impartial jury, and the presumption of innocence, U.S. Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), because Matlock was not a fair and impartial juror, in that he stated that he did not think he could (1) set aside his prior knowledge of the facts of the shooting and the fact that Baumruk had been convicted and (2) presume Baumruk innocent, yet Matlock served as a juror.

Franklin v. Anderson, 434 F.3d 412 (6thCir.2006);

Hughes v. United States, 258 F.3d 453 (6thCir.2001);

Irvin v. Dowd, 366 U.S. 717 (1961);

Taylor v. Kentucky, 436 U.S. 478 (1978);

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

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

Rule 30.20.

POINT IV

The trial court erred and abused its discretion in restricting the defense voir dire on whether venirepersons could consider the full range of punishment knowing Baumruk not only killed his wife, but attempted to kill eight other people, because the restriction denied Baumruk a fair and impartial jury, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Sec. 10,18(a),21, in that Baumruk’s having shot at eight others was a critical fact (1) the State used as a theme throughout trial, including its assertion in guilt phase opening statement and penalty phase closing argument that Baumruk tried “to be one of the biggest mass murderers in the history of this area;” (2) the State elicited testimony through numerous witnesses that Baumruk shot four others and shot at four more; (3) the State alleged the fact in eight to ten aggravating circumstances; and (4) in penalty phase closing, the State repeatedly urged the jury to impose death based on this fact.

Morgan v. Illinois, 504 U.S. 719 (1992);

State v. Clark, 981 S.W.2d 143 (Mo. banc 1998);

State v. Ezell, 233 S.W.3d 251 (Mo.App.W.D.2007);

State v. Granberry, 484 S.W.2d 295 (Mo.banc 1972);

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

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

POINT V

The trial court plainly erred in overruling Baumruk's motion to suppress his statement to Officer Glenn; in letting the State elicit the statement at trial through Dr. Rabun's testimony; and failing to *sua sponte* bar testimony regarding any expert opinion formed using the illegal statement regarding Baumruk's competency and/or mental responsibility for the crime, thereby violating Baumruk's rights to the assistance of counsel, freedom from compelled self-incrimination, and due process, U.S.Const., Amends.V,VI,XIV;Mo.Const.,Art.I,Sec.10,18(a),19, because Baumruk was never advised of his *Miranda* rights and made the statement without counsel, after he had been charged, and resulting from custodial interrogation, in that Baumruk was in custody when he made the statement and it was made in response to Officer Glenn's direct questioning.

Maine v. Moulton, 474 U.S. 159 (1985),

Massiah v. United States, 377 U.S. 201 (1964);

Miranda v. Arizona, 384 U.S. 436 (1966);

Walls v. State, 580 So.2d 131 (Fla.1991);

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

Mo.Const.,Art.I,Sec.10,18(a),19; and

Rule 30.20.

POINT VI

The court erred in finding Baumruk competent to proceed, making him stand trial, and sentencing him, thus denying Baumruk due process, freedom from cruel and unusual punishment, and not to be tried while incompetent, U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Sec.10, 21;§552.020, because Baumruk could not assist in his defense or testify in his behalf and hence was incompetent, in that he suffers from post-traumatic amnesia from being shot in the head twice, having portions of his brain removed, and undergoing medical procedures to alleviate the brain swelling.

Cooper v. Oklahoma, 517 U.S. 348 (1996);

Drope v. Missouri, 420 U.S. 162 (1975);

United States v. Andrews, 469 F.3d 1113 (7thCir.2006);

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

Mo.Const.,Art.I,Sec.10, 21; and

§552.020.

POINT VII

The trial court plainly erred in failing to intercede *sua sponte* and prevent the prosecution from improperly arguing during penalty phase closing argument, thereby denying Baumruk due process, a fair and impartial jury, fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.Art.I, Sec.10,18(a),21, because the prosecutor’s repeated, improper and excessive comments prejudiced Baumruk and resulted in manifest injustice, in that he expressed his personal opinion and implied knowledge of additional facts not on the record; and urged the jurors to vote for death so they could send a message to the police, the community, and Mary’s family.

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

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

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

State v. Tiedt, 206 S.W.2d 524 (Mo.banc 1947);

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

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

Rules 4-3.8, 30.20.

POINT VIII

The trial court erred in sentencing Baumruk to death, because the State failed to plead in the indictment those facts that the jury was required to find beyond a reasonable doubt before Baumruk could be sentenced to death and thus never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The court’s error violated Baumruk’s 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. Because Baumruk was sentenced to death for a crime for which he was never charged, his death sentence must be vacated.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

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

United States v. Booker, 543 U.S. 232 (2005);

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

Mo.Const.,Art. I,§§10,18(a), 21.

ARGUMENT I

The trial court erred in overruling Baumruk’s timely and unequivocal requests to discharge counsel, because the rulings deprived Baumruk of his right to self-representation, U.S. Const.,Amends.VI,XIV;Mo.Const.,Art.10, 18(a), in that Baumruk made a knowing, voluntary, and intelligent waiver of the right to counsel and should have been allowed to proceed *pro se*.

A bedrock principle of American jurisprudence is that the right to defend is personal to the defendant. “It is the defendant... who must be free personally to decide whether in his particular case counsel is to his advantage.” *Faretta v. California*, 422 U.S. 806, 834 (1975). After all, it is the defendant who suffers the consequences of conviction and sentence. *Id.* Yet when Kenneth Baumruk insisted on discharging his attorneys, the court refused. Although Baumruk first asserted his right in court eight weeks before trial, the court found the assertion untimely. It rejected Baumruk’s assertion of this fundamental right because the case was too complicated, defense counsel were performing well, and Baumruk could not represent himself while claiming to be incompetent. The court clearly erred on each of these grounds.

I. Baumruk Repeatedly Asserted his Right of Self-Representation

Baumruk first attempted to secure his right to self-representation on November 6, 2006 (L.F.527). He wrote his attorneys: “Dear Sir, I have come to the conclusion that I can represent myself as well as you can. Therefore Mr. D. Kenyon and Mr. R. Steele are fired” (L.F.527). Baumruk also advised counsel’s supervisor that he was firing the attorneys (L.F.527).

Next, Baumruk moved to discharge his attorneys in court on November 27 (58 days before jury selection) (11/27/06-Tr.21)(See Appendix A64). He cited Supreme Court Rule 4-1.16, that “a lawyer shall withdraw from the representation of a client if:… (3) the lawyer is discharged,” and the comment that “[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services.” When Judge Rauch asked if he would hire an attorney, Baumruk replied that, if the State did not provide one, he would represent himself (11/27/06-Tr.21). Judge Rauch advised that he had no right to choose his attorneys and urged him not to appear at “a trial of this magnitude” without counsel (11/27/06-Tr.21). Baumruk commented that he could do no worse than his attorneys (11/27/06-Tr.21). Judge Rauch acknowledged that Baumruk was intelligent and educated, but stressed his lack of legal training (11/27/06-Tr.21-22). She stated that she would not appoint other lawyers (11/27/06-Tr.22). Baumruk replied that he was not requesting different counsel, and Judge Rauch stated she understood (11/27/06-Tr.22). Although Baumruk wished to discharge his attorneys, she did not allow counsel to withdraw

(11/27/06-Tr.22). She again commented that Baumruk had no right to select appointed counsel (11/27/06-Tr.22).

On December 7, 2006, Baumruk attempted to appeal the court's ruling (L.F.492-95). He again objected that under the 2006 Supreme Court Rules, Volume I at page 37, he had the right to discharge his attorneys (L.F.498). He requested a copy of the transcript of the November 27th hearing (L.F.499).

The next day, citing Rule 4-1.16, Baumruk sent the prosecutor a motion to discharge his attorneys (L.F.501).

On December 19, 2006, Baumruk filed a "Motion for Removal (Discharge) of Public Defenders D. Kenyon and R. Steele (L.F.510). He alleged, "Defendant acting as his own attorney, has removed D. Kenyon and R. Steele as his attorneys" (L.F.510).

In a January 9, 2007 letter to the court, counsel reminded the court that Baumruk wanted to represent himself (L.F.523). Counsel sent the court a copy of a letter they had sent to an expert witness which advised that, on November 6th, Baumruk tried to fire them so he could represent himself (L.F.527). Counsel advised that Baumruk had notified their supervisor of their firing (L.F.527).

Beginning November 21, 2006, Baumruk filed *pro se* motions and notices. He filed two *pro se* motions to endorse additional witnesses; a *pro se* motion to suppress his interview with Officer Glenn; and a *pro se* "Motion (Notice) to Depose F. Rottner M.D" (L.F.488,496,511-12,522).

On January 17, 2007, the court took up Baumruk's motion to discharge counsel (1/17/07-Tr.38)(See Appendix A68). Baumruk stated that he did not intend to hire counsel and asserted that he had the right to discharge his attorneys (1/17/07-Tr.38-39). He cited some problems that he had with counsel (1/17/07-Tr.39-42). The court advised Baumruk that he had a conditional right to represent himself, but his request must be timely and unequivocal and must include a knowing, voluntary and intelligent waiver of the right to counsel (1/17/07-Tr.42-43).

The court placed Baumruk under oath and questioned him (1/17/07-Tr.44). He stated that he graduated high school, had a B.S. in Business Administration, and had taken a business law course (1/17/07-Tr.44-45). He conceded he had no formal legal training and understood that, as a *pro se* defendant, he would be completely and solely responsible for presenting defense evidence (1/17/07-Tr.44-45). He understood he would be required to question the venirepanel (1/17/07-Tr.45). The court advised that Baumruk would have to ask proper questions and not just any questions he desired (1/17/07-Tr.45). If he asked improper questions, he would have no help (1/17/07-Tr.45). Baumruk responded, "With the prosecuting attorney sitting on the bench you told me, don't make a damn bit of difference" (1/17/07-Tr.46). When asked to explain, Baumruk responded, "I think you're a very good prosecutor, but you wouldn't make a pimple on a bad judge's butt" (1/17/07-Tr.46). The court suggested that Baumruk was getting upset, that

his response was completely unresponsive, and that he was not helping his case (1/17/07-Tr.46).

The court then asked Baumruk if he understood that he would be required to ask witnesses proper questions (1/17/07-Tr.46). He replied, "I hope to, yeah" (1/17/07-Tr.46). The court reiterated that if Baumruk could not figure out how to frame the questions, no one would advise him (1/17/07-Tr.46). He asked, "What's new?" (1/17/07-Tr.46). The court replied that counsel were trained, experienced, thorough, assiduous in their representation, and knew how to ask questions properly and knew the law (1/17/07-Tr.46-47). The court questioned Baumruk's ability to represent himself in a case this complicated and serious (1/17/07-Tr.47). She warned that, if his reaction to stress was to make irrelevant remarks or lose his temper, that would not work at trial (1/17/07-Tr.47). She stressed that she wanted to ensure he understood the strict guidelines for trial (1/17/07-Tr.47). Baumruk stated he understood (1/17/07-Tr.47).

The court again stated that if Baumruk disagreed with her rulings, no one would advise him, so she did not understand how he thought he was better off representing himself (1/17/07-Tr.47-48). Baumruk figured he could do no worse than counsel (1/17/07-Tr.48). When the court suggested that was an emotional opinion, Baumruk stated, "That is what I'm stating" (1/17/07-Tr.48). The court found a difference between Baumruk's feelings and his ability to effectively represent himself (1/17/07-Tr.48).

Judge Rauch noted that “even though we are not on the eve of trial, and there is a case that said that discharge of counsel three days before trial was permissible because it wasn’t found to be dilatory, a trial of this nature cannot be adjusted in a three-day time period” (1/17/07-Tr.48). Baumruk responded that since he was not requesting a continuance, that was irrelevant (1/17/07-Tr.48). The court acknowledged his statement but noted that if he changed his mind again on the eve of trial, it would be difficult to manage (1/17/07-Tr.49).

The court asked Baumruk if he had anything further to support his motion (1/17/07-Tr.49). Baumruk added that he disagreed with counsel’s decision to incorporate the evidence from prior competency hearings into the current proceedings (1/17/07-Tr.49). The court noted that Baumruk had steadfastly maintained that he was incompetent to stand trial and wanted to raise that issue at trial (1/17/07-Tr.50). She asked Baumruk if he believed that, because he cannot remember certain things, he is incompetent and, if he is found to be incompetent, he will eventually be allowed to go home (1/17/07-Tr.50). Baumruk stated that he possibly believed those things (1/17/07-Tr.50). The court did not understand how Baumruk could request to represent himself and hold himself out as competent to do so, yet still challenge competency (1/17/07-Tr.50).

The court was not convinced Baumruk was capable of “questioning the venire panelists, questioning witnesses, preparing opening statements, or closing arguments, or making an informed decision about whether or not to testify yourself or to call witnesses in your behalf” (1/17/07-Tr.51). She found:

[I]n view of the nature of the proceedings, of the extensive proceedings in advance of this date, the quality of the representation that this Court has witnessed that you have received, and the complexity of this case, the Court finds – and defendant’s clinging to his stance that he is incompetent to proceed, the Court will find that the Court should not grant this request to proceed pro se. And that because of the size and complexity of this case that this request is untimely even though it was made in December.

So, the Court will deny the request to proceed pro se. Defendant will proceed through counsel, and the Court will not consider pro se motions which the defendant has filed. And if defendant continues to file pro se motions, for example, for the endorsement of witnesses or other such motions, the Court will not consider those.

I think it’s very important to note that there’s a huge difference here between a situation where someone may be saddled with counsel that are uninformed, don’t appear for court, don’t prepare themselves, don’t know the law, are not assiduous in their representation, that may be grounds to discharge counsel.

I realize that the law says the defendant does not need to state grounds, but I cannot see any legal argument for allowing this defendant to set himself adrift in the sea of a capital murder case of

this complexity and size, and especially in his clinging to his argument that he is incompetent to proceed.

The Court finds the motion is untimely, among these other reasons, and the Court will deny the request for leave to proceed pro se.

(1/17/07-Tr.51-52). Baumruk again asserted that he could discharge counsel without cause, and the court stated she understood (1/17/07-Tr.51-52). Baumruk asserted she was changing the law or the rules (1/17/07-Tr.53). The court stated she had looked at the individual circumstances and ruled (1/17/07-Tr.53). Jury selection began a week later (Tr.2).

II. Preservation and Standard of Review

This issue is included in the motion for new trial (L.F.800-801) and is preserved. The trial court had no discretion to deny Baumruk's timely, informed, voluntary and unequivocal request for self-representation. *State v. Black*, 223 S.W.3d 149, 153 (Mo.banc 2007); *State v. Hampton*, 959 S.W.2d 444, 447 (Mo.banc 1997). Appellate courts must review *Faretta* violations, mixed questions of law and fact, *de novo*. *United States v. Mentzos*, 462 F.3d 830, 838 (8thCir.2006); *United States v. Erskine*, 355 F.3d 1161, 1166 (9thCir.2004); *United States v. Kimball*, 291 F.3d 726, 730 (11thCir.2002).

III. Baumruk Has a Fundamental Right of Self-Representation

The court's denial of Baumruk's repeated requests for self-representation violated his constitutional rights. U.S.Const.,AmendsVI,XIV; Mo.Const.Art.I, Sec.10,18(a). "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S.Const.,Amend.VI. This right is applicable to the States through the Fourteenth Amendment. *Faretta v. California*, 422 U.S. 806, 818 (1975). Criminal defendants in Missouri "have the right to appear and defend, in person and by counsel." Mo.Const.,Art.I,§18(a); *State v. Warren*, 321 S.W.2d 705, 710 (Mo.1959).

In *Faretta v. California*, 422 U.S. 806, 835 (1975), weeks before trial, the defendant requested permission to represent himself. He had represented himself once before, 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 Court held that a State cannot force a lawyer upon a defendant who insists on conducting 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 he who must bear the consequences of 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 he 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.” *State v. Hampton*, 959 S.W.2d 444, 447 (Mo.banc 1997); *Black*, 223 S.W.3d at 153.

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). The defendant’s technical knowledge of the law and procedure “[is] not relevant to an assessment of his knowing exercise of the right to defend himself.” *Black*, 223 S.W.3d at 155.

IV. Baumruk’s Assertion Was Unequivocal

A request for self-representation must be unequivocal. *Hampton*, 959 S.W.2d at 447. Baumruk met this test. When asked if he planned to hire counsel, Baumruk stated, “No, if the State don’t give me [an attorney] I’ll represent myself” (11/27/06-Tr.21). See *People v. Michaels*, 49 P.3d 1032, 1055 (Cal.2002)(“nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself”). Although Baumruk

disagreed with the court's statement that he had no right to choose his attorneys, Baumruk insisted that he was not requesting different counsel (11/27/06-Tr.21-22). The court stated she understood (11/27/06-Tr.22).

The court treated Baumruk's assertion as a request for self-representation. See, e.g., *People v. Dent*, 65 P.3d 1286, 1288 (Cal.2003) ("the trial court, which was in a position to view defendant's demeanor, appears to have treated the request to proceed in propria persona not as equivocal but serious, and emphatically denied it"). Judge Rauch advised Baumruk not to "appear in a trial of this magnitude without counsel," stressed his lack of legal training, and warned that his education and intelligence were no match for "an experienced trial attorney in a capitol [sic] murder case" (11/27/06-Tr.21-22).

Within a week, Baumruk showed that he was serious about self-representation by attempting to appeal *pro se* the court's ruling (L.F.492-95). He again cited the Missouri Supreme Court Rule that lets a defendant discharge counsel (L.F.492). Three days later, he again objected, noting his right, under the Rule, to discharge his attorneys (L.F.498). He continued to file *pro se* pleadings (L.F.496). He requested a copy of the hearing transcript (L.F.499). He even sent the prosecutor a motion to discharge his attorneys, again citing Rule 4-1.16 (L.F.501).

On December 19, 2006, Baumruk filed a "Motion for Removal (Discharge) of Public Defenders D. Kenyon and R. Steele (L.F.510). He alleged that he, "acting as his own attorney, has removed D. Kenyon and R. Steele as his

attorneys” (L.F.510). He continued to file *pro se* pleadings and notices (L.F.511-12,519,522).

In a letter dated January 9, 2007, counsel reminded the court that Baumruk wanted to represent himself (L.F.523). In a separate letter, counsel confided that, on November 6th, Baumruk had written him, stating “Dear Sir, I have come to the conclusion that I can represent myself as well as you can. Therefore Mr. D. Kenyon and Mr. R. Steele are fired” (L.F.527). Counsel advised that Baumruk also had told counsel’s supervisor they were fired (L.F.527).

On January 17, 2007, the court finally took up Baumruk’s renewed motion for self-representation (1/17/07-Tr.38). Baumruk reiterated his right to discharge counsel and said he would not hire other counsel (1/17/07-Tr.38-39). He referred the court to his December motion stating he was acting as his own attorney (1/17/07-Tr.39).

As with Baumruk’s November 27th request, the court considered this request unequivocal. See *Dent*, 65 P.3d at 1288. Judge Rauch enunciated the litany of questions for a defendant making an unequivocal request: she questioned Baumruk about his ability to represent himself, the rights he was relinquishing by representing himself, and what would be expected of him (1/17/07-Tr.43-47). She challenged his ability to represent himself and the logic of representing himself while claiming to be incompetent (1/17/07-Tr.47,50-51).

Baumruk’s requests were clear and unequivocal – he wanted counsel discharged so he could represent himself. Baumruk never asked that counsel

handle certain parts of trial, as in *State v. Hampton*, 959 S.W.2d 444, 448 (Mo.banc 1997). He placed no conditions on the request, as in *State v. Parker*, 890 S.W.2d 312, 316 (Mo.App.S.D.1994). Nor was he asking for different lawyers, as in *Richardson v. State*, 773 S.W.2d 858, 860 (Mo.App.W.D.1989). He never fluctuated between wanting to represent himself and wanting counsel, as in *State v. Tyler*, 622 S.W.2d 379, 383-84 (Mo.App.E.D.1981). He repeatedly, steadfastly pursued self-representation.

V. Baumruk's Assertion Was Timely

As early as November 6, 2006, Baumruk wrote his attorneys that “I have come to the conclusion that I can represent myself as well as you can. Therefore Mr. D. Kenyon and Mr. R. Steele are fired” (L.F.527). He first asserted his right in court on November 27, 2006, almost two months before trial, but the court rejected it (11/27/06-Tr.21). Within a week, he attempted to appeal that ruling (L.F.492-95). A few days later, he sent the prosecutor a motion to discharge his attorneys (L.F.501). Eleven days later, on December 19, 2006, Mr. Baumruk filed a “Motion for Removal (Discharge) of Public Defenders D. Kenyon and R. Steele (L.F.510). He alleged, “Defendant acting as his own attorney, has removed D. Kenyon and R. Steele as his attorneys” (L.F.510). On January 9, 2007, counsel reminded the court that Baumruk had wanted to represent himself (L.F.523).

The court again considered Baumruk's request on January 17, 2007 (1/17/07-Tr.38). She ruled that the request was untimely:

[E]ven though we are not on the eve of trial, and there is a case that said that discharge of counsel three days before trial was permissible because it wasn't found to be dilatory, a trial of this nature cannot be adjusted in a three-day time period.

(1/17/07-Tr.48). Baumruk responded that this was irrelevant, since he was not requesting a continuance (1/17/07-Tr.48). Judge Rauch understood he was not requesting a continuance, but, if he changed his mind again on the eve of trial, it would cause her difficulty (1/17/07-Tr.49). She noted the extensive proceedings that had already occurred (1/17/07-Tr.51). She ruled, "because of the size and complexity of this case that this request is untimely even though it was made in December" (1/17/07-Tr.51). Jury selection started a week later (Tr.2).

A. The Trial Court Disregarded Precedent on Timeliness

Judge Rauch relied on *State v. Artis*, 146 S.W.3d 460 (Mo.App.S.D.2004). Artis asserted his right of self-representation on the Friday before trial started on Monday and reasserted it the morning of trial. *Id.* at 461-62. Defense counsel denied the prosecutor's suggestion that the *Faretta* request was a ruse to delay the trial; he advised the court that Artis was ready for trial. *Id.* at 462. The court found the request was "too late." *Id.*

The Court of Appeals, Southern District, reversed, since Artis was ready for trial without a continuance, demonstrating that his request was not made to delay. *Id.* at 464. Thus, his request was timely. *Id.*

Judge Rauch acknowledged, but disregarded, *Artis*. She understood that Baumruk was not requesting a continuance (1/17/07-Tr.48-49). Thus, under *Artis*, his request was timely. But instead, Judge Rauch denied Baumruk's request based on hypothetical facts – that Baumruk may change his mind on the eve of trial – not on the facts before her (1/17/07-Tr.49). Under Judge Rauch's analysis, no request would ever be timely, because it is always possible that the defendant will change his mind on the eve of trial and inconvenience the court. Rather than deny Baumruk his fundamental right of self-representation, Judge Rauch should have ordered defense counsel to serve as stand-by counsel. See, e.g., *State v. Zink*, 181 S.W.3d 66 (Mo.banc 2005). She thus could have balanced Baumruk's right of self-representation with her interest in trying the case – Baumruk could have represented himself, but if he changed his mind at the last minute, counsel could take over.

B. Baumruk's Request Was Made Well Before Trial and Was Timely

The right of self-representation is unqualified if demanded before trial. *United States v. Wesley*, 798 F.2d 1155, 1155 (8th Cir.1986). Courts differ, however, on what is “before trial.” *Artis*, 146 S.W.3d at 464.

Some courts require *Faretta* requests be made “within a reasonable time prior to the commencement of trial,” *Russell v. State*, 383 N.E.2d 309, 314 (Ind.1978); *People v. Windham*, 560 P.2d 1187, 1190-92 (Cal.1977). They reason that requests made on the morning of trial are too disruptive of the schedules of

judges, counsel, and potential jurors; potentially disturb other case settings; and require extra time and expense. *Russell*, 383 N.E.2d at 315. “By requiring a ‘reasonable’ time before day of trial, we intend only to prohibit those assertions of the self-representation right by which the defendant merely seeks delay for its own sake.” *Id.*⁵ The California Supreme Court agreed, stressing:

Our imposition of a ‘reasonable time’ requirement should not be and, indeed, must not be used as a means of limiting a defendant’s Constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the Faretta mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice.

Windham, 560 P.2d at 1191, fn.5. “The State has an interest in avoiding disruptions and delays which could occur if an untimely request to proceed pro se is granted.” *Williams v. State*, 655 P.2d 273, 276 (Wyo.1982).

Other courts consider as timely requests made on the morning of trial but before trial has started. *State v. Christian*, 657 N.W.2d 186, 193 (Minn.2003) (request is timely until start of jury selection); *Blankenship v. State*, 673 S.W.2d 578, 585 (Tex.Crim.App.1984)(timely if asserted before jury is empaneled);

⁵ The Indiana Supreme Court noted that Faretta’s request was made weeks before trial. It commented, “we do not think that the right must be asserted at that early a time to be realized.” *Russell*, 383 N.E.2d at 314.

Chapman v. United States, 553 F.2d 886, 893 (5thCir.1977) (timely until jury selection); *United States v. Smith*, 780 F.2d 810, 811 (9thCir.1986)(timely until jury selection or jury is empaneled, unless purpose is to delay trial); *United States v. Young*, 287 F.3d 1352, 1354 (11thCir.2002) (“defendant’s request to proceed *pro se* is untimely if not made before the jury is empaneled”).

Under either approach, Baumruk’s request was timely. Baumruk first asserted his right of self-representation to the court 58 days before trial, on November 27, 2006 (11/27/06-Tr.21). Within a week, on December 4, he attempted to appeal the court’s denial (L.F.492-95). On December 8, he sent the prosecutor a motion to discharge his attorneys (L.F.501). On December 19 (36 days pre-trial), he moved to discharge his attorneys and stated he was representing himself (L.F.510). Baumruk cannot be faulted for the court’s delay in hearing his *Faretta* request. Furthermore, Baumruk insisted that he was not requesting a continuance, which the court understood (1/17/06-Tr.48-49).

C. Baumruk’s Request Cannot be Considered Untimely

Because the Case is Large and Complex

The court ruled that because of the size and complexity of the case, Baumruk’s request was untimely (1/17/06-Tr.51-52). But, Baumruk was not just learning the case from scratch two months pre-trial. Baumruk had already been through a trial and appeal. He knew the State’s evidence and the legal issues that might arise.

Furthermore, Judge Rauch did not question Baumruk about his familiarity with the facts or law to ascertain whether he would be ready for trial. Judge Rauch therefore could not know whether Baumruk was prepared or could proceed to trial. Baumruk believed he was acting *pro se* as since November 6th, when he fired his attorneys and told them he was representing himself (L.F.527). From November 21st until ordered to stop on January 17th, Baumruk filed many *pro se* motions (L.F.488,496,511-12,522; 1/17/06-Tr.51). Baumruk likely used that time for trial preparation.

The fact that extensive proceedings had already occurred cannot trump Baumruk's fundamental right of self-representation. Baumruk did not indicate that anything would have to be re-done. Rather, he insisted he was not asking for a continuance (1/17/06-Tr.48). If anything, the fact that extensive proceedings had occurred meant that most of the "leg work" was complete.

Other courts have granted *Faretta* requests in capital cases in the same time period before trial, or even later. In *People v. Gordon*, 688 N.Y.S.2d 380, 382 (N.Y.Supp.1999), the request for self-representation, made the night before jury selection was to start in a capital case with six victims, was deemed timely. In *Diaz v. State*, 513 So.2d 1045, 1047 (Fla.1987), the capital defendant's assertion of his right of self-representation was timely even though he did not assert it until after jury selection and he would have to speak to the jury through an interpreter. In *Commonwealth v. Davido*, 868 A.2d 431, 439 (Pa.2005), the capital murder defendant's *Faretta* assertion, made six weeks before trial, was held timely. See

also *Commonwealth v. Davis*, 388 A.2d 324, 326 (Pa.1978) (request made one week before trial in capital case was timely).

VI. Baumruk's Assertion Was Knowing and Intelligent

To represent himself, the defendant must show that he knowingly and intelligently is relinquishing many traditional benefits associated with the right to counsel. *Faretta*, 422 U.S. at 835; *Black*, 223 S.W.3d at 153-54. He “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Faretta*, 422 U.S. at 835, quoting *Adams v. United States*, 317 U.S. 269, 279 (1942).

Baumruk demonstrated that he was seeking self-representation with eyes wide-open. He understood his sole responsibility for presenting evidence (1/17/07-Tr.44-45). He knew he was required to conduct voir dire (1/17/07-Tr.45). He recognized he had to frame his questions properly, and if he did not, no one would help him (1/17/07-Tr.45). He understood strict guidelines governed his actions (1/17/07-Tr.47). Baumruk understood every consequence of self-representation. As in *Black*, “the record failed to establish that [the] waiver was not intelligent and knowing.” 223 S.W.3d at 155. Nothing indicated he “was not capable of comprehending the judge’s explanations or that he did not actually understand the consequences of his decision.” *United States v. Arlt*, 41 F.3d 516, 521 (9th Cir.1994).

As Judge Rauch had recognized, Baumruk was intelligent and educated (11/27/06-Tr.21). He understood the facts of the case; after all, he had already been through a trial and an appeal. The court had heard evidence regarding Baumruk's competency and had agreed with the testimony of State's witnesses that Baumruk had a good understanding of his case procedurally, understood what attorneys, judge and jury do, and understood courtroom terminology and what direct and cross-examination were (L.F.246-47;6/28/05-Tr.25,32). Judge Rauch knew that Baumruk had filed lawsuits previously and could "pursue what he felt was in his best interest in a legal fashion, even though it wasn't necessarily as good as a lawyer would write it up" (6/28/05-Tr.25,32).

VII. The Court's Remaining Rationalizations for Its Denial are Also Flawed

Aside from ruling that Baumruk asserted his fundamental right of self-representation too late, the court denied the right because (1) Baumruk was receiving good representation; (2) he was claiming to be incompetent; (3) he would be unable to handle technical tasks like questioning veniremembers or witnesses, preparing opening statements and closing arguments, or making informed decisions about whether to testify or call witnesses; and (4) this was a complicated case.

A. Quality of Representation

Judge Rauch justified her denial because she believed Baumruk had been receiving good representation (1/17/06-Tr.51). She repeatedly asked during the

Faretta inquiry for Baumruk's reasons for discharging counsel (1/17/06-Tr.49). She seemed confused about the absolute nature of a *Faretta* request. A defendant need not show that counsel was deficient to secure his fundamental right of self-representation. Whether counsel was performing well was irrelevant to the *Faretta* inquiry. Counsel's performance is only relevant to whether (1) the defendant should receive substitute counsel (*State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo.banc 1989)); or (2) the court should exercise its discretion to grant an untimely *Faretta* motion (*Windham*, 560 P.2d at 1191-92). Neither factor is present here.

B. Claim of Incompetence and Ability to Handle Technical Tasks

The court ruled that Baumruk could not represent himself because he claimed to be incompetent. She stated:

I do not understand how you can request leave to represent yourself or hold yourself out as competent to represent yourself in view of your question of competence. I think that those two things are antagonistic, even though the competence issue deals with inability to recall events, but I think that doesn't help your argument that you should be allowed to proceed pro se. I am not at all convinced that you can or would be capable of questioning the venire panelists, questioning witnesses, preparing opening statements, or closing arguments, or making an

informed decision about whether or not to testify yourself or to call witnesses in your behalf.

(1/17/07-Tr.50-51).

This finding is problematic because the court found Baumruk competent to stand trial (L.F.252). If competent to stand trial, he was competent to choose self-representation. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). “[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *wave the right*, not the competence to represent himself.” *Id.* (emphasis in original).

The defendant’s “technical legal knowledge” is irrelevant to determining whether he competently (*i.e.*, knowingly) waives his right to counsel. *Faretta*, 422 U.S. at 836; *Godinez*, 509 U.S. at 400-401.

Thus, while “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,” a criminal defendant’s ability to represent himself has no bearing upon his competence to *choose* self-representation.

Godinez, 509 U.S. at 400, quoting *Faretta*, 422 U.S. at 836. “To add an additional test of competency to conduct the trial would effectively take away the right to reject counsel and proceed pro se. Other than defendants trained in the law, few would possess the skills to conduct an effective defense.” *State v. Reyes*, 114 P.3d 407, 413 (N.M.App.2005).

C. Complexity of Case

The court apparently believed that just because this was a capital case and, thus, large and complex, Baumruk was disqualified from representing himself. Other courts have rejected that belief. In *People v. Joseph*, 671 P.2d 843, 847-48 (Cal.1983), the trial court denied Joseph's *Faretta* request because he was charged with capital murder. The California Supreme Court reversed, holding that "the nature of the charge is irrelevant to the decision to grant or deny a timely proffered *Faretta* motion." *Id.* at 848. After all, the defendant's "technical legal knowledge" is irrelevant to whether he knowingly waived his right to counsel. *Faretta*, 422 U.S. at 836. The *Godinez* case, in which the Court held that a defendant's ability to represent himself "has no bearing upon his competence to choose self-representation," was itself a capital murder case. 509 U.S. at 399-400. A trial court cannot reject a *Faretta* request based on the complexity of proceedings or the magnitude of consequences of conviction. See *United States v. McKinley*, 58 F.3d 1475, 1477 (10th Cir.1995) (error to deny *Faretta* request based, in part, on complicated nature of case).

VIII. Reversal is Mandated

The trial court's denial of Baumruk's fundamental right to self-representation was structural error. *Black*, 223 S.W.3d at 153. Its denial cannot

be considered harmless. *Id.*, citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). This Court must reverse.

ARGUMENT II

The trial court abused its discretion in overruling Baumruk's motions for a jury from a county other than St. Charles County and in proceeding to trial with jurors from St. Charles County, because the rulings deprived Baumruk of due process, a fair and impartial jury, and a reliable sentencing determination, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10, 18(a),21;§494.505;and Rule32.09, in that the venirepanel's responses demonstrated that the citizens of St. Charles County were subjected to the same massive media blitz regarding the crime as those in St. Louis County, the retrial engendered a fresh spate of publicity, the State strenuously and repeatedly insisted that a St. Charles County jury would not satisfy this Court's prior mandate, and at least one juror knew Baumruk had previously been convicted of first-degree murder and could neither set aside that knowledge nor presume Baumruk innocent.

[I]n looking back and researching this case in preparation... I don't think we fit the court's mandate by just taking a jury from St.

Charles. I think the jury needs to be taken from somewhere else.

-Assistant Prosecuting Attorney John Lasater at oral argument before this Court on November 16, 2004 (L.F.274)

A criminal defendant must receive a fair trial before a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Jurors must be impartial and indifferent and base their verdicts on the evidence presented at trial, not from outside sources. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966). When “a reasonable likelihood” exists that prejudicial pretrial publicity will prevent a fair trial, the judge should transfer the case to another county “not so permeated with publicity.” *Id.* at 363. After all, “[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” *Bridges v. California*, 314 U.S. 252, 271 (1941).

In *State v. Baumruk*, 85 S.W.3d 644 (Mo.banc 2002), this Court directed that Baumruk be retried in a new venue (See Appendix A2). Venue could not lie in St. Louis County because massive media coverage prevented a fair trial and the trial occurred in the same courthouse as the shootings. *Id.* at 649-51. While the circuit court followed the letter of this Court’s mandate, by retrying the case in neighboring St. Charles County, it did not follow its spirit. The St. Charles County Courthouse is a mere 18 miles from the scene of the shooting (L.F.258), and St. Charles County citizens experienced the same massive media blitz as St. Louis County citizens. As the State itself recognized, “going to St. Charles” did not “take this far enough away” and violated the Court’s mandate (L.F.273-74,278). While the trial could occur in St. Charles County, the jury should have been drawn from another part of the state. Proceeding to trial with a St. Charles County jury violated Baumruk’s state and federal constitutional rights to due

process, a fair and impartial jury, and a reliable sentencing determination.

U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const., Art.I,Secs.10,18(a),21;

§494.505;Rule32.09.

I. Missouri Statutes and Court Rules Authorize Change of Venire to Protect the Defendant's Constitutionally-Protected Right to an Impartial Jury

The Sixth Amendment, applicable to the States through the Fourteenth Amendment, and Article I, Section 18(a) guarantee a criminal defendant a fair and impartial jury. *Ristaino v. Ross*, 424 U.S. 589, 595, fn.6 (1976); *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc 1998). “An ‘impartial jury’ is one where *each and every one* of the twelve members constituting the jury is totally free from any partiality whatsoever.” *Presley v. State*, 750 S.W.2d 602, 606 (Mo.App.S.D.1988, en banc)(emphasis in original). Failure to provide a fair trial “violates even the minimal standards” of the due process the Fifth Amendment guarantees. *Id.*, citing *Irvin*, 366 U.S. at 722.

Missouri statute and the Court Rules authorize change of venire. Section 494.505 permits summoning jurors from another county when “the inhabitants of the entire county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had” (See Appendix A12). Rule 32.04(e) permits securing the jury from another county instead of transferring the case to another county. Rule 32.09(c) allows changing venue if fundamental fairness requires it (See Appendix A14).

II. Standard of Review

Whether to grant or deny a change of venue is discretionary with the court. *Baumruk*, 85 S.W.3d at 648, citing *State v. Feltrap*, 803 S.W.2d 1, 6 (Mo.banc 1991). The court's ruling will not be disturbed except for a clear abuse of discretion, *i.e.*, unless the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. *Baumruk*, 85 S.W.3d at 648, citing *State v. Barton*, 998 S.W.2d 19, 27 (Mo.banc 1999). Venue should be changed when "the actual jurors of the case have fixed opinions such that they could not judge impartially whether the defendant was guilty." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). The party seeking the change must show a "pattern of deep and bitter prejudice" or a "wave of public passion" such that seating an impartial jury is impossible. *Baumruk*, 85 S.W.3d at 649, quoting *State v. Johns*, 34 S.W.3d 93, 108 (Mo.banc 2000). The critical question is not whether potential jurors remember facts about the case, but whether they have such fixed opinions about it that they could not be impartial. *Baumruk*, 85 S.W.3d at 648-49.

The trial court's ruling not to change venire is an issue of first impression. Because change of venire is analogous to change of venue, the same standard of review applies. Therefore, this Court should not disturb a trial court's ruling on a motion to change venire unless the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur with jurors from that venire.

III. Venue Was Changed Before; Venire Should Have Been Changed Now

Once before, venue had been moved from the St. Louis/St. Charles area. *Baumruk*, 85 S.W.3d at 647. When Baumruk was initially charged, the St. Louis Circuit Court granted a change of venue to Macon County. *Id.* Baumruk was found incompetent to proceed, and the charges thereafter were dismissed. *Id.*

The State immediately re-filed the charges (L.F.14). Baumruk's motion for a change of venue from St. Louis County was overruled (L.F.15). Baumruk's 2001 trial occurred at the St. Louis County Courthouse (L.F.27-29).

On appeal, Baumruk alleged that the trial court abused its discretion in overruling his motion for change of venue. *Id.* at 646. This Court agreed, holding that venue was improper because of massive pretrial publicity about the shooting and the trial was held at the murder scene. *Id.* at 649-51. The Court remanded with instructions to grant a change of venue. *Id.* at 651.

Back in the St. Louis circuit court, defense counsel moved that Judge Seigel transfer venue and recuse himself, as he could not accompany the case into a new county outside the circuit (L.F.107-10). At a motion hearing, defense counsel noted that, although they had discussed venue options, the judge had not yet ruled (5/14/04-Tr.11). The State agreed that, at conferences in chambers, the parties had discussed going to St. Charles or Jackson County, and the court noted it would choose either one (5/14/04-Tr.4-6). After the State criticized defense counsel for filing this motion late, counsel asserted he had moved orally for a ruling on venue

(5/14/04-Tr.7,23). Judge Seigel interrupted, insisting that defense counsel never requested a ruling on the new venue (5/14/04-Tr.7,23). Counsel told Judge Seigel that, when the court indicated off-the-record that it would elect Jackson County, co-counsel asked for a formal ruling (5/14/04-Tr.23). Seemingly irritated, Judge Seigel insisted counsel's memory was inaccurate (5/14/04-Tr.24). Moments later, he ordered the case tried in St. Charles County (5/14/04-Tr.25). He also ruled that he would preside over that trial (5/14/04-Tr.25).

Defense counsel filed a petition for writ of prohibition, alleging that Judge Seigel could not accompany the case to St. Charles. *State ex rel. Baumruk v. Seigel*, 150 S.W.3d 286 (Mo.banc 2004). At oral argument, Assistant Prosecuting Attorney John Lasater described the State's understanding of what would occur regarding venue: "And the idea was to move it to St. Charles County, where it would be convenient for the parties and the witnesses, and we'll have to fly people in" (L.F.271)(See Appendix A24-42). When asked if there was any problem with trial in St. Charles County with a St. Charles County judge, Lasater responded, "as I reread your opinion in preparing for this case, I don't know that going to St. Charles takes this far enough away... And – and so actually, we would kind of take issue that we prefer a jury from another part of the state" (L.F.273). He reiterated:

I think – or in looking back and researching this case in preparation
(inaudible) I don't think we fit the court's mandate by just taking a

jury from St. Charles. I think the jury needs to be taken from somewhere else.

(L.F.274). He further stated:

I think St. Charles County's convenient for the parties. It allows us to have a courthouse that doesn't have the problems that the St. Louis County courthouse has. And – but we've – we would probably only take a jury from another part of the state unless we're back here again.⁶

(L.F.277). He repeated:

It would be efficient to keep the case with Judge Seigel, allow us to take the proper procedures to take the – to try the case, to comply with the mandate in another county close to St. Louis but with a jury from elsewhere in the state.

(L.F.278). When Baumruk's counsel agreed that the trial could be held in St. Charles County but with a jury from elsewhere, the Court complimented the attorneys on working so well together to resolve the issue (L.F.281-82).

But later, when defense counsel moved for a venire from elsewhere, the State reversed its position (L.F.314-24). It argued that the motion was untimely,

⁶ Although the transcript reads thus, the tape of oral argument sounds like, “we would probably want to take a jury from another part of the state unless we're back here again.”

and that, having received a change of venue to St. Charles County, the defense was not entitled to another (L.F.317). It also argued that the defense could not show that fundamental fairness required a jury from outside St. Charles County (L.F.317-18). It argued that “the experience of the first trial” showed that the court could seat a fair and impartial jury in St. Charles County (L.F.322-23).

Defense counsel requested leave, if the court were disinclined to change venire, to secure polling information like Dr. Warren provided before the first trial, to show that the residents of St. Charles County were biased against him (10/3/05-Tr.16-17). Counsel assured the court that a continuance would not be required (10/3/05-Tr.17).

The court denied the motion for change of venire and the request to obtain polling data to demonstrate bias (L.F.371). The court believed jurors could be selected who had not formed an opinion about the case (10/3/05-Tr.19). It stressed the passage of time and the growth in the county’s population (10/3/05-Tr.19). The court also believed the change of venire would inconvenience the jurors:

Now, I think there is significant argument against this if we have to relocate someplace else and bring in a jury for however long this trial is going to take, that’s going to be a major inconvenience to those jurors. It will be inconvenient enough to bring people in from their own county, and that just I do not see a reason to do that.

(10/3/05-Tr.17-18).

Before jury selection, counsel renewed the motion to change venire (Tr.36). Counsel argued that the juror questionnaires indicated that many veniremembers knew of the case and knew that Baumruk had been sentenced to death before (Tr.36). The court overruled the motion (Tr.38).

Voir dire involved questioning 153 veniremembers in two panels (L.F.670-73). The court conducted individual voir dire of most of the 92 veniremembers who had heard about the case (L.F.108)(See Appendix A97). After questioning one veniremember who knew that Baumruk had been convicted and sentenced to death, the defense moved to strike for cause anyone who knew of the prior conviction or death sentence (Tr.204-205). The court recognized it would be problematic if a juror disclosed that information during deliberations (Tr.206-207). She dismissed that veniremember because of his knowledge, but did not rule counsel's motion (Tr.207).

Later, counsel again renewed the motion for change of venire (Tr.653). Counsel advised the court that, of 76 jurors questioned, 56 knew about the case, and many knew Baumruk had been convicted and sentenced to death (Tr.653). The court agreed to remove all who had heard about the death sentence, but again denied the motion for change of venire (Tr.652,658-59). The issue is included in the motion for new trial (L.F.797-98).

IV. This Court Must Evaluate the Totality of the Circumstances

In *Irvin*, 366 U.S. at 719, the defendant was charged with six murders that the news media in that county and the neighboring county covered extensively.

Id. The court granted a change of venue, but only to the neighboring county. *Id.* at 720. It overruled the defendant's request for a second change of venue. *Id.*

The Court emphasized that a defendant cannot receive due process and a fair trial without a fair and impartial jury. *Id.* at 722. Yet, it recognized that the jurors need not "be totally ignorant of the facts and issues involved." *Id.* It is enough if they can set aside their opinions and render a verdict based on the evidence presented in court. *Id.* at 722-23.

But the Court also recognized that the analysis cannot end with the jurors' assurances of impartiality. Even when jurors say they can set aside their opinions, a "pattern of deep and bitter prejudice" can preclude a fair trial. *Id.* at 725-28.

"[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount*, 467 U.S. 1025, 1031 (1984) (discussing *Irvin*).

Factors undercutting the jurors' assurances of impartiality were (1) the intense newspaper and television publicity in a cause célèbre in the community; (2) the strong feelings veniremembers revealed; (3) the high percentage of veniremembers who had to be excused; and (4) the jury makeup itself. *Irvin*, 366 U.S. at 725-27. The Court stressed how hard it is to truly discard a prior opinion: "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

Id. at 727. Although jurors stated they could render an impartial verdict despite prior opinions, the Court reversed because clear and convincing prejudice was shown. *Id.* at 724-27.

In *Murphy v. Florida*, 421 U.S. 794, 799 (1975), the Supreme Court again considered the totality of circumstances. Rejecting the defendant's contention that venue should have been moved, the Court held that the record did not support that the jurors were so hostile to the defendant that they could not be impartial. *Id.* at 800. Although each juror knew about the defendant's prior convictions, half offered that the prior convictions were irrelevant and none indicated that the priors would sway their verdicts. *Id.* at 800-801. Publicity had largely waned by the time of trial. *Id.* at 802. Finally, although a juror confessed some impartiality, it was due to defense counsel's persistent leading questions. *Id.* at 801-802.

The Court, as in *Irvin*, recognized that jurors' assurances of impartiality "might be disregarded where the general atmosphere in the community or courtroom is sufficiently inflammatory." *Id.* at 802. An important factor in determining whether jurors truly are impartial is how hard it is to select apparently impartial jurors. *Id.* at 802-803. "In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it." *Id.* at 803.

In *Baumruk*, this Court followed the Supreme Court’s lead in evaluating the totality of factors regarding venue. 85 S.W.3d at 649. This Court noted that a poll found that even six years after the shooting, 70% of St. Louis County residents remembered it. *Id.* Of those who heard about it, over 80% thought Baumruk was definitely guilty and 18% thought he probably was. *Id.* These findings were consistent with the responses in jury selection. *Id.* About two-thirds of the venire had heard about the case, and two-thirds of those who served remembered the incident. *Id.* One juror believed Baumruk was guilty. *Id.* The Court distinguished *Johns*, 34 S.W.3d at 108, where no “wave of public passion” occurred because jury selection occurred hundreds of miles from the trial location. *Baumruk*, 85 S.W.3d at 649. It also distinguished *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999), with no “barrage of inflammatory publicity immediately prior to trial.” *Baumruk*, 85 S.W.3d at 649.

The Court stressed that the trial should not have been held in the courthouse where the shootings occurred. *Id.* at 649-50. A serious question arose regarding the jury’s impartiality because of the trial environment. *Id.* at 650. The jurors were asked to liken themselves to the victims and render their verdicts at the crime scene. *Id.* Because of pretrial publicity and the trial atmosphere, Baumruk was denied a fair and impartial trial. *Id.* at 651.

V. Numerous Factors Support a Change of Venire from St. Charles County

The totality of the circumstances show that a fair trial could not be had with a St. Charles County venire. St. Charles County and St. Louis County are neighbors and form one community. The crime was just as personal to residents of St. Charles County, and they were subjected to the same media barrage, as residents of St. Louis County. A significant percentage of venirepersons – and even courthouse security and maintenance workers – expressed bias and hostility toward Baumruk. Fifteen years later, memories of events had not faded and publicity was persistent, now covering not just the crime but Baumruk’s prior conviction and death sentence. At least one actual juror knew that Baumruk had been convicted and admitted that he could not presume Baumruk innocent. Finally, the State itself repeatedly acknowledged that a fair trial could not be had with a St. Charles County venire.

A. St. Louis County and St. Charles County are One Community

St. Charles County borders St. Louis County. The St. Charles County Courthouse is a mere 18 miles from the St. Louis County Courthouse (L.F.258). Many people commute between the two counties (Tr.276,724,1479,1501). They are truly one community.

The shooting struck close to home for St. Charles veniremembers. Venireman Johns disclosed that, at the time of the shooting, Mary’s attorney, Scott

Pollard, also represented his brother and that documents for his brother's case, with Pollard when he was shot, were spattered with blood (Tr.732-34). Six veniremembers knew bailiff Fred Nicolay (Tr.497,588-89,708,711-12,719-20); another knew another bailiff present at the shooting (Tr.715); another was represented in divorce proceedings by an attorney the State endorsed (L.F.149;Tr.143). One venirewoman's aunt was a close friend of Mary's (Tr.233-37), while another knew Mary's former son-in-law and often spoke with him about the case (Tr.244-45). One had given medications to Baumruk at the jail (Tr.386-90). Another currently worked under Judge Hais and worked with many St. Louis County policemen (Tr.277). Others had personal connections to the shooting: they knew a co-worker whose lawyer was shot (Tr.517-18); a co-worker whose son was there (Tr.597); an employee's friend, a paramedic who saved someone at the scene (Tr.662); or they had friends in the street after the shooting (Tr.277). They were the wife of a law partner of Baumruk's former attorneys, or the niece of a St. Louis police detective, or people who had then lived or worked in St. Louis County (Tr.59,64,259,276,581-82,724). One venireman followed the prior trial and wrote down what he thought the verdict should be (Tr.527). Fifteen years later, another remembered precisely where she was when she first heard about the shooting (Tr.613).

B. St. Charles County Was Inundated with Media About the Crime

This Court has taken judicial notice “that the information given by newspaper, radio and TV stations does not terminate at county lines.” *State v. Odom*, 369 S.W.2d 173, 179 (Mo.1963). Since the two counties are one community, residents of St. Charles County were inundated with the same media blitz as St. Louis County. Media coverage was “massive,” centering “not only on the shootings, but also on domestic violence, concealed weapons, and the fears of domestic relations lawyers and clients.” *Baumruk*, 85 S.W.3d at 647. At the retrial, veniremembers recalled that, when it happened, television programming was interrupted with news of the shooting and scenes from outside the courthouse (Tr.264,506). “[I]t was a topic of some discussion for some time” (Tr.277). It was “all over the media” and “well broadcast” (Tr.286).

Publicity did not subside after the first trial, but followed Baumruk’s appeal and reversal and continued through the second trial (L.F.320). Before the second trial, venirepersons heard about the case on Channels 2, 4, and 5 (Tr.118,534,586, 619). One station even played the audiotape of the shooting (Tr.619). Radio stations KTRS and KWMU also ran stories (Tr.134,506-508). A venireperson stated, “you would have to live in a cave if you hadn’t heard of [the case]” (Tr.584). It “became news again last fall and then early this, you know, the last couple of days I have read about it and seen about it” (Tr.502). For several mornings and nights, Channel 2, Fox News, had recapped the shooting and current happenings (Tr.118,534). News stations “have been hyping it the last few days” (Tr.607). One venirewoman, who lived out-of-state when the shooting occurred,

was influenced by the “sensationalism” of the recent news on television, newspapers, and even on KSDK.com as she looked up the weather online (Tr. 551-53,556)⁷.

Television news stations asked permission to film pretrial hearings, voir dire, and portions of the trial (4/20/06 Tr.3). They appeared outside the courthouse after pretrial hearings (L.F.320). On the first day of voir dire, reporters and camera crews camped outside the courthouse (Tr.118,300,36-38)⁸. A reporter stopped venirepersons to ask for comments on jury selection (Tr.536). One venireman, walking past a television crew, heard the reporter discussing the facts of the case, and then, as he passed through security, a security officer disclosed that this case caused courthouse security to be implemented (Tr.300-301). One of the courthouse maintenance workers told nine potential jurors, “I don’t know why you are wasting your time. You all know he’s guilty” (Tr.308-309).

Potential jurors were inundated with facts that would be inadmissible at trial, *i.e.*, that Baumruk had already been convicted and sentenced to death. Before voir dire, the court sustained counsel’s motion that neither party mention the prior trial or death sentence (Tr.51). Yet only those who knew Baumruk had received a death sentence were struck for cause, not veniremembers who knew about the prior conviction (Tr.204-207,223). Defense counsel alerted the court,

⁷ KSDK.com is the website for St. Louis Channel 5 (Tr.586).

⁸ Channel 2 had a news van outside (Tr.118,537).

“Previous to my experience here today it would never even occur to me to ever agree to let somebody, to agree without objection to have somebody on my jury who had heard that my client had been convicted of the crime for which they were supposed to hear. But we’re drawing the line now, not at conviction but we’re drawing the line at whether or not he had previously been sentenced to death” (Tr.652).

The court lowered the bar so far that she kept a juror who knew about the prior conviction – a juror who, as the judge said, “[d]oes not think he could put behind what he heard and decide the case on the evidence... [H]e says he couldn’t set it aside” (Tr.656).⁹ Juror Matlock had heard facts about the crime and knew that Baumruk had already been convicted (Tr.506-507). He did not think he could set aside his prior knowledge of the facts and judge the case just on the evidence (Tr.508). He also did not think he could presume Baumruk innocent (Tr.508). When asked if he could acquit if the State did not meet its burden of proof, Matlock did not know how to answer (Tr.509). He reiterated that Baumruk was found guilty, and there were many witnesses (Tr.509). Matlock agreed that he had no knowledge of Baumruk’s mental state at the time of the shooting, and guessed that he could keep an open mind to, and consider, evidence of Baumruk’s mental state (Tr.514-15). But he never stated that he could set aside his prior knowledge of the facts or that Baumruk was previously convicted. He never stated that he could presume Baumruk innocent.

⁹ See Argument III.

The voir dire responses demonstrate that public knowledge of the facts had not faded and that residents of St. Charles County were as inundated with the publicity as residents of St. Louis County. In 1998, six years after the crime, a poll indicated that about 70% of St. Louis County residents remembered the shooting. *State v. Baumruk*, 85 S.W.3d 644, 649 (Mo.banc 2002). At the first trial, about 64% of the venirepersons had heard about the case, and eight jurors remembered the incident. *Id.* At this trial, 92 of 153 venirepersons (about 60%) had heard about the case. Five actual jurors had heard about the incident: #123, Booker; #128, Porter; #159, Mudd; #181, Crossman; and #198, Matlock (Tr.274-76,289-90,297-99,506-15). Juror Matlock knew Baumruk had been convicted, could not set aside the facts he knew, and could not presume Baumruk innocent (Tr.506-15).

C. Five Times, the State Conceded that a St. Charles Venire Would Be Improper

In argument on the writ petition, before this Court, the State insisted – at least five times – that the jury should be brought in from another part of Missouri. Assistant Prosecuting Attorney Lasater volunteered that, “the idea was to move it to St. Charles County, where it would be convenient for the parties and the witnesses, and we’ll have to fly people in” (L.F.271). When asked if trial in St. Charles with a St. Charles judge was problematic, Lasater responded, “as I reread your opinion in preparing for this case, I don’t know that going to St. Charles

takes this far enough away... And – and so actually, we would kind of take issue that we prefer a jury from another part of the state” (L.F.273). He reiterated:

I think – or in looking back and researching this case in preparation (inaudible) I don’t think we fit the [C]ourt’s mandate by just taking a jury from St. Charles. I think the jury needs to be taken from somewhere else.

(L.F.274). While St. Charles County was convenient for the parties and did not have the problems of St. Louis County, the State wanted a jury from another part of the state (L.F.277; tape oral arg.). He asserted:

It would be efficient to keep the case with Judge Seigel, allow us to take the proper procedures to take the – to try the case, to comply with the mandate in another county close to St. Louis but with a jury from elsewhere in the state.

(L.F.278).

After its about-face, the State argued that these comments “were made as an advocate defending the actions of Judge Seigel;” they explained his decisions and asked this Court to clarify whether St. Charles was a proper venue (L.F.320).

Despite the State’s later denial, its repeated argument that a St. Charles jury should not hear the case constituted a judicial admission. A judicial admission “is one made in court or prepatory to trial by a party or his attorney that concedes, for the purposes of that particular trial, the truth of some alleged fact so that one party need offer no evidence to prove it, and the other party ordinarily is not allowed to

disprove it.” *Self v. Brunson*, 213 S.W.3d 149, 154 (Mo.App.E.D.2006). A judicial admission “removes the proposition in question from the field of disputed issues in the case.” *Id.* The State unequivocally admitted that trial with a St. Charles County venire would be unfair and improper. It is bound by its admission and cannot now deny it.

The State offered no reason why a St. Charles venire was needed; it merely argued that Baumruk had not demonstrated that fundamental fairness required a change. Its arguments fall into four categories: (1) the rules forbid the change of venire; (2) the Court’s mandate did not require a jury from elsewhere; (3) this Court misunderstood the data from the Warren poll, and since a fair jury was seated in St. Louis County, a fair one could be seated from St. Charles; and (4) although there was media attention, it was statewide (See Appendix A43). Each of these arguments was wrong.

First, the State argued that the motion was untimely and that because there had already been a change of venue, Baumruk could not obtain a change of venire (L.F.317). Rule 32.04(b) requires that a motion for change of venue be filed within ten days after the initial plea is entered. Rule 32.09(b) allows for only one change of venue. Rule 32.09(c), however, provides that:

Nothing contained in Rules 32.01 through 32.09, inclusive, shall prohibit a judge from ordering a change of venue or change of judge when fundamental fairness so requires or pursuant to Rule 32.10.

Because Baumruk demonstrated that fundamental fairness required a jury from a different county, his request for a change of venire was neither untimely nor precluded by law.

Second, the State argued that the only true reason for this Court’s reversal was that the trial occurred in the same courthouse as the shooting (L.F.318,321). While a significant basis for the reversal, the Court made clear that pretrial publicity was also significant. *Id.* at 649-51. The Court called, “debatable” the trial court’s conclusion that the passage of time made it possible to select a fair trial in St. Louis County. *Id.* at 649. It stressed the massive media coverage of the case, the Warren poll findings, and the jury makeup. *Id.* at 647, 649. It differentiated this case from others where “jury selection took place hundreds of miles from the trial location,” or where there was no “barrage of inflammatory publicity immediately prior to trial.” *Id.* at 649, citing *Johns*, 34 S.W.3d at 108 and *Deck*, 994 S.W.2d at 534. To select a jury from St. Charles County after the Court stressed the unfairness the publicity created, flouts this Court’s authority. Additionally, while this trial did not occur where the shooting happened, the publicity this time involved additional significant information not present before – general knowledge of Baumruk’s prior conviction and death sentence.

Third, the State argued that a fair jury could be drawn from St. Charles County, because the first jury had been fair and impartial (L.F.318-19,322-23). It argued, “[i]t appears that the Supreme Court just accepted the [Warren poll] numbers without understanding the methods and basis of the poll or the weight the

trial court gave to the poll and its results” (L.F.318). It urged the trial court – ignoring this Court’s opinion – to not rely on the poll (L.F.319). It argued, “[t]he experience of the first trial is that this court should be able to seat a fair and impartial jury in St. Charles County” (L.F.322). The State’s argument, seeking to relitigate issues this Court has already decided, must fail.

Finally, the State argued that media coverage was statewide, so publicity was problematic anywhere (L.F.322). It conceded that media coverage has existed since the shooting and coverage is renewed at every step (L.F.320). But the only media sources requesting coverage, and the only reporters camped outside the courthouse during voir dire, were from the St. Louis/St. Charles area. The trial court received numerous requests for media coverage, but all from St. Louis/St. Charles sources: the St. Louis Post-Dispatch, KTVI, KMOV, KSDK, and KPLR (Channels 2,4,5,11) (L.F.166,174-76,284,372,456-57,463-64). While a cause célèbre in the St. Louis/St. Charles area, this case was of minor interest elsewhere.

VI. A New Trial is Warranted

The totality of factors demonstrates that Baumruk could not secure a fair jury with a St. Charles County venire. Factors swaying the Supreme Court to reverse in *Irvin* were present here. St. Charles County was swamped with massive publicity about the case in newspapers and television, and it was considered cause célèbre throughout the community. The veniremembers and other people in the

community – courthouse maintenance and security people – expressed strong animosity toward Baumruk.

An important factor to consider in determining whether jurors truly are impartial is the length to which the court must go to select apparently impartial jurors. *Murphy*, 421 U.S. at 802-803. Here, 45 of 152 veniremembers were excused for publicity or because they knew witnesses (33%); answers 17 others gave strongly suggested bias against Baumruk (11%); and another 12 may have been biased, but were released for other reasons without being questioned about publicity (8%)(see Appendix A96).¹⁰ Another 18 (12%) admitted having heard

¹⁰ Venirepersons struck due to prior knowledge of the case were #1 Cooke; #6 Boock; #12 Sparks; #45 Flecke; #47 Babb; #88 Warren; #106 Rowe; #127 Ward-Lipski; #138 Borgschulte; #160 Stitz; #179 Gish; #180 Lowe; #182 Bohnert; #190 Barry; #195 Spica; #196 King; #214 Oertwerth; #215 Salarano; #221 Day; #222 Collier; #225 Hart; #243 Kunz; #249 Julian; #257 Lee; #271 Walls; #278 Neal; #289 Kee; #291 Henderson; #296 Alexander; #301 Ballman; #304 Kristo; #307 Aldridge; #313 Kulp; #319 Baum; #321 Sollors; #333 Schoer; #336 Riechers; #350 McInturff; #371 Henry; #378 Johns (Tr. 60,65,72,75-76,117-20, 123,143-50,194-204,207,224-29,238-43,277-79,286-87,314,388-90,495-99,502-505,524-29,533-50,567-68,571,582-83,591,597-98,607-616,619-24,659-61,757-62,676-79,684,698-99,703-707,714-18,721,723-25,732-34,801-802,888-90).

about the case but denied holding an opinion.¹¹ Where so many admitted to a

Venirepersons struck because they knew witnesses were #269 Knoll; #325 Mittler; #329 Renaud; #332 McPherson; and #361 King (Tr. 588-89,708,711-12,719-20).

Venirepersons whose answers strongly suggested bias were #38 Hermes; #39, Corrier; #43 Brown; #67 Twillman; #107 Redwine ; #136 Sherrard; #143 Duffy; #149 Lohrmann; #151 Olson; #153 Hermann; #158 Huber; #169 Hoelscher; #198 Matlock; #231 Fritz; #310 Boehmer; #317 Kifer; and #380 Jensen (Tr. 133-42,152-53,208-13,233-37,244-63,265,268-74,279-81,301-302,506-17,551-57,662-68,689-92,734-38,785-86).

The twelve venirepersons struck for other reasons before they could be questioned on publicity were #15 Hill; #93 Bischel; #118 Banach; #155 Harris; #184 Brady; #255 Fleschner; #267 Lux; #281 Cooper; #283 Brandt; #323 Kopff; #358 Light; and #374 Jensen (Tr. 124-25,214-16,231,267,291-93,578-79,587,599-602,686,722,730).

¹¹ These were #36 Price; #76 Houston; #81 White; #123 Booker; #125 Hessler; #128 Porter; #159 Mudd; #181 Crossman; #193 Hermann; #202 Waggy; #216 Conley; #235 Ostendorf; #237 Howard; #250 Carson; #266 Reed; #274 Warden; #284 Vossenkamper; and #320 Tiskos (Tr.127-28,187-88,192-94,217-22,275-76,289-91,297-99,488-89,500-501,517-24,531-32,560-66,572-77,584-86,592-96,603-606,701-702).

disqualifying bias, the reliability of the other venirepersons' assurances of impartiality must be questioned, "for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it." *Id.* at 803. Five jurors had heard about the case, including one who could not set aside prior information or presume Baumruk innocent. *Irvin*, 366 U.S. at 725-27.

After repeatedly arguing to this Court that calling a jury from St. Charles County would be improper, the State's current position flies in the face of the prosecutor's duty to seek justice. The prosecutor's duty is "not merely to win a case, but to see that justice is done." *State v. Burnfin*, 771 S.W.2d 908, 914 (Mo.App.W.D.1989); *Berger v. United States*, 295 U.S. 78, 88 (1935). He was duty-bound to use every legitimate means to obtain a just conviction. *Berger*, 295 U.S. at 88. Yet here, after strenuously arguing to this Court that having a St. Charles venire would be unfair, this prosecutor fought to keep a St. Charles venire.

One must ask why? The defense agreed that the trial could be conducted in St. Charles County (L.F.281-82). Any jury would be sequestered. It would not be more expensive or inconvenient to draw the jury from elsewhere in Missouri. The only likely reason for the prosecutor's dramatic about-face is the State's strong advantage in pulling the jury from a community saturated with years of publicity about the crime and its more recent knowledge that Baumruk had been convicted and sentenced to death. In a "system of law [that] has always endeavored to

prevent even the probability of unfairness,” this conviction cannot stand. *In re Murchison*, 349 U.S. 133, 136 (1955).

This Court must reverse.

ARGUMENT III

The trial court plainly erred and abused its discretion in failing to *sua sponte* strike for cause Juror 198, Ronald Matlock, denying Baumruk due process, a fair and impartial jury, and the presumption of innocence, U.S. Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), because Matlock was not a fair and impartial juror, in that he stated that he did not think he could (1) set aside his prior knowledge of the facts of the shooting and the fact that Baumruk had been convicted and (2) presume Baumruk innocent, yet Matlock served as a juror.

A criminal defendant is entitled to a fair and impartial jury. *Ristaino v. Ross*, 424 U.S. 589, 595, fn.6 (1976); *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc 1998); U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a). The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). “An ‘impartial jury’ is one where *each and every one* of the twelve members constituting the jury is totally free from any partiality whatsoever.” *Presley v. State*, 750 S.W.2d 602, 606 (Mo. App.S.D.1988, en banc)(emphasis in original), quoting *Mares v. State*, 490 P.2d 667, 668 (N.M.1971). Failure to give the defendant a fair trial “violates even the minimal standards” of the due process the Fifth Amendment guarantees. *Irvin*, 366 U.S. at 722.

A venireperson is not qualified to serve as a juror unless he can “enter upon that service with an open mind, free from bias and prejudice.” *State v. Ervin*, 835 S.W.2d 905, 915 (Mo.banc 1992). The “critical question ... is whether the venireperson unequivocally indicated an ability to evaluate the evidence fairly and impartially.” *State v. Storey*, 901 S.W.2d 886, 894 (Mo.banc 1989). If his responses indicate even a possibility of bias, he is not qualified to serve unless he is rehabilitated through further questioning, by giving unequivocal assurances of impartiality. *State v. Walton*, 796 S.W.2d 374, 377 (Mo.banc 1990).

The court nonetheless allowed Venireperson #198, Ronald Matlock, to serve on the jury (Tr.926-28). Matlock did not think he could set aside his prior knowledge of the facts of the shooting and that Baumruk had already been convicted, or presume Baumruk innocent (Tr.508-509). The court recognized that Matlock “[d]oes not think he could put behind what he heard and decide the case on the evidence. And then he says he couldn’t set it aside” (Tr.656). Her failure to strike Matlock for cause constitutes plain error.

I. Standard of Review and Preservation

A trial court has wide discretion in determining whether to strike a venireperson for cause. *State v. Smith*, 649 S.W.2d 417, 421-22 (Mo.banc 1983). Its decision will not be disturbed “absent a clear abuse of discretion and real probability of injury to the complaining party.” *Id.* The appellate court need not blindly defer to that decision but should review the record to determine whether

the trial court abused its discretion. *State v. Roark*, 784 S.W.2d 194, 197 (Mo. App.W.D.1989).

Once a venireperson gives an equivocal or otherwise uncertain answer regarding his ability to hear the evidence without bias, the court must question him further to determine if he is qualified. *Walton*, 796 S.W.2d at 377. The court's failure to do so undercuts the wide discretion its decision is accorded, justifying "a more searching review by an appellate court of the challenged juror's qualifications." *State v. Clark-Ramsey*, 88 S.W.3d 484, 489 (Mo.App.W.D.2002), quoting *Roark*, 784 S.W.2d at 197. "Errors in the exclusion of potential jurors should always be made on the side of caution." *State v. Stewart*, 692 S.W.2d 295, 298 (Mo.banc 1985).

Baumruk acknowledges that defense counsel failed to move to strike Matlock for cause, and that such failure constitutes waiver. *State v. Wright*, 30 S.W.3d 906, 914 (Mo.App.E.D.2000), citing *State v. Sumowski*, 794 S.W.2d 643, 647 (Mo.banc 1990). But he respectfully requests plain error review under Rule 30.20, as in *State v. Ebeirus*, 184 S.W.3d 582, 585-86 (Mo.App.S.D.2006), *Wright*, 30 S.W.3d at 914, and *State v. Hadley*, 815 S.W.2d 422, 424 (Mo.banc 1991).

Plain error review involves two questions: first, whether the trial court "committed an evident, obvious and clear error, which affected the substantial rights of the appellant;" and second, whether the error created so much prejudice

to the defendant as to result in a manifest injustice or a miscarriage of justice.

State v. Beggs, 186 S.W.3d 306, 311-12 (Mo.App.W.D.2005).

II. Matlock Was Not Qualified to Serve as a Juror

A trial court has no duty to strike a venireperson *sua sponte*, *Hadley*, 815 S.W.2d at 423. But it must ensure that every juror who sits is qualified to do so. *Walton*, 796 S.W.2d at 377. “It is for the trial court, and not the venireperson, to determine whether a challenged member of the panel could be an impartial juror.” *Id.* at 377-78, citing *State v. Reynolds*, 619 S.W.2d 741, 749 (Mo.1981). The court must independently inquire if a juror equivocates about his ability to be fair and impartial. *State v. Wheat*, 775 S.W.2d 155, 158 (Mo.banc 1989).

Ronald Matlock remembered hearing about the shooting in a breaking news special report (Tr.506)(see Appendix A104). He knew that Baumruk killed his wife in the courtroom, a “gun battle” followed, and four or five others were injured (Tr.506). He believed this incident was why security systems are in public buildings (Tr.506). He recently heard news about the case on the radio, but shut it off immediately (Tr.506-507). He thought that Baumruk had been convicted and was surprised the case was back in court, because he believed it was resolved long ago (Tr.507-508).

When asked if he could set aside his knowledge and judge the case just on the evidence, Matlock responded:

I don't think I could, because from what I remember on – from the media that I heard was that there was so many witnesses that he actually did pull out a gun and kill his wife in the courtroom.

(Tr.508). Matlock also answered, “I don't think I could” presume Baumruk innocent (Tr.508). The prosecutor explained that he had to prove Baumruk guilty beyond a reasonable doubt and asked if Matlock could acquit if he did not meet that burden (Tr.509). Matlock answered that, “from what I understand, from what I have heard the gentleman was guilty. I thought that there were witnesses that did [sic] this” (Tr.509).

Matlock told defense counsel he was convinced that Baumruk had shot his wife, but agreed that he heard nothing about Baumruk's mental state (Tr.513-14). Defense counsel started to ask Matlock about the presumption of innocence, but abandoned his question, instead asking just whether he could consider evidence of Baumruk's mental state and keep an open mind to that evidence (Tr.514).

Defense counsel: Okay. So, would you be open and able to consider evidence that might be presented to you, if you were a juror on this case, that pertained to the mental state of the defendant?

Matlock: I guess I could. You mean like he just like snapped?

Defense counsel: That or any other number of things that might be presented with regard to his mental state. And I'm not asking you to tell me whether you think that that's true or that actually happened in this case. Obviously you have not heard any

evidence. All I'm wondering is whether or not, whether or not you would be able to keep an open mind as to those elements, you know, the elements that pertain to his mental state as it relates to the crime of murder in the first degree. If you could keep an open mind about that thing and listen to the evidence and make your own decision about those things.

Matlock: I guess I could, seeing as how I have not heard anything like that.

(Tr.514-15).

Matlock initially stated that he would automatically reject the death penalty (Tr.509-10). But he then stated that the death penalty was appropriate for some situations, like if his family or someone he knew were involved (Tr.511-13). He would have a hard time imposing death if he did not know the victim (Tr.511). He eventually guessed that he could consider the death penalty (Tr.517).

No further questions were asked about Matlock's ability to presume Baumruk innocent or to consider only the evidence in trial in deliberating guilt/innocence or sentence. The court summarized that Matlock "[d]oes not think he could put behind what he heard and decide the case on the evidence. And then he says he couldn't set it aside" (Tr.656). Neither side moved to strike Matlock for cause, and he served (Tr.926-28).

Jurors must be able to presume the defendant innocent. The presumption of innocence is a fundamental principle of American jurisprudence, *Coffin v. United*

States, 156 U.S. 432, 453-56 (1895), implicit in the right to a fair trial and the “undoubted law, axiomatic and elementary” in a criminal trial. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Enforcement of the presumption of innocence “lies at the foundation of the administration of our criminal law.” *Coffin*, 156 U.S. at 453.

Jurors must also be able to decide the case solely on the evidence presented. “One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

Matlock was not a competent juror because he could not presume Baumruk innocent, nor could he judge the case based just on the evidence (Tr.508-509). Matlock’s inability to serve as a fair and impartial juror was uncontroverted, regardless of whether counsel moved to strike him for cause. The judge, the ultimate guardian of the trial’s fairness and integrity, was independently obligated to ensure that each juror was impartial and could follow the court’s instructions. Other courts agree.

In *Franklin v. Anderson*, 434 F.3d 412 (6thCir.2006), appellate counsel was held ineffective for not challenging the trial court’s failure to *sua sponte* strike for cause an obviously-biased juror. The juror misunderstood the presumption of innocence, the defendant’s right not to testify, and the burden of proof. *Id.* at 422. Counsel did not move to strike her for cause, and she served. *Id.* at 425.

Although appellate courts usually defer to the judgment of the trial judge, the record of juror bias was so clear that it outweighed the deference accorded a judge. *Id.* at 427. The judge “had a duty to dismiss a prospective juror who could not follow the law.” *Id.* at 428.

The Sixth Circuit rejected the State’s argument that defense counsel strategically chose not to strike the juror because, like the defendant, she was African-American. *Id.* at 428. The court held, “[t]here is no situation under which the impaneling of a biased juror can be excused” and “no claims of strategy can excuse the seating of a juror unable to follow the law.” *Id.* at 428, 430-31. It stressed, “[t]o permit this would be to allow trial counsel to waive the defendant’s right to an impartial jury.” *Id.*

In *Hughes v. United States*, 258 F.3d 453 (6th Cir.2001), trial counsel was held ineffective for not moving to strike for cause a biased juror. No trial strategy could support counsel’s waiver of the defendant’s Sixth Amendment right to trial by impartial jury:

[I]f counsel cannot waive a criminal defendant’s basic Sixth Amendment right to trial by jury “without the fully informed and publicly acknowledged consent of the client,” then counsel cannot so waive a criminal defendant’s basic Sixth Amendment right to trial by an impartial jury. Indeed, given that the presence of a biased juror, like the presence of a biased judge, is a structural defect in the constitution of the trial mechanism that defies harmless error analysis,

to argue sound trial strategy in support of creating such a structural defect seems brazen at best.

Id. at 463 (internal citations omitted).

The trial court committed an evident, obvious and clear error in letting Matlock serve on the jury even though he could not presume Baumruk innocent and “[d]oes not think he could put behind what he heard and decide the case on the evidence... [H]e says he couldn’t set it aside” (Tr.508-509,656).

It was also structural error. “Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself.” *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir.1992). Trial by a jury with one or more biased jurors “is not a constitutional trial.” *Presley*, 750 S.W.2d at 606.

A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person.

Patton v. United States, 281 U.S. 276, 292 (1930), abrogated by *Williams v. Florida*, 399 U.S. 78 (1970) (six-member jury does not violate Sixth Amendment).

Baumruk was convicted and sentenced to death by a jury that included someone who could not presume Baumruk innocent nor contain his deliberations to the evidence presented at trial (Tr.508-509). Baumruk was denied his state and federal constitutional rights to due process, a fair and impartial jury, and the

presumption of innocence. U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Sec.

10,18(a). This Court must reverse.

ARGUMENT IV

The trial court erred and abused its discretion in restricting the defense voir dire on whether venirepersons could consider the full range of punishment knowing Baumruk not only killed his wife, but attempted to kill eight other people, because the restriction denied Baumruk a fair and impartial jury, due process, reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Sec. 10,18(a),21, in that Baumruk’s having shot at eight others was a critical fact (1) the State used as a theme throughout trial, including its assertion in guilt phase opening statement and penalty phase closing argument that Baumruk tried “to be one of the biggest mass murderers in the history of this area;” (2) the State elicited testimony through numerous witnesses that Baumruk shot four others and shot at four more; (3) the State alleged the fact in eight to ten aggravating circumstances; and (4) in penalty phase closing, the State repeatedly urged the jury to impose death based on this fact.

The State ended its guilt phase opening statement by urging jurors to believe that Baumruk deliberately killed his wife, “on his way to trying to be one of the biggest mass murderers in the history of this area” (Tr.1003). This was the State’s resounding theme throughout trial. The State repeatedly stressed that Baumruk not only killed his wife, but shot four other people and shot at four more

(Tr.989-90,993-96,999-1003,2713,2716-17,2719-20,2724). The State elicited this fact through numerous witnesses (Tr.1153-88,1209-13,1217,1337-69,1393-1422, 1479-1493,1501-1520,1562-1600,1610-12,1673-84). Every aggravating circumstance the State submitted focused on Baumruk's having "shot up" the courthouse (L.F.771-76). Finally, it argued in penalty phase closing that the jury should impose death because Baumruk shot at eight other people (Tr.3031,3036-37,3039-41,3043,3069-70,3077-78). Yet, the court denied counsel's request to voir dire about this critical fact, to ascertain whether the jurors could consider life without parole after knowing Baumruk shot up the courthouse. The court's refusal denied Baumruk's state and federal constitutional rights to a fair and impartial jury, due process, reliable sentencing, and freedom from cruel and unusual punishment. U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Sec.10,18(a).

I. The Issue is Fully Preserved

The State moved *in limine* to limit defense counsel's voir dire on certain topics (L.F.543-46). At a pretrial conference, defense counsel argued that they should be allowed to question veniremembers regarding their ability to consider a sentence of life without parole given the critical fact that Baumruk not only shot and killed his wife, but also committed other assaults (1/17/07-Tr.15,20). The State responded that while the jurors may hear the bare, skeletal facts in voir dire, this was not a critical fact and questioning the jurors about it would seek a commitment (1/17/07-Tr.16-18). Defense counsel responded that the only

commitment would be for jurors to consider the entire range of punishment (1/17/07-Tr.18). The court stated that it would let the defense reveal that Baumruk shot four other people (1/17/07-Tr.18). Counsel argued that, since the aggravators alleged the other assaults were actually attempted homicides, the assaults were a critical fact (1/17/07-Tr.20-21). The Court ruled that the defense could “inquire if [the veniremembers] could consider the entire penalty range for the murder first ... if the evidence showed that the defendant shot four other individuals, but not with any more specifics than that” (1/17/07-Tr.21).

During voir dire, defense counsel again requested to inquire on the critical fact that Baumruk had attempted to kill eight others (Tr.383-84). Counsel wanted to ask if venirepersons could consider life without parole knowing that in addition to killing Mary, Baumruk shot four others and shot at four more (Tr.384). The court overruled counsel’s request (Tr.386). Counsel was permitted to ask the first panel if they could consider life without parole knowing that Baumruk shot at four people (Tr.392). Counsel was also permitted to ask if venirepersons could consider life without parole knowing that Baumruk actually shot four others (Tr.392-93). He was not permitted to ask if they could consider life without parole knowing that Baumruk attempted to kill eight people.

While questioning the second panel, defense counsel again asked to pursue questioning on this critical fact (Tr.782-83). The court responded that counsel could ask if venirepersons could realistically consider a sentence of life without parole if the evidence showed that Baumruk “not only shot and killed his wife, but

shot other people as well” (Tr.782). Counsel’s questions were as the court limited (Tr.788-89). The issue is included in the motion for new trial (L.F.803-805).

II. Standard of Review

Trial judges have discretion to determine “whether a disclosure of facts on *voir dire* sufficiently assures the defendant of an impartial trial without at the same time amounting to a prejudicial presentation of evidence.” *State v. Leisure*, 749 S.W.2d 366, 373-74 (Mo.banc 1988). Appellate courts will only reverse for an abuse of that discretion. *Id.* Reversal is warranted when an error has occurred and the error has caused a “real probability of injury.” *State v. Edwards*, 116 S.W.3d 511 (Mo.banc 2003), citing *State v. Betts*, 646 S.W.2d 94, 98 (Mo.banc 1983).

III. The Court Erred in Refusing Voir Dire on Critical Facts

A defendant is constitutionally entitled to a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (right to jury trial guarantees fair trial by panel of impartial, indifferent jurors); U.S. Const., Amend. VI; Mo. Const., Art. I, Sec. 18(a). Failure to provide a fair trial “violates even the minimal standards” of the due process the Fifth Amendment guarantees. *Id.* The Sixth and Fourteenth Amendments mandate that capital sentencing be impartial. *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968).

That constitutional guarantee includes an adequate *voir dire* to identify unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). *Voir dire* is

designed to “discover bias or prejudice in order to select a fair and impartial jury.” *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc 1998), citing *State v. Leisure*, 749 S.W.2d 366, 373 (Mo.banc 1988). Counsel must “develop, not only facts which might form the basis of a challenge for cause, but also such facts as might be useful to him in intelligently determining his preliminary challenges.” *State v. Granberry*, 484 S.W. 2d 295, 299 (Mo.banc 1972). Courts must be able to remove veniremembers who cannot follow the instructions and evaluate the evidence. *Clark*, 981 S.W.2d at 146, citing *Morgan*, 504 U.S. at 729-30; *Leisure*, 749 S.W.2d at 373. Thus, “[i]t is the rule in this state that a liberal latitude is allowed in the examination of the jurors on their voir dire.” *Granberry*, 484 S.W.2d at 299.

Voir dire requires that “some portion of the facts of the case” be revealed. *Clark*, 981 S.W.2d at 147; *Leisure*, 749 S.W.2d at 373. “[S]ome inquiry into the critical facts of the case is essential to a defendant’s right to search for bias and prejudice in the jury who will determine guilt and mete out punishment.” *Clark*, 981 S.W.2d at 147. If counsel does not address those critical facts with the jury, “the parties lose the opportunity directly to explore potentially biased views, which all concerned have a duty to investigate thoroughly.” *Id.*

A critical fact is one with a “substantial potential for disqualifying bias.” *Clark*, 981 S.W.2d at 147. A fact is also critical if a “prevalent perception among society” exists that particular conduct is “never justified, regardless of any extenuating circumstances.” *State v. Oates*, 12 S.W.3d 307, 311 (Mo.banc 2000).

Thus, in *Clark*, this Court reversed because the trial court refused to let defense counsel question veniremembers on the critical fact that one of the homicide victims was a three-year-old girl. *Clark*, 981 S.W.2d at 145.

In *State v. Ezell*, 233 S.W.3d 251, 252 (Mo.App.W.D.2007), the State properly questioned the jurors about the victim's failure to report the alleged sexual abuse for almost a year. Delay was a critical fact that the defense emphasized to attack the victim's credibility. *Id.* at 253. The State was entitled to ask whether any potential jurors would automatically disbelieve the late accusation. *Id.*

In *State v. Edwards*, 116 S.W.3d 511, 528-29 (Mo.banc 2003), the defendant claimed that he should have been allowed to question the venire on the critical fact that the homicide victim was his child's mother. He wanted to know if veniremembers could consider life without parole knowing this fact. *Id.* This Court held that the relationship of defendant to child was not a critical fact because the child was not at the scene, directly involved in the crime, and was not central to the case. *Id.* at 529.

Here, the fact that Baumruk, in addition to shooting Mary, also "shot up" the courthouse was a critical fact. It carried a "substantial potential for disqualifying bias," *Clark*, 981 S.W.2d at 147, as the venue hearing prior to the first trial demonstrated. Mock jurors heard that the State alleged that Baumruk "shot and killed [Mary]...and then attempted to kill or cause serious physical injury to eight other individuals" (1stTr.13,18). In response, mock-juror Sinclair

admitted, “I couldn’t give him a fair trial. Because he hurt innocent people, regardless of whatever domestic violence he had with his wife, other people were hurt because of him” (1stTr.99-100). She could not presume Baumruk innocent (1stTr.101-102).

Firing a gun at people in a crowded courthouse is commonly accepted as conduct that would never be justified, regardless of any extenuating circumstances. *Oates*, 12 S.W.3d at 311. This critical fact riveted the community and dominated press coverage of the shooting – a “rampage,” “shooting spree,” and “mayhem that terrorized hundreds of people.” *State v. Baumruk*, 85 S.W.3d 644, 647 (Mo.banc 2002). Press coverage “compared the scene to a fire in Vietnam.” *Id.* Refusing to let the defense question the jurors about Baumruk having shot up the courthouse was a clear abuse of discretion.

IV. The Court’s Error Caused a Real Probability of Injury

A resounding theme of the State’s case in both phases was that Baumruk not only shot and killed his wife, but also assaulted eight others. The State ended guilt phase opening by commenting that Baumruk tried “to be one of the biggest mass murderers in the history of this area” (Tr.1003). It elicited testimony through numerous witnesses of Baumruk’s alleged attempted murders of eight people, in addition to Mary (Tr.1153-88,1209-13,1217,1337-69,1393-1422,1479-1493,1501-1520,1562-1600,1610-12,1673-84). It submitted a separate aggravator for each of the eight Baumruk shot or shot at (L.F.771-76). Finally, it referred to this critical

fact repeatedly in both closing arguments (Tr.2713,2716-17,2719-20,2724,3031, 3036-37,3039-41,3043,3069-70,3077-78).

In opening, the State detailed how Baumruk shot attorneys Pollard and Seltzer after shooting Mary (Tr. 989-90). It described how he then shot bailiff Freddy Nicolay and next, Baumruk tried to kill Jennings patrol officer Paul Neske (Tr.993-95). It argued that Baumruk next tried to kill plain-clothes detective Steve Salamon (Tr.996), and then shot at Jim Hartwick, an investigator for the prosecutor's office and a licensed police officer (Tr.999-1000). Finally, it described how Baumruk shot at Bill Mudd and shot and hit Wade Dillon, a "clear attempt to try to kill these people who were doing nothing more than upholding the law and being police officers" (Tr.1001). The State concluded its opening by urging jurors to convict Baumruk of deliberately killing Mary, "on his way to trying to be one of the biggest mass murderers in the history of this area" (Tr.1003).

The State's guilt phase evidence mirrored its opening. It elicited detailed testimony from all eight people whom Baumruk assaulted (Tr.1153-88,1209-13, 1217,1337-69,1393-1422,1479-1493,1501-1520,1562-1600). It elicited that most of the assault victims were married with children (Tr.1154,1337,1393,1480,1501-02,1576). It showed the jury the bullet holes in some victims' clothing (Tr.1186-87,1367,1493). It elicited the victims' enduring health problems caused by those wounds (Tr.1187,1368-69,1492,1599-1600). Through photographs and testimony, it detailed Baumruk's progress through the courthouse and each shot he fired

(Tr.1601-12,1673-84). Finally, it used how the assaults were committed to show that Baumruk could not have been suffering from a mental disease or defect at the time (Tr.2081,2195-96,2431-32).

In guilt phase closing, the State stressed that Baumruk shot at eight people, arguing, ‘We know that [Baumruk] aimed at everyone. We know that he wanted to kill everyone’ (Tr.2713). Eleven times, it recalled that five assault victims were police officers (Tr.2716-17,2719-20,2724). It argued, ‘I call them heroes and they are, they are the thin blue line that stands between him and us, they are the police.... [T]hank God, what the police do for us is stop murderers like him when they can’ (Tr.2716). ‘[Baumruk is] a cold-blooded murderer who was willing to take four lives, and then many others which would have been police officers or anybody who stopped him’ (Tr.2724).

The fact that Baumruk shot at eight other people was most critical in penalty phase. The court submitted ten aggravators (L.F.771-76). The first alleged depravity of mind, that Baumruk killed Mary as part of a plan to kill more than one person (L.F.771). Aggravators two through nine alleged that Mary was murdered while Baumruk attempted to murder one of eight other victims (L.F.771-76). Aggravator ten alleged that, by murdering Mary, Baumruk created a great risk of death to more than one person (L.F.776). All the aggravating circumstances focused on Baumruk’s ‘‘shooting up’’ the courthouse.

In penalty phase closing, the State stressed the other assaults, emphasizing those victims who were police officers. ‘‘And then he went to continue his plan of

killing more than just Mary, but killing others, the lawyers, the judges. And as you'll learn in the instruction it also counts that he tried to kill police officers, the bailiffs, and others" (Tr.3031). "He meant to kill more than just Mary" (Tr.3031). "[Baumruk] meant to kill a cop. He meant to kill someone who's there to serve and protect, someone who didn't turn and run but instead went to help without hesitation and face a murderer. And that's worth a lot." (Tr.3036). "There is no doubt [Baumruk] tried to kill another cop. Why? Because clearly he wanted to continue his rampage. He wanted to continue his murders. He wanted to kill more people" (Tr.3037). It argued this crime warranted "the most severe punishment that is allowable by law" because "what he tried to take away is part of his plan, from us, from the community, all those people, those eight people in addition to Mary, that he tried to take away from their families and from their community" (Tr.3039-40). It argued, "he had to plan it to the inth degree so that he could succeed in becoming one of the biggest murderers we've ever seen" (Tr.3043). It stressed Baumruk committed a "horrible, horrible, terrorizing, horrendous act" in that he "tried to kill nine people" (Tr.3069-70) and that bullets were flying everywhere (Tr.3040-41). It repeatedly asked the jurors to send a message to the five officers Baumruk assaulted (Tr.3077-78).

Instead of allowing defense counsel liberal latitude in questioning veniremembers, *Granberry*, 484 S.W.2d at 299, the court arbitrarily limited counsel's questioning to the four victims actually shot (1/17/07-Tr.18,20-21;Tr. 386,392-93,782). The State used the fact that Baumruk shot at eight other people

to secure a guilty verdict and death sentence. To obtain heightened emotional response, it emphasized that most victims were police. A real probability exists that at least one juror automatically rejected a sentence of life without parole, simply based on how many people Baumruk assaulted while “shooting up” the courthouse. Even if only one juror was biased, unable to consider the full range of punishment because of this critical fact, a new trial is mandated. *Patton v. United States*, 281 U.S. 276, 292 (1930). This Court must reverse.

ARGUMENT V

The trial court plainly erred in overruling Baumruk's motion to suppress his statement to Officer Glenn; in letting the State elicit the statement at trial through Dr. Rabun's testimony; and failing to *sua sponte* bar testimony regarding any expert opinion formed using the illegal statement regarding Baumruk's competency and/or mental responsibility for the crime, thereby violating Baumruk's rights to the assistance of counsel, freedom from compelled self-incrimination, and due process, U.S.Const., Amends.V,VI,XIV,Mo.Const.,Art.I,Sec.10,18(a),19, because Baumruk was never advised of his *Miranda*¹² rights and made the statement without counsel, after he had been charged, and resulting from custodial interrogation, in that Baumruk was in custody when he made the statement and it was made in response to Officer Glenn's direct questioning.

Baumruk had been charged with eighteen felony counts and was awaiting trial when he complained to police that several of his newspapers were missing. Officer Glenn arrived at the jail to question Baumruk about the problem. But Glenn had an ulterior motive. Without Baumruk's knowledge or consent, he recorded their conversation. After luring Baumruk into a false sense of security,

¹² *Miranda v. Arizona*, 384 U.S. 436 (1966).

and without *Miranda* warnings, he asked Baumruk about the charged crimes. The State used the resulting statement as evidence that Baumruk was competent to stand trial and had no mental disease or defect. That use of Baumruk's illegally obtained statement violated his state and federal constitutional rights to due process, the assistance of counsel, and to be free from self-incrimination.

U.S.Const.,Amends. V,VI,XIV,Mo.Const.,Art.I,Sec.10,18(a),19.

I. Standard of Review

A trial court's ruling on a motion to suppress may be reversed only if clearly erroneous. *State v. Sund*, 215 S.W.3d 719, 723 (Mo.banc 2007). The inquiry is limited to whether that ruling is supported by substantial evidence. *State v. Feltrop*, 803 S.W.2d 1, 12 (Mo.banc 1991). Reviewing courts defer "to the trial court's factual findings and credibility determinations and consider all evidence and reasonable inferences in the light most favorable to the trial court's ruling." *Sund*, 215 S.W.3d at 723. Questions of law are reviewed *de novo*. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo.banc 1998).

Defense counsel did not object that the State experts improperly relied on the illegally obtained statement in reaching their diagnoses; and did not object to Judge Rauch taking judicial notice of testimony and evidence from the 2000 competency hearing that was based on the illegally obtained statement. Defense counsel neither objected on Sixth Amendment grounds nor objected when Dr. Rabun testified about the statement at trial. Thus, Baumruk requests plain error

review. Rule 30.20. Baumruk must demonstrate that the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice will result if the error is uncorrected. *State v. Clayton*, 955 S.W.2d 468, 478 (Mo.banc 1999).

II. Facts Presented at Suppression Hearing

Defense counsel asked the court to consider Baumruk's *pro se* motion to suppress his statement to Officer Glenn and reconsider Judge Seigel's denial of the suppression motion prior defense counsel had filed (L.F.512;1/17/07-Tr.53). The State had no objection to Judge Rauch reconsidering Judge Seigel's ruling and referred the court to the transcript of the 2000 competency hearing, wherein the suppression issue was heard (1/17/07-Tr.54).¹³ The State denied that Glenn acted improperly, but advised that it did not intend to offer the statement as evidence, except that its experts might testify about it (1/17/07-Tr.55-57). Baumruk asked that the court entirely prevent the State from using the statement, even through experts (1/17/07-Tr.56-57). The court refused, since experts can rely on hearsay (1/17/07-Tr.57-58). The issue is included in the motion for new trial (L.F.801-803).

¹³ Citations are to the first trial transcript (1stTr.), but this is the same material as Judge Rauch admitted as State's Exhibits 28 and 29 at the competency hearing (Comp.Tr.6-8).

Evidence that had been adduced at the 2000 competency hearing regarding Baumruk's statement to Officer Glenn is as follows. In October, 1998, Baumruk was in custody awaiting trial on eighteen felony counts when he reported to police that several of his newspapers were missing (1stTr.825,828,844). Clayton Officer Stewart Glenn came to the jail to take Baumruk's complaint (1stTr.825,828,844). Before the meeting, Glenn knew that Baumruk had shot his wife and officers and Baumruk had been shot (1stTr. 827,840,851).

Glenn had a personal practice of carrying a tape recorder "for [his] own protection" in case any dispute arose later about what was said (1stTr.826-27,839). He did not record every conversation when he took a complaint, but decided to record this conversation as soon as he knew it was Baumruk, since Baumruk is "a high profile person" (1stTr.827,841). He waited until he saw Baumruk walking toward the interview room and then activated the recorder (1stTr.828,843). Baumruk did not know the conversation was being taped (1stTr.828).

Glenn started by eliciting background information from Baumruk and then asking about the dates of the missing newspapers (Comp.Ex.21-p.1-6). Baumruk had brought with him notes he had written about those dates (1stTr.828-29). When Glenn commented on Baumruk's nice handwriting, the following exchange occurred:

Baumruk: Well, shot in the head (in audible) before shot nine times
(inaudible).

Glenn: You were shot in the head?

Baumruk: Twice.

Glenn: What happened?

Baumruk: They were policemen in 1992, May the 5th in the courthouse across the street.

Glenn: What happened then?

Baumruk: They said I shot my wife in the courtroom.

Glenn: They say you shot your wife in the courtroom?

Baumruk: Yes.

Glenn: What did you say?

Baumruk: I don't know, don't know a fucking thing about it.

Glenn: You don't know anything about it?

Baumruk: No, I remember taking the Cross County Bus, that morning for a divorce hearing.

Glenn: Okay, so you remember going to court?

Baumruk: Yes, and the next thing I remember I was transferred to Regional Hospital to the old jail and that was 3 ½ months later.

Glenn: How traumatic, so your wife died?

Baumruk: Yeh, that's what the coroner's report says.

Glenn: I'm sorry to hear that.

Baumruk: I'm not.

Glenn: You're not.

Baumruk: No.

Glenn: Why not?

Baumruk: When she crunched her lips, I just shot her then.

Glenn: When she crossed her legs, you shot her then.

Baumruk: I should have.

Glenn: I take you all were getting a divorce then.

Baumruk: Yes, in fact the metal detectors were not up then.

Glenn: The metal detectors were not up then?

(Comp.Ex.21-p.6-8). After discussing the metal detectors, Glenn again Baumruk if he remembered the shooting:

Glenn: Well, I'm sorry to hear about it, but you don't remember that
huh?

Baumruk: Nope.

(Comp.Ex.21-p.9). They discussed the missing newspapers again, and Glenn again discussed the shooting:

Glenn: Okay, add 10/8, if you would please, how long were you in
the hospital Mr. Baumruk?

Baumruk: 3½ months.

Glenn: Who shot you, do you know?

Baumruk: Yes, police from Ferguson, uh Berkeley, Cook Valley,
Kirkwood, and I'm not sure where else, I was shot 9 times.

Glenn: It's a miracle you're alive.

Baumruk: Yeh, (inaudible).

Glenn: That's okay, but I have to ask this question, do you remember being shot?

Baumruk: No, two in the back of the head, one here and this.

Glenn: That's why you're missing your finger?

Baumruk: Here, here, here, and two in the leg.

Glenn: Wow.

Baumruk: And one in the back, I'm sorry, (inaudible) in the back of the head and the back of the shoulders, that's why I'm still alive maybe.

Glenn: That's why what?

Baumruk: I'm still alive, who can (inaudible) bullets that go this way.

Glenn: Oh, you think it's possible that when they were shooting you you turned around?

Baumruk: I don't know (inaudible) I don't know.

Glenn: Now, are you going to go on trial?

Baumruk: I don't know, the first time it was thrown out by the Supreme Court, and then (inaudible) prosecuting attorney to refile.

Glenn: To refile on you, what are you being charged with?

Baumruk: 18 felony counts.

Glenn: 18 felony counts.

Baumruk: Yes, 15 class A and 3 class B, I have a copy of it but I didn't bring it out with me.

Glenn: That's a lot of charges.

(Comp.Ex.21-p.14-15).

Glenn admitted that he neither read Baumruk his rights nor told him to only talk about the missing newspapers (1stTr.844-45). He knew he was getting into an area that did not pertain to the newspapers and that what Baumruk was saying could be used against him in court, yet he never stopped Baumruk to advise him (1stTr.852-53). He denied he hoped to get information about the shooting (1stTr.844). But he knew about the shooting from the news and was interested in talking to Baumruk (1stTr.838). He asked Baumruk whether he remembered being shot, because he was curious, "being a police officer" (1stTr.837). Glenn reported the conversation to his sergeant the same day (1stTr.864).

III. Use of the Statement Violated Baumruk's Fundamental Constitutional Rights

The State's use of Baumruk's illegally obtained statement violated three fundamental rights. First, it violated his Sixth Amendment right to deal with the State and its agents only through counsel. Second, it violated his Fifth Amendment right to freedom from compelled self-incrimination. Third, it violated Baumruk's right to due process under the Fourteenth Amendment and Article I, Section 10 of the Missouri Constitution.

A. Right to Counsel

A criminal defendant is entitled to assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1968); *see also* U.S.Const.,Amends. VI,XIV;Mo.Const.,Art.I,Sec.18(a). That Sixth Amendment guarantee attaches at “the initiation of adversary judicial proceedings against the defendant.” *United States v. Gouveia*, 467 U.S. 180, 187 (1984). It is “indispensable to the fair administration of our adversary system of criminal justice” and “vital” pretrial. *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

In *Massiah v. United States*, 377 U.S. 201 (1964), the defendant was charged and released on bail. A co-defendant let the government install a radio transmitter under his car’s front seat. *Id.* at 202-203. The defendant and the co-defendant spoke in the car, and the defendant made incriminating statements later introduced as evidence against him at trial. *Id.* at 203. The Supreme Court reversed, holding that the defendant, “was denied the basic protections of [the Sixth Amendment’s right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.” *Id.* at 206-207. The right to counsel applies to “indirect and surreptitious interrogations” as much as to jailhouse interrogations. *Id.*; *see also United States v. Henry*, 447 U.S. 264, 274 (1980) (government violated Henry’s Sixth Amendment right by “intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel”).

In *Brewer v. Williams*, 430 U.S. 387 (1977), the defendant surrendered to police for a ten-year-old girl's murder. He was read his rights, conferred with his lawyer, and was arraigned. *Id.* at 390-91. Before being transferred from one police station to another, police agreed he would not be questioned during the trip. *Id.* at 391. During the trip, Williams never showed a willingness to be interrogated. *Id.* at 392. Instead, he stated he would tell the whole story after speaking with counsel again. *Id.*

But the detectives driving Williams talked to him about the crime. *Id.* They knew that he was deeply religious and a former mental patient. *Id.* One told Williams that snow was coming and that the victim's body would be hidden if he did not show it to them soon. *Id.* The detective stated that they would be passing near the area, so they should stop. *Id.* at 392-93. He urged that the girl's family should be allowed a Christian burial for her, snatched away and murdered on Christmas Eve. *Id.* at 393. Williams led the detectives to the body and other evidence. *Id.* The evidence was used against Williams at trial, and he was convicted. *Id.* at 394.

The Supreme Court held that this process had violated Williams' Sixth Amendment right to counsel. *Id.* at 406. It stressed that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Id.* at 401. The Court rejected the State's argument that Williams had waived his right to counsel, holding that the State bore the burden of proving "an intentional relinquishment or

abandonment of a known right or privilege.” *Id.* at 404, citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Furthermore, the right to counsel does not depend upon a defendant’s request, and courts must “indulge in every reasonable presumption against waiver.” *Brewer*, 430 U.S. at 404.

Finally, in *Maine v. Moulton*, 474 U.S. 159, 162 (1985), Moulton and his co-defendant, Colson, were arraigned on charges of auto theft and given counsel. After receiving anonymous threatening phone calls about the charges, Colson agreed to talk to police about those charges. *Id.* Before he did so, however, he met with Moulton, who suggested they kill a State’s witness. *Id.* Colson went to the police again, confessed his involvement in the charged crimes and others, and agreed to cooperate in getting evidence against Moulton, including recording their conversations. *Id.* at 163-64. Although the police told Colson not to question Moulton, he repeatedly asked Moulton to refresh his memory of what they had done, pretending to have forgotten. *Id.* at 165-66. Moulton’s incriminating statements were used against him at trial. *Id.* at 166-67.

The Court reaffirmed the State’s affirmative duty to respect the right to counsel:

Once the right to counsel has attached and been asserted, the State must of course honor it.... The Sixth Amendment...imposes on the State an affirmative obligation to respect and preserve the accused’s choice to seek this assistance. We have...made clear that, at the very least, the prosecutor and police have an affirmative obligation not to

act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Id. at 170-71. The Court rejected the State’s argument that no violation occurred since Moulton sought out Colson to talk about the crimes. *Id.* at 174-75. Once charges were filed, Moulton was entitled “to rely on counsel as a medium between him and the State.” *Id.* at 176. The State has an “affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.” *Id.*

[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State’s obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

Id. The Sixth Amendment violation is established by “proof that the State ‘must have known’ that its agent was likely to obtain incriminating statements from the accused in the absence of counsel.” *Id.* at 176,fn. 12, citing *United States v. Henry*, 447 U.S. 264, 271 (1980); see also *Moran v. Burbine*, 475 U.S. 412, 428 (1986); *Manning v. Bowersox*, 310 F.3d 571, 576 (8th Cir.2002)(Sixth Amendment violated when government “deliberately created a circumstance ripe for its agents to elicit incriminating statements”).

This case is directly analogous to *State v. Dixon*, 916 S.W.2d 834 (Mo.App. W.D.1995). There, a DFS social worker interviewed the defendant about the charged crimes without Dixon’s lawyer present. *Id.* at 835. The State argued no

constitutional violation occurred since the State did not deliberately seek incriminating evidence. *Id.* at 837. The Western District held that, “If the state does more than merely listen, it acts deliberately.” *Id.*, citing *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Because the social worker affirmatively questioned Dixon about the accusations against him, she deliberately elicited his statements. *Dixon*, 916 S.W.2d at 837. Reversal was warranted even after a bench trial. *Id.* at 838.

Baumruk awaited trial on eighteen felony counts, and counsel had been appointed, when Officer Glenn went to the jail to take his statement about the missing newspapers (L.F.14). Glenn tape-recorded their conversation without Baumruk’s knowledge (1stTr.828). When Baumruk mentioned having been shot in the head, Glenn asked, “what happened” and when Baumruk did not answer fully, he asked, “what happened then?” (Comp.Ex.21-p.6). When Baumruk said, “They say I shot my wife in the courtroom,” Glenn asked, “What [do] you say?” (Comp.Ex.21-p.7). Glenn pushed Baumruk to continue to talk about the shooting, by repeating Baumruk’s answers as questions (Comp.Ex.21-p.6-8). Baumruk’s memory of the event was crucial to whether he was competent and/or mentally responsible, and Glenn asked three times, whether Baumruk remembered it (Comp.Ex.21-p.7,9,14). The State exploited Baumruk’s need to speak with police about the newspapers by “intentionally creating a situation likely to induce” Baumruk “to make incriminating statements without the assistance of counsel.” *Henry*, 447 U.S. at 274.

B. Right to Be Free From Compelled Self-Incrimination

“No person ... shall be compelled in any criminal case to be a witness against himself....” U.S.Const.,Amend.V,XIV;Mo.Const.,Art.I,Sec.19; *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). When the defendant challenges the admissibility of a statement, “the burden of showing admissibility rests, of course, on the prosecution.” *Brown v. Illinois*, 422 U.S. 590, 604 (1975). The State must prove, at least by a preponderance of the evidence, that the defendant waived his *Miranda* rights and gave his statement voluntarily. *Colorado v. Connelly*, 479 U.S. 157, 169 (1986); *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

The prosecution may not use statements “stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Id.* The defendant can waive his right to silence, but that waiver must be knowing, voluntary and intelligent. *Id.* “[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.” *Missouri v. Seibert*, 542 U.S. 600, 608 (2004).

“Custodial interrogation” is “questioning initiated by law enforcement officers” that occurs either when a person is formally arrested or under any other

circumstances where the suspect is significantly deprived of his freedom of action. *Miranda*, 384 U.S. at 444. In deciding whether a suspect is “in custody,” courts examine the extent of the restraints placed on him during the interrogation in light of whether a reasonable person in his position would have understood the situation to be one of custody. *State v. Werner*, 9 S.W.3d 590, 595 (Mo.banc 2000). A person is in custody even if he is in prison on another charge. *Mathis v. United States*, 391 U.S. 1, 4-5 (1968)(*Miranda* applies to questioning “which takes place in a prison setting during a suspect’s term of imprisonment on a separate offense”); see also *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984); *State v. Perkins*, 753 S.W.2d 567, 570-71 (Mo.App.E.D.1988) (defendant was “without question, ‘in custody,’ ... because at the time of the telephone conversation appellant was incarcerated for burglary and stealing charges”); *State v. Garrett*, 595 S.W.2d 422, 428 (Mo.App.S.D.1980).

“Interrogation,” for *Miranda* purposes, is “either express questioning or its functional equivalent.” *Rhode Island v. Innis*, 446 U.S. 291, 301-302 (1980); *State v. O’Toole*, 619 S.W.2d 804, 810 (Mo.App.E.D.1981). The functional equivalent of express questioning can be “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 302.

An accused can waive his Fifth Amendment right if he initiates communication, exchanges, or conversations with the police. *Edwards v. Arizona*,

451 U.S. 477, 484-85 (1981). But, while Baumruk initiated the conversation with Glenn, his purpose was solely to give Glenn details about his missing newspapers, not to discuss the facts of the charged crimes. After all, Baumruk was entitled to file a police report on what he perceived to be a crime. To the meeting, he brought notes about the missing newspapers and left his legal work in his cell (Comp.Ex.21-p.15). Baumruk reasonably believed that Glenn's purpose was solely to gather information on the missing newspapers.

Baumruk's largely inaudible comment that he had been shot in the head did not open the door to Glenn's questioning about the facts and Baumruk's memories of the shooting. Glenn had complimented Baumruk on his handwriting and Baumruk likely was trying to say that his handwriting had been better before he was shot in the head. But Glenn repeatedly asked what happened regarding the shooting (Comp.Ex.21-p.6). Glenn knew that he was getting into areas irrelevant to the missing newspapers and what Baumruk was saying could be used against him in court, yet he never stopped Baumruk to advise him (1stTr.852-53). After the conversation strayed from the shooting, Glenn moved it back, asking Baumruk again if he remembered (Comp.Ex.21-p.9). Glenn again returned the conversation to the shooting by asking how long Baumruk was hospitalized and again asking if he remembered being shot (Comp.Ex.21-p.14). The fact that Glenn recorded the conversation even though Baumruk was merely reporting the loss of several newspapers, and that Glenn wasted no time reporting the conversation to his

sergeant, revealed Glenn's expectation that the statement would be used against Baumruk.

The State cannot prove that Baumruk waived his right to counsel knowingly, voluntarily and intelligently, or that he gave his statement voluntarily. Absent specific *Miranda* warnings, the presumption of coercion in custodial interrogations is generally irrebuttable. *United States v. Patane*, 542 U.S. 630, 631 (2004). Allowing the State to use the illegal statement at trial violated Baumruk's Fifth Amendment right to freedom from self-incrimination.

C. Due Process

The statement also violated Baumruk's right to due process. U.S.Const., Amend.XIV,Mo.Const.,Art.I,Sec.10. "[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109 (1985), citing *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). Thus, even if a confession is voluntary, interrogation techniques employed can violate due process. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); also *Brown v. Mississippi*, 297 U.S. 278 , 285-86 (1936)(Due Process Clause prohibits States from using accused's coerced confessions against him).

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-

rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Spano v. New York, 360 U.S. 315, 320-21(1959). The “deliberate use of deception and manipulation” by the police is “incompatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means.” *Miller*, 474 U.S. at 116.

In *Walls v. State*, 580 So.2d 131 (Fla.1991), the defendant confessed involvement in two murders and was in custody awaiting trial. A correctional officer told him that anything he told her would be confidential and insisted he not tell his attorney. *Id.* at 132. The officer took detailed notes of Walls’ statements and behavior. *Id.* State psychiatrists later used those notes in concluding Walls was competent to stand trial. *Id.* The appellate court held that the State agent’s conduct violated due process and fraudulently interfered with the attorney-client relationship. *Id.* at 133-35.

IV. Reversal is Warranted

Because Baumruk’s statement to Glenn was obtained illegally, Judge Rauch should not have allowed the State to use it at all – the State’s experts should not have used it in forming their opinions as to competency or responsibility, and it should not have been the subject of any testimony pre-trial or at trial. In *Walls*,

the Florida Supreme Court determined that since the State violated the defendant's due process rights in obtaining information from him, it could not use "the fruits of that subterfuge for any purpose that will work to the detriment of the defense's case, including determination of competence or insanity." *Walls*, 580 So.2d at 134. "Any other conclusion would encourage the use of such subterfuges and run against every basic conception of fairness embodied within [the due process clause of the state constitution.]" *Id.* On remand, the State could not use any psychiatric examinations that relied at all on the illegally obtained information. *Id.* at 134-35. See also *United States v. Hinckley*, 672 F.2d 115, 132-34 (D.C.Cir.1982) (overturned on other grounds) (cannot use illegally obtained statement to determine sanity: "Were we to [let the statement be used to rebut the defense's claim of insanity], we would provide little or no deterrence of constitutional violations against defendants whose sanity is the principal issue in the case"); *People v. Ricco*, 437 N.E.2d 1097, 1101 (N.Y.App.1982) (detective took statement illegally to prove malingering; "it was no less a part of the People's case than was the charged criminal conduct per se" and should have been excluded).

Baumruk was prejudiced by Judge Rauch's refusal to suppress his statement to Glenn. The court's error is harmless only if the State can prove beyond a reasonable doubt that it did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967). Although the State did not present Glenn's testimony at trial, it used Baumruk's statement to him to show that Baumruk was competent to stand trial and had no mental disease or defect. On these issues, it is

impossible to find this error harmless beyond a reasonable doubt. *See State v. Fakes*, 51 S.W.3d 24, 35 (Mo.App.W.D.2001).

In her findings on competency, Judge Rauch recognized that a key issue was the degree to which Baumruk remembered the events immediately before and during the shooting (L.F.247-51). Two state experts found Baumruk competent to proceed, but three defense experts found that Baumruk could not render meaningful assistance to his attorneys, and hence was not competent, because he could not remember events leading up to and during the shooting (L.F.247). The court considered testimony by both Officer Glenn and Dr. Rabun regarding the illegally obtained statement (L.F.239,248,251). Her findings indicate that she considered the statement in her analysis: “This exchange with Officer Glenn indicates that Baumruk is able to recall the point when he shot his wife in the courtroom” (L.F.239,248). The State cannot prove beyond a reasonable doubt that the illegally obtained statement did not contribute to Judge Rauch’s finding of competency.

So, too, the State cannot prove that the jury did not consider the statement at trial. In rebuttal to defense evidence that Baumruk lacked mental responsibility for the shooting, Dr. Rabun testified that Baumruk’s statement to Glenn “suggested a memory for the actual instant that he shot his wife” (Tr.2402). Based in part on the statement, Rabun concluded that Baumruk was malingering, actually remembered the events, and had no mental disease or defect (Tr.2402-03).

This Court must reverse.

ARGUMENT VI

The court erred in finding Baumruk competent to proceed, making him stand trial, and sentencing him, thus denying Baumruk due process, freedom from cruel and unusual punishment, and not to be tried while incompetent, U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Sec.10, 21;§552.020, because Baumruk could not assist in his defense or testify in his behalf and hence was incompetent, in that he suffers from post-traumatic amnesia from being shot in the head twice, having portions of his brain removed, and undergoing medical procedures to alleviate the brain swelling.

Conviction of a legally incompetent defendant violates his due process right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, 172 (1975), citing *Pate v. Robinson*, 383 U.S. 375 (1966). “Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential for a fair trial, including the right to the effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.” *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). “No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.” §552.020.1.

A defendant is competent to proceed if he has (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and (2) a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 402 (1960). He is presumed competent and bears the burden of showing his incompetence by a preponderance of the evidence. *State v. Anderson*, 79 S.W.3d 420, 432-33 (Mo.banc 2002).

“The trial court’s determination of competency is one of fact, and must stand unless there is no substantial evidence to support it.” *Id.* at 433. This Court must accept as true all evidence and reasonable inferences tending to support the trial court’s finding. *Id.* A “mere disagreement among the experts does not necessarily indicate error.” *Id.*

Baumruk was shot twice in the head (Tr.1668). The force caused Baumruk’s brain to smack against the side of his skull, injuring the areas of the brain which affect the formation, storage, and retrieval of memory (1stTr.890-91;1stSupp.Tr.12). Doctors removed the bullet, part of the cerebellum, and other irreparably damaged tissue (1stTr.884,886). Later, Baumruk’s brain swelled from excess fluid which, “pushe[d] the brain against the skull casing” (1stTr.885; Comp.Tr.266). Doctors drilled into Baumruk’s brain and inserted a tube to drain the fluids, causing further damage (Comp.Tr.266-67). All experts agreed that Baumruk suffered brain damage from the gunshot wounds and surgeries (Comp.Tr.267).

I. The Competency Hearings

In January 1994, Judge Belt heard testimony from State's witnesses Drs. Peters and Gowdy and defense witnesses Drs. Parwatikar and Cuneo (1st L.F.166-67). They agreed that Baumruk suffered from amnesia regarding the time period from the shooting to some time afterwards, but disagreed as to his competency to stand trial (1stL.F.168). The court found that Baumruk suffered from organic personality disorder and organic dementia and lacked the capacity to understand the proceedings and assist in his defense (1stL.F.169-70).

The State hired Dr. Rabun to try to convince Judge Belt that he erred in finding Baumruk incompetent (1stL.F.172). It failed – in June, 1995, Judge Belt again found that Baumruk suffered from organic dementia and lacked capacity to understand the proceedings or to assist in his defense (1stL.F.173). Judge Belt also found no substantial probability that Baumruk would be mentally fit to proceed in the reasonably foreseeable future (1stL.F.173).

In 2000, Judge Seigel reconsidered Baumruk's competency. The State presented testimony from Drs. Rabun and Scott as well as eight lay witnesses (1stTr.243-866). Before the hearing, Rabun submitted his May, 1999 evaluation report, wherein he agreed that Baumruk suffered from amnesic disorder due to head trauma; and opined that Baumruk "will never recall all of the circumstances of the charged offense (Comp.Ex.1-p.14-15). He concluded that despite the mental defect, however, Baumruk was competent (Comp.Ex.1-p.18). But Rabun

warned that “Baumruk’s amnesia for the complete charged offense will interfere with his ability to testify on his own behalf and to disclose all of his thoughts and actions” (Comp.Ex.1-p.18).

The State was not satisfied with Rabun’s conclusion. It hand-picked people for him to interview and helped him locate them (Comp.Ex.2-p.24). By May, 2000, Rabun reversed his position, now concluding that Baumruk was faking his memory loss (Comp.Ex.1-p.55-56). Rabun asked Scott to conduct psychological tests to support his suspicion of malingering (1stTr.676). All tests showed that Baumruk was not malingering (1stTr.712,715,718-20,722-25).

The defense presented the testimony of Drs. Harry, Parwatikar, and Cuneo (1stTr. 869-984;1stSupp.Tr.1-220). Harry, a staff psychiatrist at Fulton State Hospital, concluded that Baumruk was incompetent because of amnesia regarding the events at issue; although he could understand the proceedings, he could not assist in his defense (1stTr.907). Parwatikar found that Baumruk had significant memory loss and diminished insight and judgment, and concluded that the brain damage caused “personality and memory change which will affect his ability to appreciate the functions of the adversarial system and impair his ability to assist his attorneys in his defense” (D.Ex.G-p.15-17,23). Cuneo found that Baumruk’s amnesia substantially impaired his ability to assist in his defense; Baumruk could not tell his attorneys what happened regarding the charged events (Comp.Ex.L-p.5). Judge Seigel found Baumruk competent to stand trial (1stL.F.757-59).

Finally, in 2005, Judge Rauch considered Baumruk's competence. She took judicial notice the 2000 competency hearing and also heard testimony of State's witness Dr. Reynolds and defense witnesses Parwatikar, Cuneo, Harry, and prior defense counsel, Larry Bagsby (Comp.Tr.2-3,7). Reynolds found that Baumruk suffered from dementia not otherwise specified, but was exaggerating his memory loss for the events at issue, and concluded he was competent to stand trial (Comp.Tr.97,100). Bagsby advised that Baumruk never helped his attorneys develop a defense; never related what occurred regarding the charged crime; never related his emotions in the weeks leading up to the crime; and never appreciated the seriousness of his predicament (Comp.Tr.238-42,246).

II. Judge Rauch Erred in Finding Baumruk Competent

Judge Rauch found Baumruk competent to stand trial (L.F.235-52). She acknowledged that while the experts agreed Baumruk had amnesia from his head trauma, they disagreed on its extent (L.F.247). She asserted that "amnesia does not impair defendant's ability to assist his attorneys" (L.F.249-50). Judge Rauch believed other witnesses could provide evidence of Baumruk's thoughts before and during the shooting, so Baumruk could proceed with a diminished capacity defense and present evidence in mitigation (L.F.250). That Bagsby could find no such evidence through other witnesses just meant that the diminished capacity defense might not exist here (L.F. 250). She denied that Baumruk could not assist

counsel and found that he could review the facts to accurately reconstruct his actions where his memory was lacking (L.F.216).

Baumruk acknowledges that “amnesia does not bar prosecution of an otherwise competent defendant.” *State v. Baumruk*, 85 S.W.3d 644, 648 (Mo.banc 2002). But while amnesia does not automatically render a defendant incompetent, courts must consider whether it hinders his ability to understand the proceedings or assist in his defense. *Davis v. Wyrick*, 766 F.2d 1197, 1202 (8th Cir.1985). Several factors provide guidance in this determination. See, e.g., *United States v. Andrews*, 469 F.3d 1113,1119 (7th Cir.2006):

First, the court must consider whether Baumruk had any ability to participate in his defense. *Id.* Baumruk could not help develop any type of diminished capacity or insanity defense, the only type of defense available here. Baumruk simply could not recall what he was thinking immediately before and during the shooting. Thus, he could not testify in his defense. He could be the only witness to those thoughts, since he made no statements immediately before or during the shooting that showed his state of mind. Baumruk never assisted his attorneys in developing a defense; never related any recollection of what occurred; and never related the emotions he felt in the weeks leading up to the crime (Comp.Tr.238-42,246).

Statements Baumruk made after the shooting did not accurately demonstrate his state of mind before or during the shooting. Dr. Rabun believed Baumruk could remember because he allegedly told Officer Glenn that, when Mary crossed

her legs, he shot her (Comp.Ex.21-p.8). But another State expert, Dr. Reynolds, conceded that Rabun relied on a faulty transcript, and the tape of the conversation did not indicate that Baumruk remembered the event (Comp.Tr.176,222-23). Baumruk's alleged statements made months after the shooting that Mary deserved to die showed his thoughts when he said the statements, not his thoughts at the time of the shooting. His statements well after-the-fact were unreliable in determining his actual emotions at the time of the shooting.

Second, the court should consider whether Baumruk's amnesia was temporary or permanent. *Andrews*, 469 F.3d at 1119. Baumruk's brain cells and tissue could not regenerate (1stTr.884). Rabun himself opined in 1999 that Baumruk "will never recall all of the circumstances of the charged offense" (CompEx.1-p.14-15).

Third, the court should consider whether the crime and Baumruk's whereabouts at the time can be reconstructed without his testimony. *Id.* Baumruk's defense was not alibi or self-defense; it was NGRI. The facts that made up that defense, *i.e.*, Baumruk's emotional state, could not be "reconstructed" without Baumruk's memory.

Fourth, the court should consider whether access to the State's files would help prepare the defense. *Id.* As with the first and third factors, the State's files would not assist Baumruk in developing his defense.

Fifth, the court should consider the strength of the State's case against Baumruk. *Id.* This factor, too, is inapposite. Baumruk conceded that he shot

Mary. The only issue was whether he was mentally responsible. That issue could not be determined accurately given Baumruk's memory loss.

Baumruk could not aid and assist his lawyer, because he could not relate his emotional state before and during the shooting, and that emotional state would determine the outcome of trial. In 1999, Rabun warned, "Baumruk's amnesia for the complete charged offense will interfere with his ability to testify on his own behalf and to disclose all of his thoughts and actions" (Comp.Ex.1-p.18).

Baumruk was denied due process and freedom from cruel and unusual punishment, because he was convicted and sentenced while incompetent. U.S. Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Sec.10,21;§552.020. This Court must reverse.

ARGUMENT VII

The trial court plainly erred in failing to intercede *sua sponte* and prevent the prosecution from improperly arguing during penalty phase closing argument, thereby denying Baumruk due process, a fair and impartial jury, fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.Art.I, Sec.10,18(a),21, because the prosecutor’s repeated, improper and excessive comments prejudiced Baumruk and resulted in manifest injustice, in that he expressed his personal opinion and implied knowledge of additional facts not on the record; and urged the jurors to vote for death so they could send a message to the police, the community, and Mary’s family.

An accused is entitled to a fair trial, and the court and prosecutor must see that he gets one. *Berger v. United States*, 295 U.S. 78, 88 (1935); *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo.banc 1947); *Rule 4-3.8*. The trial judge must maintain courtroom decorum. *United States v. Young*, 470 U.S. 1, 10 (1985). She 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). She must exercise 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).

As the State's representative, the prosecutor must remain impartial, as his role is not to seek conviction at all costs but to seek justice. *State v. Storey*, 901 S.W.2d 886, 901 (Mo.banc 1995). His attempts to "inflame the passions and prejudices of the jury by reference to facts outside the record are condemned by ABA standards and constitute unprofessional conduct. *State v. Burnfin*, 771 S.W.2d 908, 912 (Mo.App.W.D.1989). He "may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." *Id.*

"The touchstone of due process analysis is the fairness of the trial." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). 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). It may be so outrageous that it violates due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8th Cir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364 (8th Cir.1995).

Closing arguments in capital cases must receive a "greater degree of scrutiny" than in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Trial courts have wide discretion in controlling closing arguments. *State v. Newlon*, 627 S.W.2d 606, 616 (Mo.banc 1982). Statements made in closing amount to plain error if they have had a decisive effect on the jury. *State v. Pagano*, 882 S.W.2d 326, 334 (Mo. App.S.D. 1994); Rule 30.20. An argument has a decisive effect when it is reasonably probable that, absent the argument, the

verdict would have been different. *State v. Kee*, 956 S.W.2d 298, 303 (Mo.App.W.D.1997).

I. Facts Outside the Evidence

The prosecutor reached outside the record and argued for death based on his unsworn testimony: “[Baumruk] knew what he was doing was wrong, and he had to plan it to the inth degree so that he could succeed in becoming one of the biggest murderers we’ve ever seen” (Tr.3043). He continued: “Why is it that whenever somebody commits a horrible, horrible, terrorizing, horrendous act like this is, that’s why it’s noteworthy.... Why is it every time you have one of those acts, it must be something about mental disease, mental illness?” (Tr.3070-71).

This argument neither conformed to the evidence nor was based on reasonable inferences fairly drawn from the evidence. *State v. Hill*, 866 S.W.2d 160, 164 (Mo.App.S.D.1993). While counsel has wide latitude in closing, his argument must not go beyond the evidence presented, misstate the evidence, or introduce irrelevant and prejudicial matters. *State v. Rush*, 949 S.W.2d 251, 256 (Mo.App.S.D.1997).

When a prosecutor argues facts outside the record, prejudice is created, because the jury likely gives his 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.*; see also *ABA Standards for Criminal Justice* 3-5.8 (3d ed.1993).

In *Storey*, the prosecutor argued, “This case is about the most brutal slaying in the history of this county.” *Id.* Since no evidence supported the argument, it was improper. See also *Shurn v. Delo*, 177 F.3d 662, 665-67 (8th Cir.1999) (improper and prejudicial for prosecutor to emphasize his position of authority and personal opinion on propriety of death sentence).

This prosecutor repeatedly reached outside the record. As in *Storey*, no evidence supported the State’s assertion that Baumruk was trying to “becom[e] one of the biggest murderers we’ve ever seen” (Tr.3043). Its impropriety is compounded by its repetition – in guilt phase opening, the State urged the jury to believe that Baumruk was “on his way to trying to be one of the biggest mass murderers in the history of this area” (Tr.1003). The argument reached outside the evidence to convince the jury that Baumruk, even though he had killed just one person, was, in mind and intent, a mass murderer who deserved to die.

Additionally, no evidence supported the prosecutor’s assertion that whenever someone commits a horrible act, he claims to be mentally ill (Tr.3070-71). This argument urged the jurors to rely on the prosecutor’s knowledge and experience of defenses he typically encountered in these “horrible, horrible, terrorizing, horrendous” cases. The argument reached outside the evidence to trivialize Baumruk’s only defense.

II. “Send a message”

The prosecutor argued that the jury’s sentence would “send messages out into the community, and those messages are going to go to a lot of people” (Tr.3077). The message would go to each officer Baumruk assaulted, “people who as I said before are heroes in my eyes” (Tr.3077). The verdict must send the “right message” to the officers “that we appreciate what you do, that your sacrifices, you’re willing to take risks, that we appreciate that and we understand” (Tr.3078). He told the jurors to send the “right message” to Mary’s elderly father and her daughters, to show that the jurors understood (Tr.3078-79).

Baumruk recognizes that this Court has held that a prosecutor may argue that the jury should “send a message” that criminal conduct will not be tolerated or should be severely punished. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo.banc 1994). But it is improper to inflame the jury’s passions or prejudice by implying that its role is something other than as the impartial arbiter of the facts in the case before it. “The purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.” Standards for Criminal Justice, Standard 6-1.1 (A.B.A.2000). A prosecutor must “refrain from argument which would divert the jury from its duty to decide the case on the evidence.” *Id.*, Standard 3-5.8(d).

The jury’s “function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.... Information regarding the

consequences of a verdict is therefore irrelevant to the jury's task." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Considering the consequences of a verdict "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id*; *Payton v. State*, 785 So.2d 267, 270-71 (Miss.1999). "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir.1991); *People v. Johnson*, 803 N.E.2d 405, 419 (Ill.2003).

III. A New Trial is Warranted

The State's arguments violated its sacred obligation "not merely to win a case, but to see that justice is done, that guilt shall not escape nor innocence suffer." *Burnfin*, 771 S.W.2d at 914, *citing Berger*, 295 U.S. at 88; see also *Storey*, 901 S.W.2d at 901. Its intent was solely to arouse the jury's passions and prejudices. This was especially detrimental in this capital case, "where there are unique threats to life and liberty." *State v. Barton*, 936 S.W.2d 781, 783 (Mo.banc 1996). The State's repeated, intentional violations during both closing arguments deprived Baumruk of due process, a fair and impartial jury, fair and reliable sentencing, and freedom from cruel and unusual punishment, under the state and federal constitutions. U.S.Const., Amends. V, VI, VIII, XIV; Mo. Const. Art. I, Sec. 10, 18(a), 21. This Court must reverse.

ARGUMENT VIII

The trial court erred in sentencing Baumruk to death, because the State failed to plead in the indictment those facts that the jury was required to find beyond a reasonable doubt before Baumruk could be sentenced to death and thus never charged him with the only offense punishable by death in Missouri – *aggravated* first degree murder. The court’s error violated Baumruk’s 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. Because Baumruk was sentenced to death for a crime for which he was never charged, his death sentence must be vacated.¹⁴

In *Apprendi v. New Jersey*, 530 U.S. 466,484 (2000), the Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. The Fifth, Sixth, and Fourteenth Amendments demand that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id.* at 476,490; *Ring v. Arizona*, 536 U.S. 584,609 (2002); *United States v. Booker*, 543 U.S. 232 (2005).

¹⁴While this Court has rejected these arguments previously, they are raised here to preserve them for federal review.

Missouri statutes expressly provide that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the jury finds that the State has proven certain facts beyond a reasonable doubt. §565.030.4(2),(3); *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003). For death-eligibility, the State must plead and prove at least one statutory aggravator; prove that the evidence in aggravation warrants a death sentence; and prove that the evidence in aggravation outweighs the evidence in mitigation. §565.030.4(2),(3); *Whitfield*, 107 S.W.3d at 258-61.

Thus, while the “form” of Missouri’s statutory scheme, and §565.020 appear to create only one crime – first-degree murder punishable by either LWOP or death – the “effect” of the statute is quite different. In reality, Missouri has both the offense of “unaggravated” first-degree murder, for which the only authorized punishment is LWOP; and the offense of “aggravated” first-degree murder, for which the authorized punishments include both LWOP and death.

Steps one, two, and three of Missouri’s death penalty procedure are, in function and effect, elements of the greater offense of aggravated first-degree murder. To pass constitutional muster, these facts must be pled in the charging document and proven beyond a reasonable doubt. *United States v. Allen*, 406 F.3d 940 (8th Cir.2005); *State v. Fortin*, 843 A.2d 974 (N.J.2004). The State failed to plead in the indictment (L.F.55-68) those facts that the jury must find beyond a reasonable doubt before Baumruk could be sentenced to death. Thus, it never charged him with the only offense punishable by death in Missouri – *aggravated*

first-degree murder. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978). Counsel fully preserved this issue (L.F.637-53,813). This Court must vacate Baumruk's death sentence and impose a sentence of life without parole.

CONCLUSION

Based on Arguments I-VII, Mr. Baumruk respectfully requests that the Court remand for a new trial. Based on Argument VIII, he requests that the Court resentence him to life without parole.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, along with a floppy disk containing the brief and two copies of Appellant's Appendix, to: The Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 28th day of January, 2008.

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 2007, 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 29,520 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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