

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,
THE HON. MARCO A. ROLDAN, JUDGE

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE</u>
TABLE OF AUTHORITIES.....	3-4
REPLY ARGUMENT:	
Reply to Respondent’s Point I	6-26
Reply to Respondent’s Point II.....	27-30
CONCLUSION	31
CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULES	32

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Ake v. Oklahoma</i> , 740 U.S. 68 (1985)	17, 24
<i>Avery v. Johnson</i> , 393 U.S. 483 (1969)	16
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977)	17, 18, 25
<i>Delaware v. VanArsdall</i> , 475 U.S. 673 (1986).....	23
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	10, 13, 15, 17, 21
<i>Franklin v. State</i> , 24 S.W.3d 686 (Mo.banc 2000)	12
<i>Holt v. Pitts</i> , 702 F.2d 639 (6th Cir. 1983)	16
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	11
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983)	29
<i>Kane v. Espitia</i> 546 U.S. 9 (2005)	20-21
<i>Kleim v. Sansone</i> , 248 S.W.3d 599.....	6
(Mo.banc 2008)	
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996)	25-26
<i>McKaskle v. Wiggins</i> , 465 U.S. 168 (1984).....	15
<i>Nguyen by and through Nguyen v. Haworth</i> ,	28
916 S.W.2d 887, 889 (Mo.App. W.D. 1996)	
<i>People v. Blair</i> , 115 P.3d 1145 (Cal. 2005)	22

<i>Robins v. United States</i> , 404 U.S. 1049 (1972)	11
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987)	29
<i>State v. Black</i> , 223 S.W.3d 149 (Mo.banc 2007)	12
<i>State v. Hampton</i> , 959 S.W.2d 444 (Mo.banc 1997).....	12-13
<i>State v. Johnson</i> , 207 S.W.3d 24 (Mo. banc 2006)	28
<i>State v. Neher</i> , 213 S.W.3d 44 (Mo.banc 2007)	10
<i>State v. 12</i> , 297 N.W.2d 206 (Iowa 1980)	12
<i>State v. White</i> , 44 S.W.3d 838 (Mo.App.W.D. 2001).....	12
<i>Stevens v. Missouri Pac. R. Co.</i> ,.....	6
355 S.W.2d 122 (Mo. 1962)	
<i>United States ex rel. George v. Lane</i> ,.....	18-19
718 F.2d 226 (7 th Cir. 1983)	
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	24
<i>United States v. Chatman</i> , 584 F.2d 1358	18-19
(4 th Cir. 1978)	
<i>United States v. Smith</i> , 907 F.2d 42.....	18
(6 th Cir. 1990)	
<i>United States v. Wilson</i> , 690 F.2d 1267	18, 20
(9 th Cir. 1982)	

CONSTITUTIONAL PROVISIONS

U.S.Const., Amend. VI..... passim
U.S.Const., Amend. XIV 10, 14

RULES

Rule 30.20..... 7, 29

OTHER AUTHORITIES

Webster’s New World Dictionary, 3d College Ed. (1988) 10

Reply Point 1

(Replying to Respondent's Point I)

Respondent's theories, reasons, and arguments in opposition to Rick's request to represent himself and for the basic tools for an adequate defense were not raised in the court below and may not be considered, for the first time, on appeal.

For the first time, on appeal, respondent,¹ presents arguments in opposition to Rick's constitutional rights to proceed *pro se* and to the basic tools necessary for an adequate defense. This Court has consistently held that a theory not raised in the court below will not be considered on appeal.

Kleim v. Sansone, 248 S.W.3d 599, 602-03 (Mo.banc 2008) (“A party on appeal generally ‘must stand or fall’ by the theory on which he tried and submitted

¹ In the court below, the state did not make any of the arguments presented here in opposition to Rick's requests to represent himself and for the means and tools to do so. Paragraphs 1 and 2 of the defendant's motion for new trial raised the trial court's ruling on this matter; the state's response to the motion for new trial stated: “The State denies the allegations set forth in points 1-57. The State stands on transcript and the arguments made along with the Court's rulings on all issues.” (LF5307).

his case in the court below”); *Stevens v. Missouri Pac. R. Co.*, 355 S.W.2d 122, 127 (Mo. 1962) (a theory not presented to the court below, “raised for the first time in respondent’s appellate brief, comes too late and may not be relied upon in support of this judgment.”). Particularly in light of the many written motions and requests that Rick filed requesting that he be allowed to proceed *pro se* and be provided the basic tools of an adequate defense, and the hearing concerning these motions held October 10, 2007, it is evident that respondent had more than ample opportunity to present its theories, reasons, and arguments opposing Rick’s request in the court below. Accordingly, this Court should not consider any of the arguments. In the alternative, if the Court does not follow its precedents, the Court should only review the state’s arguments under the plain error standard. In this instance, the plain error standard would require the state to demonstrate that not affirming the trial court would be a manifest injustice or a miscarriage of justice. Rule 30.20. As undersigned counsel does not know how the Court will treat respondent’s failure to raise any of its arguments in the lower court, she will reply to the arguments respondent makes, for the first time, in its brief on appeal.

Rick’s motions did not ask that he, personally, receive or have funds to represent himself or that equipment (such as a typewriter) be purchased for him.

Respondent's argument requires clarification. Respondent argues that "appellant had no constitutional right *to access to the funds* he requested to pay his own litigation expenses if he proceeded *pro se*" (Resp.Br.31; emphasis added). Similarly, respondent argues that "[a]mong the aid that appellant sought was... physical items, including additional copies, a typewriter, a VCR, and a telephone... and an unmonitored telephone with access to all telephone systems...." (Resp.Br. 32). The above language from respondent's argument could be read as suggesting that Rick was asking that funds for his defense be given directly to him, personally, and that equipment – "physical items" – be purchased for him.

But Rick's motions and requests, all or virtually all in the record, do not support such reading or suggestion. Rick requested "the means" to represent himself (*e.g.* LF 154) but did not ask for a bank account with his name on it or a blank check. He never asked to personally receive or have direct control over the funds for his defense. Nor does the record suggest that the trial court thought Rick was asking for funds to be given to him directly. Rick did not request that equipment or any sort of physical items be purchased for him. Again, the record does not support any such argument or suggestion. The record shows that Rick simply asked for access to such items (*e.g.* LF 170).

Rick Davis unequivocally asserted two constitutional rights: his

right to self-representation and his right as a *pro se* defendant to the basic tools of an adequate defense. His unequivocal assertion of these two rights did not make either assertion equivocal.

Respondent argues that because Rick sought to represent himself and also asked – frequently in the same motion – that he be given “the means” and “help” necessary for self-representation, his request to represent himself was not “unequivocal” (Resp.Br.32-35). Respondent’s support for this argument is that Rick’s motions never said “that he was willing to represent himself without the requested funding” or “unequivocal[ly] request[ed] to represent himself” but “requested assistance, including the assistance of attorneys, in representing himself” (Resp.Br. 33, 35).²

Respondent fails to mention that *Rick never said he wanted to represent himself only if provided means and tools to do so* or that he *would not represent himself if denied the means and tools*. Rick unequivocally asked to represent himself, and he unequivocally, separately, requested “tools,”

² The state is incorrect: at least two of Rick’s motions – his “Motion to Dismiss Public Defenders and Represent Myself” (date unclear), (LF285-86), and his, “Motion for Removal of Counsel with Reasons to be *Pro Se*,” December 7, 2007, (LF324-29) – only asked to be allowed to proceed *pro se*.

“services,” and “assistance”³ in proceeding *pro se*.

Respondent does not argue that Rick’s numerous requests to represent himself were “equivocal” because they had “two or more meanings,” were “purposely vague, misleading, or ambiguous,” or were “uncertain,” “undecided,” “doubtful,” “suspicious,” or “questionable.” “Equivocal,” Webster’s New World Dictionary, 3d College Ed. (1988) 460. Rather, respondent attempts to nullify the trial court’s erroneous rulings – requiring Rick to choose between his right to self-representation and his right to “tools of an adequate defense” and denying Rick’s right to represent himself – by arguing that Rick “relinquished his right to self-representation” and therefore cannot claim the court improperly denied that right (Resp.Br.35).⁴

³ This brief uses the terms “basic tools,” “tools,” “services,” “resources,” and “assistance” to refer to the Sixth and Fourteenth Amendment “defense tools” referenced in *Faretta v. California*, 422 U.S. 806, 820 (1975).

⁴ Citing *State v. Neher*, 213 S.W.3d 44, 49 n.5 (Mo.banc 2007), respondent argues that appellant’s initial brief made no argument as to Rick’s post-hearing requests to represent himself, so claims concerning those requests are abandoned (Resp.Br. 35). This argument fails because the argument in appellant’s initial brief as to his Point I applies to all of the trial court’s rulings denying Rick’s self-representation requests; Rick’s post-hearing, self-

Respondent's argument is flawed and must be rejected. Although not addressed in its brief, respondent necessarily relies on the faulty premise that appellant *voluntarily* relinquished his right to self-representation (Resp.Br. 35). But Rick did not *voluntarily* "relinquish" his self-representation right: Rick gave up this right only because the trial court erroneously forced Rick to choose either his right of self-representation or his right to the basic tools of an adequate defense. (App.Br. 35, 45-69). And an involuntary relinquishment of a constitutional right is not a valid waiver of that right: "a waiver of a right to counsel is valid only if it is voluntarily and understandingly made." *Robins v. United States*, 404 U.S. 1049, 1051 (1972),

representation requests and motions did not differ significantly from his pre-hearing motions and requests, the subsequent motions and requests were all denied without a hearing, and nothing in the record suggests that the trial court's denials of Rick's subsequent, post-hearing requests were based on different claims or grounds or to different effect than the court's initial ruling requiring Rick to choose between his constitutional rights. In contrast, in *Neher*, apparently, the point relied on identified four, disparate, reasons for finding a sheriff's affidavit insufficient to establish probable cause for a search warrant, but appellant's argument only addressed three reasons. *Id.* *Neher* is inapposite; respondent's argument fails (App.Br.35, 45-69).

Brennan, Douglas, and Marshall, JJ., dissenting, citing *Johnson v. Zerbst*, 304 U.S. 458 (1938). Being forced to choose between two rights does not result in the voluntary relinquishment of the lost right.

Citing *State v. Hampton*, 959 S.W.2d 444, 448 (Mo.banc 1997), respondent next argues that Rick’s request for “legal assistance,” including an attorney, was neither “an unequivocal waiver of the right to counsel” or “a proper request for self-representation” (Resp.Br.35-36). Respondent’s argument is contrary to cases such as *State v. Black* in which this Court stated, “In capital cases where the defendant insists on representing himself, standby counsel should usually be appointed.” 223 S.W.3d 149, 156 (Mo.banc 2007).⁵

⁵ In researching and drafting this Reply, undersigned counsel has found cases using the terms “standby counsel” and “advisory counsel,” (*e.g.*, *Franklin v. State*, 24 S.W.3d 686, 689 (Mo.banc 2000); *State v. White*, 44 S.W.3d 838, 841 and 849-50, Smart, J., dissenting, (Mo.App.W.D. 2001)), but has not found a case that defines, distinguishes, or explains these terms. If, under *State v. Black, supra*, a trial court’s unsolicited appointment of “standby counsel” for a defendant who wishes to proceed *pro se* is deemed a waiver of his self-representation right or means that the defendant did not waive his right to counsel, it violates the Sixth Amendment, *Faretta*, and destroys the right to self-representation.

Further, *Hampton* does not help respondent. Unlike Rick, Hampton expressly sought “hybrid” representation: his motions indicated his attorneys should “advise *and represent*” him, “not to replace or second-guess the defendant” and that his attorneys would be conducting voir dire and cross-examining most, if not all, witnesses. *Id.* at 448. The Court in *Hampton* explained, “What *Faretta* guarantees is the right to forgo the assistance of counsel in defending oneself, not the right to insist on self-representation in addition to representation by counsel.” *Id.* at 447. *Faretta* does not require “hybrid” representation – defendant acting as co-counsel with his lawyer. *Id.*

Rick’s motion of June 25, 2007, (LF155-61), “to compel counsel or make defendant counsel pro-se shows that he was not asking to be “represented by” counsel. It includes a list of things he wanted his attorneys to do (primarily investigating and obtaining evidence) and states, “if this cannot be done then

Rick’s request for legal assistance did not require, and should not be equated with, a request for “appointment” of counsel. Rather, Rick sought, and his request could have been met by, alternatives such as allowing him a reasonable number of hours per week in the prison law library or by other means of access to legal materials. As noted elsewhere, “access” to legal materials or a law library should not be narrowly read to mean the defendant, himself, physically entering a law library.

I will represent myself” (LF156). Paragraphs 1-11 specifies things that Rick wanted done for his defense at trial (LF157-60). Paragraph 11 continued:

If I can not have the above, then if it is true and I can be the so-called Lawyer and have access to assistance in doing the above then I want to do that and have access to Law Library, people to help investigate for me, witnesses, and help I will need for a trial. I was told that I could and have a Lawyer to help me. But I will need help, being my Lawyer and representing myself.

I have a possible defense and the Lawyers said I do not, and that is why I asked for the above (1-10).

(LF155-61; emphasis in original).

A thorough review of the record shows that Rick wanted assistance in representing himself – not representation by someone else. Rick’s motions asked that someone – not necessarily an attorney – “assist” in such things as legal research, serving subpoenas, investigating, and contacting witnesses. In fact, at the October 10th hearing, it was the judge, not Rick, who brought up appointment of counsel: the judge said that he had to appoint an attorney to assist Rick (Tr.32-33). Rick asked only about assistance in contacting witnesses and investigating (Tr. 34-35).

Contrary to respondent’s arguments, (Resp.Br. 37-42), good authority establishes that providing to a *pro se* defendant “assistance” or “legal

assistance” and other tools that are necessary in the particular case is constitutionally required. Such assistance does not undermine or usurp, and is not inconsistent with, a defendant’s *pro se* representation.

In *Faretta*, the Court ruled that ‘a State may—even over objection by the accused—appoint a “standby counsel” to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.’ 422 U.S. at 834, n.46. This statement from *Faretta* does not stand alone.

“[C]ounsel, *like the other defense tools guaranteed by the [Sixth] Amendment*, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.” *Id.* at 820. “The Counsel Clause itself, which permits the accused “to have the Assistance of Counsel for his defense,” implies a right in the defendant to conduct his own defense, with the *assistance* at what, after all, is his, not counsel’s trial.” *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984); emphasis in original. “[A]n assistant, however expert, is still an assistant.” *Faretta*, 422 U.S. at 820.

In *McKaskle*, the Supreme Court considered the extent of the assistance that could be provided by appointed, “standby counsel,” without infringing on the defendant’s right to proceed *pro se*. The Court held there was “no absolute bar on standby counsel’s unsolicited participation” and that both “[t]he right

to appear *pro se*” does not require “categorically silencing standby counsel.” *Id.* at 176-77. *See also State v. Simon*, 297 N.W.2d 206, 207-08 (Iowa 1980) (holding that while having an attorney perform legal research for a *pro se* defendant did, to a limited extent, deny the defendant his rights to proceed *pro se*, it did not “usurp” them).

Relying on *Holt v. Pitts*, 702 F.2d 639 (6th Cir. 1983), respondent asserts that “because appellant was represented by counsel, appellant had ‘full access’ to the necessary tools for his defense” (Resp.Br. 36). But *Holt* does not help respondent. *Holt* ultimately **accepted** appointed counsel, and he had in his possession the law books he desired (though the hard covers had been removed). *Id.* at 640-41

Although inapposite, *Holt’s* indication that the “legal tools necessary [for a criminal defendant] to defend himself” include “a state-provided law library, or the assistance of legally-trained personnel” is instructive in the present case because it suggests alternative tools of “legal assistance.” *Id.* Similarly, in *Avery v. Johnson*, 393 U.S. 483 (1969), in holding that a prison regulation that prohibited inmates from assisting each other with “Writs or other legal matters” violated the inmates’ statutory habeas corpus rights to access to the courts, *id.* at 484-86, the Supreme Court noted the existence of alternatives to the assistance provided by inmates including: “several States, [in which] the public defender system supplies trained attorneys, paid from public funds,

who are available to consult with prisoners regarding their habeas corpus petitions... [a]t least one State employs senior law students to interview and advise inmates in state prisons.... Another State has a voluntary program whereby members of the local bar association make periodic visits to the prison to consult with prisoners concerning their cases” and “One State has designated an inmate as the official prison writ-writer.” *Id.* at 489 and n.10. *See also Bounds v. Smith*, 430 U.S. 817, 828, 830-31 (1977) (The legal “assistance” required to protect inmates “constitutional right of access to the courts” did not mean representation *by* counsel; it included “professional or quasi-professional legal assistance to prisoners... paraprofessionals and law students... [and] volunteer attorneys...”); emphasis added.

Respondent next asserts that because the trial court’s advice – that the Court would not provide resources if Rick represented himself – “was not erroneous,” there was no error (Resp.Br. 36). Respondent recognizes that *Ake v. Oklahoma*, 740 U.S. 68 (1985) requires that indigent defendants “have access to the basic tools necessary for representation” but says this obligation is satisfied by providing the accused with appointed counsel (Resp.Br. 37-38).

Respondent’s argument eviscerates *Faretta* and repeats the trial court’s error. The state would have this Court find that forcing a defendant to forego his Sixth Amendment right to represent himself is a constitutionally acceptable means of protecting the defendant’s Sixth Amendment right to the

basic tools necessary for an adequate defense.

Respondent also relies on *United States v. Smith*, 907 F.2d 42 (6th Cir. 1990), *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978), *United States ex rel. George v. Lane*, 718 F.2d 226 (7th Cir. 1983), and *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982). These cases do not help respondent.

In *Smith*, the defendant was offered but rejected both appointed counsel and *standby* counsel; instead, he demanded “access to a legal library “with the minimum standards set forth by the American Bar Association, American Association for Legal Libraries, and the Supreme Court in *Bounds v. Smith* and *Gilmore v. Younger...*” *Id.* at 43, 44, 45. The Sixth Circuit upheld the lower court’s finding “that it was not the prerogative of the defendant to decide whether he would accept either the state’s offer of legal counsel or instead insist that the state provide him with access to the same facilities that a bar association would have.” *Id.* at 44. Since Smith was offered – but rejected – standby counsel (who, under *Faretta*, could have provided the legal assistance Smith sought without infringing on his self-representation right), Smith is distinguishable on its facts from the present case.

Chatman, too, is distinguishable on its facts from Rick’s case. In *Chatman*, the defendant complained that “he had not been permitted access to the penitentiary library to prepare his defense.” *Id.* at 1360.” But Chatman, himself, caused his own denial of access to the prison library. He had been

denied “access [to the library] because he was in segregated confinement” for various violations of the prison’s rules including mailing a threatening letter⁶ and twice assaulting prison guards. *Id.*

After repeatedly vacillating between proceeding *pro se* or being represented by counsel, George, the defendant in *United States ex rel. George v. Lane*, 718 F.2d 226 (7th Cir. 1983) decided to represent himself and asked the trial judge to “provide him with a typewriter, the use of a law library and ‘the same facilities that a bar association lawyer would get.’” *Id.* at 228. George got quite a bit: the judge, “to protect the interests of the defendant, appointed an assistant public defender to be available at all proceedings to assist George...” *Id.* Responding to George’s motions for paper, a typewriter, and use of a law library, the trial court gave George yellow legal pads, said he could file a single copy of an “ink-written” motion, and that the court would provide “any reasonable photocopying” necessary. *Id.* Because “transporting and supervising each and every prisoner (pre-trial detainee) requesting law library access” would place an “intolerable” burden on the jail officials, the judge refused to order “prison officials to accompany [George] to legal research facilities outside of the jail...” *Id.* at 232. But the trial court did agree to give George “a number of legal manuals and treatises he

⁶ Chatman sent a letter to the judge threatening to kill him. *Id.* at 1359-60.

requested and directed that the Public Defender's Office comply with reasonable requests for assistance from the petitioner.” *Id.* George “was also in contact with the Northwestern University Law School Legal Clinic... and was in receipt of eighty cases which were sent to him by inmates at other detention facilities....” *Id.*

The defendant in *United States v. Wilson*, initially rejected “the offer of court-appointed counsel” and insisted on “personally conduct[ing] his own research, even though the local county facility in which he was being held had no library.” 690 F.2d 1267, 1272 (9th Cir. 1982. He never asked “his court appointed attorney or anyone else” for legal research assistance. *Id.* On the day of trial, he “chose to have his court-appointed counsel represent him.” *Id.*

Respondent incorrectly asserts that the trial court ***correctly*** advised Rick Davis that he had no right to funds or “tools” other than appointed counsel (Resp.Br.31; emphasis added). *Kane v. Espitia* 546 U.S. 9 (2005) makes it clear that the law does not limit “tools” to appointed counsel. Espitia, who represented himself at trial, argued on appeal that his Sixth Amendment rights had been violated because, while incarcerated before trial, he had no access to the law library “despite his repeated requests and court orders to the contrary....”*Id.* The state courts denied relief, but the Ninth Circuit reversed, holding that “the lack of any pretrial access to law books violated Espitia’s constitutional right to represent himself” under *Faretta*. *Id.* at 10.

The case reached the Supreme Court, but the Court expressly declined to rule on merits of *Espitia*'s claim. Instead, it ruled that *Espitia*'s claim did not meet the standard for federal habeas relief because “[t]he federal appellate courts have split on whether *Faretta*, which establishes a Sixth Amendment right to self-representation, implies a right of the pro se defendant to have access to a law library,” and *Faretta* says nothing about any specific legal aid that the State owes a *pro se* criminal defendant.

What is significant about *Espitia* for present purposes is what the Court did *not* hold. Had the law been clear that an accused proceeding *pro se* is entitled only to appointed counsel, the Court would have so held.

The foregoing cases also highlight the fact that the trial court ruled it would not provide any “basic tools” for Rick Davis’ *pro se* defense without ever considering, in the particular circumstances of his case, what defense tools Rick reasonably needed to represent himself and what means existed to provide those tools. Implicit in the trial court’s ruling – that the only way Rick could only obtain the basic tools for his defense was through the public defender’s office – is the trial court’s acknowledgement that Rick reasonably needed at least some of those tools; see Tr. 33-37, 51.

Had the trial court considered what defense tools were reasonably necessary for Rick’s defense, the court would have realized that some of those tools could have been provided without the expenditure of any funds. The

sheriff's office, for example, serves subpoenas without charge for indigent defendants represented by the public defender. Computers and internet access are now ubiquitous. Quite possibly a means of providing Rick access to a computer with internet service so he could perform his own legal research could have been arranged with the assistance of jail officials.

In *People v. Blair*, the California Supreme Court found that “depriving a self-represented defendant of ‘all means of presenting a defense’ violates the right of self-representation,” and that “a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.” 115 P.3d 1145, 1175 (Cal. 2005); citations omitted. The Court also recognized that “[i]nstitutional and security concerns of pretrial detention facilities” must be considered “in determining what means will be accorded to the defendant to prepare his or her defense,” and providing “advisory counsel” for a self-represented defendant should be adequate to protect the above-described rights. *Id.* “[T]he Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances.” *Id.* The *Blair* Court found that “the crucial question” in determining if a defendant’s constitutional rights had been violated was “whether he had reasonable access to the ancillary services that were

reasonably necessary for his defense.” The record in *Blair* showed that the defendant had been given access to those ancillary services that in his case were reasonably necessary for his defense. *Id.* Blair had been given “access not only to advisory counsel..., but also to investigators, experts, a runner, and library and other resources.” *Id.* at 1175-77.

The trial court had discretion to determine, under the circumstances of this case, what tools were reasonable and necessary. The trial court failed to do so, and its wholesale refusal of all tools and assistance if Rick proceeded *pro se* violated Rick’s Sixth and Fourteenth Amendment rights. *Cf. Delaware v. VanArsdall*, 475 U.S. 673, 679 (1986) (Although “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose **reasonable limits** on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety or interrogation that is repetitive or only marginally relevant...” in “cutting off **all** questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court’s ruling violated [defendant’s] rights secured by the Confrontation Clause.”).

Respondent maintains that its argument – that the trial court correctly advised Rick “that by waiving counsel, he was also waiving the provision of funds to cover litigation expenses” – is “strengthened” by the Supreme

Court's opinion in *United States v. Bagley*, 473 U.S. 667, 695 (1985) (Resp.Br.39). The language quoted in respondent's brief, however, is taken from Justices Marshall's and Brennan's dissent, and should be evaluated in its full context.

The state's quote appears as part of a much broader argument that begins by stating that "the state's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case...." *Id.* at 693. Justices Marshall and Brennan note the "frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices" and that "because this reality so directly questions the fairness of our longstanding processes, change has been cautious and halting." *Id.* at 694-95. The language quoted by the state (underlined) is pulled from the following context:

Thus, the Court has not gone the full road and expressly required that the state provide to the defendant access to the prosecutor's complete files, or investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. But cf. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (access to assistance of psychiatrist constitutionally required on proper showing of need). Instead, in acknowledgment of the fact that important interests are served when potentially favorable evidence is

disclosed, the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that it possesses. This requirement is but a small, albeit important, step toward equality of justice.

Id. at 695.

Likewise, with regard to respondent's quotation of language from *Lewis v. Casey*, 518 U.S. 343 (1996), (Resp.Br. 39), it is important to note that in that case the question before the Court was whether the Arizona prison system had violated the holding of *Bounds v. Smith*, 430 U.S. 817, 828 (1977), "that 'the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'" *Id.* at 346.⁷ In *Lewis v. Casey*, Justice Scalia explained that *Bounds* protected the "entitlement of access to the courts," *Id.* at 350, and that "prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring 'a

⁷ *Lewis v. Casey* held that to establish a *Bounds* violation, the inmates must "show widespread actual injury, and that the [lower] court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid." *Id.* at 349.

reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.” *Id.* at 351. The state’s quoted language, underlined appears in the foregoing context: “Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense.” *Id.* at 351.

To paraphrase Justice Scalia’s comments in *Lewis v. Casey*, Sixth Amendment “rights” must be determined in the context of the particular circumstances of a case. *Lewis v. Casey* and the other cases relied on the state do not show that the Sixth Amendment *never* requires provision of resources, tools, or services. The state’s cases demonstrate only one thing: the trial courts must determine what resources, or tools, or services are reasonably necessary in the circumstances of a particular case.

For the foregoing reasons, the Court must reject respondent’s arguments, reverse the judgment of the trial court, and remand the cause for a new trial.

Reply Point 2

(Replying to Respondent's Point II)

Point II of appellant's initial brief should be treated as preserved. Even though Rick's attorneys did not include this point in the motion for new trial (except in a point alleging Rick was incompetent because, against their advice, he wanted to testify - LF5287-88) – Rick filed at least one motion raising this issue shortly before trial (LF4855-4922), and he also attempted to preserve it by filing, *pro se*, “Defendant's Supplemental *Pro Se* Objections and Motion for New Trial” (LF5345-48).

Appellant's initial brief conceded that Point II had not been preserved because it was not included in the motion for new trial (App.Br. 70-71, n.9). Undersigned counsel believes she overlooked the following facts that the Court should consider in determining whether to treat this claim as preserved or unpreserved. An important fact is that shortly before trial Rick filed his “Motion by *Pro Se* Defendant to State His objections and Be Heard in Writing Due to Public Defenders and Court Not Allowing *Pro Se* (Motions,) (Complaints,) (Suppression Grounds,) to be Heard in Court, Made Record of, and Ignored and Covered Up,” LF4855-4922, in which he stated:

I just want to be heard in court and the public defenders by their actions, inactions and betrayal of my trust are keeping me from this.

How can I not be a witness at my own trial and be allowed to have other witnesses and evidence to support my testimony?

(LF4902). Since the purpose of a motion for new trial is “to allow the trial court the opportunity to reflect on its action during the trial,” Rick’s pretrial motion fully served this purpose. *Nguyen by and through Nguyen v. Haworth*, 916 S.W.2d 887, 889 (Mo.App. W.D. 1996).

In addition, in paragraph 1 of his post-trial, ‘Defendant’s Supplemental *Pro Se* Objections and Motion for New Trial,’ (LF5345-48), which was filed after the deadline for filing a motion for new trial but on or before sentencing, Rick objected that his public defenders had not met with him since trial “and refuse to include any of his grounds for new trial” (LF5345). It is evident from the record that Rick’s attorneys did not want him to testify (Tr4146-62; 4161; 4711-12), and it would be unfair to penalize him because his attorneys, who did not believe his testimony should have been heard, failed to include in the motion for new trial a point alleging error as to that matter. For these reasons, even if not technically, perfectly, preserved, the Court should treat Rick’s right to testify claim as fully preserved; the standard of review of a preserved denial of a fundamental constitutional right requires the state to show that the error was harmless beyond a reasonable doubt. *State v.*

Johnson, 207 S.W.3d 24, 38, n.7 (Mo. banc 2006). If not, Rick respectfully renews his request that the Court review this claim for plain error. Rule 30.20.

Respondent's brief incorrectly suggests that, at guilt phase, Rick was insisting that the trial court allow him "to testify in any manner he desire[d]" (Resp.Br.47). As pointed out in appellant's initial brief, Rick proposed that he provide questions that his attorney would ask or, alternatively, that he testify in the narrative (App.Br.73-74).

Respondent fails to explain why the trial court's refusal to allow Rick to give his attorneys questions or, alternatively, to allow Rick to testify in narrative form, was unreasonable. Rick understood that if he his testimony did not comply with evidentiary rules and procedures, the prosecutor would object (Tr.Tr4157-58). *See Rock v. Arkansas*, 483 U.S. 44, 55-56 & n. 11 (1987). But a trial court's discretion is not unlimited, and "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.*, at 55-56.

Here the state has failed to explain what purposes were served by the trial court's refusal to allow Ricky to present to the jury – either through questions he prepared for his attorney to ask or in the narrative form – his own testimony. The trial court's rulings violated the defendant's "has the ultimate authority to make certain fundamental decisions" including "whether to...

testify in his or her own behalf....” *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Whether reviewed for plain error or for harmless error, the trial court’s actions resulted in a violation of a fundamental constitutional right, and cannot be affirmed. This Court must reject respondent’s arguments, reverse the judgment below, and remand for a new trial.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his initial brief, appellant prays that the Court will reverse the judgment of the circuit court and grant him a new trial.

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 provisions of Missouri Supreme Court Rule 84.06(b). The brief comprises 5,587 words according to Microsoft word count.

The CD ROM disk filed with this brief contains a copy of this brief and complies with Missouri Supreme Court Rule 84.06(g). The disks filed with this Court and served on respondent have been scanned for viruses by a McAfee Virus Scan program and according to that program are virus-free.

On this ____ day of _____, 20____, a true and correct copy of the attached brief and the disk containing a copy of this brief were hand delivered to Richard A. Starnes, c/o the Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, and an email with this reply brief attached was sent to richard.starnes@ago.mo.gov.

Attorney for Appellant