

Sup. Ct. # 88497

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

KENNETH BAUMRUK,

Appellant.

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

APPELLANT'S REPLY BRIEF

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

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

Baumruk incorporates the Statement of Facts from pages 12-24 of his Opening Brief.

ARGUMENT I

The State argues that Baumruk's waiver was equivocal and untimely and that he did not knowingly and intelligently waive his right to counsel. The State is wrong in each of these assertions.

Baumruk's Request Was Unequivocal

The State's argument that the waiver was unequivocal hinges on one answer Baumruk gave at the November 27th hearing. When asked if he intended to hire private counsel, Baumruk said that if the State did not provide an attorney, he would represent himself (Tr. 21). The State overlooks that just moments later, Baumruk specified that he was not asking for different counsel, and Judge Rauch said she understood that (Tr. 22). The State's argument completely ignores the numerous pleadings Baumruk filed in which he stated he was acting as his own attorney, his motions to discharge counsel because he was acting as his own attorney, and Judge Rauch's dialogue with him regarding the dangers of self-representation and the rights he was waiving (L.F. 490-99, 501, 510, 519, 522; 11/27/06-Tr. 21-22, 1/17/07-Tr. 38-48).

The State claims that Baumruk never explicitly and unequivocally asserted his right of self-representation (Resp. Br. 31). But there are no "magic words" required to assert the right of self-representation. The defendant's Sixth Amendment right of self-representation is not conditioned upon his "knowledge of the precise language needed to assert it." *Buhl v. Cooksey*, 233 F.3d 783, 792 (3rd Cir. 2000). "A defendant need not 'recite some talismanic formula hoping to open the eyes and ears of the court to his request' to invoke his/her Sixth Amendment rights under *Faretta*." *Id.*, quoting *Dorman*

v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986). The defendant “must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made.” *Buhl*, 233 F.3d at 792. Judge Rauch certainly understood that Baumruk was asking to represent himself.

Instead of focusing on just one comment within a discussion, as the State does (Resp. Br. 32), the analysis of whether a request is unequivocal should be “fact intensive and should be based on the totality of the circumstances surrounding the request.”

Commonwealth v. Davido, 868 A.2d 431, 439 (Pa. 2005). The history of Baumruk’s statements and requests demonstrates that he unequivocally asserted his right of self-representation and that it was not a spur-of-the-moment decision. By the time Baumruk first asserted his fundamental right of self-representation in court on November 27th, he had already set the wheels in motion. On November 6, 2006, he told his attorneys, and by separate letter their supervisor, that he was firing them and would represent himself (L.F. 527). On November 21, 2006, he filed a *pro se* motion to endorse in which he stated he was acting as his own attorney (L.F. 490-91).

On November 27th, Judge Rauch allowed Baumruk himself to argue his *pro se* motion to endorse and sustained it in large part (11/27/06 Tr. 19). Court adjourned, but reconvened a few minutes later at Baumruk’s request (11/27/06 Tr. 19-21). Baumruk moved to discharge counsel, repeatedly referencing Rule 4-1.16, which is entitled “Declining or Terminating Representation.” The fact that he had looked up Rule 4-1.16 shows that he had deliberately planned to discharge counsel before arriving in court. Additionally, nothing had occurred earlier in the motions conference that would have

angered Baumruk and thereby prompted a spur-of-the-moment request; it was a routine conference, Baumruk was allowed to argue his *pro se* motion, and the motion was largely sustained.

The State overlooks Baumruk's persistence in his pursuit of self-representation. On December 4th, he tried to appeal the court's denial (L.F. 492-95). On December 8th, he filed a motion to discharge his attorneys, in which he stated he was acting as his own attorney and stressed that he had the right to discharge his attorneys without cause (L.F. 501). On December 19th, he filed another motion to discharge his attorneys and stated he was acting as his own attorney (L.F. 510). He continued to file *pro se* pleadings in which he alleged he was acting as his own attorney (L.F. 512, 521-22). On January 5, 2007, he wrote to the court asking why he never received a file-stamped copy of his motion to discharge his attorneys (L.F. 519). On January 19th, he reasserted his right to discharge his attorneys and answered the court's questions about the rights he was waiving by representing himself (1/17/07 Tr.38-48).

An important factor in determining whether the defendant's request was equivocal is the trial court's response to the request. *See United States v. Hernandez*, 203 F.3d 614, 621 (9th Cir. 2000) ("judge's response to Hernandez's request strongly supports the conclusion that it was unequivocal"). Judge Rauch considered Baumruk's requests as requests for self-representation. As mentioned above, even before Baumruk raised the issue at the November 27th hearing, he had filed a *pro se* endorsement of additional witnesses, in which he stated he was acting as his own attorney, and Judge Rauch allowed him to argue it himself (L.F. 490; 11/27/06 Tr.15-19). When Baumruk raised

the issue of self-representation on the 27th, Judge Rauch urged Baumruk not to appear “in a trial of this magnitude without counsel” (11/27/06 Tr.21). When he suggested that he could not do any worse than counsel, Judge Rauch replied that he would be better off with counsel than representing himself:

You have – it’s my understanding you have no legal training. I realize that you are an intelligent gentleman and you have education, but that’s a very different thing from being an experienced trial attorney in a capitol [sic] murder case.

(11/27/06 Tr. 21-22). When Baumruk insisted that he was not asking for different counsel, Judge Rauch replied, “I understand that” (11/27/06 Tr. 22). Judge Rauch was able to assess Baumruk’s demeanor and the force of his words better than a reader of the cold record now can, and she understood he was not asking for different counsel. We must defer to her understanding of the request.

Requests for self-representation must be unequivocal so that the defendant does not make vague references to self-representation, proceed *pro se*, and then challenge any subsequent conviction by alleging a denial of the right to counsel. *Buhl*, 233 F.3d at 792. But here, if the situation were flipped, and Baumruk had been granted self-representation, any allegation on appeal that he had not truly requested self-representation would be easily dismissed given the persistent manner in which he expressed his desire for self-representation. Baumruk never stated that he wanted to replace his trial attorneys with different attorneys. In fact, he affirmatively stated he was not asking for different counsel (11/27/06 Tr.22). When Judge Rauch questioned him at both the hearings, about the difficulties he would face representing himself, he never stopped her to say that all he

wanted was new counsel, or that he did not want to go *pro se*. Notably, before his first trial, when Baumruk wished to change attorneys, he moved the court to “replace” them (1st L.F. 132-33, 630). If he had wanted different attorneys this time, he would have used that same language.

Baumruk does not agree with the State that his request to represent himself was conditioned on the court’s refusal to appoint new counsel. But even if it had been, that request for self-representation would not necessarily be equivocal. A conditional request can still be unequivocal. For example, in *Faretta v. California*, 422 U.S. 806, 811 fn.5 (1975), the defendant’s request for self-representation was unequivocal even though he had argued that he was entitled to a lawyer of his own choice and moved three times to replace counsel. See also *Carey v. Minnesota*, 767 F.2d 440, 441-42 (8th Cir.), cert. denied 474 U.S. 1010 (1985) (unequivocal assertion: when asked if he wanted to represent himself, the defendant replied, “No. I don’t. I want a different attorney. But since I can’t have one I’ll conduct my own defense, yes”); *Adams v. Carroll*, 875 F.2d 1441, 1444-45 (9th Cir. 1989) (defendant unequivocally requested self-representation by his conditional request to represent himself unless another attorney was appointed); *Johnstone v. Kelly*, 808 F.2d 214, 216 fn. 2 (2d Cir. 1986) (request “is not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel”); *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004); *Gallego v. State*, 23 P.3d 227, 236 (Nev. 2001).

In fact, a defendant’s persistent attempt to discharge his attorney without good cause is the equivalent of exercising his right of self-representation. See, e.g., *United*

States v. Gallop, 838 F.2d 105, 109 (4th Cir. 1988); *Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984); *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976); *Trease v. State*, 768 So.2d 1050, 1053 (Fla. 2000) (if defendant persists in discharging his counsel, without good cause, the court must advise him that if counsel is discharged, the defendant “would be exercising his right to represent himself”); *State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990); *State v. Harper*, 381 So.2d 468, 471 (La. 1980)(a defendant’s “refusal without good cause to proceed with able appointed counsel amounted to a waiver of his right to assistance of counsel”). If a defendant can waive his right to counsel by insisting on discharging counsel, then surely he can do so by insisting to discharge counsel while also insisting that he is acting as his own attorney.

The State relies on three cases for the proposition that a conditional request must be considered equivocal (Resp. Br. 32). But a close reading of those cases show that the State’s summary of the cases is not completely accurate. In *State v. Williams*, 716 S.W.2d 452, 453 (Mo. App. S.D. 1986), the defendant stated that he would rather represent himself than continue with his current public defender, but he also stated he would accept representation from a different public defender. Although the defendant signed a waiver of counsel, he refused to waive parts. *Id.* His request was equivocal not because he stated he would rather go *pro se* than continue with a certain attorney, but because (1) he stated he wanted another attorney to represent him; and (2) he refused to agree with parts of the waiver. *Id.* Baumruk, in contrast, strenuously denied that he wanted a different lawyer, and agreed with all parts of the waiver.

In *State v. Garrison*, 928 S.W.2d 359, 361 (Mo. App. S.D. 1996), the defendant had lost his phone privileges because of threats made against his prior lawyer and the victim. Eventually his phone privileges were restored. *Id.* On the first day of trial, someone threatened defense counsel and his family. *Id.* Although the defendant denied that he had anything to do with the threats, the court again revoked his phone privileges. *Id.* The defendant argued to the court that he would rather have his phone privileges than be represented by that attorney, even though he was “the best attorney in Springfield” and “the best lawyer I ever had.” *Id.* at 361. He further stated:

I tell him I want him to be my legal counsel and you’re telling me no....

Well, if I’m trusting my life in this man’s hands and I want him to represent me, how are you keeping me from talking to my family... I’ve told it on the record here, this man’s – I want this man to be my lawyer.

Id. at 361-62. The court denied the request for self-representation ruling that Garrison was using self-representation “as leverage to restore his telephone privileges.” *Id.* at 362. The request for self-representation was equivocal because in the same breath, he also asked that his attorney continue to represent him. *Id.* at 361-62.

In *State v. Hamilton*, 791 S.W.2d 789, 796 (Mo. App. E.D. 1990), the defendant claimed the court erred in refusing his request for self-representation and forcing him to go to trial with an attorney with whom he had irreconcilable differences. The Court of Appeals held that a request is equivocal where the defendant states that he would prefer to represent himself rather than accept the aid of his appointed attorney, but would like another attorney appointed who meets his standards. *Id.* The record clearly showed that

the defendant did not really wish to represent himself, but rather just wanted a different attorney appointed. *Id.*

The Eighth Circuit Court of Appeals shed more light on Hamilton's request, in its opinion affirming the denial of habeas relief. *Hamilton v. Goose*, 28 F.3d 859, 862 (8th Cir. 1994). The federal court stressed that Hamilton's request was equivocal because, "first and foremost," he told the trial judge that he was "not very serious about wanting to represent [himself]" and that he was "not asking to proceed pro se totally." *Id.* The appellate court stressed that "[p]lainly, what Hamilton wanted was yet another public defender, rather than to represent himself." *Id.* It was also equivocal because the circumstances showed that Hamilton was using self-representation as a ruse to delay the trial. *Id.*

The Eighth Circuit recognized that conditional requests for self-representation can still be unequivocal. "It is true that a defendant may make a conditional waiver of his right to counsel." *Hamilton*, 28 F.3d at 862. A problem arose in *Hamilton* because the request was both conditional and equivocal.

Finally, the State also misconstrues *State v. Johnson*, 943 S.W.2d 285 (Mo. App. E.D. 1997), for the proposition that, "a motion to remove appointed counsel that does not express a desire by the defendant to represent himself does not constitute an unequivocal request for self-representation" (Resp. Br. 32). In *Johnson*, the defendant moved pretrial, not to discharge counsel, but to have substitute counsel. *Id.* at 289. Upon the court's repeated denial, the defendant asked if he had the right to represent himself. *Id.* at 290.

The court answered affirmatively, but the defendant said nothing further. *Id.* Thus, the defendant did not make an unequivocal request for self-representation. *Id.*

Baumruk's Request Was Timely

The State alleges that Baumruk's written motion, filed about a month before trial started, was untimely, because Baumruk would not be prepared to present the most logical defense, NGRI, and it would be unfair if he went to trial unprepared (Resp. Br. 34-35).² There is no requirement that a defendant prove to the court that he is prepared with the most logical defense, before he is allowed to represent himself. The essence of *Faretta* is that the defendant gets to pursue "his" defense. *Faretta*, 422 U.S. at 819 (Sixth Amendment "grants to the accused personally the right to make his defense... for it is he who suffers the consequences if the defense fails"). Baumruk may have decided to pursue the defense presented at the first trial, or to present no evidence at all, or even to plead guilty. If, once granted self-representation, he persisted in trying to present inadmissible evidence after being ordered to cease, his right of self-representation could be terminated. *Id.* at 834, fn.46. But the fundamental right of self-representation cannot be denied, just because there is a possibility that the defendant may present a defense that

² The State suggests that Baumruk did not properly file his December 19th motion with the court (Resp. Br. 34). The court file contains the original, date-stamped motion Baumruk filed (L.F. 510). It is irrelevant whether the docket sheet includes a notation of the filing.

seems ill-advised. *Wise v. Bowersox*, 136 F.3d 1197, 1202 (8th Cir. 1998) (*pro se* defendant chose “patently incredible conspiracy theory,” but “poor defense theory alone does not prove that a defendant should not have been allowed to waive the right to counsel”).

The State also argues, without any support in the record, that Baumruk was unprepared for trial and hence, his motion was untimely and the court could deny the motion at its discretion (Resp. Br. 34-35). The record itself does not show that Baumruk was unprepared to go to trial. Baumruk had been through one trial and an appeal after that trial. He had been living with the case for a long time. From his perspective, he started representing himself at least from the date he told counsel they were fired, on November 6th (L.F. 527). Although Baumruk complained that counsel was not providing him with copies of motions (1/17/07 Tr. 41, 49), he never stated that he was missing vital discovery.

The State uses circular logic to argue that the motion was untimely because Baumruk would not have time to prepare (Resp. Br. 34-35). Under the State’s reasoning, a request made well before trial could be considered untimely, at the court’s discretion, if the court felt that the defendant would not be prepared by the trial date. But the court has no discretion to deny a timely and unequivocal request made knowingly, voluntarily and intelligently. *State v. Black*, 223 S.W.3d 149, 153 (Mo. banc 2007); *State v. Hampton*, 959 S.W.2d 444, 447 (Mo. banc 1997). In each of the cases cited by the State, the motion for self-representation was first determined to be untimely. “Allowing an *untimely* motion to proceed *pro se* would either require a continuance, which is not the intended

use of the right, or would require the proceedings to proceed as scheduled which would not be fair to the parties involved, especially an unprepared defendant.” *State v. Gomez*, 863 S.W.2d 652, 656 (Mo. App. W.D. 1993) (emphasis added); *Garrison*, 928 S.W.2d at 362-63; *State v. Parker*, 890 S.W.2d 312, 316 (Mo. App. S.D. 1994). In *Gomez*, the defendant waited until after jury selection to request self-representation; in *Garrison*, he waited until the first day of trial; and in *Parker*, he waited until the Friday before Monday’s trial and then asked for additional time to prepare. Only because the requests were untimely to start with did the court have discretion to deny them based on lack of preparation. Those cases did not grant the court discretion to deny a timely request on the ground that the defendant might not be as prepared for trial as the State deems he should be.

The State suggests that Baumruk should have taken action in between December 19th and January 17th to have the motion heard (Resp. Br. 34). Baumruk did in fact follow-up on the motion – on January 5th, he wrote to the Circuit Clerk to make sure the motion had been filed, since neither he nor defense counsel ever received file-stamped copies (L.F. 519). The issue was raised at the first court date following the filing of the motion (1/17/07 Tr. 38-52). Furthermore, a defendant’s right of self-representation does not depend on how soon the court decides to hear the motion. Otherwise, the defendant’s fundamental right could be denied based on something as arbitrary as how busy the court’s docket happened to be.

Baumruk's Waiver was Knowing and Intelligent

The State also argues that Baumruk's waiver was not knowing and intelligent (Resp. Br. 36-38). "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it." *Iowa v. Tovar*, 541 U.S. 77, 92 (2004) (discussing whether waiver of counsel at plea hearing was knowing and intelligent), quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original).

Baumruk was mentally competent and understood the nature of the proceedings and the possible penalties. *See Black*, 223 S.W.3d at 154. He had already been through one trial. He understood that he would be solely responsible for presenting evidence, that he would be required to conduct voir dire, that he had to frame his questions properly, that no one would be there to help him frame his questions properly, and that strict guidelines would govern his actions (1/17/07 Tr. 44-45, 47). As in *Black*, "the record failed to establish that [the] waiver was not intelligent and knowing." *Id.* at 155.

Judge Rauch had previously concluded that Baumruk understood the charges against him, the roles of the attorneys and judge, and the possible consequences he faced (L.F. 246-47). She acknowledged that Baumruk was intelligent and educated (11/27/06 Tr. 21). She knew he had a bachelor's degree in business administration and had taken a business law course (1/17/07 Tr. 44-45; Comp. Tr. 40-41).

The State suggests that Baumruk’s request for self-representation can be denied because he believed he could present evidence to the jury about his competence to stand trial (Resp. Br. 37). But Baumruk’s beliefs about the admissibility of evidence did not affect his right to self-representation. Attorneys frequently proceed to trial intending to present evidence that is later deemed inadmissible. Baumruk’s request for self-representation was knowing and intelligent, because his eyes were “wide open” – he knew the precise nature of the right he was waiving and the difficulties he would face (11/27/06 Tr. 21-22; 1/17/07 Tr. 44-47). Baumruk was “literate and ... minimally familiar with the trial process, including possible defenses to the crime charged, the different phases of trial, objection procedure and the elements of the crime charged.” *See Black*, 223 S.W.3d at 156. Hence his waiver was knowing and intelligent.

The State argues that Baumruk’s waiver was not knowing and intelligent because he engaged in a “pattern of obstreperous and truculent behavior” (Resp. Br. 37-38). But bad behavior does not relate to whether the waiver is knowing and intelligent. The two cases cited by the State are not on point (Resp. Br. 37-38). In *People v. Rohlf*s, 858 N.E.2d 616, 621 (Ill. Ct. App. 2006), the defendant’s bad pretrial behavior had nothing to do with the knowing and intelligent nature of his request for self-representation. *Id.* at 622. The appellate court held that the defendant equivocated by vacillating on whether to go *pro se* and by acting badly in court to delay the proceedings, not that his waiver was unknowing and unintelligent. *Id.* at 622-23. In *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006), the issue was not whether the defendant would forfeit his right of self-representation by bad behavior before trial, but rather, whether a defendant who failed to

retain counsel had knowingly forfeited his right to counsel through his obstinate refusal to abide by the court's instruction to retain counsel or represent himself. *Id.* The defendants were warned that if they failed to retain counsel by the next court appearance, the court would find that they had waived their right to representation. *Id.* The appellate court instructed that, to determine if the defendants had knowingly forfeited the right to counsel, the trial court should look at the record as a whole, including the defendants' reasons for not having retained counsel and any "pattern of obstreperous, truculent, and dilatory behavior." *Id.*

Though it asserts that Baumruk engaged in a "pattern of obstreperous and truculent behavior," the State never specifies the "pattern." It is true that at one point in the January 17th hearing, Baumruk spoke disrespectfully to Judge Rauch (1/17/07 Tr. 46). But when she warned him that he could not speak that way, he stated he understood, and there were no further incidents (1/17/07 Tr. 47). *See State v. Camacho*, 561 N.W.2d 160, 167, 175 (Minn. 1997) (single outburst where *pro se* defendant called juror "a fucking, lying bitch" during jury selection did not mandate termination of self-representation).

Baumruk acknowledges that "a trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 843, fn.46, citing *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant can waive right to be present at trial when "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"). But Baumruk did not engage in any

“pattern” of bad behavior or the type of “serious and obstructionist misconduct” anticipated by *Faretta*.

The court’s denial of Baumruk’s fundamental right of self-representation violated the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse.

ARGUMENT II

In its brief, the State relegates to a footnote its discussion of its prior concessions that although the trial should have been held in St. Charles County, “we’ll have to fly people in,” because jurors living in St. Charles County were not “far enough away” (L.F. 271, 273). The State earlier agreed completely with Baumruk’s argument: “I don’t think we fit the Court’s mandate by just taking a jury from St. Charles. I think the jury needs to be taken from somewhere else” (Tr. 274). It proposed to “comply with the mandate in another county close to St. Louis but with a jury from elsewhere in the state” (Tr. 278).

The State now argues that these statements, made by the assistant prosecutor who initially tried the case, have no relevance (Resp. Br. 39, fn.6). But the prosecutor’s candid assessment was highly relevant, because he was specially situated to gauge the community sentiment and the extent of publicity. For the prosecutor himself to admit that a fair trial could not be had with a St. Charles County jury, the publicity and community sentiment against Baumruk must have been very bad indeed.

The purpose of a change of venue is to ensure a fair and impartial jury, by removing the case from a community wherein there lies too great a risk of a biased jury, to a community without such a risk. The key word is “community.” The leading Supreme Court cases on venue focus on that word – “community.” See *Irvin v. Dowd*, 366 U.S. 717, 727 (1961) (discussing “prejudice in the community”); *Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984) (discussing “community sentiment” and “effect on the community”); and *Murphy v. Florida*, 421 U.S. 794, 802-803 (1975) (“general atmosphere in the community” and “In a community where most veniremen...”).

Here, there was never a true change of venue, because St. Louis and St. Charles counties comprise the same community. The St. Charles jurors were members of the St. Louis community. At least four members of the jury had been longtime St. Louis County residents and actually lived in St. Louis County at the time of the shooting in 1992: Ms. Jones (#119) lived in St. Louis County (Manchester) from 1971-2002; Mr. Porter (#128) from 1972-1999 (Woodson Terrace); Ms. Loveless (#175), from 1982-2002 (St. John); and Mr. Matlock (#198) from 1987-1995 (Riverview Gardens and Bellefontaine Neighbors) (Supp.L.F.59,95,166,202). Many St. Charles residents were personally connected to, or deeply affected by, the shooting (Tr. 59, 64, 143, 233-37, 244-45, 259, 276-77, 386-90, 497, 517-18, 527, 581-82, 588-89, 597, 613, 662, 708, 711-12, 715, 719-20, 724, 732-34; L.F.149). About the same percentage of venirepersons remembered the case for each county (about 60% remembered in St. Charles County and 64% in St. Louis County).

Second, the State incorrectly argues that none of the jurors had a fixed opinion about guilt (Resp. Br. 48-51). It argues that Juror Matlock was rehabilitated by his statement that he would keep an open mind to evidence of Baumruk's mental state, even though he admitted that he could not hold the State to its burden of proof and could not presume Baumruk innocent (Tr. 506-09; Resp. Br. 50-51). But Matlock was not rehabilitated. Although he stated that he would keep an open mind to the evidence, he never stated that he would presume Baumruk innocent. He never stated that he could set aside his knowledge that a prior jury found Baumruk guilty. The State ignores that Judge Rauch herself acknowledged, based on the totality of Matlock's responses, that he

“[d]oes not think he could put behind what he heard and decide the case on the evidence. And then he says he couldn’t set it aside” (Tr. 656).

Third, the State makes much of the fact that the defense did not attempt to strike for cause any of the five jurors who had heard about the case (Resp. Br. 49). The State overlooks that, as defense counsel warned the court, the normal standards for what constituted a “fair” juror were greatly diminished here:

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

(Tr. 652). Counsel knew that his objections would be futile.

Finally, while conceding that there was a significant amount of publicity, the State argues that the publicity was not sufficiently negative to engender prejudice against Baumruk. But, just as in *Irvin*, this case was a cause célèbre. About three weeks before trial, Baumruk’s retrial was hailed as one of the seven most momentous upcoming events to take place in 2007. See St. Louis Post-Dispatch, “7 Things to Watch in ‘07” (Dec. 31, 2006). News footage from 1992 showing people fleeing into the street after the shooting was replayed on television, and one station even played the audiotape of the shooting (Tr. 118, 619). Venirepersons were stopped on the way into the courthouse and asked to comment on jury selection for the news media (Tr. 536). Reporters discussed the facts of

the case within earshot of venirepersons, while a security officer revealed that Baumruk's case caused courthouse security to be implemented (Tr. 300-301). Nine potential jurors were told by a courthouse maintenance man that, "I don't know why you are wasting your time. You all know he's guilty" (Tr. 308-309). The entire community – St. Louis and St. Charles counties – was inflamed against Baumruk, and jurors from neither county should have judged his fate.

ARGUMENT III

The State incorrectly argues that Juror Matlock was rehabilitated (Resp. Br. 67). It is true that Matlock stated he could consider evidence of Baumruk's mental state (Tr. 514-15). But saying that he would consider evidence of mental state is not the same as saying that he would presume Baumruk innocent of any crime. There was no further questioning to ensure that Matlock could be fair and impartial and follow the court's instructions. Matlock's statement that he would consider evidence of Baumruk's mental state is simply not enough to rehabilitate him given his prior statements that (1) he knew Baumruk had been found guilty by a prior jury; (2) he believed Baumruk was guilty; (3) he could not set aside what he knew; (4) he could not presume Baumruk innocent; and (5) he could not say that he would hold the State to its burden of proof (Tr. 506-509). Even if Matlock were able to consider evidence of mental state, he might still believe Baumruk had the burden of proving his innocence. He still might presume Baumruk guilty until the defense showed that he lacked the required mental state for first degree murder. While deliberating, he still might consider the fact that a prior jury found Baumruk guilty.

The State argues that Matlock made an unequivocal statement that "he could hear the evidence and adjudge the case without bias or prejudice" when he stated that he guessed he could consider evidence of Baumruk's mental state (Resp. Br. 65). To reach this conclusion, the State likens Matlock's responses to those given by a juror in *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991)(Resp. Br. 64-65). But as the following excerpt from *Feltrop* shows, the cases are completely distinguishable, in that the *Feltrop* juror expressly and unequivocally stated that she did not form any opinion on the defendant's

guilt, that she could set aside what she had heard and judge the case just on the evidence presented, and that she could be fair and impartial:

Q. At that time [that you heard about the case] did you form any opinions or conclusions as to the guilt or innocence of any persons in connection with that?

A. No, I did not.

Q. Do you feel that you can put aside what you saw or heard in the news and base your decision, if chosen as a juror, solely on the evidence to be presented here in the courtroom and on the instructions to be given by Judge Hess?

A. Yes, I do.

Q. Do you feel that you can be fair and impartial to both the defendant and the state?

A. Yes.

Q. Can you promise this court that you can put aside any preconception that you might have and, if chosen as a juror, make your decision based solely on the evidence presented in this court and the instructions given by the Judge?

A. Yes, I could.

Q. Do you think that you can be fair and impartial to the defendant as well as to the state?

A. Yes, I believe I could.

Id. at 7. In contrast, Matlock admitted that he had formed an opinion, could not set aside what he had heard and judge the case just on the evidence presented, and never stated he could be fair and impartial.

State v. Wheat, cited by the State, is also distinguishable (Resp. Br. 65). There, the juror, when questioned about his ability to sit on the jury and decide the case fairly and impartially based on the facts, answered, “I am sure I could.” *State v. Wheat*, 775 S.W.2d 155, 158 (Mo. banc 1989). The juror “stated that he would have no problems deciding the case or in following the court’s instructions and he could act as a juror with fairness and impartiality.” *Id.* Matlock, in contrast, never stated that he could be fair and impartial and follow the court’s instructions.

The State also completely overlooks that Judge Rauch herself, assessing the totality of Matlock’s answers, concluded that he “[d]oes not think he could put behind what he heard and decide the case on the evidence. And then he says he couldn’t set it aside” (Tr.656). Judge Rauch thus expressly acknowledged that Matlock would not be able to follow the court’s instruction that, “It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. Your decisions must be based only on the evidence presented to you in the proceedings in this courtroom” (L.F. 721). As such, Matlock was statutorily barred from service. Section 494.470.2, RSMo 2000 (“Persons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions are ineligible to serve as jurors on that case”).

“A defendant has the right to an impartial jury - a jury which decides the case on the evidence presented at trial, not on information gleaned from some external source.”

State v. Antwine, 743 S.W.2d 51, 58 (Mo. banc 1987). The Supreme Court has stressed:

[A juror’s] verdict must be based upon the evidence developed at the trial.

This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.

Irvin, 366 U.S. at 722 (internal citations omitted).

The State stresses that a number of Missouri cases have held that the trial court has no duty to strike jurors *sua sponte* (Resp. Br. 61-63). But it is also true that the trial court has a “responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence.” *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). The purpose of voir dire is to discover bias or prejudice in order to select a fair and impartial jury. *State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988). To this end, the trial court has the duty to independently question jurors who equivocate on their ability to be fair and impartial. *State v. Walton*, 796 S.W.2d 374, 377 (Mo. banc 1990); *see also Wheat*, 775 S.W.2d at 158; *State v. Clark-Ramsey*, 88 S.W.3d 484, 488-89 (Mo. App. W.D. 2002). It would make no sense to require the trial court to independently question jurors who have equivocated if there were no corresponding duty to remove those jurors who maintain that equivocation even after further questioning.

Under the State's approach, a convicted felon could serve on a jury, despite his ineligibility for service, as long as neither party objected. But surely, even without a challenge for cause, the court would be required to excuse the felon from service. So too here, where the court acknowledged that Matlock could not decide the case on the evidence presented, Judge Rauch had the duty to excuse him from service independent of any challenge for cause.

Because "the impartiality of the adjudicator goes to the very integrity of the legal system," Baumruk suffered manifest injustice when the court allowed a biased juror to serve on his jury. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (harmless-error analysis cannot apply when defendant was denied fundamental right of fair and impartial jury). A new trial is mandated.

ARGUMENT VIII

In his opening brief, Baumruk mistakenly asked that the Court resentence him to life without parole. Instead, Baumruk requests that the Court reverse his conviction, vacate the sentence, and remand for a grand jury to determine whether he should be indicted of “aggravated” first-degree murder.

CONCLUSION

Based on Arguments I-VII, Mr. Baumruk respectfully requests that the Court remand for a new trial. As to Argument VIII, he asks that the Court reverse his conviction, vacate the sentence, and remand for a grand jury determination of whether he should be indicted for “aggravated” first-degree murder.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on April 17, 2008, two copies of the foregoing and a disk containing the foregoing were mailed, postage prepaid, to Dan McPherson, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Rosemary E. Percival

Certificate of Compliance

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

- ✓ The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. This brief contains 6,919 words, which does not exceed the 7,750 words allowed for a reply brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated on July 28, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

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