

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
RESPONDENT,)
)
VS.) No. SC89699
)
RICHARD D. DAVIS,)
)
APPELLANT.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY,
DIVISION 16, HONORABLE MARCO ROLDAN, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

By amended information, the state charged appellant Richard Davis with Count I-first degree murder; Count II-kidnapping; Count III-felonious restraint; Count IV-sexual abuse; Count V-forcible sodomy; Count VI-forcible sodomy; Count VII-forcible rape; Count VIII-forcible sodomy; Count IX-forcible rape; Count X-kidnapping; Count XI-felonious restraint; Count XII-forcible sodomy; Count XIII-forcible sodomy; Count XIV-sexual abuse; Count XV-forcible sodomy; Count XVI-forcible sodomy; Count XVII-forcible rape; Count XVIII-forcible sodomy; Count XIX-forcible rape; Count XX-first degree assault; Count XXI-first degree assault; Count XXII-sexual abuse; Count XXIII-first degree assault; Count XXIV-first degree assault; Count XXV-first degree assault; Count XXVI-forcible sodomy; the state also charged Rick with being a persistent sexual offender and a persistent offender, §558.018.

The jury acquitted Rick of Count XXIV and found him guilty of all other Counts as charged.

The trial court sentenced Rick to death on Count I. On the other counts, the court sentenced Rick as follows: as a persistent offender, to terms of 15 years on Counts III and XI, and terms of life imprisonment

on Counts II, IV, X, XIV, XX-XXV, and XV; as a persistent sex offender, to terms of life imprisonment on Counts V-X, and XV-XIX and XVI. The trial court ordered Counts II, III, and IV to run concurrently with each other but consecutive to all other counts; Counts V, VI, VII, VIII, and IX to run concurrently with each other but consecutive to all other counts; Counts XII, XIII, XV, XVI, XVII, XVIII, XIX, and XXVI to run concurrently with each other but consecutive to all other counts.

This Court has jurisdiction. Art. V, Sec. 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

On Mary 14, 2006,¹ Jack McGhee went fishing at Sni Creek near the junction of Highways FF and D in Lafayette County (Tr.3548-51; StEx's 4 and 5).² At the third spot McGhee tried, he saw a hole in the ground with a shovel in it (Tr.3554). He saw no other person in the area during the entire time he was at fishing Sni Creek (Tr.3554-56).

McGhee went back the next day to look at the hole and found it filled with dirt (Tr.3557-58). Using a stick, he began digging (Tr.3558).

¹ Unless otherwise indicated, the events involved in this case occurred in 2006.

² Appellant's citations to the record are as follows: Tr. – Trial Transcript; LF – Legal File; StEx – State Exhibit; DefEx – Defense Exhibit. The record comprises numerous exhibits including videotapes in which the people are referred to, at different times, by first name or last name or nicknames. For clarity, intending no disrespect to those involved in this case, appellant attempts in this brief to initially provide the full name of the person testifying or referenced in the record and subsequently use only the first or last name of that person (*e.g.*, “Richard Davis,” then “Rick” or “Ricky” or “Davis”).

About 9” down, there was a human hand (Tr.3559). He left, told the Bates City police, and went back to the heavily wooded site with Bates City Police Chief McCorkle (Tr.3558-60, 3566). McCorkle saw human remains and summoned the Lafayette County Sheriff’s crime scene officers (Tr.3567-68).

Marsha Spicer’s nude body was in the “grave” (Tr.3580,3584; StEx’s 11-14, 328). An autopsy done by pathologist Thomas Gill showed discoloration of Spicer’s body consistent with soaking in bleach; injuries to her face consistent with being dropped, post-death, on a flight of stairs; and finger marks and injuries at her neck and hemorrhaged “strap muscles” consistent with strangulation (Tr.3588-99, 3603-04; StEx’s 15-19, 21-22,24). Strangulation cuts off blood flow and starves the body of oxygen; loss of sphincter, bowel, and bladder control is consistent with near-death (Tr.3601-05, 3612-13).

The nature of Spicer’s injuries indicated multiple episodes of strangulation; these did not kill her (Tr.3604-05). Her blood contained trace amounts of cocaine and Trazodone—a sedative that would have decreased her ability to resist (Tr.3610). Dr. Gill initially found that Spicer died of strangulation; after seeing videotapes recording her death, Dr. Gill found Spicer’s death was caused by the combined effects of strangulation and smothering (Tr.3612). Richard Davis’ statement to

the police – that Spicer was smothered – was consistent with Dr. Gill’s findings (Tr.3622).

On May 17th, as part of the investigation of Spicer’s death, Donald Hammond, a Lafayette County Sheriff’s Department detective, went to speak with people at the apartment complex where Spicer lived (Tr.3678, 3695). Lorie Dunfield, a friend of Spicer’s told Hammond about an incident in February that she had not reported at that time (Tr.3642): a man had called her and identified himself as Athena Fagan’s cousin; Dunfield knew Fagan (Tr.3633-34, 3679).

The man, “David,” said Athena had given him Dunfield’s number and he could get her “hooked up with women” for “sexual things” (Tr.3655,3679). Dunfield agreed; the man (whom Dunfield identified at trial as Richard Davis) picked her up and took her back to his apartment (Tr.3635-36). They ate lunch and talked; then they went into the bedroom and Rick showed her a video of him, Athena, and an unknown woman having sex; then Dunfield and Rick had sex (Tr.3638,3680). Afterward, he asked if Dunfield “wanted to participate and his fantasy was to start killing women” (Tr. 3639). “He wanted to have sex with a woman while she was giving [Dunfield] oral sex and to choke her out or to suffocate her from behind” (Tr.3639,3681). And he wanted to videotape it (Tr.3639,3681).

Dunfield took Detectives Hammond and Alkire to Davis' apartment at 1125 West Truman Road and pointed out Rick's third floor apartment and his light blue Toyota (Tr.3646,3682,3697). Because the apartment was in Independence, the detectives obtained help from the Independence Police (IPD) in contacting Rick (Tr.3655,3683-84).

That evening, Detective Hammond and IPD Sgt. Turner and Officer Poletis went up to Rick's third floor apartment; Sgt. Turner knocked on Rick's door (Tr.3684). Two officers and Detective Alkire remained in the parking area at the bottom of the stairs (Tr.3657-58,3684,3699).

Rick answered the door; Turner told Rick there were some detectives who wanted to talk to him and asked if they could come in (Tr.3659). Rick "physically backed up shortly and said we could come in" and the three officers entered the apartment (Tr.3659). Turner asked about searching the apartment to check for other people; Rick said "that's fine but my girlfriend's here and she's naked" (Tr.3659). Turner walked into the living room and Rick's girlfriend, who identified herself as Dena Riley, walked out of the bedroom wearing just a pair of panties (Tr.3659,3661). Turner told her to cover up or get dressed (Tr.3659-60). Dena dressed and sat on the couch (Tr.3660). Hammond was in the kitchen with Davis, and Turner checked the apartment to see if anyone else was inside (Tr.3660-61). In the bedroom, on a stand next to the

bed, was a video camera plugged in and pointed at the bed (Tr.3661). Officer Poletis, in the living room, showed Turner a note titled “choices” that appeared to say things about “choke to overcome inner voice” and “offend against my victim” ... “in a sexual way” (Tr.130-32).

Hammond, in the meantime, was in the kitchen with Rick (Tr.3685). Hammond said Rick’s name had come up in an investigation and asked Rick to come to the IPD so they could “clear things up” (Tr.3685-86). Hammond said it was a homicide investigation and that Rick and Athena’s names had come up (Tr.3686-87).

Rick “said he’d like to call his attorney to see if he should” talk with the police, and Hammond told him to go ahead and call (Tr.3687). While Rick was making his call, Turner told Hammond about the video camera in the bedroom (Tr.3662,3687).

The officers decided to “secure the apartment” while they sought a search warrant (Tr.3688). They told Dena and Rick that they had to leave but could take some personal items, including medicine, with them and they could return the next morning after the search (Tr.3688). Someone got Rick’s and Dena’s cell phone numbers to be able to notify them when they could return to the apartment (Tr.3689). Rick and Dena were not allowed to take their cars and had a friend, Sherri Brisbin, pick them up (Tr.3690).

The judge denied the application for a search warrant finding insufficient evidence of a connection between Rick and Marsha (Tr.3690). Hammond and Alkire tried to call Rick and Marsha but did not reach either (Tr.254-55,3691).

The following day, after more information had been received, another attempt was made to obtain a search warrant (Tr.3692). Late that night, the judge signed a warrant (Tr.3693).

The search warrant was executed early the next morning – May 19th (Tr.3693). During the search of the apartment, IPD crime scene investigator Linda Rosewarren seized the video camcorder in the bedroom and a number of tapes including two mini cassette tapes – Items 26 and 31 (Tr.3713-17;StEx’s 65 & 66). That afternoon, Rosewarren used the camcorder to view StEx 65 – Item 26 (Tr.3720). It showed a man and woman raping another woman (Tr.3721). After watching the entire video, Rosewarren contacted the detective bureau; several detectives watched the tape then took it, the camcorder, and the other tapes not yet viewed (Tr.3721). Rosewarren returned to Rick’s apartment that afternoon and seized a number of items shown in the video including a roll of duct tape and numerous pieces, prescription pill bottles, A&W cans, a digital camera, and skin lotion (Tr.3722-27).

IPD Detective John Howe determined that the 68-minute tape

known as Item 26 – from which he created a DVD marked as StEx 100 – was filmed in Rick’s apartment on May 14, 2008, at 3:25 a.m. (Tr.3749-52). The tape depicted Rick and Dena forcing Marsha Spicer to engage in oral, anal, and vaginal sex acts (Tr.3753-54).

Item 31, an 81-minute tape from which Det. Howe created a DVD, StEx 101, was filmed in the bedroom of Rick’s apartment on April 8th at 11:34 pm (Tr.3756-57). The tape depicted Rick and Dena engaging in forced sexual acts with an unknown woman whose hands were bound behind her back with yellow “speaker” wire (Tr.3758). On May 21st, investigator Myers returned to Davis’ apartment and recovered yellow wire and a receipt with “Marsha” and a phone number written on it (Tr.3765-66). A Blockbuster receipt for Davis’ rental of the video “Natural Born Killers” was recovered from his apartment on May 22nd (Tr.3863-65).

Detective Howe “pulled” a “still” photo of the unknown woman from the tape to use in an “attempt-to-locate” flyer (Tr.3759). He later learned the unknown woman was Michelle Huff Ricci (Tr.3762).

Rick and Dena were arrested in Barton County on May 25th (Tr.3802). A red truck they had been driving had crashed in a ditch (Tr.3793-94). Dena, bloodied and not fully conscious, was taken to the hospital (Tr.3815-16). Rick was taken to a hospital in Lamar and, later

that day, to the Truman Medical Center in Independence (Tr.3816,3833-34).

On May 26th, Rick was booked into the Independence Jail (Tr.591). The next afternoon, May 27th, he asked a jailer if his girlfriend was dead and was told he would have to talk about this with the detectives (Tr.598-99). Shortly afterward, Detectives Seever and Rapp spoke to Rick in the jail's interview room (Tr.3885-86). Seever advised Rick of his rights and Rick signed form waiving those rights (Tr.3886-88). In a series of statements beginning that day and continuing through May 29th, Rick provided the IPD detectives with information and evidence concerning the offenses he committed against Spicer and Ricci (Tr.3890-3954). Recordings of portions of these statements were introduced at guilt phase as StEx's 220, 221, 222, 223, 225.

In his first statement, StEx220, Rick said that his cousin Athena set him up with Marsha Spicer. Rick and Dena called Marsha, picked her up, and brought her back to their apartment so the three of them could have sex. Marsha wanted money or dope for sex. Rick had never talked to Marsha before that night.

Rick was drinking and Dena "was on that other crap." They got carried away. Marsha had consensual sex with Rick but didn't want to have sex with Dena. Marsha started to leave; Rick blocked her

way. Dena grabbed her by the hair and threw her on the bed, and Rick tied her up with plastic ties. Dena tried to put duct tape on her mouth but it didn't stick. Rick had sex with Marsha again – oral, anal, vaginal – and Dena had sex with Marsha also. Dena was doing “Meth” and would stop having sex with Marsha to shoot more dope. Rick was drinking; it was late. They kept Marsha at the house for about a day.

Dena made Marsha “perform oral sex on her” while Rick held her. When Dena was finished, Marsha was “gone.” Rick denied choking Marsha. He said that's what “freaked [them] out.”

Rick put Marsha in the bathtub and poured bleach on her. He and Dena didn't know what to do. They knew they would be in trouble; Rick decided to put Marsha's body at a place in Lafayette County where he went fishing. Rick went there and dug a hole, and Dena pretended to fish. He returned to his apartment and wrapped Marsha's body in a plastic bag and a rug. Then he and Dena went back to Lafayette County. Rick put Marsha's body in the hole.

Afterward they “trashed” “everything” in City Park. Rick denied knowing anyone named Michelle.

On the night the police came to his apartment, Dena's ex-lover, Sherri, picked them up in a truck. They spent the night with a friend

of Rick's. The next day, Rick and Dena went to his Doug's house and took a black truck belonging to Doug and drove to DeSoto, Missouri to see Rick's ex-wife. After two or three days they went to visit Rick's friend, Susan, in Perryville. The police arrived while Rick and Dena were there and they hid until the police left.

Using back roads they eventually reached Interstate 70 and returned to Doug's house in Kansas City where they spent the night. The following day they took a red truck belonging to Doug and drove around all night. They had read an article in the Kansas City paper saying they "were wanted in the Marsha Spicer case."

Rick said that what was on the tape was him "just doing what [he] wanted." He was excited. He said he "honestly couldn't remember choking" Marsha. Rick said Dena was sitting on Marsha's face, and Marsha went limp and just stopped breathing. He and Dena tried to help her: they used cool water, they slapped her to try to wake her up.

Rick admitted he may have hit Marsha at the beginning – possibly in her ribs. He said initially he had vaginal, consensual sex with Marsha; he also had oral sex and anal sex with her. He "probably" got upset when she didn't want to have oral sex.

When Rick told Marsha he wanted her to "go down on Dena," she

said she wanted to get high first. Dena just started kissing Marsha; Marsha said she wasn't into that and wanted to leave – she had thought there would be drugs and wasn't getting what she expected.

Marsha left the bedroom and called somebody on her cell phone then went back to the bedroom. She wanted Rick and Dena to figure out where they could get drugs. Rick and Dena decided they would just have sex with Marsha and pay her later.

Rick told Marsha to “shut up” and slapped her. Rick tied her up and turned on the video camera. She was scared. Dena sat on her face. Rick said it didn't seem real when Marsha stopped breathing. He thought it might be some pills they'd taken – before they went into the bedroom, everyone had taken adavan, vicadin, or colonapan – and threw her in the shower to see if that would wake her up. He left her sitting in the tub with the water running.

StEx 221: Marsha was in tub and Davis poured bleach on her. Marsha was not bleeding; when Davis carried her out on the steps, she fell out of the bag he'd put her in and hit her head.

Rick and Dena argued about what went wrong. Dena didn't realize she had suffocated Marsha. They were shocked about what happened. They had done this before. They worried about what to do and whether to tell anyone.

After burying Marsha they went back home, then to Dena's mom's for mother's day. They didn't tell anyone what had happened. They did tell Susan, in Perryville, "in a roundabout way, that they had killed someone.

The detectives showed Rick a picture of a woman; he denied knowing her or having sex with her. The detectives said they had a video of Rick having sex with her while she was tied up – the same as with Marsha. Rick asked if her name was Angie. The detectives asked what happened to her and then said they knew what happened because they had talked to Dena.

The detectives asked Rick, "What's 'smotherfucking'? Who says that." Rick shook his head and denied seeing the girl in the picture. He said this was the first time he'd ever heard "smotherfucking." The detectives asked Rick about movies he and Dena had rented. Rick knew about "Mickey and Mallory" and the detectives asked if he and Dena were trying to pattern their lives to that.

Rick admitted he and Dena had watched the movie together.

He continued to deny knowing the woman in the photo.

The detectives said Dena had told them about what she and he had done. They told Rick that the medical examiner said Marsha didn't die from someone sitting on her – someone strangled her.

Rick eventually admitted he knew the girl in the picture and that he'd had sex with her. He met her six to eight weeks earlier when he saw her walking down the street and started talking to her. They agreed Rick would "get her high" and in exchange she would give him sex. She got in his car and they went back to Rick's house. He had told her they would "party" and engage in a "threesome."

At the apartment, Rick spiked the woman's drink with "5 or 6" vicodan pills and he got pretty drunk. He and Dena planned to have sex with the woman. The spiked drink started taking effect; she had consensual sex with Dena in the bedroom. About an hour later, Rick started having sex with the woman and tied her with wire. She got scared of him and Dena. He turned her onto her stomach and had different kinds of sex with her; he and Dena had sex with her at the same time. Dena sat on her face and hit her. They kept her there and had sex with her off and on for hours – probably a day and a half – by keeping her drugged with pills – Trazadone. She was not tied up the entire time. He hit her at different times.

Rick told the detectives his fantasy was watching Dena be in control and he fulfilled this fantasy. Things had never reached this point with other girls.

Rick and Dena decided the girl would probably tell someone

about what they had done to her if they let her go. Dena tried more than once to “smotherfuck” the girl – by sitting or straddling her face and pushing down with all her weight until orgasm – but the girl struggled too much. During some of Dena’s attempts Rick had sex with the girl.

StEx 222: Rick denied strangling Marsha. He said she died while giving oral sex to Dena when Dena smothered her by sitting on her face and squeezing Marsha with her thighs. Rick, between her legs, knew there was a good chance she would die and watched. It didn’t take long; Dena stayed on Marsha until Rick told her Marsha wasn’t breathing. Rick said it wasn’t filmed because they were out of film.

They were excited until Marsha quit breathing. They didn’t call 911 because this was planned; they knew Marsha would not leave the apartment alive. They thought if this didn’t work, they would “hot shot” her with dope. It happened fast.

Davis remembered forcing himself on Marsha – holding her head onto his penis and rolling over on her and that she had trouble breathing. He didn’t think he could have smothered her that way. She was scared. He didn’t think he could have suffocated her.

StEx223: Using a map, Rick showed the detectives the route he and Dena from the time they left his apartment on the 17th until

they were arrested in Barton County.

StEx225: Rick offered to tell Det. Rapp what he and Dena did with Marsha's clothes and the duct tape they used on her. He said he could show the detectives where he and Dena had discarded all the evidence pertaining to Marsha and described where they had discarded it.

Rick said that he had put Marsha into the bathtub about 20 minutes after she stopped breathing. Dena got off Marsha and began playing a video game, "pogo," on Rick's computer.

After putting Marsha in the tub, Rick turned the shower on and let it run for about an hour. During that time, Dena went through Marsha's purse, and they talked about how they had "fucked up."

Then he put in the plug. After the water ran for an hour, Rick plugged the tub, filled it up to about 8 inches, and poured in some bleach. Dena said it would "cover up" any DNA. He left Michelle in the bleach for about 10 hours.

In the meantime, he and Dena went to his nephew's graduation party. On the drive home, they talked about what to do with Marsha; they talked about burning her but decided to bury her.

Early the next morning, about midnight, Rick drained the water from the tub, wrapped Marsha's body using plastic, a trash bag, and an old rug. He tried to sleep, but couldn't.

He woke Dena and carried Marsha down the steps and her head slipped out of the bags and bumped on the steps. Rick stuffed her into the rug and put her in the Toyota trunk.

He described, in detail, burying Marsha at Sni A Bar Creek and provided details about discarding evidence including the rug, plastic bags, plastic, duct tape, things from his car and other evidence. Afterward, he discarded and other evidence. They arrived back at the apartment at about 5:00 a.m.; it was starting to get light. They cleaned the house and got rid of the vacuum cleaner. The detectives talked with Rick about the movie Natural Born Killers. Rick said he'd seen it with Dena.

The following day, the detectives took Rick out to help them locate the items of evidence he had discarded (Tr.3908-09;StEx273). That night, Rick told the detectives that he had hidden tapes showing Marsha's death at Winntech where he worked (Tr.3908-09). Rick drew a map showing the location of the tapes at Winntech (Tr. 3909-10). He told the detectives that he knew he'd hurt a lot of people and let his family and friends down (Tr.3946). He apologized to the

victims, their families, and their friends (Tr.3947). Rick said the tapes at Winntech was the last bit of evidence and he wanted to give it up; it was his decision (Tr.3947).

At the close of evidence, the state played excerpts from the Winntech tapes (StEx's 304 and 305). StEx 304 contained excerpts from the videotapes of Rick and Marsha sexually assaulting Michelle Ricci. StEx 305 contained excerpts from the videotapes of Rick and Marsha sexually assaulting, and killing, Marsha Spicer.

The jury returned verdicts finding Rick not guilty of Count 24 and guilty of all other Counts as charged (LF5214-39).

At penalty phase, state's witness Tammy Butler testified that in 1987, when she was 27 years old, she was driving home one evening, she saw a man by the side of the road with his car hood up (Tr.4289-91). The man was Rick (Tr.4293). He asked for a ride to his home, and she gave him a ride (Tr.4291). Rick directed her to a deserted area, then raped and sodomized her and hit her (Tr.4292-96). He had a knife and threatened to kill her (Tr.4296). Rick pled guilty to forcible rape and forcible sodomy and was sentenced to a term of 25 years (Tr.4301-02).

The state played StEx 505 – taken from Rick's videotaped interrogations that had not been played at guilt phase. In this

excerpt, Rick described how he and Dena had gone to Kansas to see two women who believed, incorrectly, that they were his step-sisters. He stayed with one sister, Jodie, and her family, overnight. The next day Jodie, her husband, and her son and daughter took Rick and Dena to visit the other sister, Tessie, in Pittsburg, Kansas. They decided to get something to eat, and Jodie's little girl, Josie, drove with Rick and Dena. Everyone else went to a pizza place, but knowing his picture had been in the Kansas City paper, Rick opted for the McDonald's drive-through. Then he and Dena drove off; Josie was still with them. They drove back into Missouri and, in a little town, drove off the road and onto a field. Rick's statement described in detail how they sodomized Josie. Dr. Jeffrey Wall testified about Josie's injuries and surgically repairing them (Tr.4441-50).

The state also played StEx 595 - another portion of Rick's interrogation that the jury had not heard at guilt phase. In this excerpt Rick told the detectives about killing Michelle Ricci by covering her mouth and nose with his hand until she stopped breathing. He told the detectives that he later burned her body. Rick also provided additional details about raping and sodomizing Josie.

Cory Patterson, a correctional officer at the Jackson County jail, testified that when Rick was on the mental health ward, he had

assaulted another inmate (Tr.4364-76).

Rick's former girlfriend, Vicki Gunn, his friend Hugh Marsh, and his sister, Yvonne Hunter, testified in his behalf at penalty phase (Tr.4473-4518). Psychologist Steven Mandracchia evaluated Rick to assess his mental condition – then and at the time of the offenses – and to “assess general background and developmental issues that may have contributed to the charged offenses (Tr.4571-72). This evaluation included an assessment of Rick's sexual development (Tr.4572). Dr. Mandracchia found “the lack of interpersonal connection” and physical abuse that existed in Rick's family when he was growing up, and “the nature and range of sexual experiences beginning at a very early age” in his life “striking” (Tr.4574). Normal human development depends on children, from an early age, having “positive relationships with those around them” (Tr.4575). Both the records Dr. Mandracchia reviewed and his interviews showed Rick's family experiences “laden with pretty harsh physical abuse, inconstant adult figures, and sexual abuse” (Tr.4576). By age 12, Rick had begun to run away and had been referred to the juvenile court (Tr.4576). Rick's stepdad admitted beating Rick (Tr.4576). On three separate occasions, between ages 12 and 14, Rick was admitted to the Western Missouri Mental Health Center (WMMHC)

(Tr.4576). The records consistently showed a “harsh,” antagonistic home environment (Tr.4576).

Records from WMMHC were psychologically significant in understanding Rick’s behavior (Tr.4577). The records showed there were still “issues of rivalry with stepfather and that the family needed help” to see Rick was “being ... severely scapegoated” (Tr.4579). Rick “got the brunt of whatever negative, abusive, and rejection behaviors” were going on in his home (Tr.4580).

WMMHC’s assessment showed Rick was depressed, anxious, had very low self-esteem, and had become very angry (Tr.4581). His “anger and his sexuality became associated” (Tr.4582). Rick’s parents resisted treatment, rejected him, and lacked concern for him (Tr.4582).

Rick’s earliest sexual experiences began at age 6 and involved family members setting up “sexual acts or at least simulated sexual acts with his sister” (Tr.4590). Rick reported that between age 10 and 12 he was “engaging in sexual activity with a range of people” including adults (Tr.4591). By age 15, he was already “tired” or “routine sexuality” and moved to anal sex and threesomes and rough sex (Tr.4591). Adult family members had provided inadequate supervision; at least one aunt had made him and his sister engage in sexual acts and had talked about her sexual experiences with him (Tr.4592).

Rick reported being molested at least twice when he was a child and at least once by his stepfather (Tr.4593). Sexual abuse was multi-generational in Rick's family (Tr.4593). The constant exposure Rick had to sex contributed to how he developed psychologically (Tr.4594).

Dr. Mandracchia found Rick probably had several severe personality disorders (Tr.4597). He identified these disorders as antisocial personality, narcissism, and paranoid personality (Tr.4598). The rejection, lack of acceptance, lack of warmth in his home contributed to his distrust and insecurity in social and interpersonal relationships (Tr.4599). Rick was given "woefully little" that could have helped him develop in a more positive direction (Tr.4599). In essence, Rick was abandoned by his parents (Tr.4599).

The psychological term for Rick's significant sexual abnormalities was paraphilia – meaning acting on an "outside of normal" attraction to something (Tr.4601). Rick's paraphilias, which involved children and aggressive types of sexual activity, had begun by his adolescence (Tr.4602-04). The childhood sexual abuse Rick experienced was a factor in the development of his paraphilias (Tr.4604).

Dr. Mandracchia asked Rick several times if his stepfather had sexually abused him (Tr.4610-11). Rick finally said, "I'm not going to tell you" (Tr.4611). Other people, including Vickie Gunn, had reported

to Dr. Mandracchia that Rick had said he had been sexually abused by his stepfather (Tr.4611).

Dr. Mandracchia said that Rick had been in situations that were out of his control – including his parents – that had contributed to his development (Tr.4614). Dr. Mandracchia explained he was not saying that Rick could not control his behavior (Tr.4614). He meant that Rick could not control the factors that influenced him, *e.g.*, the violence in his home when he was a 96-pound 12 year-old, the extensive, multi-generational sexual abuse in his family, the deviant sexuality that Rick experienced at a very young age and lack of supervision by adults, the complete abandonment by his father and significant abandonment by his mother (Tr.4614-16).

Rick testified in his own behalf at penalty phase. He said he was truly sorry for what he had done to Marsha Spicer, Michelle Ricci, Jose Bryant, Tammy Butler, and others he had hurt (Tr.4718). He told the jury about his earliest memory of family violence – being burned by his stepdad when he was 4 or 5 (Tr.4719). When he was older, he began skipping school because the coach made everyone strip to shower and he didn't want other people to see the bruises on his body (Tr.4718-19).

Rick talked about the abuse he experienced from a young age (Tr.4721-31). At the end of his testimony, he said he knew that

“apologizing” was “so lame” (Tr.4742). He said that sometimes he felt as though he didn’t care about anything, and other times he “hated that he cared so much” (Tr.4742).

The jury returned a verdict of death at penalty phase (LF5240).

Judge Roldan overruled Rick’s timely filed motion for new trial and sentenced him to death on Count I, and, as described in the Jurisdictional Statement, *supra*, on Counts II-XXIII and XXV-XVI. (Tr.4788,4800-04; LF5358-60).

To avoid repetition, additional facts will be presented as necessary in the argument.

POINTS RELIED ON

I

The trial court erred in initially ruling on Rick's requests to represent himself by telling him if he represented himself he must "come up with the money" for his defense and he could only have resources for his defense if represented by the public defender, and in denying subsequent requests to represent himself, because this violated his rights to both self-representation, *Faretta v. California*, 422 U.S. 806 (1975), and to "basic tools for an adequate defense," *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), U.S. Const., Amend's VI and XIV; Mo.Const., Art. 1, §§2, 10, 14, 18(a), in that the court's misstatement of law compelled Rick to relinquish his self-representation right: based on the court's misstatement of law, Rick believed he could only have "basic tools" of an adequate defense if the public defender represented him; he did not waive his self-representation right voluntarily, knowingly, or intelligently.

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

Ake v. Oklahoma, 470 U.S. 68 (1985);

Simmons v. United States, 390 U.S. 377 (1968); and

Johnson v. Zerbst, 304 U.S. 458 (1938).

II

The trial court plainly erred in misinforming, and accepting, Rick's decision not to testify at guilt phase because the court's misstatements of law concerning Rick's right to testify coerced his decision and violated his rights to present a defense, testify, due process of law, and fundamental fairness, U.S. Const., Amend's V, VI, and XIV, Mo. Const., Art. I, §§ 10 and 18(a), and Rule 30.20, in that the law does not require a defendant to accept his attorney's advice and strategy and testify only to questions his attorney selects, and whether or not represented by counsel, the law allows a defendant – within the rules of evidence – to testify by asking himself questions and answering them or in narrative form; the error here was not harmless: Rick's attorneys' raised only the "technical legal" question of deliberation; the only possible defense would have been through Rick's own testimony.

Rock v. Arkansas, 483 U.S. 44 (1987);

Johnson v. Zerbst, 304 U.S. 458 (1938);

State v. Hart, 569 N.W.2d 451 (N.D. 1997); and

Quarels v. Commonwealth, 142 S.W.3d 73 (Ky. 2004).

III

The trial court erred in denying Rick’s motion to strike juror Adam Powell for cause because Powell’s voir dire showed he could not give meaningful consideration to all mitigating evidence, and was unqualified to serve in a capital case and seating Powell on the jury violated Rick’s right to a fair and impartial jury, due process of law, and reliable sentencing, U.S. Const., Amend’s V, VI, VIII, and XIV; Mo.Const., Art. I, §§10, 18(a), and 21, in that Powell testified that in an “abstract” and “vague” sense he was willing “to look at” someone’s childhood experiences “but [he] believe[d], generally, no, as an adult human being you know that it’s right to kill a person or not right,” and “generally” would not consider a person’s childhood as mitigating; he also believed in the “eye for an eye” principle “in the context of the justice system.”

Tennard v. Dretke, 542 U.S. 274 (2004);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

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

Strong v. State, 263 S.W.3d 636 (Mo.banc 2008).

IV

The trial court erred in overruling Rick's repeated objections and permitting the state to admit and use at both guilt and penalty phase excessively prejudicial duplicative evidence because the admission of evidence in one form served the state's probative purposes and the prejudicial effect of the same evidence being again introduced in a different form far outweighed any possible probative value the evidence could have and violated Rick's rights to due process of law, fair trial, and reliable sentencing, U.S. Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. I, §§10, 18(a), and 21, in that the duplicative evidence in question – videotapes and still photos made from those videotapes, the testimony of witnesses about about the content of the videotapes, and Rick's statements concerning the offenses shown on the videotapes and the still photographs – was of such a painfully graphic and violent nature that the excessive display and presentation of this evidence cannot be considered harmless.

State v. Tisius, 92 S.W.3d 751 (Mo.banc 2002); and

State v. Tillman, 289 S.W.3d 282 (Mo.App.W.D. 2009).

V

The trial court erred in overruling Rick's objections to instructions 13, 15, 17, 19, 21, 23, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 55, and 57 because these instructions violated the respective pattern instructions for the offense in question and the MAI Notes on Use in that each of these instructions specifically referenced evidence introduced by the state during guilt phase thus violating Rick's rights to due process of law, a correctly instructed jury and fundamental fairness, U.S.Const., Amend's V, VI, and XIV; Mo. Const., Art. I, §§10 and 18(a) in that including specific evidentiary references in the instructions was the equivalent of the trial court commenting on the evidence and telling the jurors that the evidence referenced in the instruction would provide proof of the charged offense.

State v. Bearden, 748 S.W.2d 753 (Mo.App.E.D. 1988);

State v. Lomack, 570 S.W.2d 711 (Mo.App.St.L.D. 1978); and

State v. Bowles, 23 S.W.3d 775 (Mo.App.W.D. 2000).

VI

The trial court erred in overruling Rick's objections to the verdict directors – Instructions 5, 7, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, and 57 because they failed to instruct the jurors that they must be unanimous as to each of the elements of the offense as set out in each instruction and violated Rick's rights to due process of law, and fair trial by a correctly instructed jury, U.S. Const., Amend's V, VI, XIV and Mo. Const., Art. I, §§10 and 18(a) in that although this Court has said that Missouri's "instructions require unanimity as to each element," *State v. Johnson*, 284 S.W.3d 561, 575 (Mo.banc 2009), the current version of MAI entirely fails to so instruct the jurors.

Richardson v. United States, 526 U.S. 813 (1999);

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

State v. Johnson, 284 S.W.3d 561 (Mo.banc 2009); and

United States v. Booker, 543 U.S. 220 (2005).

VII

The trial court erred in overruling Rick's motion to quash the information or, alternatively, preclude the death penalty, and sentencing him to death because this violated the rule of *Apprendi v. New Jersey*, 500 U.S. 466 (2000) and progeny – that all facts necessary to enhance the sentence must be alleged in the charging document – and Rick's rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const. Amend's V,VI,&XIV; Mo.Const., Art. 1, §§ 10, 17, 18(a) & 21, in that in Missouri, at least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death and thus statutory aggravators are, or are in effect, alternate elements of the greater offense of first-degree murder and must be pled in the charging document for the charged murder to be punishable by death; because no statutory aggravators were alleged in the information, Rick's death sentence was unauthorized and must be reduced to life imprisonment.

Apprendi v. New Jersey, 500 U.S. 466 (2000);

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

Jones v. United States, 526 U.S. 227 (1999); and

State v. Nolan, 418 S.W.2d 51 (Mo. 1967).

VIII

The trial court erred in overruling Rick's objections to §565.030.4(3) and Instructions 70 and 71, MAI-CR3d 313.44 and 314.48, and in refusing to submit Instructions B and C because §565.030.4(3) Instructions 70 and 71 imposed on Rick the burden of proving himself non death-eligible thus violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VI, VIII, and XIV, in that under *Apprendi v. New Jersey*, 500 U.S. 466 (2000), and progeny, the state bears the burden of proving beyond a reasonable doubt all sentence-enhancing facts, but in *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo.banc 2008), this Court held that §565.030.4(3), which provides the sentence must be life if the jury "concludes" mitigation outweighs aggravation, places on the defendant the burden of proving to a unanimous jury that mitigation outweighs aggravation to obtain a life sentence; Rick was prejudiced because unlike Instructions 70 and 71, Instructions B and C correctly put the burden of proof of this sentence-enhancing fact on the state.

State v. Whitfield, 837 S.W.2d 503 (Mo.banc 1992);

Woldt v. People, 64 P.3d 256 (Colo. 2003);

Bullington v. Missouri, 451 U.S. 430 (1981); and
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).

ARGUMENT

I

The trial court erred in initially ruling on Rick's requests to represent himself by telling him if he represented himself he must "come up with the money" for his defense and he could only have resources for his defense if represented by the public defender, and in denying subsequent requests to represent himself, because this violated his rights to both self-representation, *Faretta v. California*, 422 U.S. 806 (1975), and to "basic tools for an adequate defense," *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), U.S. Const., Amend's VI and XIV; Mo.Const., Art. 1, §§2, 10, 14, 18(a), in that the court's misstatement of law compelled Rick to relinquish his self-representation right: based on the court's misstatement of law, Rick believed he could only have "basic tools" of an adequate defense if the public defender represented him; he did not waive his self-

representation right voluntarily, knowingly, or intelligently.³

On May 30, 2006, the public defender entered an appearance as counsel for Richard Davis (LF3,59). On September 14, 2006, Rick wrote to the trial court:

We tried to do what we thought we were supposed to and allow lawyers to be lawyers. Told them where evidence was, witnesses, ect., ect (sic). But all they have done now is make some witnesses forget, evidence get lost, ect (sic). I was going to speak up in Aug at Court but was told not to by [illegible] lawyer....

(LF90-91).

Rick was arraigned July 12, 2006; new attorneys entered appearances on November 2, 2006 (LF 11,12,84,99-100). On March 28, 2007, Rick, *pro se*, moved to “Dismiss and Replace Counsel” and represent himself (LF13,107-08). On April 11, 2007, after hearing from Rick, his new attorneys and the prosecutor, the trial court denied the motion (LTr.4-15; LF110).

Before the court recessed, Rick advised it was “going on a year” that he had been trying to get the various lawyers who represented him to

³ Rick preserved this point for review in the motion for new trial (L.F.5241-42).

talk to his witnesses – he had given them a list of people to talk to – and nothing had been done (Tr.36-37). He worried about “people’s memories ... people forget stuff” and felt that he had “no say-so in this case. I’ve been asking for things and, you know, it’s just like, I feel like I’m combating my attorneys....” (Tr.38).

Subsequently, Rick repeatedly moved, *pro se*, to be allowed to represent himself often also requesting that he be provided resources to assist his self-representation – an investigator or legal assistant and additional time in the law library; several motions, alternatively, asked the court to order Rick’s lawyers to investigate specific matters (identified in the motions) and obtain evidence for his defense (*e.g.* LF153-54,155-61,162-65,168,169-70, 171,172-76,179-83,192-97,213-16). His “Motion to Be My Own Lawyer,” for example, filed June 20, 2007, asked “the Judge to appoint Defendant as his own Counsel” because, among other reasons, his “Lawyers have refused to investigate Defendant’s 4th and 5th Amendment claims, talk to witnesses, Lawyers have told Defendant that he has no defense and Defendant believes he does” (LF153). This motion also asked the court “to appoint someone to assist in investigating facts, deposing witnesses, gathering evidence, And to give the defendant the means to represent himself” (LF154). Rick’s June 25, 2007, “Motion to Compel Counsel or Make Defendant

Counsel *Pro Se*,” asked that, if he was going to represent himself, that he be granted “reasonable weekly access to the Law Library here in the Jail” and “access to copies, typewriter, VCR, phone” (LF155). Rick’s motion asked in the alternative, if he was not going to be allowed to represent himself, that the court move up the trial date (LF155) and have his attorneys contact his witnesses “before witnesses forget ... and more evidence is lost” (LF156). If this could not be done, Rick said he would represent himself (LF156). Rick’s motion listed, among other things, witnesses he wanted his lawyers to contact, other investigation that he wanted done, and evidence he wanted examined (LF157-61).

At a hearing on October 10, 2007, the trial court questioned Rick concerning his request to represent himself and elicited the following:

Rick wanted to represent himself, had thought about it, and discussed it with his attorneys (Tr.17;A4). He had neither alcohol nor drugs in the past 24 hours and was not under psychological or psychiatric care for a mental illness (Tr.18-19;A5). He had a GED, “a little bit of college,” and when he didn’t understand case “documents” he went to the law library to “learn” and “figure things out” (Tr.19;A5). He read and understood police reports (Tr.20;A5).

Rick understood that a person charged with a felony had the right to assistance of counsel (Tr.20;A5). Representing himself was not “forced

or coerced in any way” (Tr.21;A5). Rick was “unsatisfied with constantly battling... [his] lawyers” and understood his dissatisfaction was different than being forced to represent himself (Tr.21;A5). Rick decided to represent himself: no one told him to, or made him, do this (Tr.21-22;A5-A6). He had considered all aspects of self-representation, “comprehend[ed]” his decision, and made it intelligently (Tr.22;A6).

Rick understood he was charged with first degree murder which was punishable only by life imprisonment without probation or parole or death (Tr.23;A6). He understood his right to jury trial with or without counsel’s assistance and that representing himself meant he would make every tactical and strategy decision before and at trial (Tr.23-24;A6). “That’s one of the reasons I’m doing this” (Tr.24;A6).

Rick understood that he would be responsible for voir dire and jury selection, deciding whether to make an opening statement, and questioning witnesses at trial (Tr.24-25;A6). Regarding improper state questions, Rick said he would “try to learn” about objections (Tr.25;A6). He acknowledged not “know[ing] all the rules of evidence” and said he would have to learn them (Tr.25;A6). He knew he would decide what defense witnesses to present, elicit testimony, and respond to state objections to questions or evidence (Tr.26;A7). Rick admitted the things he did not, then, know how to do and would need to learn: “Not at this

moment.... I ain't going to say I know the rules because I don't. But I'm going to try to learn them" (Tr.26;A7).

Asked if he had "sufficient knowledge about the possible defenses" for the charged offenses to represent himself, Rick said, "That's one reason I want to represent myself" (Tr.27;A7). Asked if he had sufficient knowledge to present a defense to the charged felonies, Rick replied: "I'm trying to learn it now, I've been trying, that's part of my motions I've been sending you, is to get to where I can have access to the law library and, you know, to work with the public defenders." (Tr.27;A7).

The court asked if Rick understood the rules pertaining to the two phases of a capital trial (Tr.28;A7). Rick said this was something he needed to learn and could learn in time for trial given "access to stuff to learn from" (Tr.28-29;A7).

Questioned about his familiarity with the "constitutional guidelines" for a trial, Rick was not sure, then, what they were but was trying to learn about them (Tr.29;A7). Rick said he would "do his best" "to prepare [him]self with the knowledge that [he would] need to try a case such as this" to "be ready" to try the case himself (Tr.29;A7).

Noting "bad things" could occur if Rick represented himself, the court "need[ed] to make sure" Rick's decision was "voluntary" and "intelligent" (Tr.30;A8). Rick said he was "not coerced but [felt] like [he

had] to do it to be heard” and was doing it for that reason (Tr.30;A8).

The court asked, “[A]fter weighing all these things, you’re telling me that this is what you feel is ..., the best solution for you, is to represent yourself. Is that what you’re telling me?” (Tr.31;A8). Rick said, “Yes” (Tr.31;A8). The court said it was his duty to tell Rick it was a mistake; Rick understood (Tr.31-32;A8). The court said he was required to appoint counsel to assist Rick; Rick understood (Tr.32-33;A8).

Asked if he understood Rick that representing himself “limits a lot of the things that you can do in behalf of your defense?” Rick replied, “Like how?” (Tr.33;A8). The court said that being incarcerated would limit Rick; Rick understood (Tr.34;A9).

Then the court told Rick, “financial issues also kick in”: the public defender had, and could use, “whatever resources they feel they need to make the best defense for you” -- “money to send out investigators... money to take depositions... things of that nature” (Tr.34;A9). Rick said he had been told that providing resources “would be up to [the court],” and the following occurred:

Court: Exactly. And do you understand that there’s no absolute right in a lot of those things under the law for you to have? ***In other words, you would have to come up with the money for that. Do you***

understand that?

Rick: For like a, to talk to witnesses?

Court: ***Exactly. Do you understand that?***

Rick: So, basically, I couldn't talk to witnesses or nothing?

Court: ***Well, there's certain things about witnesses where money is required, to send out investigators, to take a deposition of certain records that need to be taken or something. Do you understand that, obviously, those things cost money and you would have to obviously come up with that money?***

Rick: No. That's one of the reasons I'm doing this, is because I was wanting this stuff done. And I thought that I could maybe do it myself, that I could question, you know, like the police officers or witnesses in my case and prepare and learn, you know, what they was going to testify to and remembered.

Court: ***Do you understand that that takes money to do that? Do you understand that when the public defender is taking depositions, they're paying for those depositions? Do you understand that?***

Rick: I believed that you could, you know, help me, appoint

someone, like, to investigate where I can't go talk to people and locate people.

Court: ***I'm telling you up front, you understand, I have no power to do that.*** I can't force people to work for free. Do you understand that?

Rick: Yes.

Court: Okay, now, understanding that you're going to be limited as far as a lot of things that you can do pretrial to prepare for this, are you still telling me you want to represent yourself?

Rick: I'm back to where I started again, you know.

Court: Well, my question is, I've explained to you that, obviously, ***a lot of these things take money, that you're not going to be able to get this. My question to you is, knowing these things, do you still want to represent yourself?***

Rick: ***I couldn't – I couldn't. Because I couldn't contact any witnesses, period. I couldn't do anything. I can't even get copies or nothing to do anything then. So I was, you know, led to believe that I could get somebody appointed to help me***

investigate and stuff like that.

Court: Let me ask you this, you understand, obviously, again, it's my obligation, Mr. Rick, to make sure that you're making an intelligent decision about your wanting to represent yourself. Do you understand that?

Rick: Yes.

Court: From what you're telling me, it sounds to me like you haven't thought about all these things.

Rick: I've thought about it, just had the wrong answers.

Court: Knowing now that, obviously, you have the wrong answers, are you still telling me right now, knowing that I'm not going to have these funds available, you still want to represent yourself? Is that what you're telling me?

Rick: I'm back to where I started. I thought that I could do this. Yes, I know what you're saying.

Court: I understand that. Now you know you can't. Are you still telling me you want to represent yourself?

Rick: It would be useless.

Court: Did I not tell you that just a few minutes ago, that I

think it's a huge mistake on your part? You understand that?

Rick: Yes, yes.

Court: I gather from your hesitation that maybe the decision to represent yourself is not a very good decision?

Rick: Yeah, I wouldn't have the ability to put on a defense, period.

Court: ***You would be very limited. Do you understand that? Because of resources, for one, and because of the lack of the legal knowledge.*** Do you understand that?

Rick: Yes. Yes.

Court: ***Understanding that now, Mr. Davis, do you agree with this Court that, obviously, it's a mistake to represent yourself?***

Rick: ***It would be a mistake, yes, to represent myself, because I couldn't do it.***

Court: ***You can do it. You're just not going to be in the same situation that you are with, obviously, competent and good counsel. Do you understand that?***

Rick: Yes.

Court: I gather your answers to tell me that we can then proceed on this first issue that, obviously, Mr. Jacquinot and Ms. Susan Elliott will represent you?

Rick: Yes.

Tr.34-38;A9-A10; emphasis added.

Subsequently, and continuing through trial, Rick filed at least eleven additional *pro se* motions reasserting his desire to represent himself and for funding for such things as transcripts, photo copies of exhibits, copies of motions, expert witnesses, an investigator, (*e.g.* 285-86, 318-23, 324-29, 406-22, 670-81, 4855-4922, 4904, 4909-11A, 4946-48, 4957, 5020-36). For example, Rick's motion of May 16, 2008, asked the court to provide a "substitute" appointed counsel due to an irreconcilable conflict with current counsel or, alternatively, to allow Rick to proceed *pro se* and provide him "the Basic Tools of an Adequate Defense" (LF406). Rick requested funds for "expert testimony," an investigator, copies, gathering evidence, reviewing the testimony of witnesses, and locating and contacting witnesses by mail or phone (LF420). In support of his requests to proceed *pro se* and for funds, Rick cited, *e.g.*, *Ake v. Oklahoma*, 105 S.Ct. 2174; *United States v. Sarno*; 73 F.3d 1470; *Bounds v. Smith*, 430 U.S. 817 (1977); *Little v.*

Armontrout, 835 F.2d 1240 (8th Cir. 1987); *Milton v. Morris*, 767 F.2d 1443 (9th Cir. 1985) (LF419,421). The Court denied all of Rick’s post-hearing motions requesting leave to proceed *pro se* and the “tools” to do so (LF5113-14).

The Sixth and Fourteenth Amendments guarantee to an accused the rights to both self-representation and, if indigent, provision of the basic tools for an adequate defense. *Faretta v. California*, 422 U.S. 806 (1975); *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Supreme Court and this Court have warned that a trial court may not condition the defendant’s exercise of one constitutional right on his relinquishment of another. *Simmons v. United States*, 390 U.S. 377, 394 (1968); *State v. Armentrout*, 8 S.W.3d 99, 105 (Mo.banc 1999)⁴; *see also State v. Samuels*, 965 S.W.2d 913, 916-20 (Mo.App.W.D. 1998).

But here the trial court did precisely that. Misstating the law, the

⁴ In *Armentrout*, the defendant actually was not forced to choose and the Court found it unnecessary to determine if *Ake* required the state to provide resources for a *pro se* defendant: the defendant was allowed to proceed *pro se* and accepted appointment of the public defender’s office as standby counsel; after initially resisting, the public defender’s office “assist[ed] Appellant with funding and expenses....” 8 S.W.3d at 104.

trial court told Rick that if the public defender's office represented him, that office would provide resources for his defense; if he represented himself, he "would have to come up with the money" for his defense (Tr.34). Forced to make a legally invalid choice between his constitutional rights of self-representation or the tools for an adequate defense, Rick relinquished his longstanding desire to represent himself; he accepted representation by the public defender solely to ensure financial resources for his defense. Rick, compelled by the trial court's misstatement of law, sacrificed one constitutional right to secure the other, *Simmons v. United States*, 390 U.S. 377, 394 (1968). In these circumstances, Rick's choice was not a valid, knowing waiver of his right to represent himself. *Johnson v. Zerbst*, 304 U.S. 458, U.S. 1938. This Court must reverse Davis' convictions and remand for a new trial. *State v. Black*, 223 S.W.3d 149 (Mo.banc 2007).

Alleged *Faretta* violations – mixed questions of law and fact – and claims that the defendant did not knowingly, intelligently, and voluntarily waive his right to self-representation, are both reviewed *de novo*. *United States v. Mentzos*, 462 F.3d 830, 838 (8thCir. 2006); *United States v. Peppers*, 302 F.3d 120, 127 (3d Cir. 2002). A trial court has "no discretion ... to force an attorney upon a competent defendant who makes a timely, unequivocal, voluntary and informed waiver of the

right to counsel.” *State v. Black*, 223 S.W.3d 149, 153 (Mo.banc 2007).

“Denial of a defendant's right to self-representation is considered structural error.” *Id.* at 153 citing *Washington v. Recueno*, 548 U.S. 212 (2006); *Neder v. United States*, 527 U.S. 1 (1999); *Johnson v. United States*, 520 U.S. 461 (1997). “Deprivation” of this right “cannot be harmless.” *Id.* citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984).

In *Black*, this Court identified “four requirements for a defendant seeking to waive his right to counsel and proceed pro se.” *Id.* A defendant must (1) timely and (2) unequivocally invoke this right and (3) “knowing[ly] and (4) “intelligent[ly]” waive his right to counsel. *Id.* In the instant case, the trial court’s inquiry and Rick’s responses to the court’s questions, *supra*, more than satisfied the specific requirements set out in *Black*, *supra*. Rick’s responses gave no reason to deny his requests to represent himself.

In questioning Rick about the limitations involved in proceeding *pro se*, however, the court misstated the law. The court told Rick that if he represented himself, the court would not provide any funding for him to prepare his defense – he would have to “come up with the money” (Tr.34-36; A9). The court expressly told Rick that “right now, the public defender’s office, because they represent you, they can throw whatever resources they feel they need to make the best defense for you. And

they have the resources to do that.” (Tr.34; A9). The court then told Rick that if he represented himself, however, he “would have to come up with the money for that” (Tr.34; A9).

The trial court was incorrect. The law requires the state to provide an indigent, *pro se*, defendant with the basic tools for an adequate defense. “*Griffin v. Illinois*[, 351 U.S. 12 (1956)] and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.” *See e.g. Britt v. North Carolina*, 404 U.S. 226 (1971) Both of Rick’s requests – to represent himself and to be provided the “tools” to do so – should have been granted.⁵

Neither the Supreme Court nor this Court have expressly held that *Ake, supra*, and its progeny require the state to provide tools other than a mental health expert to an indigent defendant proceeding *pro se*. But

⁵ What tools were necessary for Rick’s defense, and the means of providing access to those tools, are separate questions. *See e.g., Little v. Armontrout, infra* to be determined by considering Rick was certainly not asking the court to provide a blank check: his motions requested “an investigator,” phone calls, increased access to the jail law library

the Supreme Court's opinions in *Faretta*, *Ake*, and its other Sixth and Fourteenth Amendment cases indicate that basic defense tools needed by *pro se* litigants must be provided to them. The Court's decisions are consistent with the rule that "basic tools of an adequate defense" must be provided to indigent defendants whether represented by counsel or proceeding *pro se*. Basic tools are not limited to mental health experts.⁶

Indeed, the heart of *Faretta* is its holding that the Sixth Amendment "grants to the accused personally the right to make his defense." 406 U.S. 806, 819. Two years later, the Court held that the Fourteenth

⁶ "Expert witnesses and investigators are of ever-increasing importance in the modern criminal legal system and are often a deciding factor in the outcome of a case." Comment, *Reconsidering Ake v. Oklahoma: What Ancillary Defense Services Must States Provide to Indigent Defendants Represented by Private or Pro Bono Counsel?* 18 Temp.Pol.&Civ.Rts.L.Rev. 783, 784 (Spring 2009). In addition to experts and investigators, the author defined non-counsel, "ancillary" services to include "services commonly needed to promulgating an effective criminal defense, such as interpreters, investigators, and experts (e.g., ballistics, fingerprint, DNA, psychiatric, and medical)." *Id.* at 784 n.10.

Amendment required states to provide “tools” – “adequate law libraries or adequate assistance from persons trained in the law” – to indigent, *pro se* defendants to ensure meaningful access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977).

In 1985, the Court “recognized ... that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.” 470 U.S. at 77. *Ake v. Oklahoma* held that “when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.” *Id.* at 74. The Court explained:

[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system.... To implement this principle, we have focused on identifying the “basic tools of an adequate defense or appeal ... and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Id. at 77; internal quotation marks and citations omitted.

As the Court in *Ake* recognized, “[t]o say that these basic tools must be provided is, of course, merely to begin our inquiry.”*Id.* Other cases, addressing *Ake*’s “basic tools” holding, demonstrate that Rick’s requests – expert testimony, an investigator, copies, gathering evidence, reviewing the testimony of witnesses, and locating and contacting witnesses by mail or phone, LF420 – were reasonable requests for basic tools.⁷ For example, in *United States v. Sarno*, 73 F.3d 1470 (9th Cir.

⁷ The trial court apparently believed that the state had no obligation to provide any “tools” to Rick; accordingly, the court’s inquiry never reached the question of what tools should be provided. Rick’s *pro se* motions and other writings, however, repeatedly stated that one of his prime reasons for representing himself was to interview witnesses and otherwise investigate his case. In a motion filed well before the October 10, 2007 hearing, (Rick’s “Motion to Be My Own Lawyer” filed June 20, 2007) Rick expressed concern about his lawyers’ failure to investigate, talk to witnesses, gather evidence to support a defense and asked the court “to appoint Defendant as his own Counsel” and “appoint someone to assist in investigating facts, deposing witnesses, gathering evidence. And to give the defendant the means to represent himself.” (LF 153-54).

1995), the Ninth Circuit held that “the Sixth Amendment demands that a *pro se* defendant who is incarcerated be afforded reasonable access to law books, witnesses, or other tools to prepare a defense.” *Id.* at 1491. This “access is not unlimited, but must be balanced against the legitimate security needs or resource constraints of the prison.” *Id.*

The Eighth Circuit, in *Little v. Armontrout*, 835 F.2d 1240, 1243-44 (8th Cir. 1987) held that *Ake* required appointment of a non-psychiatric expert to assist an indigent defendant in a noncapital case. *Id.* at 1243. The Court said that the “defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.” *Id.* at 1244.

Three state courts have held that the state must assist an indigent defendant whether represented by appointed counsel, retained counsel, or appearing *pro se*. In *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981), the issue was “whether an indigent has the right to employ an expert and take depositions at public expense when he is represented by private counsel.” *Id.* at 293. The Supreme Court of Iowa held that “authority for the services requested by plaintiff exists under his sixth amendment right to effective representation of counsel.” *Id.* “For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services.” *Id.* at 293-94.

“The Constitution does not limit this right to defendants represented by appointed or assigned counsel.” *Id.* at 294.

Much like the question presented here, the issue before the Supreme Court of Utah in *State v. Burns*, 4 P.3d 795 (Utah 2000), was whether, under the applicable state statutes “a trial court can require a defendant to accept [appointed] LDA [Legal Defender’s Association] counsel in order to qualify for other state-funded assistance...” *Id.* at 799. The Court noted that the Supreme Court’s Sixth and Fourteenth Amendment cases, including *Ake*, required states to provide indigent defendants with the basic tools of an adequate defense, and had “prompted states to implement acts such as the Utah Indigent Defense Act (the ‘Act’) to ensure that the Sixth Amendment right to effective assistance of counsel includes access for indigents to the basic tools of defense.” *Id.* The Court found that under the statute, “a county must “[p]rovide the investigatory and other facilities necessary for a complete defense” to every indigent person, not just to those represented by the LDA.” *Id.* at 801. “[T]he only deciding factors of eligibility for this type of assistance are that the defendant in a criminal case be *indigent* and that the investigatory and other facilities be *necessary* to a complete defense.” *Id.* Of particular interest here is that the state, at oral argument, admitted that “an indigent defendant proceeding *pro se* ...

would be able to acquire *funding* for expert assistance.” *Id.*

State v. Silva, 27 P.3d 663 (Wash.App. 2001), is of particular interest here because the Court relied on a state constitutional provision almost identical to a provision of Article I, §18(a) of the Missouri Constitution.⁸ In *Silva*, the Court concluded that “article I, section 22 [of the state constitution] affords a pretrial detainee who has exercised his constitutional right to represent himself, a right of reasonable access to state provided resources that will enable him to prepare a meaningful *pro se* defense.” *Id.* at 674. The Court also addressed the separate question of determining what resources should be provided:

What measures are necessary or appropriate to constitute reasonable access lies within the sound discretion of the trial court after consideration of all the circumstances, including, but not limited to, the nature of the charge, the complexity of the

⁸ Article I, §22 of the Washington Constitution’s Declaration of Rights “provides... ‘In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....’” *Id.* at 671-72.

Article I, §18(a) of Missouri’s Constitution provides, “That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel....”

issues involved, the need for investigative services, the orderly administration of justice, the fair allocation of judicial resources (*i.e.*, an accused is not entitled to greater resources than he would otherwise receive if he were represented by appointed counsel), legitimate safety and security concerns, and the conduct of the accused.

Id. at 674-75.

Because Rick (after being told that the trial court had “no power” to provide resources and he could only have resources if he was represented by the public defender) ultimately decided not to represent himself, appellant anticipates the state may argue that Rick “waived” his right to represent himself. But such argument would be incorrect. Rick’s sacrifice of his right to represent himself was only to secure another constitutional right – not an intentional relinquishment of his self-representation right. In no sense was this a constitutional waiver.

“[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights.” *Johnson v. Zerbst, supra*, 304 U.S. at 464; citations and internal quotation marks omitted. “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Id.* “Waivers of constitutional rights not only must be

voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

Misinformation from the trial court that compels a defendant to waive a constitutional right will invalidate that waiver as unknowing, involuntary, unintelligent or coerced. For example, in *Henderson v. State*, 13 S.W.3d 107 (Tex.App. 2000), “the State called Henderson as a witness at the presentation of the State's case in chief.” *Id.* at 110. The Texas Court of Appeals held that the trial court’s statement to Henderson - that if he wanted to testify he had to answer the prosecutor's questions “was an incorrect and misleading statement which compelled Henderson to testify on behalf of the State at the presentation of its case in chief.” *Id.* Accordingly, it held that Henderson’s waiver of his right not to testify against himself was invalid “because it was not made ‘knowingly, voluntarily and intelligently.’” *Id.*

In *Morales v. State*, 600 A.2d 851 (Md. 1992), the trial court provided Morales incorrect information about his right to testify at trial. *Id.* at 854. Finding that Morales “changed his decision to testify based on the trial court's incorrect implication that all of his prior convictions could be used to impeach him,” the Maryland Court of Appeals held that Morales’ decision to waive his constitutional right to testify and to

exercise his constitutional right to remain silent was not knowingly and intelligently made and reversed. *Id.*

Other cases are to the same effect. *See e.g., State ex rel. Gill v. Irons*, 530 S.E.2d 460, 463 (W.Va. 2000) (the Supreme Court of West Virginia held that a defendant who received inaccurate information from the trial court concerning the range of punishment did not “intelligently waive his constitutional rights” to a trial); *People v. Brown*, 661 N.E.2d 287, 298-302 (Ill. 1996) (defendant’s waiver of a jury for the sentencing phase of his capital trial was invalid where the trial court’s misstatement of law misled defendant to believe he could not waive a trial of the guilt phase without waiving the sentencing phase).

In light of the foregoing, this Court must find that Rick timely and unequivocally invoked his right to represent himself and only relinquished that right to protect his right to ensure he would have the basic tools necessary for his defense. This Court must find that Rick’s determination not to represent himself was compelled by the trial court’s misstatement of the law, and was not a knowing, intelligent, and voluntary waiver of that right. This Court must reverse and remand for a new trial.

II

The trial court plainly erred in misinforming, and accepting, Rick's decision not to testify at guilt phase because the court's misstatements of law concerning Rick's right to testify coerced his decision and violated his rights to present a defense, testify, due process of law, and fundamental fairness, U.S. Const., Amend's V, VI, and XIV, Mo. Const., Art. I, §§ 10 and 18(a), and Rule 30.20, in that the law does not require a defendant to accept his attorney's advice and strategy and testify only to questions his attorney selects, and whether or not represented by counsel, the law allows a defendant – within the rules of evidence – to testify by asking himself questions and answering them, or in narrative form, or, as shown by the trial court's different approach at penalty phase, by writing down questions for his lawyer to ask; this error was manifestly unjust: Rick's attorneys' raised only the "technical legal" question of deliberation; the only possible defense would have been through

Rick's own testimony.⁹

Before the parties rested, the trial court questioned Rick about his right to testify.¹⁰ Rick had read the constitutional provision about his right to testify but wondered if he could testify “to what he want[ed] to testify to, or [did he] have to rely on [his] attorneys to question [him]?” (Tr.4145). There were “issues” Rick had wanted to be “dealt with for as long as [he’d] ever known [the judge], ever been in this court” (Tr.4145). The court said he did not want to hear anything – by law could not hear anything – concerning discussions between Rick and his attorneys (Tr.4145-46).

The court just wanted to make sure Rick understood his constitutional rights – “not really whether [Rick] want[ed to testify] or not” (Tr.4147-48). Rick said he understood he had the right to testify or not (Tr.4148). The court told Rick that whether to testify or not was Rick’s decision but he had to consult with his attorneys (Tr.4148-49). Rick understood (Tr.4148-49).

⁹ This point was not included in the motion for new trial. Because the right to testify is a fundamental constitutional right, Rick requests review for plain error. Rule 30.20.

¹⁰ The trial court’s examination of Rick is in the Appendix, A28-A32.

The court said, “[M]y understanding is, that in this case, you are not going to testify. Is that correct?” (Tr.4149).

Rick answered, “No. I’ve been saying from day one I wanted just to be heard, from ever since I filed the first thing in your court and talked to them. That’s what I’ve been trying to do.”

(Tr.4149). The court tried again:

I understand that. My question to you is that you might have some strategies that you feel, but after consultation with your attorney, what you’re saying is that after consultations, whether you agree with them or not, you’ve made a decision not to testify in this case. Is that what I’m hearing?

(Tr.4149). Rick disagreed: He had “never said that” and had not decided “not to testify” (Tr.4149).

Asked, “Are you telling this court you want to testify in this case?”

Rick said:

That’s what I’ve been trying to say since day one. I was just trying to get to where I could talk and ... ***to just try to, you know, explain the last two months that I was out there.***”

Tr.4150; emphasis added.

“[A]t the present time,” Rick “want[ed] to testify and put on evidence, whatever you call it.” (Tr.4150). The court responded: “[T]here are

things that you might want to say that aren't going to be able to come in because of the rules of evidence" (Tr.4150).

Rick had said to his attorneys that he wanted to testify (Tr.4150-51). But there had been no discussions between him and his attorneys concerning him testifying (Tr.4151).

The judge wanted to make sure that Rick wasn't going to take the stand and try to "say certain things" that his attorneys had already told him were inadmissible under the rules of evidence (Tr.4151). Rick understood what the judge was saying, and said he had never talked about this with his attorneys (Tr.4152).

The court and Rick's attorney told him this was not the time to raise claims about his trial attorneys (Tr.4152-54). Rick repeated, "I have been trying to be heard, not just by them but by you... I just want to be heard... I don't know how to get any more simpler than that" (Tr.4154).

The court repeated: his concern "right now" was whether Davis understood his constitutional "rights to testify or not to testify" (Tr.4157). Davis replied: "yes, I know what it means but I don't know what actually to testify means, if they have to cross-examine me, if I have to count on them to cross-examine me or do I get to just, to talk to my – to say what I want to say within the legal evidence rules and all that" (Tr.4157).

Prompted by defense counsel, the court told Rick that if he testified, Mr. Jacquinot would be asking you the questions. You would be answering those questions, okay, that he would be asking you.... [T]he state would have an opportunity to cross-examine you. Do you understand that's the procedure? You don't get to just sit there and tell the jury whatever you want.

(Tr.4157-58).

Rick understood and asked, "*Can I have him ask questions that I want to ask?*" (Tr.4158; emphasis added). The court said, "no":

[I]t falls under an attorney-client, first of all privilege and then strategy too, what the strategy of the case is. You have to rely, obviously, on his advice...

If you're saying, I don't need him and I just want to get up there and say something to the jury, that's not going to happen.

Tr.4158-59; emphasis added.

Rick replied, "I'll waive counsel" (Tr.4159). The court said he'd already ruled on that and Rick could not waive counsel:

It's going to be under the rules of evidence, and that is that Mr. Jacquinot is going to ask you questions or it's not going to be done at all. Because I will not just let you sit there and talk to the jury on your own.

(Tr.4159; emphasis added). Rick understood. (Tr.4159). He agreed to a recess saying he would ask his lawyer if he would “ask certain questions” (Tr.4159).

Questioned further by the court, Rick said he understood that if he testified it would have to be under the rules of evidence; he could not get on the stand and “tell the jury what [he] want[ed] to tell them (Tr.4160). The questions Rick was asked would be determined by his attorney based on what his attorney decided was relevant and probative (Tr.4160).

Believing the court’s rules would restrict his testimony, Rick decided against testifying: “I could not testify to anything I would want to testify to because the counsel would not ask the questions I wanted to ask. So I cannot cross-examine myself, I cannot testify to just whatever I want, so, no.” (Tr.4161).

Things were starkly different at penalty phase. At penalty phase, before the defense rested, the trial court once again questioned Rick about his right to testify. Rick said, “You said I have the right to testify, but if I can’t get my lawyer to ask me questions, then I have no right to testify” (Tr.4700). The court began telling Rick that “the evidence that comes in is evidence that I have to determine is relevant, I have to determine is legal...” and Rick responded, “If Mr. Hunt objects, you

know, we figure out if it can be admitted or not, I understand that. And it's all I've ever asked for, was to be treated equal" (Tr.4700).

The court continued, do you understand, though, that your right to testify is obviously based on questions that your attorney would be asking you? Do you understand that?" (Tr.4700). Rick asked if he "could write questions and have [his attorney] ask..." (Tr.4701).

After questioning Rick further, the trial court recessed so he could talk to his attorney about testifying (Tr.4701-07). After the recess, the court again told Rick he could only testify by answering the questions his attorney asked, and Rick said he wanted to testify (Tr.4709). The court then said, "Wait a minute, do you understand – and I'm going to ask your attorney – but you understand that my understanding is that the advice of your attorneys is for you not to testify. Do you understand that... Do you want to testify or do you want to follow their advice and not testify?" (Tr.4709-10).

Rick said, "I would like to put questions to them to have them put the questions back to me so I could testify" (Tr.4710). The court said, "*Well, you can give them questions, yes, but I'm not guaranteeing you they're going to ask those questions...*"(Tr.4710). He clarified: "obviously you can give your attorneys questions... they might not ask you those questions, though, because they're making the decision of whether

your questions are admissible or not admissible...” (Tr.4710-11).

The court agreed Rick could testify, then asked his lawyer if he wanted to make any record (Tr.4711). Rick’s lawyer asked the court to “take leave” so “Dr. Mandracchia can examine him and determine whether or not he’s fit to proceed and fit to make this decision at this time” (Tr.4711-12). The prosecutor then said that based on his observations of “Rick over the last four weeks,” he had no reason to think Rick was not competent or did not understand what was being said or what he, himself, was saying (Tr.4712-13).

The trial court denied defense counsel’s request for Rick to be examined (Tr.4714). The court again said Rick could give questions to his attorney, but the court could not guarantee his attorney would ask those questions (Tr.4714). The court provided Rick with a pen to write out the questions he wanted his attorney to ask (Tr.4715). And, after his attorney once again advised him against testifying, Rick testified in his own behalf at penalty phase (Tr.4717-4742).

The trial court’s imposition of its testimonial “rules” at guilt phase violated Rick’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§10, and 18(a) of the Missouri Constitution. The court misinformed and misled Rick by telling him that under the law, he could only testify to those

matters his then-counsel chose to include in his questions. A defendant's "right to present his own version of events in his own words" is "more fundamental to a personal defense than the right of self-representation." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). Beyond doubt, "[a]t this point in the development of our adversary system ... a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Id.* at 49.

Here, because the court's mistaken and misleading statements of law and its unnecessarily restrictive rules kept Rick from testifying in his own defense at guilt phase, Rick's decision not to testify was not a voluntary, knowing, and intelligent waiver of his constitutional right. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Forcing Rick to abandon his long-held desire to testify – "since day one. I was just trying to get to where I could ... *you know, explain the last two months that I was out there*" – was a manifest injustice, Rule 30.20. The Court must reverse his convictions and remand for a new trial.

"Restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas, supra*, 483 U.S. at 55-56. No law prohibits a defendant from testifying – even if contrary to his counsel's strategy. In fact, the Missouri Constitution affords specific protection to a defendant's right

to present his own testimony, in his own words, in his defense. Article I, §18(a) of the Missouri Constitution guarantees “[t]hat in criminal prosecutions *the accused* shall have the right to appear and defend, *in person* and by counsel...”; emphasis added.

In declaring that under the law Rick could only testify to those matters his then-counsel chose for questions, the court imposed arbitrary, unnecessary, and unconstitutional rules – and misled Rick. Perhaps nothing more clearly illustrates the arbitrary nature of the trial court’s guilt phase treatment of Rick’s right to testify than the trial court’s very different treatment of Rick’s right to testify at penalty phase in letting Rick write out questions for his attorney to ask.

Quarels v. Commonwealth, 142 S.W.3d 73 (Ky. 2004), is instructive. In *Quarels*, after defense counsel told the court that, against his advice, the defendant wished to testify, the trial court “extensively and strenuously suggested to [defendant] that she change her mind.” *Id.* at 77-78. The defendant, however, “continually reasserted her desire to testify, stating that she would not be able to live with herself unless she told the truth.” *Id.* at 78. Finding “it would be extremely detrimental to [defendant’s] defense if she were to testify in front of the jury based on her prior outbursts and inability to control her emotions,” the trial court did not allow the defendant to testify.

On appeal, “even though it [was] clear ... that the trial court was merely trying to protect [defendant] from herself,” the Kentucky Supreme Court reversed. *Id.* at 79. The Court acknowledged that a defendant’s exercise of her right to testify may be unwise or detrimental to herself. *Id.* at 79-80. Nevertheless, the Court held that “[a] defendant who wants to testify can reject defense counsel’s advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel.” *Id.* at 79 quoting *United States v. Webber*, 208 F.3d 545, 550-51 (6th Cir. 2000).

The legal incorrectness of the trial court’s ruling that Rick could only testify by answering questions asked by his attorney is also shown by the fact that defendants who proceed *pro se* need not give up their right to self-representation to testify. A defendant proceeding *pro se* does not have counsel to ask questions but the trial court must still accommodate his constitutional right to testify. “[P]ro se defendants are often permitted to testify in narrative form to facilitate presentation of their case” but “it is not necessarily an abuse of discretion to require a pro se defendant to use a question-and-answer format.” *State v. Joyner*, 848 P.2d 769, 774 (Wash.App. 1993).

In Missouri, *pro se* defendants have testified in their own defense. *Brock v. Denney*, Slip Copy, 2009 WL 3228694*4 (E.D.Mo. September

30, 2009) (“Petitioner proceeded pro se and testified at trial”); *State v. McCracken*, 948 S.W.2d 710, 712 (Mo.App.S.D. 1997) (defendant, charged with burglary, “elected to proceed *pro se* at trial” and “testified that when the burglary occurred, he was with another woman....”); *State v. Davis*, 867 S.W.2d 539, 542 (Mo.App.W.D. 1993) (“Defendant Rick represented himself” and “also testified at trial”).

Federal courts also accommodate *pro se* defendants who wish to testify in federal criminal cases. See, e.g., *Cheek v. United States*, 498 U.S. 192, 195 (1991) (“Cheek represented himself at trial and testified in his defense”); *United States v. Ciak*, 102 F.3d 38, 41 (2d Cir. 1996) (“[D]efendant, acting *pro se* at his second trial,” but with court-appointed “standby” counsel available to him throughout trial, “denied” being the person with the gun in the parking lot, but “admitted to being in the lot at the time of the incident” and “claimed” that the weapons police found in his car were put there without his knowledge by his sister); *United States v. Kistner*, 68 F.3d 218, 220 (8th Cir. 1995) (“Kistner represented himself at trial, testified on his own behalf, and cross-examined government witnesses”); *United States v. Berkowitz*, 927 F.2d 1376, 1380 (7th Cir. 1991) (defendant representing himself testified at trial with standby counsel asking questions); *Burke v. United States*, 293 F.2d 398, 399 (1st Cir. 1961) (“The defendant, a

member of the Massachusetts bar, represented himself at the trial and testified in his own behalf”).

Likewise, in other states, defendants representing themselves testify. *See, e.g., People v. Littebrant*, 867 N.Y.S.2d 550, 552 (N.Y.App. 2008) (“Defendant, who proceeded *pro se* at trial with standby counsel, testified on his own behalf”); *State v. Williamson*, 166 P.3d 387, 388 (Id.App. 2007) (“At trial, both police officers testified, as did Williamson, who was acting *pro se*”); *State v. May*, 829 A.2d 1106, 1112 (N.J.Super. 2003) (“Defendant, appearing *pro se* at trial, testified on his own behalf”); *Bridle v. Illinois*, 450 U.S. 986, 987 (1981), Brennan and Stewart, JJ., (dissenting from denial of petition for writ of certiorari) (defendant appeared *pro se* and testified in his own defense).

These cases illustrate that a defendant who does not wish to be restricted to answering questions chosen solely by his attorney – to match the attorney’s trial strategy – may testify either by asking himself questions or by testifying in narrative form: simply saying what he had to say. The trial court may determine the method by which the defendant will present *his* testimony.

In *State v. Hart*, 569 N.W.2d 451 (N.D. 1997), a defendant proceeding *pro se* wished to testify. *Id.* at 454. The trial court had appointed standby counsel, and gave the defendant the options of

testifying in narrative form or by question and answer:

If you testify in a narrative form, it will be necessary for you to write down that narrative form or have someone write it down for you so that the State is given an opportunity to object to those parts of the narrative that would be objectionable to them, and that the Court can rule on them.

The other way that you may testify is through your counsel. *You may give him such questions as you deem necessary or appropriate.* And he may ask you those questions and you may answer those questions, subject to the objection of the State.”

Id. at 455; emphasis added. Similarly, a Texas Court required a *pro se* defendant who wished to testify to “to pose questions of himself before providing an answer” to give the prosecutor an “opportunity to object to the question before the jury heard the answer.” *Watson v. State*, 176 S.W.3d 413, 418 (Tex.App. 2004). *See also State v. Joyner, supra.*

As with the testimony of any other witness, Rick’s testimony would have to comply with evidentiary rules. But no evidentiary rule restricts a defendant’s testimony to subjects chosen by his attorney. No authority supports the trial court’s assertion, in this case, that the “attorney-client ... privilege” and “strategy” circumscribe what a defendant may testify to in his defense. If Rick’s testimony – or the

questions he asked himself, or his answers – did not comply with the rules, the state could object and the court could sustain the objection.

“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United*, 397 U.S. 742, 748 (1970). In *Williams v. State*, 675 A.2d 1037 (Md.App. 1996), the Maryland Court of Special Appeals held that the defendant had been “coerced with respect to his decision not to testify because the circuit court incorrectly advised him with respect to the applicable law.” *Id.* at 1055.

Here, the trial court here misinformed Rick about the law; Rick’s responses, quoted above, show that Rick believed what the judge told him. In these circumstances, Rick’s decision to not testify was not made knowingly or intelligently or voluntarily. Rick’s decision was coerced; he made that decision only because – misinformed the court – he believed that he would not be able to present his defense and would be limited to matters and content chosen by counsel.

The question, because this point was not preserved, is whether the violation of Rick’s right to testify was a manifest injustice. Rule 30.20. The answer is that in the circumstances of this capital case, the violation of this right was a manifest injustice.

Rick's attorneys did not present any evidence in his defense at guilt phase. In contrast, at guilt phase the state put before the jury extensive evidence – including portions of three days' of Rick's confessions – to prove the charges against him. Rick's attorneys' guilt phase "defense" was, as his attorney stated during opening statement and closing argument, "the technical legal question about whether Rick actually deliberated at the specific time that he killed Marsha Spicer... a fine distinction" concerning "that one technical distinction between the two types of intentional murder" (Tr.3546-474209).

The trial judge repeatedly prevented Rick from giving details describing his proposed testimony (A28-A32). Rick's responses to the trial court's inquiries, albeit limited by the court, indicate that his testimony would have provided evidence supporting the defense of lack of deliberation. He said that he wanted to testify "to just try to, you know, explain the last two months that [he] was out there" (Tr. 4150).

What Rick wanted to say to the jury at guilt phase, and would have said but for the court's erroneous treatment of this constitutional right, should not have been denied. For the foregoing reasons, the judgment must be reversed and remanded for a new trial at which Rick will have the opportunity to present to the jury at guilt phase his testimony in his defense.

III

The trial court erred in denying Rick’s motion to strike juror Adam Powell for cause because Powell’s voir dire showed he could not give meaningful consideration to all mitigating evidence, and was unqualified to serve in a capital case and seating Powell on the jury violated Rick’s right to a fair and impartial jury, due process of law, and reliable sentencing, U.S. Const., Amend’s V, VI, VIII, and XIV; Mo.Const., Art. I, §§10, 18(a), and 21, in that Powell testified that in an “abstract” and “vague” sense he was willing “to look at” someone’s childhood experiences “but [he] believe[d], generally, no, as an adult human being you know that it’s right to kill a person or not right,” and “generally” would not consider a person’s childhood as mitigating; he also believed in the “eye for an eye” principle “in the context of the justice system.”¹¹

To be qualified to serve on the jury in a capital case, a juror must be able to give meaningful consideration to relevant mitigating evidence.

¹¹ This point was preserved in Rick’s motion for new trial (LF5259).

Tennard v. Dretke, 542 U.S. 274, 284-85 (2004); *Eddings v. Oklahoma*, 455 U.S. 104, 13-14 (1982); *Morgan v. Illinois*, 504 U.S. 719, 739 (1992). “Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.” *Eddings*, 455 U.S. at 13-14; emphasis in original. Unless a juror determining sentence in a capital case is able to give meaningful consideration to mitigation offered by the defense, the juror’s ability to serve as a fair and impartial juror is substantially impaired. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

Evaluated under the above standards, Juror Powell’s voir dire showed that he was unable to serve on this particular jury as a fair and impartial juror. Nonetheless, Juror Powell not only served as a member of the petit jury, he served as its foreperson. Because Powell’s presence on the jury deprived Rick of his right to a fair and impartial jury, the trial court’s error in failing to sustain the defense motion to strike Powell for cause is *per se* reversible error requiring the cause to be reversed for a new penalty phase proceeding. *Strong v. State*, 263 S.W.3d 636, 647 (Mo.banc 2008).

During voir dire, defense counsel asked the prospective jurors if they

could give “meaningful consideration” to mitigating evidence. Powell’s voir dire was as follows:

Q. [I]t’s always kind of hard to ask these kind of questions in the abstract before they are evidenced, but when you look inside yourself at your own views on punishment, are you willing to say that you could look at somebody’s childhood experience and give that meaningful consideration as a reason to vote against the death penalty for a guilty murderer?”

A. I’m willing to look at it, but I believe as an adult you’re a person and no matter what happened in your childhood you know the difference between right and wrong and killing a person and not killing a person.

Q. So if I’m hearing you correctly, you’re willing to look at it and listen to it?

A. Yes, sir.

Q. But from your world view it’s not something that should be given meaningful consideration in deciding which punishment to give the deliberate murderer?

A. Again, I think ***that’s so abstract. In some cases, yes, it could be, but I believe that most generally, no, as an adult human being you know that it’s right to kill a***

person or not right or what your feelings are.

Q. And, again, sort of to follow up on your questionnaire¹² – and this might sort of tie in what you’ve just told me – it’s at least your philosophical belief that you do believe in the concept of an eye for an eye and a tooth for tooth and a life for a life?

A. I believe in that in the context of the justice system, that if that is what is laid forth by the justice system and that’s ordained how it works in a society, orderly society, if that’s what’s rendered, I believe in that, yes.

(Tr.1020-22; A11; emphasis added).

The prosecutor, who had questioned Powell before defense counsel, questioned him again:

Q. Mr. Powell, as I understand it, sir, while you generally are not going to give a great deal of weight to evidence of someone’s childhood, for example, it is something that if the circumstances were appropriate, you would consider.

A. ***Being that we’re talking so vague, yes. I mean, I could see where there could be something that I would consider but generally no.***

¹² See A17.

Q. But it's a matter of weight, how much credit you would give it, if you will.

A. Correct.

Q. As opposed to being unwilling to consider it at all.

A. Correct.

(Tr.1035; A12; emphasis added).

Counsel moved to strike Powell for cause: “when asked if he could give meaningful consideration to things such as childhood experiences as a reason to vote against the death penalty for an adult murderer, essentially his answer was no” (Tr. 1041-42; A13). Counsel noted that even when the prosecutor “attempted rehabilitation” Mr. Powell basically reaffirmed that “basically” he could not consider childhood experiences (Tr.1042; A13). Counsel argued that under the “substantial impairment” standard of *Morgan v. Illinois, supra*, Powell was “not life qualified ... in that he cannot give meaningful consideration to childhood experiences as reasons to vote against the death penalty” (Tr.1042; A13). The trial court denied the defense motion to strike Powell for cause (Tr.1043; A14).

Powell served as the foreperson of the jury that convicted Rick and sentenced him to death (LF4853,5240; A26, A158).

Structural defects are “constitutional deprivations ... affecting

the framework within which the trial proceeds, rather than simply an error in the trial process itself....” “Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair....” One such structural defect is the trial by an adjudicator who is not impartial.... [When] a criminal defendant is deprived of the right to a fair and impartial jury, prejudice therefrom is presumed.”

Strong v. State, supra, 263 S.W.3d at 647 *citing Arizona v. Fulminante*, 479 U.S. 279, 310 (1991); *Knese v. State*, 85 S.W.3d 628, 633 (Mo.banc 2002) (failure to seat a fair and impartial jury is structural error).

“[S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.” *Abdul-Kabir, supra*, 550 U.S. at 246. The ‘proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”’ *Wainwright v. Witt, supra*, 469 U.S. at 424

quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980).

A juror who “cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case” is not qualified to serve and may be struck for cause. *State v. Rousan*, 961 S.W.2d 831,839 (Mo.banc 1998). Whether a prospective juror is qualified must be determined on the basis of the entire examination.” *State v. Clayton*, 995 S.W.2d 468,475 (Mo.banc 1999).

In their entirety, Powell’s responses to the jury questionnaire and to the voir dire show that only in an “abstract” and “vague” sense would he be able to consider childhood experiences and circumstances as mitigating evidence. Nothing in his voir dire indicated that in reality – as opposed to vague and abstract discussions – he could consider mitigating evidence of a defendant’s childhood.

Powell, who served as foreperson of Rick’s jury, was not qualified because he could not “give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.” *Abdul-Kabir, supra*, 550 U.S. at 246. His views on mitigating evidence substantially impaired his ability to serve as a fair and

impartial juror “in accordance with his instructions and his oath.”

Morgan v. Illinois, supra, 504 U.S. at 728.

For the forgoing reasons, this Court must find the trial court erred in denying Rick’s motion to strike Mr. Powell for cause and must reverse and remand for a new penalty phase proceeding.

IV

The trial court erred in overruling Rick's repeated objections and permitting the state to admit and use at both guilt and penalty phase excessively prejudicial duplicative evidence because the admission of evidence in one form served the state's probative purposes and the prejudicial effect of the same evidence being again introduced in a different form far outweighed any possible probative value the evidence could have and violated Rick's rights to due process of law, fair trial, and reliable sentencing, U.S. Const., Amend's V, VI, VIII, and XIV; Mo.Const., Art. I, §§10, 18(a), and 21, in that the duplicative evidence in question – videotapes and still photos made from those videotapes, the testimony of witnesses about the content of the videotapes, and Rick's statements concerning the offenses shown on the videotapes and the still photographs – was of such a painfully graphic and violent nature that the excessive display and presentation of this evidence

cannot be considered harmless.¹³

Prior to trial, Rick filed a motion asking the trial court to preclude the state from playing the videotapes (the “sex videos”) depicting the physically and sexually assaultive conduct giving rise to the charges against him (LF720-26). The motion argued that the tapes would be cumulative to other state’s evidence, in particular, “Mr. Davis’ full confession to the charged crimes” which documented, in detail, the acts committed (LF721). The trial court denied the motion (LF1094-95).

Before the state’s guilt phase opening statement, Rick renewed his motion and objected to the state’s proposed use in opening statement, of still photos made from the sex videos (Tr.3476). The trial court denied the objection (Tr.3476).

The pathologist testified that Spicer’s death was caused by the combined effects of strangulation and smothering (Tr.3612).

IPD crime scene investigator Linda Rosewarren testified that Item 26, a mini cassette seized from Rick’s apartment, “showed a man and a woman raping another woman” (Tr.3721).

Detective Howe testified that StEx 100 – a DVD of Item 26, depicted

¹³ This point was preserved in Rick’s motion for new trial (LF5245-46, 5274-75, 5280, 5289-90).

“forced sexual acts between two females and a male” (Tr.3753). He testified that Dena, Rick and Marsha Spicer were the people shown on the tape, “Marsha was bound ... [h]er wrists were bound behind her back with duct tape” (Tr.3753). Notwithstanding defense objections, Howe further testified that he saw anal intercourse on the tape, he saw “oral sex performed on Richard Davis on the tape,” he saw oral sex performed on Dena Riley on the tape, and the tape contained “general acts of violence” (Tr.3754). Howe testified that Item 31 – StEx 101 – depicted Richard Davis and Dena Riley and an “unknown female” engaging in “[f]orced sexual acts between two women and one man” (Tr.3758). The hands of the unknown woman were bound behind her back with yellow speaker wire” (Tr.3758). He saw “anal intercourse,” “vaginal intercourse,” “oral sex performed on Richard Davis” and “oral sex performed on Dena Riley” on StEx 101 (Tr.3761-62).

Through state’s witness Detective Rapp, the state introduced Rick’s videotaped statements describing, in detail, the sexually and physically violent acts he and Dena committed against Marsha Spicer and Michelle Ricci (Tr.3890-96, 3906-07; StEx’s 220, 221, 222, 223, 225).

Before closing argument, Rick renewed his motion and objected to the state introducing still photos made from the videotapes previously introduced and played for the jury (Tr.4068-69; StEx’s 301-315). The

prosecutor said she did not intend to “publish” them to the jury but did “intend to use them in [her] closing argument” instead of playing the video again “to show each and every element of the crimes” (Tr.4070). The court overruled the objection but told the prosecutor the stills “will not be depicted to the public, only to the jury” (Tr.4070).

Detective Howe testified to what was shown on the videotapes recovered from Winntech. Tape A showed four sexual acts between Rick, Dena, and Michelle Ricci (Tr.4086). Ricci’s hands were bound behind her back with yellow speaker wire (Tr.4086). The video showed anal sex, oral sex, and vaginal sex (Tr.4086). Tape B showed four sexual acts with Dena, Rick, and Marsha Spicer (Tr.4088). Initially Marsha was not bound, but later she was bound with plastic ties and then with duct tape (Tr.4088). The video showed anal sex, oral sex, and vaginal sex (Tr.4088).

Tape C showed four sexual acts between Rick, Dena, and Marsha Spicer; Marsha was bound with duct tape at the beginning of the tape but not towards the end (Tr.4090). The tape showed anal sex, oral sex and vaginal sex (Tr.4090). It also showed Marsha Spicer struggling and dying (Tr.4090).

Howe testified that during the final section of Tape C the camera was positioned differently, “[t]he bed was smoothed out,” and there was

plastic under the blankets” (Tr.4090). Unlike the other video clips, there was very little talking in this clip (Tr.4090).

Howe told the jury that Tape D showed Rick, Dena and Michelle engaging in four sexual acts (Tr.4092). Michelle was bound with duct tape (Tr. 4092). The video showed anal sex, oral sex, and vaginal sex (Tr.4092-93). In preparation for trial, Howe downloaded excerpts from the tapes onto two DVDs marked StEx’s 304 and 305 (Tr.4093-94). He also made “still pictures” from the videos (StEx’s 306-27). Following Howe’s testimony, the prosecutor played the video excerpts - StEx’s304 & 305 – to the jury (Tr.4099). Throughout her closing argument the prosecutor referred back to the videotapes, used the still photos, and also referred to Rick’s videotaped confessions (Tr.4189, 4190, 4191, 4193, 4194, 4195,4196, 4200, 4201).

At penalty phase, the state presented the testimony of Sheriff Higgins who described how the child victim, Josie, looked when he arrived at the scene (Tr.4427). The surgeon who repaired the vaginal and perineal lacerations Josie sustained testified (Tr.4441-48). The state also introduced photographs of these injuries (Tr.4449-50; St.Ex’s 552, 553,554, & 555).

In Missouri, “evidence must be both logically and legally relevant” to be admissible. *State v. Tisius*, 92 S.W.3d 751, 760 (Mo.banc

2002). For evidence to be “logically relevant” it must be probative, that is, it “tends to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case.” *Id.* But legal relevance requires more: legal relevance requires that the probative value of the evidence outweigh its prejudicial effect. *Id.* A trial court’s ruling on the admission of evidence is reviewed for an abuse of its discretion. *State v. Tillman*, 289 S.W.3d 282, 287 (Mo.App.W.D. 2009).

Rick does not dispute that his videotaped confessions graphically describing the crimes committed were probative of the charged offenses. He does not dispute that the videotapes he made graphically depicting the crimes committed were probative. He does not dispute that the still photographs made from the videotapes of the crimes were probative. He does not even dispute that Detective Howe’s testimony tended to show he committed the crimes charged.

But Rick does strongly urge this Court to find that the prejudicial impact of the onslaught of this duplicative, graphic, sexually violent evidence denied him a fair trial. Determination of legal relevance requires balancing the probative value of the evidence against its

prejudicial effect. Here, the trial court's own rulings acknowledged the extraordinary prejudicial nature of this evidence. This may be best shown by the fact that the trial court agreed that the evidence was prejudicial and mandated that the evidence not be displayed so that it could be seen by the public – the tapes and photographs were to be shown only to the jury. *See* Tr. 4073-74.

Rick's statements, alone, were probative. If the state had never recovered the videos Rick made, the state could have still tried this case. The statements were enough. To add to that both the videotapes and still photos from the videotapes threw the proceedings out of balance. Yet, on top of that, the trial court allowed the state to add police officer testimony telling the jury what was on the videos.

The trial court's overruling Rick's motion to preclude admission of the videotapes and then to admit as many as 3 other kinds of evidence (confessions, still photos, officer testimony) concerning the same issue was an abuse of discretion and violated Rick's rights to due process of law, fundamental fairness, jury trial, and reliable sentencing.

For the foregoing reasons, the cause must be reversed and remanded for a new trial.

V

The trial court erred in overruling Rick's objections to instructions 13, 15, 17, 19, 21, 23, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 55, and 57 because these instructions violated the respective pattern instructions for the offense in question and the MAI Notes on Use in that each of these instructions specifically referenced evidence introduced by the state during guilt phase thus violating Rick's rights to due process of law, a correctly instructed jury and fundamental fairness, U.S.Const., Amend's V, VI, and XIV; Mo. Const., Art. I, §§10 and 18(a) in that including specific evidentiary references in the instructions was the equivalent of the trial court commenting on the evidence and telling the jurors that the evidence referenced in the instruction would provide proof of the charged offense.¹⁴

At the guilt phase instruction conference, defense counsel objected to the verdict directors submitted by the state for Count IV-

¹⁴ Rick preserved this Point in his motion for new trial (LF5284-85).

-Instruction 13, Count V--Instruction 15, Count VI—Instruction 17, Count VII—Instruction 19, Count VIII—Instruction 21, Count IX—Instruction 23, Count XIII—Instruction 31, Count XIV—Instruction 33, Count XV—Instruction 35, Count XVI—Instruction 37, Count XVII—Instruction 39, Count XVIII—Instruction 41, Count XIX—Instruction 43, Count XX—Instruction 45, Count XXI—Instruction 47, Count XXII—Instruction 49, Count XXIII—Instruction 51, Count XXV—Instruction 55, and Count XXVI—Instruction 57 on the grounds that “language specifically pointing to a specific piece of evidence is prejudicial” (Tr.4106-4119; A59-A106). Thus, for example, Instruction 13 stated,

“As to Count IV, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May 14, 2006, ... the defendant touched the breast of Marsha Spicer ***as depicted in ‘Tape B’...*** (LF5141).

“The law prohibits the trial court from commenting on the evidence.” *State v. Bearden*, 748 S.W.2d 753, 756 (Mo.App.E.D. 1988). This is because, as the Eastern District explained, “juries are ... quite sensitive to any indications of the judge’s belief as to the merits of the issue being tried.” *State v. Lomack*, 570 S.W.2d 711, 713 (Mo.App.St.L.D.

1978). In *State v. Bowles*, 23 S.W.3d 775 (Mo.App.W.D. 2000), the jury, during deliberations, sent a note asking the court the time at which a witness identified the defendant. *Id.* at 783. Both sides agreed that the witness had not identified the defendant. The defendant requested a “mistrial on the grounds that the jury had completely misinterpreted the evidence in a material way that is likely to result in a miscarriage of justice.” *Id.* The trial court, however, replied to the jury’s note by saying that it must rely on the jurors’ collective memory of the evidence because the court could not comment on the evidence. *Id.* On appeal, the Western District upheld the trial court’s decision because “it would have been inappropriate for the trial court to comment upon the evidence in the case.” *Id.*

Submission of incorrect MAI-CR3d instructions to a jury is “error” with “the error’s prejudicial effect to be judicially determined....” Rules 28.02(c) and (f). Neither the MAI-CR3d instructions nor the Notes on Use provide for directing the jurors to specific evidence. The instructions here were in violation of the MAI and, therefore, error.

Further, this error was prejudicial. The trial court here, albeit inadvertently, put his stamp of approval on specific evidence by allowing it to be specifically referenced in the instructions. Because the instructions come from the court, and the evidence cited in each of the

instructions was introduced by the state in its case in chief, it is as though the court were saying to the jury: “this is the evidence that will prove the charge.” The effect was to tilt the case toward the state and violate Rick’s rights to due process of law, fair jury trial, and fundamental fairness.

For these reasons, the cause must be reversed and remanded for a new trial on Counts IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI.

VI

The trial court erred in overruling Rick's objections to the verdict directors – Instructions 5, 7, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, and 57 because they failed to instruct the jurors that they must be unanimous as to each of the elements of the offense as set out in each instruction and violated Rick's rights to due process of law, and fair trial by a correctly instructed jury, U.S. Const., Amend's V, VI, XIV and Mo. Const., Art. I, §§10 and 18(a) in that although this Court has said that Missouri's "instructions require unanimity as to each element," *State v. Johnson*, 284 S.W.3d 561, 575 (Mo.banc 2009), the current version of MAI entirely fails to so instruct the jurors.

One instruction, No. 64, told the jurors that their "verdict, whether guilty or not guilty, must be agreed to by each juror" (LF5196). Although this Court agrees that the jurors must be unanimous as to each element of the offense, the current MAI instructions, used in this case, contained no such requirement. The instructions submitted in this case violated Rick's rights to due process of law and trial by a properly instructed jury.

[T]he Constitution protects every criminal defendant “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged....” It is equally clear that the “Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged....”

United States v. Booker, 543 U.S. 220,230 (2005); citations omitted.

As in Missouri, crimes under federal law “are made up of factual elements, which are ordinarily listed in the statute that defines the crime.” *Richardson v. United States*, 526 U.S. 813,817 (1999). “[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.” *Id.*

The same question was presented to this Court as a matter of plain error in *State v. Johnson*, 284 S.W.3d 561, 573, 575 (Mo.banc 2009). The Court did not disagree with the appellant’s point that unanimity was required but found that the instructions did “require unanimity as to each element.” *Id.* at 575. Here, Appellant suggests that the current MAI simply does not provide a clear and sufficient directive to the jurors that they may not return a verdict of guilty unless they are unanimous as to each element of the offense. Appellant further suggests that this matter is fundamentally

important – sufficiently so that it is not enough that the law requires the jurors to be unanimous as to each element: the instructions must tell the jurors that.

Appellant’s research on this question is not exhaustive, but it shows that a number of jurisdictions follow the federal rule that to convict a defendant in a criminal case, a jury must unanimously find “that the Government has proved each element.” *Richardson*, 526 U.S. at 817. See, e.g., *State v. Gardner*, 889 N.E.2d 995, 1004 (Ohio2008); *State v. Pendleton*, 725 N.W.2d 717,730-31 (Minn.2007); *State v. Erskine*, 889 A.2d 312, 316 (Me.2006); *People v. Jenkins*, 997 P.2d 1044, 1130 (Cal.2000); *Martinez v. State*, 190 S.W.3d 254, 258 (Tex.App.2006); *Capano v. State*, 889 A.2d 968,980 (Del.2006); *People v. Palmer*, 87 P.3d 137,141 (Colo.App.2003); *State v. Doucette*, 776 A.2d 744,751 (N.H. 2001).

Failing to instruct the jury that to convict Rick of the charged offenses it must unanimously find each element of each charged offense violated his rights to jury trial and due process. U.S.Const., Amend’s VI and XIV. No instruction required the jury to unanimously find and agree upon the elements of any of the charged offenses. No instruction told the jurors what to do if they were not unanimous as to any of the elements.

Taylor v. Kentucky, 436 U.S. 478 (1978) is instructive. In *Taylor*, the question before the Supreme Court was whether Taylor’s jury should have been instructed on the presumption of innocence.

Opposing such an instruction, the state of Kentucky claimed an instruction on reasonable doubt, which Taylor’s jury received, was sufficient. *Id.* at 488. But the Court said the reasonable doubt instruction was unclear and even if it had been clearer, a “presumption-of-innocence” instruction serves a “special purpose.” *Id.* Further, rejecting Kentucky’s contention that because defense counsel discussed the presumption of innocence in his opening and closing statements, an instruction on presumption of innocence was unnecessary, *id.*, the Court said, “arguments of counsel cannot substitute for instructions by the court.” *Id.* at 488-89.

The Supreme Court recognized, “[w]hile the legal scholar may understand that the presumption of innocence and the prosecution’s burden of proof [beyond a reasonable doubt] are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence.” *Id.* at 484. “[T]he rule about burden of proof requires the prosecution by evidence to convince the jury of the accused’s guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution

(which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i.e.,* no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases.” *Id.* at 485; emphasis in original; citation omitted.

The same is true here. The instruction on the state’s burden of proof – beyond a reasonable doubt – simply does not tell the jury it must be unanimous as to the elements of the offense charged to convict.

An analogy may be made concerning proof of the elements of the state’s case for death at the penalty phase. Penalty phase instructions MAI-CR3d 314.40 and 314.44, concerning death-eligibility requirements – or elements - in §§565.030.4(2) and (3), both expressly inform the jury that the finding of a statutory aggravating circumstance must be agreed to by all twelve jurors – unanimously:

On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment

for life....

MAI-CR3d 314.40.

If you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No.____ exists, you must then determine whether there are facts or circumstances in mitigation of punishment....

MAI-CR3d 314.44. The Sixth and Fourteenth Amendments' requirement of unanimity is as important and constitutionally required for conviction of a crime as it is for proving the state's case for death.

Failing to ensure that the jurors were fully and correctly instructed that to return a verdict of guilt, they must unanimously find each element of the charged offense, deprived Rick of his right to due process of law and fair trial by a properly instructed jury. U.S. Const., Amend's V, VI, and XIV; Mo.Const., Art. I, §§10 and 18(a). The cause must be reversed and remanded for a new trial.

VII

The trial court erred in overruling Rick's motion to quash the information or, alternatively, preclude the death penalty, and sentencing him to death because this violated the rule of *Apprendi v. New Jersey*, 500 U.S. 466 (2000) and progeny – that all facts necessary to enhance the sentence must be alleged in the charging document – and Rick's rights to due process, notice of the offense charged, prosecution by indictment or information, and punishment only for the offense charged. U.S.Const. Amend's V,VI,&XIV; Mo.Const., Art. 1, §§ 10, 17, 18(a) & 21, in that in Missouri, at least one statutory aggravator must be found beyond a reasonable doubt to increase punishment for first-degree murder from life to death and thus statutory aggravators are, or are in effect, alternate elements of the greater offense of first-degree murder and must be pled in the charging document for the charged murder to be punishable by death; because no statutory aggravators were alleged in the information, Rick's death sentence was unauthorized and must

be reduced to life imprisonment.¹⁵

Before trial, relying on *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 500 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999), Rick moved to quash the information or preclude the death penalty (LF5037-59). The trial court overruled his motion (LF5037, 5114).¹⁶

In *Apprendi, supra*, the Supreme Court ruled that under the Due Process Clause, a factual determination authorizing an increase in the maximum prison sentence must be made by a jury based on proof beyond a reasonable doubt.” 530 U.S. at 469. Subsequently, in *Ring, supra*, the Court applied *Apprendi* to a capital case to hold the factual finding that a statutory aggravating circumstance exists must be made by a jury; the Court explained: the Sixth Amendment requires jury fact finding beyond a reasonable doubt “[b]ecause *Arizona's enumerated*

¹⁵ This point was preserved in Rick’s motion for new trial (LF5299).

¹⁶ Rick acknowledges this Court has denied similar claims, *e.g.*, *State v. Glass*, 136 S.W.3d 184, 193-94 (Mo.banc 2005). Rick respectfully requests full review because this point raises a federal constitutional issue that has not yet been ruled on by the United States Supreme Court.

aggravating factors operate as ‘the functional equivalent of an element of a greater offense...,’” *Id.* at 609 *citing Apprendi*, 530 U.S. at 494, n.19; emphasis added.

In Missouri, a defendant convicted of first-degree murder may not be death-sentenced unless a jury additionally finds, beyond a reasonable doubt, at least one statutory aggravator. Section 565.030.4(2), RSMo. (Supp. 2006); *see e.g., State v. Whitfield, supra*. Thus Missouri’s statutory aggravators, like Arizona’s, are facts required to increase the punishment for a defendant convicted of first-degree murder from life imprisonment to death. And Missouri’s statutory aggravators have precisely the same effect as Arizona’s statutory aggravators: they serve as “the functional equivalent of an element of a greater offense....” *Ring*, 536 U.S. at 609 *citing Apprendi*, 530 U.S. at 494, n.19. Because statutory aggravators authorize an increase in punishment and serve as elements of the greater offense of aggravated first-degree murder, the state must plead in the charging document the statutory aggravators it will rely on at trial to establish the offense as death-eligible. This conclusion is further explained as follows:

“An indictment must set forth each element of the crime that it charges.” *Almendarez-Torres v. United States*, 523 U.S. 224,228 (1998); *State v. Barnes*, 942 S.W.2d 362, 367 (Mo. banc 1997). A person may

not be convicted of a crime not charged unless it is a lesser included offense. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo.banc 1992).

Although §565.020 ostensibly establishes a single offense of first-degree murder punishable by either life imprisonment or death, under *Ring*, *Apprendi*, *Jones*, and *Whitfield*, the combined effect of §§565.020, 565.030.4, and 565.032.2 is to create two kinds of first-degree murder: *unaggravated* first-degree murder which does not require proof of a statutory aggravating circumstance, and the greater offense of *aggravated* first-degree murder which requires the additional finding of fact, and includes as an additional element, at least one statutory aggravator. To charge aggravated first-degree murder, the state must plead in the charging document the statutory aggravators on which it will rely at trial to obtain a death sentence.

Missouri law supports Rick's argument that unless a sentence-enhancing aggravator is pled in the charging document, the sentence may not be enhanced beyond what is authorized without the aggravator. For example, in *State v. Nolan*, 418 S.W.2d 51 (Mo. 1967), the defendant was charged with first-degree robbery. Although the robbery statute authorized an enhanced punishment of ten years imprisonment 'for the aggravating fact for such robbery being committed "by means of a dangerous and deadly weapon,"' the

information failed to charge this aggravating fact. *Id.* at 52. The jury, however, found the defendant guilty of “[r]obbery first degree, by means of a dangerous and deadly weapon” and based on this aggravator, enhanced his punishment. *Id.*

The question on appeal was whether the “aggravating circumstances” authorizing additional punishment must be pled in the charging document. *Id.* at 53. The state claimed the defendant had adequate notice “of the cause and the nature of the offense for which he was convicted,” so it was not necessary to charge the aggravating circumstance in the information. *Id.* at 53-54. The state argued the defendant had “notice” from other language in the charge referring to a weapon; further, the defendant’s motion to vacate his sentence indicated he knew the state would try the case as an aggravated robbery. *Id.* at 53-54.

This Court rejected these arguments holding that other language in the charging document, “with force and arms,” was insufficient to charge the aggravator: that the robbery was committed by means of a dangerous and deadly weapon. *Id.* at 54. “The sentence here, being based upon a finding of the jury of an aggravated fact not charged in the information, is illegal” and “[t]he trial court was without power or jurisdiction to impose that sentence.” *Id.*

Here, the state did not plead any statutory aggravators in the Information, (LF79-84). Although *Nolan* was not a capital case, the teaching of *Apprendi* and *Ring* is the same principle applies in both capital and non capital cases. Here, as in *Nolan*, the Information did not charge Rick with an aggravated offense, *i.e.*, an aggravated murder punishable by death. The state charged only unaggravated first-degree murder for which the maximum sentence is life imprisonment. Accordingly, Rick's death sentence is unauthorized and cannot stand.

For the foregoing reasons, the Court should find that in this case, the state charged only the offense of unaggravated first-degree murder and the trial court exceeded its jurisdiction in sentencing Rick to death. Rick's sentence must be vacated and he must be resentenced to life imprisonment without probation or parole.

VIII

The trial court erred in overruling Rick's objections to §565.030.4(3) and Instructions 70 and 71, MAI-CR3d 313.44 and 314.48, and in refusing to submit Instructions B and C because §565.030.4(3) Instructions 70 and 71 imposed on Rick the burden of proving himself non death-eligible thus violating his rights to due process, jury trial, and reliable sentencing, U.S.Const., Amend's V, VI, VI, VIII, and XIV, in that under *Apprendi v. New Jersey*, 500 U.S. 466 (2000), and progeny, the state bears the burden of proving beyond a reasonable doubt all sentence-enhancing facts, but in *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo.banc 2008), this Court held that §565.030.4(3), which provides the sentence must be life if the jury "concludes" mitigation outweighs aggravation, places on the defendant the burden of proving to a unanimous jury that mitigation outweighs aggravation to obtain a life sentence; Rick was prejudiced because unlike Instructions 70 and 71, Instructions B and C correctly put the burden of proof of this

sentence-enhancing fact on the state.¹⁷

Section 565.030.4's three subsections – “steps” – provide circumstances under which the punishment for first-degree murder “shall” be life imprisonment: “(1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances... (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances... warrants imposing the death sentence... (3) If the trier concludes that there is evidence in mitigation of punishment... which is sufficient to outweigh the evidence in aggravation of punishment found by the trier....” Each of these steps requires findings of fact. *State v. Whitfield*, 107 S.W.3d 253, 256, 261 (Mo.banc 2003) (“*Whitfield II*”).

The phrasing of §565.030.4 as to each of the “steps” of subsections (1), (2), and (3) establishes the factual finding that, if made, will require a sentence of life. Thus, for (1), a sentence of life is required if the jury

¹⁷ Rick acknowledges this Court has denied similar claims, *e.g.*, *State v. Johnson*, 284 S.W.3d 561, 587-89 (Mo.banc 2009), but requests review because this point raises a federal constitutional issue not yet ruled on by the United States Supreme Court.

does not find beyond a reasonable doubt at least one statutory aggravator. For (2), a sentence of life is required if the jury does not find the aggravation warrants death. For (3), a sentence of life is required if the jury finds the mitigation outweighs the aggravation found by the trier. If any one of these facts is found, the defendant must be sentenced to life.

It logically follows that the jury must find the converse at *all* of these steps to impose a death sentence (because any one of the steps found for life will require a life sentence). For a death sentence, then, the jury must (1) find at least one statutory aggravator, (2) find the aggravation warrants death, and (3) find the mitigation is not sufficient to outweigh the aggravation.

This Court's previous holdings were consistent with this logic. Previously, this Court held that "[t]he jury can impose the death penalty only under certain conditions.... [T]he jury must unanimously find that mitigating circumstances weigh less than aggravating circumstances.... *State v. Whitfield*, 837 S.W.2d 503, 515 (Mo.banc 1992) ("*Whitfield I*"); emphasis added; *Whitfield II* at 259 citing *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) ("Colorado's death penalty statute, like Missouri's, requires... [that] mitigating factors must not outweigh the aggravating factors" for a sentence of death to be

imposed.).

More recently, however, this Court has held that §565.030.4(3) requires the defendant to bear the burden of proving the mitigation outweighs the aggravation to obtain a sentence of life imprisonment and both this statute and MAI-CR3d 314.44. *See, e.g., State v. Johnson, supra*, citing *State v. Taylor*, 134 S.W.3d 21, 30 (Mo.banc 2004); *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo.banc 2008) (“under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence.”). These recent cases are inconsistent with the United States Supreme Court’s Sixth, Eighth, and Fourteenth Amendment jurisprudence which requires the state to bear the burden of proving all facts necessary for a sentence of death. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101,117 (2003), O’Connor, J., concurring in part and concurring in judgment citing *Poland v. Arizona*, 476 U.S. 147,155 (1986) (“A defendant is ‘acquitted’ of the death penalty for purposes of double jeopardy when the sentencer ‘decide[s] that the prosecution has not proved its case that the death penalty is appropriate’”); *Poland*, 476 U.S. at 154 (“the relevant inquiry in the cases before us is whether the sentencing judge or the reviewing court has ‘decid[ed] that the prosecution has not proved its case’ for the

death penalty and hence has ‘acquitted’ petitioners”); *Bullington v. Missouri*, 451 U.S. 430,432 (1981) (“the prosecution has the burden of proving certain elements beyond a reasonable doubt before the death penalty may be imposed...”).

Apprendi, supra, teaches that it is the *effect* of statutory provisions that matters – not the form. *Id.* at 494; *see also Ring, supra*, 536 U.S. at 604. Although the “form” of §565.030.4(3) is to establish the fact that must be found for a sentence of life, this overlooks the “effect” of that provision.

The effect of §565.030.4(3) is that the findings of this step (and the other steps of §565.030.4) determine whether the sentence for a person convicted of first-degree murder will be enhanced to death. Unless the requisite findings of §565.030.4 are made, a sentence of life imprisonment is the only punishment authorized for a person convicted of first degree murder. Thus, to comply with *Apprendi* and progeny, and the Eighth and Fourteenth Amendment’s requirements that the state bear the burden of proving its “case” for death, Missouri juries must be instructed that the state bears the burden of proof at the §565.030.4(3) weighing step.

Instructions 70 and 71 were erroneous because they misplaced the sentencing burden of proof: they required Rick to prove he was eligible

for a life sentence by proving the mitigation outweighed the aggravation. Instructions 70 and 71 violated Rick's Sixth, Eighth, and Fourteenth Amendment rights to due process, jury trial, reliable non arbitrary sentencing rights by diminishing the state's obligation to prove the sentence of death it was seeking. It was the sentencing equivalent of shifting the burden of proving an element of the offense at guilt phase and requiring the defendant to show it did not exist.

Rick's Instructions B and C each provided constitutionally correct alternatives to Instructions 70 and 71 (LF174-75,180-81; A27-A28, A33-A34). Instruction B told the jury that if it had found at least one statutory aggravating circumstance existed, it "must then determine whether the State has proven, beyond a reasonable doubt, that facts or circumstances in mitigation of punishment are not sufficient to outweigh facts and circumstances in aggravation of punishment" (LF5209;A154). Instruction C, likewise, placed on the state the burden of proving beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances (LF5211;A156).

For the foregoing reasons, the trial court erred in overruling Rick's objections to §565.030.4 and Instructions 70 and 71 and in refusing to submit Instructions B and C. Rick was prejudiced because had his jury

been correctly instructed, the result might very well have been a sentence of life imprisonment. His sentence of death must be reversed and he must be resentenced to life imprisonment or, alternatively, the cause must be remanded for further proceedings.

Conclusion

Wherefore, for the foregoing reasons, as to Points 1, 2, 4, and 5, Richard Davis prays that the Court will reverse the judgment of the circuit court and grant him a new trial; in the alternative, as to Points 3, 6, 7 and 8, he prays that the Court will vacated his sentence of death and resentence him to life imprisonment without probation or parole or, in the alternative, grant him a new penalty phase proceeding.

Respectfully submitted,

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Certificate of Compliance and Service

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rules 84.05 and 84.06. The brief comprises 23,782 words according to Microsoft word count.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in October, 2009. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

This 26th day of October, 2009, a true and correct copy of the attached brief, with the separately bound appendix, were hand-delivered to the Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102.

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