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*In the  
Supreme Court of Missouri*

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**KENNETH BAUMRUK,**

**Appellant.**

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**Appeal from St. Charles County Circuit Court  
Eleventh Judicial Circuit  
The Honorable Lucy D. Rauch, Judge**

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**RESPONDENT’S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction obtained in the Circuit Court of St. Charles County for murder in the first degree, section 565.020, RSMo Supp. 1990, for which Appellant was sentenced to death. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

## STATEMENT OF FACTS

On March 30, 1998, Appellant was indicted in the Circuit Court of St. Louis County for one count of murder in the first degree, section 565.020, RSMo Supp. 1990; eight counts of assault in the first degree, section 565.050, RSMo 1986; and nine counts of armed criminal action, section 571.015, RSMo 1986. (L.F. 14, 55-61).<sup>1</sup> The State filed a Notice of Aggravating Circumstances on April 21, 1998. (L.F. 14). The assault and armed criminal action charges were severed from the murder in the first degree charge, and in 2001, Appellant was tried, found guilty of murder in the first degree, and sentenced to death. (L.F. 27-29). That conviction and sentence were overturned by this Court, which ordered that the murder charge be retried in a venue other than St. Louis County. *State v. Baumruk*, 85 S.W.3d 644, 651 (Mo. banc 2002).

Following this Court's remand, the cause was transferred to the Circuit Court of St. Charles County and assigned to Judge Lucy D. Rauch. (L.F. 30, 32, 40). A

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<sup>1</sup> The record on appeal consists of a Legal File (L.F.), Supplemental Legal File (Supp. L.F.), and several volumes of transcript. The trial transcript is contained in eighteen consecutively paginated volumes and will be cited as (Tr.). The sentencing transcript will be cited as (Sent. Tr.) and the two volume transcript of the competency hearing will be cited as (Comp. Tr.). There are also ten separate transcripts for various pre-trial hearings. Those will be cited by reference to the date of the hearing, i.e., (5/5/04 Tr.). In addition, the transcript from Appellant's first trial will be cited, where relevant, as (1<sup>st</sup> Tr.).

competency hearing was held on June 28-29, 2005, and the trial court issued Findings of Fact and Conclusions of Law on August 26, 2005, finding Appellant competent to proceed to trial. (L.F. 41, 235-52). Appellant filed a motion on September 16, 2005, to secure a jury from a county other than St. Charles County. (L.F. 42). That motion was denied on October 3, 2005. (L.F. 371). A First Amended Notice of Evidence in Aggravation was filed on April 20, 2006. (L.F. 382-84).

Appellant was tried by a jury secured from St. Charles County on January 24-February 6, 2007. (Tr. 2-15). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant married Mary Baumruk<sup>2</sup> in 1977. (Tr. 1118). It was the second marriage for both. (Tr. 1117). Mary and her children moved into Appellant's home and lived there with Appellant and his son. (Tr. 1119-21). Mary filed for divorce in 1990 and moved out of the house. (Tr. 1121-22, 1155-56). She worked as a housekeeper at DePaul Hospital. (Tr. 1122). Appellant, who worked for McDonnell-Douglas in St. Louis, got a job with Boeing and moved to the Seattle, Washington area in 1991. (Tr. 1221-23). Appellant sometimes talked about the pending divorce with his co-workers and friends, and on numerous occasions made statements to the effect that he should shoot Mary and the attorneys. (Tr. 1226-27). When questioned about those statements,

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<sup>2</sup> To avoid confusion, Mary Baumruk will hereafter be referred to by her first name.

No disrespect is intended.

Appellant would say that he was not serious and that he was just blowing-off steam. (Tr. 1227).

Appellant purchased two .38-caliber revolvers in January 1992. (Tr. 1302-03). He told the clerk that he needed the guns for defense, both for himself and for his wife. (Tr. 1304-05). Appellant also told the clerk that he preferred revolvers to semi-automatics because they were simpler to operate and less likely to jam. (Tr. 1306-07). Appellant also bought forty rounds of multi-ball “Man Stopper” ammunition that contains two projectiles in each shell, and a box of .38-special double-ended wad cutter ammunition that is primarily designed for target shooting. (Tr. 1309-11). He took possession of the guns following a five-business day waiting period. (Tr. 1318-19).

Appellant initially hired Frank Smiley as his attorney in the divorce proceedings. (Tr. 1157). Mary had hired attorney Scott Pollard to represent her. (Tr. 1153-54). Pollard testified that Appellant cursed at Mary following two of the initial court hearings, using “very, very, very crude language.” (Tr. 1160-61). Smiley withdrew as Appellant’s lawyer after Appellant assaulted him. (Tr. 1162). Garry Seltzer then entered his appearance as Appellant’s lawyer. (Tr. 1162, 1340). Seltzer sent Appellant some financial documents that needed to be completed and brought to the trial on the divorce petition. (Tr. 1346-47).

That trial was set for May 5, 1992, before Judge Sam Hais in the Division 38 courtroom on the second floor of the St. Louis County Courthouse. (Tr. 1016, 1164-65, 1242, 1344). Appellant arrived at the courthouse carrying a briefcase containing the guns and the box of wad-cutter ammunition. (Tr. 1128-29, 1349, 1605, 1607). The guns were

loaded with the multi-ball and the wad-cutter ammunition. (Tr. 1702-03, 1705). The briefcase also contained the financial forms that Seltzer had asked him to complete. (Tr. 1346, 1605-06). The forms were blank. (Tr. 1348).

A few days before the trial, Mary's lawyer, Scott Pollard began looking at the file from Appellant's first divorce. (Tr. 1165). As he did so, Pollard realized that he had represented Appellant about fourteen or fifteen years previously on a Motion to Modify that had been filed in connection with that divorce. (Tr. 1168). Pollard notified Mary of the conflict, and tried unsuccessfully to contact Appellant's lawyer, Garry Seltzer. (Tr. 1170).

When Pollard arrived at the courthouse on the morning of May 5, 1992, he informed Seltzer of the conflict. (Tr. 1350-51). Seltzer then informed Appellant, who indicated that he had already recognized Pollard as having previously represented him. (Tr. 1353, 1391). The two lawyers met with Judge Hais in his chambers to discuss the situation. (Tr. 1172, 1243-44, 1351). Judge Hais decided to make a record in open court on whether Appellant and Mary were willing to waive the conflict. (Tr. 1174, 1245, 1353). Appellant told Seltzer that he was willing to waive the conflict so long as the trial took place that day. (Tr. 1383). Appellant and Seltzer had also appeared to be arguing immediately before the proceedings began in open court, with Appellant telling Seltzer that he wanted to be in on all back-room conversations and meetings. (Tr. 1066).

The Division 38 courtroom had a single table where both parties and their counsel would sit. (Tr. 1174). Pollard and Seltzer sat directly opposite each other. (Tr. 1174). Appellant sat to Seltzer's right and directly across from Mary. (Tr. 1079-80, 1354,

1385). After the proceedings began, Pollard was making a statement and turned to ask Mary a question when Appellant pulled the guns out of his briefcase and shot her.<sup>3</sup> (Tr. 1035, 1128-29, 1176, 1249, 1356). She slumped back in the chair and to the right. (Tr. 1035, 1129). Appellant and Pollard both stood up, and Appellant shot Pollard in the chest. (Tr. 1067, 1177, 1179, 1356). Appellant then shot Seltzer, with the projectiles striking him in the chest, left shoulder, near the left ear, and the left arm. (Tr. 1068, 1180, 1357). Seltzer crawled underneath a desk where the court clerk was also hiding. (Tr. 1040, 1358). Pollard took advantage of the opportunity to run out the back door of the courtroom. (Tr. 1181). As he ran into the hallway, Pollard looked back and saw Appellant aiming his gun towards the judge's bench. (Tr. 1182).

Judge Hais had left the courtroom through a door behind the bench, and Appellant followed him. (Tr. 1036, 1249, 1357-58, 1389). Attorney Bruce Hilton was in the Division 38 clerk's office, and he grabbed hold of Judge Hais as he ran down the corridor and shoved him into the office. (Tr. 1463, 1466). Hilton then turned around to see Appellant standing five to eight feet away from him. (Tr. 1466-67). Appellant pointed the two revolvers directly at Hilton, who made eye contact with Appellant and closed the door. (Tr. 1467). Hilton then heard a voice say, "which way did he go?" (Tr. 1468).

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<sup>3</sup> Seltzer testified that he thought he heard Appellant say, "This is what I have to say," just before he pulled out the guns and began shooting. (Tr. 1355). No other witness heard Appellant say anything before the shooting started.

Rufus Whittier, an officer for the St. Louis County Justice Services Department, had seen Appellant chasing Judge Hais with gun in hand. (Tr. 1526, 1531, 1533-34). Whittier was not armed and he tried to get to safety. (Tr. 1528, 1531). Appellant caught up to Whittier near an elevator. (Tr. 1535). Appellant put one gun to Whittier's midsection and another to his head, and asked him where the elevator went. (Tr. 1535). Whittier told Appellant that the elevator was used to transport prisoners, and that it went down. (Tr. 1535). Appellant responded that he did not want to go that way, and took off down the hallway. (Tr. 1536).

Jennings Police Officer Paul Neske was in the main hallway outside the Division 38 courtroom when he heard gunshots and saw people fleeing the courtroom. (Tr. 1503-04). Neske went into the courtroom and was told that the gunman had fled into the back hallway. (Tr. 1504). Neske drew his pistol and went through the door, where he saw Appellant holding a gun. (Tr. 1506, 1508). Neske initially thought Appellant was a bailiff, because he was wearing a blue blazer similar to what the bailiffs wore. (Tr. 1506). Neske said something to Appellant, who fired at him. (Tr. 1506-07). Neske ran back into the courtroom. (Tr. 1507).

Attorney Timothy Devereux was walking down the hallway when he saw Appellant walking toward him with a gun in each hand. (Tr. 1548). Appellant pointed both guns at Devereux and said, "Who are you?" (Tr. 1548-49) Devereux responded, "You're surrounded at this time. You have no way of getting out of here. You should give up." (Tr. 1548). Appellant replied, "Get out of my way. I have no quarrel with you." (Tr. 1548). Devereux watched Appellant walk away and saw him stop, eject the

shells from the guns, and reload. (Tr. 1550). Appellant then continued down the hall. (Tr. 1550-51).

Jim Hartwick, an investigator for the St. Louis County Prosecuting Attorney's office had gone down the hallway in search of Appellant. (Tr. 1562-63, 1566-67). He passed an office where some women were working, apparently unaware of what was going on. (Tr. 1567-68). Hartwick then saw Appellant standing in the hallway, facing the other way and moving his right arm slightly. (Tr. 1568). Hartwick also saw shell casings on the floor. (Tr. 1568). Hartwick, who had his gun drawn, started backing-up to warn the women in the nearby office. (Tr. 1570). In doing so, he took his eyes off of Appellant for two seconds and Appellant fired a shot at him. (Tr. 1570). Hartwick flung himself into the office and got on the phone to call 911. (Tr. 1571). As he was on the phone, Appellant walked by and fired a shot through the window. (Tr. 1572).

Fred Nicolay was the bailiff in the nearby Division 36 courtroom. (Tr. 1480). Two attorneys came running into the office, saying that someone was shooting up the courthouse. (Tr. 1482). Nicolay got the attorneys and the clerk into the judge's chambers, and then shut and locked the door. (Tr. 1482-83). As he did so, Nicolay sensed someone coming up behind him. (Tr. 1483). Nicolay turned around while raising his hands, and said, "Let's talk this over. It's not as bad as you think it is." (Tr. 1483). Nicolay testified that he thought that his hand hit the gun and that Appellant then shot him in the shoulder. (Tr. 1484). Appellant walked around Nicolay and tried to get into the judge's chamber. (Tr. 1484). He then came back and looked down at Nicolay, who was on the floor, before running out the door. (Tr. 1484).

St. Louis County Police Detective Steve Salomon was in the main hallway outside the Division 36 courtroom when he heard gunshots. (Tr. 1394-96). Salomon drew his weapon and went inside the Division 38 courtroom to investigate. (Tr. 1397). Some people who were still inside the courtroom told Salomon that the gunman had gone out the back door. (Tr. 1398). Salomon went through the door and was joined by a Jennings police officer. (Tr. 1401, 1405). The officers were about halfway down the back hallway when Appellant stepped out and fired a shot at them. (Tr. 1401-02). Salomon dropped to the floor and began crawling towards Appellant. (Tr. 1403-04). The two men found Nicolay, who was sitting in a chair and holding his chest. (Tr. 1405).

Jennings Police Officer Paul Neske had meanwhile returned to the main hallway, where he met up with another Jennings officer, John Bozarth. (Tr. 1511). As Neske briefed Bozarth on what had happened, he heard gunshots, a door slamming, and people yelling, "He's coming. Here he comes." (Tr. 1511-12). Appellant came around the corner, firing two handguns. (Tr. 1513). He was shooting at Ferguson Police Officer William Mudd and courthouse security officer Wade Dillon, who had stationed themselves outside the Division 38 courtroom. (Tr. 1575, 1583, 1585, 1592-93, 1595). One of the bullets hit Dillon in the thigh. (Tr. 1587, 1597).

Appellant ran towards Neske and Bozarth, who opened fire along with the other officers who had gathered in the hallway. (Tr. 1513, 1587). Appellant immediately fell to the ground, but then tried to roll over to get back up. (Tr. 1514). He was still holding one of the guns. (Tr. 1514). Neske fired two more times, and Appellant dropped the second gun. (Tr. 1514). He was handcuffed and searched. (Tr. 1408, 1514). Extra

ammunition was found in both of his outside coat pockets. (Tr. 1408). As he was searched, Appellant asked in a calm voice, “Officer, did I get her, did I kill her?” (Tr. 1409).

Appellant was taken to the emergency room at Barnes Hospital in St. Louis. (Tr. 1655-56). He had bullet wounds near his right ear, chest, collarbone, both arms, left hand and left foot. (Tr. 1662). Despite the wounds, Appellant was alert and cooperative. (Tr. 1663). He was able to give the doctor his past medical history, his occupation, and his address. (Tr. 1660). Appellant made comments to the doctor such as “wanted to shoot that bitch.” (Tr. 1658). He also referred to “divorce.” (Tr. 1658). The doctor testified that those remarks were “very memorable and remarkable to me that despite being under the obvious stresses of multiple wounds this man was expressing great vehemence and coldness about having reached a conclusion to something.” (Tr. 1664-65).

The autopsy on Mary Baumruk showed that she suffered two gunshot wounds to the neck.<sup>4</sup> (Tr. 1725). One of the bullets fractured the second cervical vertebrae in the neck. (Tr. 1728). That wound could have been fatal, and would at least have paralyzed Mary. (Tr. 1732-33). The second bullet passed into the spinal canal and was embedded in the middle portion of the brainstem. (Tr. 1735). That wound would likely have been fatal. (Tr. 1740).

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<sup>4</sup> It’s not clear from the testimony when in the sequence of events Appellant shot Mary the second time.

Appellant presented an NGRI defense. (L.F. 435, 735). Psychologist Elizabeth Nettles testified that Appellant suffered from a delusional disorder, persecutory type on the day of the shootings. (Tr. 1780, 1788). Psychiatrist Moisy Shopper testified that Appellant suffered from a delusional disorder, paranoid type on the day of the shootings. (Tr. 1933-34, 1949). The State presented rebuttal evidence from psychiatrists Jerome Peters and John Rabun. (Tr. 2143, 2377-78). Both doctors testified that Appellant did not suffer from a mental disease or defect on the day of the shootings, that he fully knew and appreciated the nature, quality and wrongfulness of his conduct, and that he was capable of conforming his conduct to the requirements of the law. (Tr. 2199-2202, 2415-16).

The jury was instructed on murder in the first degree and the lesser-included offense of murder in the second degree. (L.F. 734, 738). It was also given the option of finding Appellant not guilty by reason of mental disease or defect. (L.F. 739-40). The jury found Appellant guilty of murder in the first degree. (L.F. 750).

The State presented six witnesses in the penalty phase. (Tr. 13). Trina Bland, a medical assistant at the St. Louis County Justice Center, testified that Appellant hit her in the face and body when she changed a dressing one day later than scheduled. (Tr. 2803, 2807, 2810-11). Bland testified that she required physical therapy and is now more jumpy when treating inmates. (Tr. 2811). Robert Venable, a corrections officer at the Justice Center, took Appellant into custody after the assault. (Tr. 2823, 2829). Venable testified that Appellant said to him, "I killed once and I would do it again." (Tr. 2830).

Mary Baumruk's sister, father, and two daughters all testified about the impact of her death. (Tr. 2837, 2850, 2853, 2858).

Appellant presented four penalty phase witnesses. (Tr. 14). Appellant's brother, a nephew, and a co-worker testified about Appellant's upbringing and life prior to the murder (Tr. 2868, 2907-08, 2919). An employee of a nursing home where Appellant's mother was a patient testified about Appellant's interactions with his mother and the nursing home staff. (Tr. 2930-31).

The jury returned a verdict recommending a sentence of death. (L.F. 788). The jury found that the State had proven ten statutory aggravating circumstances beyond a reasonable doubt. (L.F. 788) The jury found that the murder of Mary Baumruk involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. (L.F. 771, 788). The jury also found that Appellant, by his act of murdering Mary Baumruk, knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person. (L.F. 776, 788). The remaining eight statutory aggravating circumstances found by the jury were that the murder of Mary Baumruk was committed while Appellant was engaged in the attempted commission of other unlawful homicides of Scott Pollard, Gary Seltzer, Fred Nicolay, Paul Neske, Steve Salomon, James Hartwick, William Mudd, and Wade Dillon. (L.F. 771-76, 788). The court imposed the death sentence on March 19, 2007. (L.F. 857-59). This appeal follows. (L.F. 865).

## **ARGUMENT**

### **I.**

**Denial of Appellant's motion to discharge his attorneys.**

Appellant contends the trial court erred in overruling his motion to discharge his attorneys and in not permitting him to represent himself *pro se*. The trial court did not err because Appellant did not make an unequivocal, timely, or knowing and intelligent request to represent himself.

**A. Underlying Facts.**

The first indication in the court file of any friction between Appellant and his attorneys was the November 21, 2006, filing of a *pro se* endorsement of additional witnesses. (L.F. 490-91). The list of endorsed witnesses included the trial judge in this case, as well as the judge who presided over Appellant's previous trial in St. Louis County. (L.F. 490). Appellant also endorsed a laptop computer belonging to the chief medical officer at the St. Louis County Jail. (L.F. 490).

The motion was taken up at a hearing on November 27, 2006, and was sustained with the exception of the attempted endorsement of the trial judge. (11/27/06 Tr. 18-19). Following a brief off-the-record discussion, the court noted that it had thought the hearing was over and asked defense attorney David Kenyon if he had a further announcement:

MR. KENYON: I believe Mr. Baumruk does, Your Honor.

THE COURT: Well, now just a moment. Is this pursuant to any written motion that's been filed? The defendant is shaking his head no. I'll permit you to make a very brief statement, Mr. Baumruk, but I'm going to handle these matters in an orderly fashion and I'm not going to take up any motion. I have no idea what you're going to say, but I am not going to

entertain spontaneous oral requests that you might decide that you want to make. That's not proper procedure.

So, what is it that you wish to take up at this time?

THE DEFENDANT: Your Honor, let's see, Rules of the Court, 2006, Page 37, I have the right to discharge and give no reason, my attorneys, which I'll take into effect right now. They're fired.

THE COURT: Well, Mr. Baumruk, do you plan to hire an attorney to represent you?

THE DEFENDANT: No, if the State don't give me one I'll represent myself.

THE COURT: Well, Mr. Baumruk, the case law is settled that you do not have the right to choose your attorneys.

THE DEFENDANT: Baloney.

THE COURT: And you can retain an attorney of your choosing, but you don't have the right to choose appointed counsel.

THE DEFENDANT: According to rule of the Court, Page 37, I do.

THE COURT: You don't have the right to select the attorney, and I do not advise you to appear in a trial of this magnitude without counsel.

THE DEFENDANT: Considering what they have done I can't do any worse.

THE COURT: Well, I think you can. 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. And the Court will not appoint different counsel.

THE DEFENDANT: I'm not asking you to appoint different counsel.

THE COURT: I understand that.

THE DEFENDANT: I'm saying a fact –

THE COURT: Well, you may wish to discharge attorneys. I'm not going to allow them to withdraw. They are going to remain on record as your counsel and they are going to continue to represent you. You do not have the right to select appointed counsel.

THE DEFENDANT: I take offense to that.

THE COURT: Well, you're free to do that.

THE DEFENDANT: Also, any motions I have to approve before they are even sent in.

THE COURT: Well, you can talk to your attorney about asking them to forward any motions that you want, but they are still your attorneys of record, and the request to discharge them is denied. And we're now going off the record.

On the record, let it be noted that the defendant did not file any motions. He just made that oral statement to the Court. We're off the record.

(11/27/06 Tr. 20-22).

On December 4, 2006, Appellant filed in the Circuit Court what appears to be a handwritten Notice of Appeal to the Missouri Court of Appeals Eastern District. (L.F. 492-95). The notice refers to the trial court's refusal to allow Appellant to discharge his attorneys, and makes no reference to Appellant desiring to represent himself. (L.F. 492-93).

At some point prior to December 8, 2006, Appellant sent to the prosecutors a motion to remove his public defenders. (L.F. 500). The case style on the motion is "Kenneth Baumruk v. L. Rauch." (L.F. 500). The motion contained no request that Appellant be allowed to represent himself. (L.F. 500). Appellant also sent what appears to be a jurisdictional statement for an appeal. (L.F. 501).

On December 19, 2006, Appellant filed in the trial court a "Motion for Removal (Discharge) of Public Defenders D. Kenyon and R. Steele." (L.F. 510). The motion reads in its entirety: "Now Comes Defendant Acting As His Own Attorney, Has Removed D. Kenyon And R. Steele As His Attorneys." (L.F. 510). The trial court took up the motion at a hearing on January 17, 2007:

THE COURT: . . . And I guess my first question to you, Mr.

Baumruk, is do you intend to hire or retain different counsel?

MR. BAUMRUK: No.

THE COURT: You're requesting that the Court allow you to represent yourself?

MR. BAUMRUK: Under the Statute, Volume 1, Page 37 of the State Court's 2006, I have the right to discharge.

THE COURT: Well, but –

MR. BAUMRUK: And I am – I wish to – I have forwarded a motion, but I never got a copy. I sent one.

THE COURT: You sent one what, sir?

MR. BAUMRUK: To Judy Zerr the third week of December.

THE COURT: All right, sir. And what did that motion say?

MR. BAUMRUK: I wanted to discharge them, and I had some of the references, communication, diligence, and –

THE COURT: I'm sorry, I'm having trouble understanding you. Your what? Can you hook up that microphone?

MR. BAUMRUK: I filed a motion back in the third week of December to Judy Zerr.

THE COURT: The Circuit Clerk.

MR. BAUMRUK: The Circuit Clerk, wanting a discharge, and under supporting points is communication, diligence, and something else. I can't remember what that was, something – the scope of their presentation or representation.

(1/17/07 Tr. 38-40). After reading through the motion, the court asked Appellant if he had anything to say in support of it:

MR. BAUMRUK: Well, communications, I haven't got a copy of half of these things, and somewhere –

THE COURT: Half of what things, sir?

MR. BAUMRUK: These motions. I got two of them, that one that you just read and another one to suppress some information by Glenn.

THE COURT: Suppress some information what?

MR. BAUMRUK: By Officer Glenn, Clayton Police Department.

THE COURT: All right. And your attorney – you say your attorney did not provide you with a copy of those motions?

MR. BAUMRUK: Not with a stamped copy, no. No copy at all until just now he handed me a copy.

THE COURT: All right. So, now do you have copies of those motions?

MR. BAUMRUK: Not – I don't know. Are these stamped?

MR. KENYON: No. These – if I might interject? Mr. Baumruk never served any of these motions on us.

THE COURT: Right.

MR. KENYON: The only reason – the only way that we knew that they were filed is because the State of Missouri was kind enough to make a copy of the correspondence that he's had with them. And that's how we have these. So I'm not sure that he ever –

THE COURT: Well, anyway, all right. I think also the Court – the only way the Court got some of these copies is through the State. I'm not sure that we have received all – the originals of all of these various motions either.

But now, Mr. Baumruk, there is a constitutional right to the assistance of counsel, and the law says that – as a corollary of that right is the right to waive counsel or proceed pro se. however, the request to proceed has to be timely, and it has to be unequivocal, and the request to proceed must include a voluntary(,) knowing and intelligent waiver of the right to the assistance of counsel.

And so I think I have to, in fact, I'm sure I must question you here to make a record about your request, and then the Court has some findings. I don't think that you have an unqualified right to discharge counsel.

We may disagree about that, but I'm not sure that I agree that you have an unqualified right. You also do not have the right to the public defender of your choice. So, in order for the Court to make a determination in this matter I'll have to place you under oath and ask you some questions.

(1/17/07 Tr. 41-43).

Appellant testified under oath that he held a bachelors of science in business administration and had taken a course in business law. (1/17/07 Tr. 44-45). Appellant stated that he understood that if his attorneys were discharged that he would be solely responsible for presenting anything that he wished to have presented at trial. (1/17/07 Tr.

44). Appellant also said that he understood that he would be required to question the panelists on voir dire. (1/17/07 Tr. 45). When told that he would have to ask proper questions and that no one would advise him on how to do that, Appellant responded:

A. With the prosecuting attorney sitting on the bench you told me, don't make a damn bit of difference.

Q. What do you mean?

A. I think you're a very good prosecutor, but you wouldn't make a pimple on a bad judge's butt.

(1/17/07 Tr. 46). When the court reiterated that no one would be able to advise him on how to ask proper questions, Appellant responded, "What's new?" (1/17/07 Tr. 46).

When asked if he had any other reasons why counsel should be discharged, Appellant indicated that he disagreed with counsel's decision to enter into evidence transcripts of a previous competency hearing. (1/17/07 Tr. 49). Appellant also told the court that it was still his position that he was not competent to stand trial. (1/17/07 Tr. 50).

The court denied Appellant's request, citing the nature of the proceedings, the extensive proceedings that had already taken place, the quality of representation provided by defense counsel, the complexity of the case, and Appellant's clinging to his stance of being incompetent to proceed. (1/17/07 Tr. 51). The court also found the request to be untimely due to the size and complexity of the case, which was set to go to trial in one week. (1/17/07 Tr. 51).

**B. Standard of Review.**

As outlined above, all of the various motions filed by Appellant were aimed at discharging his attorneys and none of those motions invoked his right to self-representation. The first mention of any constitutional deprivations is contained in the Motion for New Trial. (L.F. 800). Because Appellant did not make an unequivocal request for self-representation and did not raise his constitutional claim at the earliest opportunity, that claim is not preserved for review. *State v. Strong*, 142 S.W.3d 702, 714 (Mo. banc 2004). Unpreserved constitutional claims can only be reviewed for plain error, requiring Appellant to establish that a manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

### **C. Analysis.**

A trial court must indulge in every reasonable presumption against a defendant's waiver of the right to counsel. *State v. Hampton*, 959 S.W.2d 444, 447 (Mo. banc 1997). A defendant must therefore meet four requirements before he will be allowed to waive his right to counsel and proceed *pro se*. *State v. Black*, 223 S.W.3d 149, 153 (Mo. banc 2007). The request for self-representation must be: (1) unequivocal; (2) timely; (3) knowing; and (4) intelligent. *Id.* Those requirements were not met in this case, and the trial court properly denied Appellant's request to discharge counsel.

#### **1. Appellant did not unequivocally ask to represent himself.**

Because a defendant who is allowed to proceed *pro se* may argue on appeal that his right to counsel was improperly denied, a defendant who wishes to waive his right to counsel must do so explicitly and unequivocally. *Id.* Appellant never explicitly and

unequivocally asserted a desire to completely forego the assistance of counsel and proceed *pro se*.

At no time did Appellant directly request that he be allowed to represent himself. His motions were entirely focused on his desire to discharge the two public defenders assigned to his case. (11/27/06 Tr. 20-22; L.F. 492-93, 500, 510). 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. *State v. Johnson*, 943 S.W.2d 285, 290 (Mo. App. E.D. 1997).

When Appellant first brought the issue before the court and was asked if he intended to retain counsel, he responded: “No, *if the State don’t give me one I’ll represent myself.*” (11/27/06 Tr. 20) (emphasis added). The highlighted comment shows that Appellant was willing to accept another attorney. The remainder of his comments indicate that Appellant would prefer to represent himself rather than be represented by attorneys Kenyon and Steele. In *State v. Williams*, the defendant “stated that he would prefer, rather than accept representation from the public defender of Jasper County, to represent himself.” *State v. Williams*, 716 S.W.2d 452, 453 (Mo. App. S.D. 1986). The court found that did not constitute an unequivocal request for self-representation. *Id. see also State v. Garrison*, 928 S.W.2d 359, 362 (Mo. App. S.D. 1996); *State v. Hamilton*, 791 S.W.2d 789, 796 (Mo. App. E.D. 1990) (following *Williams* by stating that a request is not considered unequivocal where the defendant states that he would prefer to represent himself rather than accept the aid of his appointed attorney).

The oral motion made at the November 27, 2006, hearing is equivocal for the further reason that it appears to have been a knee-jerk reaction made “on the spur of the moment” in response to the court’s pronouncement that Appellant was not entitled to the appointed counsel of his choice. A request that is made without deliberation or on the spur of the moment does not qualify as an unequivocal request for self-representation. *State v. Gomez*, 863 S.W.2d 652, 655, 657 (Mo. App. W.D. 1993); *Garrison*, 928 S.W.2d at 362.

“Trial courts must be allowed ‘to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel.’” *United States v. Edelman*, 458 F.3d 791, 809 (8th Cir. 2006) quoting *United States v. Frazier-El*, 204 F.3d 553, 560 (4<sup>th</sup> Cir. 2000). The record shows that Appellant’s real purpose was to get rid of his attorneys when they would not present the evidence and arguments that he wanted to put before the jury. Appellant’s intent was not to represent himself – he was, at most, willing to say that he would do so if that was what it would take to get his attorneys off the case. Appellant did not make an unequivocal request to represent himself, and the trial court was justified on that basis alone in denying Appellant’s motions.

2. Written motion was not timely.

When Appellant did finally get around to filing a written motion, that motion not only failed to explicitly request self-representation, but it was also untimely. (L.F. 510). The motion is file-stamped December 19, 2006, about one month before trial began. (L.F. 510). The motion is not reflected in the docket sheets, however, and the court

expressed some concerns that the motions were being sent to the prosecutor rather than directly to the circuit clerk. (L.F. 48; 1/17/07 Tr. 42). The motion was heard on January 17, 2007, one week before trial began, and the record does not reflect any attempt to bring the motion to the court's attention prior to that date. (L.F. 49).

Appellant's argument focuses on cases finding that requests made less than a week before trial were timely and on the fact that Appellant disclaimed any interest in a continuance. Timeliness must, however, be analyzed in light of the Sixth Amendment, from which the right to self-representation originates. That amendment is "trial-centered," meaning it is intended to ensure the defendant's right to a full and fair trial. *State v. Herron*, 736 S.W.2d 447, 449 (Mo. App. W.D. 1987). As a result, requests for self-representation have been denied as untimely even where the defendant did not request a continuance. The court, the prosecutor, and the defendant all need ample time to prepare for trial. *Gomez*, 863 S.W.2d at 656. A motion to proceed *pro se* that would result in the trial proceeding as scheduled with an unprepared defendant would be unfair to the parties. *Id*; *Garrison*, 928 S.W.2d at 362-63; *State v. Parker*, 890 S.W.2d 312, 316 (Mo. App. S.D. 1994). In such a case, a motion for self-representation is addressed to the sound discretion of the trial court. *Parker*, 890 S.W.2d at 316.

While Appellant maintained that he did not wish a continuance, the record shows that he was not prepared to try the case himself. Indeed, one of Appellant's biggest complaints about his lawyers was that they were not providing him with copies of various pleadings and other documents. (1/17/07 Tr. 41, 49). Given the number of witnesses to his actions on the day of the shootings, the only real chance that Appellant had to avoid a

conviction for murder in the first degree was to persuade the jury to accept an NGRI defense. Appellant not only failed to give any indication that he was prepared to put on such a defense, he remained focused on the issue of his competency to stand trial and seemed to think that he could present that issue to the jury. (1/17/07 Tr. 50).

In finding Appellant's request untimely, the court noted the size and complexity of the case.<sup>5</sup> (1/17/07 Tr. 51). The court correctly concluded that allowing this particular case to go to trial as scheduled would be unfair to the parties because Appellant could not be adequately prepared to try the case. Under the circumstances presented in this case, the trial court did not abuse its discretion in not permitting Appellant to proceed *pro se*.

3. Waiver was not knowing and intelligent.

A defendant's waiver of counsel is not knowing and intelligent unless the court timely informs him as to the nature of the charges against him, potential sentences if

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<sup>5</sup> Appellant relies on four cases to argue that the size and complexity of the case should not be considered in determining timeliness. (Appellant's Brf., pp. 49-50). In three of those cases, the court granted the defendant's request to proceed *pro se*, so those cases do not address the issue of when a court abuses its discretion by refusing such a request. *People v. Gordon*, 688 N.Y.S. 2d 380, 381-82 (N.Y. Sup. Ct. 1999); *Diaz v. State*, 513 So. 2d 1045, 1047 (Fla. 1987); *Commonwealth v. Davis*, 388 A.2d 324, 325 (Pa. 1978). In the fourth case, the denial of defendant's request for self-representation was upheld due to the request being equivocal. *Commonwealth v. Davido*, 868 A.2d 431, 439-70 (Pa. 2005).

convicted of the offenses, potential defenses he can offer, the nature of the trial proceedings, the fact that he will have to proceed *pro se* if he refuses counsel, and the dangers of proceeding *pro se*. *Black*, 223 S.W.3d at 154. The trial court should inquire into the defendant's capacity to make an intelligent decision and his knowledge of his own situation. *Id.* at 155. The court should ensure that the defendant is not acting under duress, does not suffer from a mental incapacity, is literate and is 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. *Id.* at 156.

As noted above, Appellant operated under the mistaken belief that he could present evidence to the jury about his competency to stand trial. (1/17/07 Tr. 50). Appellant also indicated that he believed the judge was in league with the prosecutor, so that his lack of ability to try a case did not matter because the deck was stacked against him. (1/17/07 Tr. 45-48). The court noted Appellant's demeanor while being questioned about his waiver, and expressed concern about Appellant's ability to maintain decorum and present a proper demeanor during the trial. (1/17/07 Tr. 46-47).

In the seminal case finding a right to self-representation, the United States Supreme Court noted that the right can be forfeited if the defendant engages in serious and obstructionist misconduct. *Faretta v. California*, 422 U.S. 806, 834 (1975). Such obstructionist misconduct has been found to exist where a defendant repeatedly filed ill-conceived pretrial pleadings, disregarded the court's admonitions to speak through counsel, and argued that his attorney was sabotaging his case by refusing to give him discovery documents. *People v. Rohlf*s, 858 N.E.2d 616, 621 (Ill. Ct. App. 2006). "A

defendant's pattern of obstreperous, truculent, and dilatory behavior may be deemed relevant as to whether such conduct has been undertaken with full awareness of the consequences of doing so." *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006). The record shows a pattern of obstreperous and truculent behavior by Appellant, and the trial court correctly took that behavior into account in determining whether Appellant was knowingly and intelligently waiving the right to counsel.

The record demonstrates that the requirements for waiving counsel and proceeding *pro se* were not met. Appellant never made an unequivocal request to represent himself, and to the extent that his motion to discharge counsel can be construed as a request for self-representation, it was not timely. The record also fails to show that Appellant made a knowing and intelligent waiver of counsel. The trial court did not err in denying Appellant's motion to discharge counsel and did not err in not allowing Appellant to represent himself at trial. Appellant's point should be denied.

## II.

### **Denial of Appellant's motion to empanel a jury from outside St. Charles County.**

Appellant contends the trial court erred in overruling his motion to import a jury from outside St. Charles County to hear his case because the citizens of St. Charles County were exposed to extensive media coverage of the charged crime. The trial court did not err because none of the jurors who participated in the verdict had fixed opinions about Appellant's guilt or innocence based on pre-trial publicity.

#### **A. Underlying Facts.**

On May 14, 2004, venue in the instant case was transferred from St. Louis County to St. Charles County. (L.F. 32). On September 16, 2005, Appellant filed a motion to secure a jury from a county other than St. Charles County.<sup>6</sup> (L.F. 42, 255-63). The motion alleged that pre-trial publicity and media coverage in the St. Louis area, which included St. Charles County, had caused the inhabitants of St. Charles County to be

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<sup>6</sup> Appellant's Brief makes much of the fact that the prosecutor opposed that motion after previously indicating during oral argument on a Writ of Prohibition proceeding before this Court that it might be necessary to bring in a jury from another county. That issue is irrelevant since the decision whether or not to import a jury lies solely within the discretion of the trial court, which is not bound by any position taken by the parties. Furthermore, the prosecutor's stance has no bearing on the issue before this Court, which is whether Appellant received a fair trial before an impartial jury.

prejudiced against Appellant. (L.F. 261). Appellant's motion was denied on October 3, 2005. (L.F. 371).

Trial commenced on January 24, 2007, with 283 people being summoned for the venire panel. (L.F. 670-75). Of those summoned, 234 actually reported. (L.F. 670, 672, 674). On Appellant's motion, all prospective jurors were sent a questionnaire containing a summary of the case and asking if they had knowledge of the case from any sources. (L.F. 398-403; Supp. L.F. 1-216). Appellant renewed his motion to bring in a jury from outside St. Charles County, on the basis that "a large number" of venirepersons had indicated on the questionnaire that they had some familiarity with the case. (Tr. 36). The court denied the motion, noting that a large number of venire panelists did not indicate any familiarity with the case. (Tr. 38). The court did sustain Appellant's motion that no mention be made to the venire panel about Appellant's previous trial, the sentence that he received, or any appellate court rulings in that case. (Tr. 51).

The panel was divided into three groups. (L.F. 670-75). After being questioned about hardship, the members of the group were asked a general question about whether they were aware of the case from any outside source. (Tr. 38, 107). Those who responded affirmatively were then brought in for individual questioning. (Tr. 38, 107).

In the first group, thirty-seven venire members indicated that they had prior knowledge of the case. (Tr. 58, 64, 71, 75, 109-12, 126-27, 297, 298, 300). Of those thirty-seven, the court excused eight who indicated that they had fixed opinions about the case due to their prior knowledge. (Tr. 60, 66, 72, 76, 123, 200, 229, 243). The court determined that it would automatically excuse everyone who was aware that Appellant

had received the death sentence in his prior trial, regardless of whether they could set aside that information and judge the case solely on the evidence presented at this trial. (Tr. 207). Three venire members were excused for that reason. (Tr. 207, 279, 287). Another five were excused for hardship. (Tr. 125, 156, 216, 257, 267). The court excused six people who either could not impose the death sentence or who would automatically vote for death upon returning a guilty verdict. (Tr. 132, 150, 213, 250, 266). One venire member was excused due to a prior relationship with one of the prosecutors trying the case. (Tr. 293). At the end of hardship strikes and individual questioning on publicity, forty-four persons remained from the first group. (Tr. 320).

In the second group, fifty-five persons indicated a prior knowledge of the case.<sup>7</sup> (Tr. 485). Of those who underwent individual questioning on publicity, ten were excused for hardship, including one veniremember who suffered a seizure in the hallway while individual questioning was taking place, and one person was excused for a combination of hardship and cause. (Tr. 578-79, 587, 599, 602, 675, 683, 688, 708, 722, 729, 731). Of the remaining twenty-nine persons struck for cause, five indicated that they knew Fred Nicolay, the bailiff shot and wounded by Appellant; one indicated that she could not return a sentence of less than death if Appellant were found guilty; and nineteen were struck after indicating that they were aware that Appellant had previously been sentenced

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<sup>7</sup> Venireperson Lawrence Snyder also raised his hand and participated in individual questioning. (Tr. 486, 568). Snyder indicated that he raised his hand because he had difficulty hearing, and that he had no prior knowledge of the case. (Tr. 569).

to death. (Tr. 499, 505, 529, 542, 549-50, 583, 589, 591, 598, 608, 610-11, 612, 661, 699-700, 709-10, 714, 721, 725, 734). At the end of hardship strikes and individual questioning on publicity, forty-four persons remained from the second group. (Tr. 739).

In the midst of the questioning of the second group, defense counsel had renewed the motion to bring in a jury from outside St. Charles County. (Tr. 653). The court denied the motion, stating that people could find out information about the case from the internet, no matter where they lived.<sup>8</sup> (Tr. 658-59).

At the end of death qualification questioning of the first two groups, a total of fifty-six veniremembers remained. (Tr. 803). The third group of veniremembers was not questioned and the jury was selected from those members of the first two groups that remained after all strikes for cause were exercised. (Tr. 804, 922-24). Of the veniremembers who did undergo individual questioning, five served on the jury and participated in the verdict: David Booker, Jesse Porter, Terry Mudd, Nancy Crossman, and Ronald Matlock. (Tr. 274-76, 289-91, 297-98, 298-99, 507-16, 929-30). Appellant did not attempt to strike any of those jurors for cause and made no strikes for cause at the end of the general voir dire. (Tr. 922).

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<sup>8</sup> In fact, several veniremembers said that they had read about the case on the internet, with many of them specifically looking-up information after they were summoned for jury duty. (Tr. 71, 146, 269, 502, 524-25, 547, 551, 560, 689, 698-99). There is no reason to believe that jurors summoned from another county would not do the same thing.

**B. Standard of Review.**

Respondent is unaware of any reported Missouri court opinions addressing the issue of whether a trial court erred in not importing a jury from another county to hear a case following a change of venue. *But see State v. Norman*, 243 S.W.3d 466, 473 (Mo. App. S.D. 2007) (appellant challenged the trial court's refusal to change venue or import a jury). Respondent agrees with Appellant's suggestion that such claims are properly analyzed under the standard of review that applies to the denial of a motion to change venue based on pre-trial publicity. *See id.*

The trial court may order a change of venue if the inhabitants of the county in which the trial is to take place are prejudiced against the defendant. *State v. Johns*, 34 S.W.3d 93, 107 (Mo. banc 2000). The decision to grant or deny a change of venue is a matter of trial court discretion and will not be disturbed absent an abuse of that discretion. *Id.* A trial court abuses its discretion when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. *Id.* Potential jurors are not disqualified merely because they remember the case. *Id.* Instead, the critical question in assessing the impact of potentially prejudicial publicity on jurors is whether they have such fixed opinions regarding the case that they could not impartially determine the guilt or innocence of the defendant. *Id.*

**C. Analysis.**

Appellant's previous conviction was reversed due to the trial court's refusal to order a change of venue from St. Louis County. *Baumruk*, 85 S.W.3d at 651. Appellant contended then, as he does now, that pretrial publicity in the St. Louis area made it impossible to seat an impartial jury. *Id.* at 649. This Court characterized as debatable the trial court's determination that the passage of time from the murder to the trial made it possible to select a fair jury from St. Louis County, but nonetheless stated that it would defer to that determination in an ordinary case. *Id.* The Court went on to note, however, that "[t]his is not just a pre-trial publicity, improper venue case." *Id.* at 650. What made the case unusual was that it was tried in the very courthouse where the shootings took place:

Here, the jurors arrived at the courthouse and entered through metal detectors that had been installed as a direct result of Baumruk's shooting spree. Jurors walked the same halls, used the same elevators, stairwells, and escalators that were used by the escaping victims. The trial was held in a courtroom nearly identical to the courtroom that was the scene of the crime. The jurors, in effect, sat at the murder scene while determining guilt or innocence and the penalty to be imposed.

*Id.* (footnotes omitted). The Court concluded that the combination of pre-trial publicity *and* the atmosphere of the trial setting made it impossible to assure that Appellant received a fair and impartial trial. *Id.* at 651.

The Court's opinion in *Baumruk* shows that the level of pre-trial publicity was not sufficient by itself to mandate a new trial. That distinction has been recognized in other

opinions that found that *Baumruk* did not provide authority for reversal due to the unique circumstances of that case. *Norman*, 243 S.W.3d at 474; *State v. Hayes*, 169 S.W.3d 613, 620 (Mo. App. S.D. 2005); *State v. Davis*, 107 S.W.3d 410, 418 (Mo. App. W.D. 2003).

Since this trial did not take place in the same courthouse as the charged crime, it is “just a pre-trial publicity, improper venue case” in which this Court will normally defer to the trial court’s discretion. *See Baumruk*, 85 S.W.3d at 650. Because the record does not show that the jurors who tried the case and rendered a verdict had fixed opinions about Appellant’s guilt, Appellant has not met his burden of showing that the trial court abused its discretion in refusing to import a jury from another county.

1. Venire panel not unduly exposed to publicity.

The number of prospective jurors who had heard about the crime does not mandate a change of venire. A total of 234 potential jurors reported to the courthouse. (L.F. 670, 672, 674). Only the first two groups, comprising 153 veniremembers, were questioned about pretrial publicity. (L.F. 670, 672). Of those 153 veniremembers, 92, or 60%, indicated that they had prior knowledge of the case. (Tr. 58, 64, 71, 75, 109-12, 126-27, 297, 298, 300, 485). A change of venue has been found not to be warranted in cases where a much higher percentage of potential jurors were exposed to pretrial publicity about the case. *See, e.g., Johns*, 34 S.W.3d at 107 (over 80%); *State v. Deck*, 994 S.W.2d 527, 533 (Mo. banc 1999) (69%); *State v. Barton*, 998 S.W.2d 19, 27 (Mo. banc 1999) (68%); *State v. Leisure*, 749 S.W.2d 366, 376 (Mo. banc 1988) (approximately two-thirds).

This Court has never required that jurors be ignorant of the facts and issues reported by the media. *Johns*, 34 S.W.3d at 107. The relevant question is not whether the community remembers the case, but whether the actual jurors of the case have such fixed opinions that a fair trial is impossible. *State v. Feltrop*, 803 S.W.2d 1, 6 (Mo. banc 1991); *Davis*, 107 S.W.3d at 418. The record demonstrates that the jurors who heard the evidence and participated in the verdict did not hold fixed opinions about Appellant's guilt.

In selecting the jury, the trial court utilized the procedure that has previously been noted with approval by this Court. *State v. Whalen*, 49 S.W.3d 181, 189 (Mo. banc 2001). The court and the attorneys identified those veniremembers who had heard about the case and thoroughly questioned them concerning their views of the case. *See id.* That procedure allowed the trial court to observe each venireperson's demeanor, evaluate whether the venireperson was affected by publicity, and act accordingly. *Barton*, 998 S.W.2d at 27.

The court struck forty-seven persons for cause. That number, however, included twenty-one persons who were automatically excused because they were aware that Appellant had received the death penalty in his previous trial; seven people who could not consider the full range of punishment; and six persons who had prior relationships with persons connected with the case. (Tr. 132, 150, 207, 213, 250, 266, 279, 287, 293, 499, 505, 529, 542, 549-50, 583, 589, 591, 598, 608, 610-11, 612, 661, 699-700, 709-10, 714, 721, 725, 734). Only thirteen veniremembers were struck for indicating that they had fixed opinions about the case. (Tr. 60, 66, 72, 76, 123, 200, 207, 229, 243, 526, 623-

24, 708, 718). After hardship strikes, questioning about publicity, and death qualification, enough prospective jurors remained that it was unnecessary to question the third group of veniremembers. (Tr. 803-04).

2. Jurors who decided case did not have fixed opinion on guilt.

Of the twelve jurors who participated in the verdict, five had indicated prior knowledge of the case and had been individually questioned. (Tr. 274-76, 289-91, 297-98, 298-99, 507-16, 929-30). Juries with a greater number of persons who had been exposed to pretrial publicity have nonetheless been found to be fair and impartial. *Norman*, 243 S.W.3d at 473 (seven of twelve voting jurors); *Barton*, 998 S.W.2d at 27 (six of twelve); *Feltrop*, 803 S.W.2d at 7 (eight of fourteen empaneled jurors); *State v. East*, 976 S.W.2d 507, 510 (Mo. App. W.D. 1998) (seven of twelve).

Appellant did not attempt to strike any of the five for cause. *Norman*, 243 S.W.3d at 473. The failure to challenge the jurors for cause is strong evidence that Appellant was convinced that the jurors were not biased and had not formed an opinion as to guilt. *Beck v. Washington*, 369 U.S. 541, 557-58 (1961). During the individual voir dire on publicity, Appellant asked no questions of veniremembers Booker and Porter, posed only one question to venireperson Mudd, and asked venireperson Crossman one question regarding her relationship to a judge. (Tr. 276, 290-91, 298, 299). None of the four indicated that they had formed an opinion about Appellant's guilt. (Tr. 275, 290, 297-98, 299). Appellant makes no claim that jurors Booker, Porter, Mudd, or Crossman were biased against him. See *State v. Hall*, 982 S.W.2d 675, 682 (Mo. banc 1998).

Appellant does argue, for the first time on appeal, that juror Matlock did have a fixed opinion about his guilt. Appellant raises a separate claim of error concerning juror Matlock in Point III of his Brief, and the facts regarding juror Matlock are developed more fully in Point III of this Brief. Those facts and arguments are incorporated into this Point and they show that Matlock did not have a fixed opinion on Appellant's guilt or innocence.

While Matlock initially said that he did not think that he could give Appellant the presumption of innocence, that response was based on the fact that "there was so many witnesses that he actually did pull out a gun and kill his wife in the courtroom." (Tr. 508). In response to defense counsel's questioning, Matlock said that he had not heard anything about Appellant's mental state at the time of the shootings. (Tr. 513-14). Matlock said that he could keep an open mind and listen to evidence about Appellant's mental state as it related to murder in the first degree, and make his own decision about how to apply that evidence to the elements. (Tr. 515).

Venirepersons are not automatically excluded because they may have formed an opinion based on publicity. *Feltrop*, 803 S.W.2d at 8. A venireperson's qualifications are not determined by their initial reservations, but are instead judged on the basis of the entire voir dire examination. *Id.* The relevant question is not whether the prospective juror holds opinions about the case, but whether those opinions will yield and the juror will determine the issues under the law. *Id.* The entirety of Matlock's responses show that he did not have a fixed opinion about Appellant's guilt, and that he was willing to yield his initial opinion and decide the case based on all the evidence and the law.

Appellant has failed to meet his burden of showing that Matlock or any of the other jurors who served “had such fixed opinions that they could not impartially judge [his] guilt.” *Whalen*, 49 S.W.3d at 189.

3. No showing of “a pattern of deep and bitter prejudice”.

Appellant nonetheless argues that the juror’s assurances of impartiality should be set aside because media coverage of the case made it impossible for the jurors to be impartial. Appellant relies primarily on *Irvin v. Dowd*, 366 U.S. 717 (1961). The defendant in that case was arrested for six murders, and tried and convicted for one of those killings. *Id.* at 719. In overturning the conviction, the Court noted that not only had the case received extensive publicity, but that the tone of the news coverage “fostered a strong prejudice” against the defendant. *Id.* at 726. Various news reports characterized the defendant as “remorseless and without conscience,” a “confessed slayer of six,” “a parole violator and fraudulent check artist.” *Id.* News stories also focused on the defendant’s criminal history, including “crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war.” *Id.* at 725. News stories at the time of the trial discussed the “strong . . . often bitter and angry” feelings in the community, and described those feelings as “a pattern of deep and bitter prejudice” against the defendant. *Id.* at 726-27. Almost 90% of the veniremembers questioned on the subject held an opinion that the defendant might be, or was, guilty. *Id.* at 727. The Court noted that the “pattern of deep and bitter

prejudice” was reflected by the fact that eight of the twelve jurors who heard the case thought the defendant was guilty. *Id.*

Later cases have distinguished *Irvin* where the media coverage of the case was largely factual, as opposed to the inflammatory coverage present in *Irvin*. *Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984); *Murphy v. Florida*, 421 U.S. 794, 802 (1975); *Beck*, 369 U.S. at 556. While Appellant’s case undoubtedly attracted widespread media attention,<sup>9</sup> the record does not reveal that the nature of that coverage was so inflammatory that it created unyielding prejudice and hostility towards Appellant. Many, if not all, of the veniremembers who indicated that they believed Appellant to be guilty reached that conclusion on the unremarkable (and obvious from a layperson standpoint) basis that Appellant committed the charged crime in a public place and in front of many witnesses. *See, e.g.*, (Tr. 120, 140, 152, 254, 280-82, 525, 549, 724). Also, the record as set forth above does not reflect nearly the same percentage of veniremembers or actual jurors who held an opinion about Appellant’s guilt as occurred in *Irvin*.

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<sup>9</sup> That media coverage was not confined to the St. Louis area. At least one veniremember said that she heard about the shooting in 1992, when she lived in another state, but had not heard anything since then. (Tr. 193). The record also indicates that the Associated Press joined in some of the “cameras in the courtroom” requests made to the trial court through the circuit’s media coordinator. (L.F. 354-59).

This is not a case where media coverage created such levels of bias and prejudice that the juror's assurances of impartiality must be set aside. Appellant received a fair trial before an impartial jury, and his point should be denied.

### III.

#### **Failure to *sua sponte* strike juror Ronald Matlock for cause.**

Appellant contends the trial court plainly erred in failing to *sua sponte* strike juror Ronald Matlock because Matlock indicated during voir dire that he could not set aside his prior knowledge of the charged crime and could not presume Appellant to be innocent. Appellant waived any claim of error by not challenging Matlock for cause. Furthermore, the record shows that defense counsel wanted Matlock on the jury due to his misgivings about the death penalty. Finally, the full context of Matlock's responses showed that he did not have a fixed opinion about Appellant's guilt or innocence so the trial court was under no duty to strike him *sua sponte*.

#### **A. Underlying Facts.**

Juror number 198, Ronald Matlock, indicated that he had prior knowledge of the case. (Tr. 475-76). Matlock was questioned individually, away from the other venirepersons, and was asked by the prosecutor what he knew about the case and how he might have learned that information:

VENIREPERSON MATLOCK: Well, I remember that it was a breaking news special when it actually happened, and I seen it on TV. And that basically I understood that a gentleman had pulled out a gun in the courtroom and shot his wife in the courtroom and killed her. And then that there was a gun battle, from what I understand, ensued afterwards and four or five other people were injured. And just publicity from that of what was

going on. And I also believe that the reason why we have security systems in our public buildings now is due to the fact of this case.

[PROSECUTOR]: Anything else that you know about the case that you can think of?

VENIREPERSON MATLOCK: Not right now. I know it's on the news already. When I got in my car yesterday, it was on KTRS. As soon as I heard the gentlemen's name mentioned I turned the radio off immediately, but that still doesn't, you know, I still remember the stuff that happened, you know, from what I remember of that. Other than that that's about all I remember or know of the case.

[PROSECUTOR]: Okay. Have you learned anything about the case since that initial news?

VENIREPERSON MATLOCK: The questionnaire?

[PROSECUTOR]: No, since that initial news that you saw when it happened, have you learned anything about what's happened to the case since it happened in '92 to bring it here today?

VENIREPERSON MATLOCK: No, I thought he was convicted, though?

[PROSECUTOR]: And why do you say that?

VENIREPERSON MATLOCK: Well, I thought that's how the outcome of it was. Other than that –

[PROSECUTOR]: Okay. Did you know anything other than that, that you thought he was convicted?

VENIREPERSON MATLOCK: No.

[PROSECUTOR]: You don't know anything else that happened to him or anything like that?

VENIREPERSON MATLOCK: No, sir. I was actually surprised that after so long that this is coming up again. I thought it was all over with.

[PROSECUTOR]: All of the information that you have about this case, do you think you could set aside that information, put it out of your mind, and just decide the guilt or innocence of the defendant based upon the evidence that would be put forth in the courtroom?

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

[PROSECUTOR]: Okay.

VENIREPERSON MATLOCK: But I wasn't there, so, you know, I'm going by hearsay.

[PROSECUTOR]: Okay. Well, he had the right to be presumed innocent?

VENIREPERSON MATLOCK: Yes.

[PROSECUTOR]: Do you think you could presume him innocent knowing everything you know about this case?

VENIREPERSON MATLOCK: I don't think I could.

[PROSECUTOR]: Okay. Do you – he has the right to be proven guilty beyond a reasonable doubt, and it's my burden to prove him guilty beyond a reasonable doubt. Do you believe that if I failed to meet my burden, I failed to prove to you beyond a reasonable doubt that he was guilty, do you think you could give him the benefit of the doubt and acquit him with all of the information that you have?

VENIREPERSON MATLOCK: I'm sorry?

[PROSECUTOR]: It was kind of a long question. I apologize. I have to prove him guilty beyond a reasonable doubt. Let's say I don't prove that, I don't prove my case, but you have all this other information. Would you be able to hold me to my burden? Would you be able to acquit him if I don't prove the case beyond a reasonable doubt knowing all of the information that you know right now?

VENIREPERSON MATLOCK: I don't know how to answer that question. Like I said, I just – from what I understand, from what I have heard the gentleman was guilty. I thought that there were witnesses that did this (sic). I have never been in anything like this before, so I'll apologize.

(Tr. 506-09). The prosecutor then asked Matlock about his views on the death penalty.

(Tr. 509-10). Matlock said that he would automatically reject the death penalty and vote for a sentence of life imprisonment. (Tr. 510).

Defense counsel began his questioning of Matlock by posing several questions related to Matlock's views on the death penalty. (Tr. 511-13). Matlock eventually conceded that it was possible that he could consider imposing the death penalty. (Tr. 513). Defense counsel then turned to the issue of prior knowledge of the case:

[DEFENSE COUNSEL]: Okay. And then [the prosecutor] also asked you some questions about your ability to presume, you know, Mr. Baumruk is innocent. You said that you have read a number of things that convince you in your mind that he shot his wife and other people in the courtroom back in 1992; is that correct?

VENIREPERSON MATLOCK: That's correct.

[DEFENSE COUNSEL]: Okay. So, have you heard anything at all in this case that had anything to do with what his mental state might have been at that time?

VENIREPERSON MATLOCK: Not that I recall.

[DEFENSE COUNSEL]: Okay. When [the prosecutor] asked you if you could presume that he was innocent and if he failed to prove him guilty, if we were to concede that Mr. Baumruk was the one that committed the shooting, but that's a different thing than saying whether or not you can presume him innocent of murder in the first degree. Murder in the first

degree requires – well, I'm not, excuse me, I'm not permitted to get into the definition of the crime of murder in the first degree.

Suffice it to say, he has been charged with murder in the first degree and it does involve a mental ailment. Do you know anything about the mental ailment of Mr. Baumruk at the time that this crime was committed?

VENIREPERSON MATLOCK: No, I do not.

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

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

[DEFENSE COUNSEL]: That or any other number of things that might be presented with regard to his mental state. And I'm not asking you to tell me whether you think that's true or actually happened in this case. Obviously you have not heard any evidence. All I'm wondering is whether or not, whether or not you would be able to keep an open mind as to those elements, you know, the elements that pertain to his mental state as it relates to the crime of murder in the first degree. If you could keep an open mind about that thing and listen to the evidence and make your own decision about those things.

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

[DEFENSE COUNSEL]: Fair enough. I don't have any other questions.

(Tr. 513-15). Defense counsel did not move to strike venireperson Matlock for cause.

(Tr. 517, 922). Matlock served on the jury and participated in the verdict. (L.F. 676).

No assignment of error regarding juror Matlock was raised in the Motion for New Trial.

(L.F. 795-840).

### **B. Standard of Review.**

By failing to challenge juror Matlock for cause, Appellant has waived review of this claim. “The failure to make a timely and proper objection to members of a jury panel constitutes a waiver.” *State v. Wright*, 30 S.W.3d 906, 914 (Mo. App. E.D. 2000). If this Court were to review Appellant's claim, that review would be limited to plain error.

*State v. Hadley*, 815 S.W.2d 422, 423 (Mo. banc 1991). Relief under the plain error rule is granted only when the alleged error so substantially affects the rights of the accused that a manifest injustice or miscarriage of justice inexorably results if left uncorrected.

*Id.*

### **C. Analysis.**

#### 1. Claim conflicts with trial strategy and amounts to sandbagging.

“Missouri courts have steadfastly held [that] a trial court is under no duty to remove any venire member *sua sponte*.” *State v. Eberius*, 184 S.W.3d 582, 585 (Mo. App. S.D. 2006). Appellant points to no cases where an appellate court, on plain error review, has found reversible error in a trial court's failure to *sua sponte* remove a member of the venire. *See id.* As the Southern District noted, the absence of such cases “is the

natural result of the policy requiring a contemporaneous objection to the qualifications of jurors.” *Id.* This Court has noted that the rule is well-founded:

It serves to minimize the incentive to sandbag in the hope of acquittal and, if unsuccessful, mount a post-conviction attack on the jury selection process. For that reason, juror challenges made for the first time after a conviction are highly suspect.

*Hadley*, 815 S.W.2d at 423 (internal citation omitted). Granting Appellant’s claim would encourage the type of sandbagging that *Hadley* warns against, with the sandbagging taking place at the appellate level instead of at trial. Appellate counsel would have an incentive to comb the record looking for reasons why a strike for cause might have been raised against a juror and then raise that as a claim of error, even though the claim is directly contrary to defense counsel’s trial strategy.

That concern applies with special force here, as the record clearly indicates that defense counsel made a strategic decision to keep Matlock on the jury. Matlock originally told the prosecutor that he would automatically vote against imposing the death penalty. (Tr. 510). Defense counsel began his questioning with a vigorous attempt to rehabilitate Matlock on that issue. (Tr. 511-13). Once counsel had succeeded in getting Matlock to admit that he might consider the death penalty in some circumstances, counsel then attempted to rehabilitate him on the issue of whether he could give Appellant the presumption of innocence. (Tr. 513-15). Counsel’s attempts to rehabilitate Matlock and his failure to request a strike for cause show that counsel was satisfied that Matlock would be open to the defense theory of the case, and that counsel wanted Matlock on the

jury in the hopes that Matlock would have some reservations about imposing the death penalty.

The rule that a trial court has no duty to strike a juror *sua sponte* applies with special force when a defendant expressly decides not to make a strike for cause because it is not the trial court's duty to try a party's case. *State v. Parnell*, 792 S.W.2d 635, 638 (Mo. App. E.D. 1989). Plain error relief of the type being sought here would put trial judges in the untenable position of second-guessing the trial attorneys' judgment as to which veniremembers should be struck. Attorneys undoubtedly would not welcome that intrusion into the jury selection process.

2. Matlock was rehabilitated on the presumption of innocence.

A trial court has no duty to excuse a potential juror for cause where that person's answers concerning their ability to hear the evidence and adjudge the case without bias or prejudice are neither equivocal or uncertain. *State v. Clemmons*, 753 S.W.2d 901, 907 (Mo. banc 1988). A trial court thus does not plainly err in failing to *sua sponte* excuse a venireperson who states unequivocally that he can be fair and impartial. *State v. Williams*, 46 S.W.3d 35, 41 (Mo. App. E.D. 2001). While Matlock initially expressed an opinion that Appellant was guilty, he eventually expressed that he was open to considering evidence that could lead to Appellant's acquittal. Matlock's answers, when taken in their entirety, demonstrated an ability to hear the evidence and adjudge the case without bias or prejudice.

Matlock's initial statement that he could not give Appellant the presumption of innocence was based on the limited information he had that Appellant shot and killed his

wife in front of several witnesses. (Tr. 508-09). A layperson unschooled in legal concepts such as culpable mental states is naturally going to believe that a murder committed in a public place and in a very public manner presents an open-and-shut case of guilt. A venireperson's qualifications are not determined by their initial reservations, however, but are instead judged on the basis of the entire voir dire examination. *Feltrop*, 803 S.W.2d at 8. The relevant question is not whether the prospective juror holds opinions about the case, but whether those opinions will yield and the juror will determine the issues under the law. *Id.*

In *Feltrop*, a veniremember initially indicated that she might have difficulty affording the defendant the presumption of innocence. *Id.* at 7. The veniremember was found qualified to serve on the jury, however, after she stated unequivocally during questioning that she could follow the court's instructions and could act with fairness and impartiality. *Id.* at 7, 8.

In this case, defense counsel explained that Appellant's mental state was one of the issues to be considered in determining guilt and asked Matlock if he could keep an open mind about that evidence. (Tr. 514-15). Matlock replied, "I guess I could, seeing as how I have not heard anything like that." (Tr. 515). That constitutes an unequivocal assurance by Matlock that he could hear the evidence and adjudge the case without bias or prejudice. In *State v. Wheat*, a venireperson, when asked if he could 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). This Court found the answer to be unequivocal. *Id.* The Court of Appeals for the Western District has noted that, "[e]xpressions such as

‘I believe I could’ are common terms for definitive expressions of a person’s state of mind and are not equivocations.” *Andersen v. Osman*, 217 S.W.3d 375, 379 (Mo. App. W.D. 2007). The Court of Appeals for the Eastern District found no manifest injustice from the failure to strike a venireperson who answered, “I think I could yes. I think I could evaluate that, yes[,]” when asked if she could evaluate the defendant’s testimony and consider his prior convictions only as they related to credibility and not as an indication of guilt. *State v. Goode*, 721 S.W.2d 766, 768, 769-70 (Mo. App. E.D. 1986). Because Matlock gave an unequivocal assurance that he could hear the case fairly and impartially, the trial court did not plainly err in failing to dismiss him *sua sponte*. *Williams*, 46 S.W.3d at 41.

The two cases that Appellant relies on for the proposition that the trial court was nonetheless obliged to strike Matlock are distinguishable. In *Hughes v. United States*, the veniremember stated during voir dire, “I don’t think I could be fair.” *Hughes v. United States*, 258 F.3d 453, 456 (6<sup>th</sup> Cir. 2001). In reversing the conviction, the court noted that the distinguishing factor in the case was the lack of response by both counsel and the trial judge to the veniremember’s clear declaration that she could not be fair. *Id.* at 458. *Hughes* has been distinguished in cases where the veniremember was adequately questioned. *Bryant v. State*, 115 P.3d 1249, 1257 (Alaska Ct. App. 2005). This case is likewise distinguishable because veniremember Matlock was extensively questioned by both the prosecutor and defense counsel about his ability to sit on the case, with defense counsel rehabilitating Matlock after his initial statements about giving Appellant the presumption of innocence.

*Franklin v. Anderson* involved a veniremember who made at least five statements during the course of voir dire indicating that she did not understand that the defendant was not required to prove himself innocent. *Franklin v. Anderson*, 434 F.3d 412, 427 (6<sup>th</sup> Cir. 2006). The court noted that the veniremember’s confusion persisted despite the trial court intervening on three separate occasions to explain the law to her. *Id.* The record in this case reveals no such persistent confusion. As noted above, Matlock initially expressed the very understandable opinion that a person who openly committed a murder in front of numerous witnesses must be guilty. (Tr. 509). Defense counsel even acknowledged that there was no dispute that Appellant committed the shooting. (Tr. 514). But when it was explained to him that the crime of murder in the first degree also contained a mental element, Matlock agreed that he could consider such evidence in reaching a verdict. (Tr. 514-15). The voir dire showed that Matlock was able to understand the information being presented to him and that he was open to persuasion on the issue of Appellant’s guilt or innocence.<sup>10</sup>

The trial court did not plainly err in failing to *sua sponte* strike veniremember Matlock, and Appellant’s point should be denied.

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<sup>10</sup> By contrast, the trial court, with the express consent of counsel, did strike veniremember Cooke, who repeatedly said that he was unwilling to consider any defense involving Appellant’s mental state, and that he would reject any such defense “out of hand.” (Tr. 120-23).

#### IV.

##### **Appellant's voir dire on the range of punishment.**

Appellant contends the trial court abused its discretion in restricting his voir dire on whether the veniremembers could consider the full range of punishment knowing that Appellant had attempted to kill eight other persons in addition to killing his wife. The trial court did not err because the specific number of other potential victims was not a critical fact that had to be put before the veniremembers.

##### **A. Underlying Facts.**

The State filed a Motion in Limine on January 9, 2007. (L.F. 543). Paragraph five of the motion requested that Appellant be precluded from questioning the venire “as to the effect of evidence of other crimes committed by [Appellant].” (L.F. 544). The motion was taken up at a pretrial hearing on January 17, 2007. (1/17/07 Tr. 7). The trial court sustained that paragraph after defense counsel declined to present any argument. (1/17/07 Tr. 12).

After discussing other parts of the motion, defense counsel then asked to revisit paragraph five. (1/17/07 Tr. 14-15). Counsel then argued that the jury would need to hear about some of the other offenses committed by Appellant in order to “make a true determination” of whether they could consider a sentence of life without parole. (1/17/07 Tr. 15). Later in the argument, defense counsel told the court that the jury needed to be made aware that “there are multiple victims [Appellant] allegedly shot during the course of his conduct . . . .” (1/17/07 Tr. 19). The court then indicated that it would permit questioning along those lines:

THE COURT: I guess I'd let them say how many other people allegedly were shot, but I'm not going to let you go into anything more specific than that.

MR. STEELE (defense co-counsel): That's fine.

THE COURT: How many other people were shot?

MR. BAUMRUK: Four.

THE COURT: Four?

MR. STEELE: We have no intention of getting into location and ages and anything.

THE COURT: Okay.

MR. KENYON (defense counsel): But if I can just add something, Judge? I mean, one of the aggravating – one of the statutory aggravating factors that the State has alleged is that the murder in the first degree was committed while the offender was in the commission or attempted commission of another unlawful homicide.

The State has alleged with respect to these other assaults that these were actually attempted homicide. And I anticipate that these are going to be statutory aggravating factors that they are going to try and present before the jury. To the extent that they're statutory aggravating factors it would seem to me that they are critical facts.

THE COURT: Okay. Are you going to allege that the defendant was trying – that these were attempted other – are you going to try to use that as a statutory aggravating?

[PROSECUTOR]: Your Honor, yes. Those are among the very many statutory aggravating circumstances, but the cases, in talking about aggravating circumstances during voir dire has precluded counsel from going into the specifics of them, both counsel. And to go through the specifics, I mean, again, if they want to say can you still consider the full range of punishment if you find that the defendant may have or allegedly fired upon other people during this time, I'm not going to object to that. I don't think that's proper. But to go into the fact that there are aggravators and to ask them, you know, can you still consider life if these are all the aggravators, that's seeking a commitment (sic) that I think is improper.

THE COURT: Well, since Mr. Baumruk volunteered the number four here, I would allow – in court during our discussion, I'd permit defendant to inquire if they could consider the entire penalty range for the murder first as well as the lesser included offenses if the evidence showed that the defendant shot four other individuals, but not with anymore specifics than that.

Anything else as to paragraph 5?

MR. STEELE: No, Your Honor.

(1/17/07 Tr. 19-21).

During death qualification voir dire of the first panel, counsel David Kenyon again asserted that he should be permitted to ask the venire whether they could realistically impose a sentence of life imprisonment if the evidence showed that Appellant shot four other people besides Mary Baumruk, and shot at four additional people. (Tr. 383-84). The court indicated that it would allow Kenyon to ask the question, but not to spell out how many people were shot. (Tr. 385-86). Kenyon asked the veniremembers if they could realistically consider anything less than the death penalty if the evidence showed that Appellant not only killed his wife but shot at other people in the courtroom. (Tr. 392). Venireperson Brendel was the only person to answer that he could not consider anything less than the death penalty under those circumstances. (Tr. 392-93). He was struck for cause for indicating that he would automatically impose the death sentence for the taking of a life. (Tr. 401).

Kenyon made an offer of proof during death qualification voir dire of the second panel that he wanted to question the veniremembers about whether they could realistically consider life imprisonment if they knew that Appellant had shot four people besides his wife and had shot at four additional people. (Tr. 782). The court denied the offer of proof and permitted Kenyon to ask the same question that he directed to the first panel. (Tr. 782-83). Kenyon asked the veniremembers if they would automatically reject a life sentence if the evidence showed that Appellant shot other people besides his wife. (Tr. 788-89). No one responded to that question. (Tr. 789). Appellant included a claim of error in his Motion for New Trial. (L.F. 803-05).

**B. Standard of Review.**

The trial court is vested with discretion to judge the appropriateness of specific questions, and is generally vested with wide discretion in the conduct of voir dire. *State v. Oates*, 12 S.W.3d 307, 310 (Mo. banc 2000). “We rely on our trial courts to judge whether a disclosure of facts on *voir dire* sufficiently assures the defendant of an impartial trial without at the same time amounting to a prejudicial presentation of evidence. Absent abuse, the trial judge’s discretion in this regard will be upheld.” *Leisure*, 749 S.W.2d at 373. An appellant claiming an abuse of discretion in conducting voir dire has the burden of showing a real probability that he was prejudiced by the abuse. *Oates*, 12 S.W.3d at 311.

**C. Analysis.**

It is inappropriate for counsel to present the facts of the case in explicit detail during voir dire. *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). Only those critical facts – facts with substantial potential for disqualifying bias – must be divulged to the venire. *Id.* at 147. Appellant argues that the number of people, besides Mary Baumruk, whom he either shot and wounded, or shot at and missed, was a critical fact that should have been put before the venire.

In *Oates*, this Court explored the concept of what constitutes a critical fact. *Oates*, 12 S.W.3d at 311-12. The Court looked at the *Clark* decision, where the critical fact involved the brutal murder of a very young child. *Id.* at 311. The Court noted “a prevalent perception among society that the killing of an innocent child is never justified, regardless of any extenuating circumstances.” *Id.* By contrast, the defendant in *Oates* was prohibited from asking the veniremembers if they could consider self-defense if the

evidence showed that the victim was shot in the back of the head. *Id.* The Court noted that the victim being shot in the back of the head posed a substantial obstacle for the defense, but that the obstacle did not stem from any preconceived bias among the venire. *Id.* at 312. The Court even noted that the jury could find the defendant's actions justified if it believed his testimony that the victim was reaching for a weapon while his back was to the defendant. *Id.* at 311-12. The Court concluded that if the circumstances surrounding the murder in that case constituted a critical fact, "then nearly any fact that strongly weighs against a defendant would pass muster." *Id.* at 312.

The number of people that Appellant either shot or shot at is a fact that strongly weighs against him, but it is not a fact that that presents obstacles to the defense because of some preconceived bias. Appellant has not demonstrated that eight is some kind of magic number that creates a bias, where some lower number would not. Had the jury believed Appellant's diminished capacity defense, it could have found him not guilty by reason of mental disease or defect despite the number of victims involved.

Appellant attempts to argue bias from the answer given by a participant in a mock jury held before Appellant's first trial. (Appellant's Brf., pp. 97-98). That mock juror responded that she could not give Appellant a fair trial "[b]ecause he hurt innocent people." (Appellant's Brf., p. 98). Even if that could be taken as evidence of some widespread preconceived bias, the concern about hurting innocent people would have been more than adequately addressed by the information presented to the venire that Appellant had shot other people besides his wife. (Tr. 392, 788-89).

This Court has also declined to find an abuse of discretion or prejudice where the defendant is permitted to explore other lines of questioning that are designed to explore the venireperson's beliefs about the death penalty. *State v. Gilbert*, 103 S.W.3d 743, 746-47 (Mo. banc 2003); *State v. Kreutzer*, 928 S.W.2d 854, 664-65 (Mo. banc 1996). Defense counsel was allowed to engage in extensive questioning about the venire's ability to consider evidence of mitigating circumstances, its willingness to consider both sentencing alternatives, and its ability to follow the instructions of the court. (Tr. 365-80, 390-96, 759-62, 767-98). In addition to general questions, counsel was permitted to individually question some veniremembers regarding information they had put on their questionnaire regarding the death penalty. (Tr. 789-98). The voir dire was sufficient to uncover any disqualifying bias on the part of the potential jurors and Appellant's point should be denied.

V.

**Appellant's motion to suppress his statement to Officer Glenn.**

Appellant contends the trial court plainly erred in overruling his motion to suppress his statement to Officer Glenn and in failing to *sua sponte* bar any expert opinion that relied on that statement. Appellant waived review of the issue when counsel stated he had no objection to the statement being admitted at the competency hearing. Admission of the statement was also not erroneous because Appellant was not being subjected to an unwarned custodial interrogation when he made the statement.

**A. Underlying Facts.**

The trial court conducted a hearing on Appellant's competency to stand trial on June 28-29, 2005. (L.F. 41). At the beginning of the hearing, the State offered into evidence the transcript of the competency hearing conducted on September 25, 2000, in Appellant's previous trial, and the exhibits that were admitted into evidence at that hearing. (Comp. Tr. 6-8; 1<sup>st</sup> Tr. 3). Defense counsel stated that he had no objection to the admission of the transcripts and exhibits. (Comp. Tr. 7-8).

1. Evidence from 2000 competency hearing.

Among the exhibits admitted at the 2000 competency hearing were a tape recording and a transcript of a conversation that took place in October of 1999 between Appellant and Clayton Police Officer Stewart Glenn. (1<sup>st</sup> Tr. 824-25, 835, 866). Those items were admitted after the trial court overruled a motion to suppress filed by defense counsel. (1<sup>st</sup> Tr. 866). Appellant had made a complaint that he was not receiving his newspapers on a regular basis and he wanted the Clayton Police to investigate. (1<sup>st</sup> Tr.

828). Glenn went to the jail, where he met with Appellant in an interview room. (1<sup>st</sup> Tr. 825-27). Glenn brought along a tape recorder for his own protection and used it during the conversation with Appellant. (1<sup>st</sup> Tr. 826-27). Glenn did not tell Appellant that he was recording the conversation. (Tr. 1<sup>st</sup> 828).

Glenn also testified at the 2000 competency hearing, and said that he did not go to the jail with the intent of obtaining any information other than what related to the newspaper complaint. (1<sup>st</sup> Tr. 829). After collecting information on Appellant's complaint, Officer Glenn noted that Appellant had some handwritten notes in front of him. Appellant told Glenn that one copy of the notes was for him:

SG: Very good, you have good handwriting.

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

SG: You were shot in the head?

KB: Twice.

SG: What happened?

KB: They were policemen in 1992, May the 5<sup>th</sup> in the courthouse across the street.

SG: What happened then?

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

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

KB: Yes.

SG: What do you say?

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

SG: You don't know anything about it?

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

SG: Okay, so you remember going to court?

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

SG: How traumatic, so your wife died?

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

SG: I'm sorry to hear that.

KB: I'm not.

SG: You're not.

KB: No.

KB: No.

SG: Why not?

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

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

KB: I should have.

(State's Ex. 21 to Sept. 25, 2000, Comp. Hrng., pp. 6-7).

Psychiatrist John Rabun conducted Chapter 552 evaluations of Appellant in May of 1999 and June of 2000. (1<sup>st</sup> Tr. 243, 251-52). The 1999 evaluation dealt exclusively with Appellant's competency to stand trial. (1<sup>st</sup> Tr. 252-53). The second evaluation was ordered to generate an opinion on Appellant's mental state at the time of the charged

offense, but also dealt with issues related to competency. (1<sup>st</sup> Tr. 252-53). Dr. Rabun issued an opinion in May of 1999, prior to Appellant's encounter with Officer Glenn, that Appellant was suffering from a mental defect of amnesic disorder due to head trauma. (1<sup>st</sup> Tr. 278). But Rabun also expressed the opinion that Appellant, in spite of the presence of mental defect, had the capacity to understand the proceedings against him and to assist in his defense. (1<sup>st</sup> Tr. 281, 288). Rabun testified that in 1999, Appellant "still has within his memory enough information to work with his attorneys to present information about his thoughts leading up to when he walks into and sits down in front of Judge Hais." (1<sup>st</sup> Tr. 281).

When Rabun conducted his evaluation in June of 2000, he had Officer Glenn's report about his encounter with Appellant. (1<sup>st</sup> Tr. 276-77). Rabun testified that Appellant's statement to Glenn that he shot Mary Baumruk when she crunched her lips, "suggests a memory for the moment of the shooting." (1<sup>st</sup> Tr. 277). Rabun testified that he also interviewed two inmates who had contact with Appellant, who said that Appellant described in detail some of the actual shootings and talked about what he was thinking before and during the shootings. (1<sup>st</sup> Tr. 300-06, 308-10). Rabun also interviewed a social worker to whom Appellant had given a detailed account of the shootings. (1<sup>st</sup> Tr. 315-19). Rabun testified that all of the new information he learned after the 1999 evaluation – including depositions, the additional interviews he conducted, lawsuits, motions and letters written by Appellant to the court – caused him to dismiss his earlier diagnosis that Appellant suffered from amnesic disorder, but did not change his opinion that Appellant was competent to stand trial. (1<sup>st</sup> Tr. 398-99, 412-13).

2. Pre-trial motions in the present case.

The trial court issued an order on August 26, 2005, finding Appellant competent to proceed. (L.F. 41, 235-52). Appellant filed a *pro se* Motion to Suppress on December 26, 2006. (L.F. 48, 512). The motion alleged that Appellant's interview with Officer Glenn should be suppressed because Glenn failed to give Appellant the *Miranda*<sup>11</sup> warnings even though Appellant was arrested and the interview was held in the St. Louis County Jail. (L.F. 512).

At the pretrial hearing on January 17, 2007, defense counsel brought up the *pro se* motion at Appellant's request. (1/17/07 Tr. 53-54). The prosecutor indicated that he had no objection to the court reconsidering the ruling made on the motion to suppress filed during the first competency hearing. (1/17/07 Tr. 54). Defense counsel then indicated that the matter could be resolved quickly if the State was agreeing not to introduce any evidence of Appellant's statement. (1/17/07 Tr. 54). The prosecutor responded that he did not intend on calling Officer Glenn or playing the tape of the conversation during the State's case-in-chief, but that some of the mental health witnesses might refer to the conversation in discussing their opinion on the issues of competency and responsibility. (1/17/07 Tr. 55-56).

Defense counsel expressed agreement with what the prosecutor had outlined, but Appellant indicated that he wanted the statement to be suppressed completely and not used in any manner. (1/17/07 Tr. 56-57). The trial court directed that the State not seek

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<sup>11</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

to introduce any evidence of the interview in its case-in-chief, but denied Appellant's *pro se* request to prevent any mental health professionals from referring to the interview. (1/17/07 Tr. 57-58).

3. Evidence presented at the trial of the present case.

As promised, the State did not seek to introduce any evidence about the interview in its case-in-chief. Dr. Rabun testified as a rebuttal witness for the State regarding Appellant's NGRI defense. (Tr. 2377). Dr. Rabun told the jury that the 2000 evaluation of Appellant's mental responsibility at the time of the offense required him to review fifteen depositions, interview fourteen other persons, and re-interview Appellant. (Tr. 2392-96). Dr. Rabun testified that four of the people he interviewed indicated that Appellant had some memories of the shootings that he had not previously disclosed and that he had denied having in previous examinations. (Tr. 2396). Rabun testified that the information provided by those persons caused him to conclude that Appellant was not suffering from a mental disorder. (Tr. 2396).

Rabun also testified that Appellant was malingering his memory loss – that he was either describing symptoms that did not exist or was exaggerating symptoms he might have. (Tr. 2397). Dr. Rabun said he based that conclusion on statements that Appellant made to the emergency room nurse, to a fellow inmate, to the social worker at the jail, to witness descriptions of Appellant's behavior at the courthouse, and on the statements made to Officer Glenn at the jail. (Tr. 2398-2403). Dr. Rabun did not describe the details of Appellant's statement to Officer Glenn, but said only that Appellant had, "made

a statement which suggested he recalled the moment that he had shot his wife, some type of memory for that.” (Tr. 2402). Defense counsel did not object to Rabun’s testimony.

Appellant’s Motion for New Trial contained a claim that the trial court erred in overruling the *pro se* Motion to Suppress because the statements were obtained from Appellant while he was in custody and without proper *Miranda* warnings. (L.F. 801).

**B. Standard of Review.**

Appellant’s claims are not preserved. Defense counsel stated that he had no objection to the transcripts and exhibits from the previous competency hearing being admitted into evidence at the competency hearing conducted in the present case. (Comp. Tr. 7-8). Missouri courts have consistently held that stating “no objection” when evidence is introduced precludes direct appellate review of the admission. *State v. Baker*, 103 S.W.3d 711, 716 (Mo. banc 2003). *Baker* carved out a limited exception for cases where it was mutually understood that the appellant was not repudiating any prior objections that had been made to admission of the evidence. *Id.* at 716-17.

The record shows that this case does not fall within the *Baker* exception. Although a motion to suppress had been filed prior to the first competency hearing, Appellant did not reassert the motion prior to the competency hearing in this case. The first time the issue was brought up before the judge who presided over the instant trial was when Appellant filed a *pro se* motion months after the competency hearing had been resolved. The hearing on that motion reveals that Appellant and his attorneys disagreed about the admissibility of the evidence during the competency hearing. This was not a case where it was mutually understood that Appellant was maintaining his prior objection

to admission of the evidence at the competency hearing. *See State v. McWhorter*, 240 S.W.3d 761, 763 (Mo. App. S.D. 2007) (mutual understanding exception did not apply where motion to suppress was not renewed and counsel did not request a continuing objection). Appellant thus waived review of the admission and use of the evidence at the competency hearing. *Id.* at 764.

Appellant has likewise waived review of his claim that admission of his statement to Officer Glenn violated his Sixth Amendment right to counsel. The only theory presented to the trial court through the *pro se* motion to suppress and the motion for new trial was that the statement should be suppressed because Appellant made the statement while in custody and without receiving the *Miranda* warnings. To preserve an objection to evidence for review, the objection must be specific and the point raised on appeal must be based upon the same theory. *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

The claim that the trial court erred in allowing Dr. Rabun to testify at trial about Appellant's statement is also not subject to review because defense counsel consented to Dr. Rabun's testimony. Because Appellant was represented by counsel, the trial court was not obligated to consider his *pro se* motion to suppress. *State v. Hurt*, 931 S.W.2d 213, 214 (Mo. App. W.D. 1996) *see also State v. Wise*, 879 S.W.2d 494, 514-15 (Mo. banc 1994) (criminal defendant does not have constitutional right to act as co-counsel with appointed counsel). While the State consented to the court reconsidering the ruling made during the first competency hearing, defense counsel stated that the matter could be resolved if the State promised not to introduce the statement during its case-in-chief. The State agreed. Appellant insisted that the statement not be used for any purpose, but it is

clear from the record that defense counsel disagreed with that position, and that counsel had no objection to use of the statement by expert witnesses as it related to the formation of their opinions. Because the position being maintained by Appellant was inconsistent with the position being taken by counsel, the trial court did not have to give any further consideration to the *pro se* request, and the court did not abuse its discretion by issuing a ruling that was consistent with the position agreed to by the attorneys for both sides.

If this Court decides to review Appellant's claims, the failure to properly preserve those claims limits this Court to plain error review. *State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006). Plain error review requires a finding that manifest injustice or a miscarriage of justice resulted from the trial court error. *Id.*

### **C. Analysis.**

#### 1. Appellant not subjected to unwarned custodial interrogation.

The Supreme Court ruling in *Miranda v. Arizona* requires that certain warnings be given to those subjected to custodial interrogation. *See, e.g., State v. Glass*, 136 S.W.3d 496, 511 (Mo. banc 2004). For purposes of *Miranda* analysis, the general test is that a person is in custody if they are not free to leave. *Id.* This definition poses analytical problems when applied to situations involving those accused of crimes while they are already incarcerated because they are not free to leave at any time. *Cervantes v. Walker*, 589 F.2d 424 (9<sup>th</sup> Cir. 1978). To hold that an inmate is in custody for purposes of *Miranda* merely because he is incarcerated would “totally disrupt prison administration. *Miranda* certainly does not dictate such a consequence.” *Id.* at 427. Therefore, Missouri courts have held that “[a] defendant’s status as a prison inmate does not necessarily make

an interview by prison officials ‘custodial interrogation’ requiring the protections set out in *Miranda*.” *State v. Brown*, 18 S.W.3d 482, 485 (Mo. App. E.D. 2000).

In examining the issue of whether a prison inmate is in custody for purposes of *Miranda*, the ordinary free-to-leave test has been abandoned in favor of a test requiring a showing that “a reasonable person would believe there has been a restriction of his freedom over and above that in his normal prisoner setting.” *Id.* The courts consider several factors in determining whether this standard had been met, including “the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him.” *Id. quoting Cervantes*, 589 F.2d at 428.

In *Brown*, a corrections officer found a homemade knife under the mattress belonging to the defendant’s cellmate. *Brown*, 18 S.W.3d at 483. The next day, the corrections officer interviewed the defendant, and the defendant indicated he wanted a lawyer. *Id.* In deciding whether those statements constituted an invocation of the defendant’s *Miranda* rights, the court considered whether the defendant was in custody when he made his statement about getting a lawyer. *Id.* at 484. The court held that the defendant had not been subjected to custodial interrogation at that time because he had not been summoned with coercive language, the interview took place in his own cell, the defendant was not confronted with evidence of his guilt, and no additional pressures were employed. *Id.* at 485. In short, *Miranda* warnings were not required because the interview was a routine proceeding and the defendant had not been subjected to restraints beyond those normally attendant on prison life.

Applying the *Brown* factors to this case leads to the conclusion that Appellant was not in custody for *Miranda* purposes when he spoke with Officer Glenn. Not only was Appellant not summoned with coercive language, he initiated the encounter by filing a complaint and asking for an investigation. (1<sup>st</sup> Tr. 828). The interview did not take place in Appellant's own cell, but the record does not indicate that the interview room where the conversation did take place created a coercive atmosphere. Appellant was not handcuffed or otherwise restrained. (1<sup>st</sup> Tr. 830). Officer Glenn did not confront Appellant with any evidence of his guilt. In fact, Glenn's knowledge of the case appears to have been limited to the knowledge that was generally available to the public. Glenn did not engage in any coercive questioning techniques or apply any pressure to Appellant. He merely asked some open-ended questions that Appellant was free to ignore.

To trigger the requirement of *Miranda* warnings, the suspect must not only be in custody, but must also be interrogated. *Glass*, 136 S.W.3d at 510. However, "*Miranda* warnings are not required every time the police question an individual." *Id.* The rule is no different in prison settings. In *State v. Baker*, the court reasoned that "[t]he type of interrogation the *Miranda* decision proscribed was lengthy interrogation, employing psychological schemes designed to elicit inculpatory statements from criminal suspects who do not know or are unaware of the implications of their right to remain silent and to be represented by counsel." *State v. Baker*, 850 S.W.2d 944, 950 (Mo. App. E.D. 1993). The record does not reflect that the conversation between Officer Glenn and Appellant was the type of interrogation that *Miranda* was aimed at. The conversation between Glenn and Appellant does not appear to be overly lengthy, and the majority of it

concerned Appellant's complaint about his missing newspapers. Glenn testified that he did not have the intention to elicit incriminating information from Appellant when he went to interview him, and the record does not indicate that Glenn employed any psychological schemes to elicit inculpatory statements. (1<sup>st</sup> Tr. 829). Finally, the record taken as a whole conclusively refutes any notion that Appellant was unaware of the implications of his right to be silent and to be represented by counsel. The record, in fact, reveals the opposite – that Appellant was hypervigilant when it came to asserting his rights, real or imagined.

Appellant was not subjected to a custodial interrogation that required the reading of the *Miranda* warnings. The trial court thus did not err in denying the motion to suppress based on the only grounds presented to the court.

2. Appellant's Sixth Amendment right to counsel not infringed.

The Sixth Amendment right to counsel attaches once adversary judicial proceedings have been initiated. *State v. Greer*, 159 S.W.3d 451, 461 (Mo. App. E.D. 2005). Once the right has been invoked, subsequent waiver during a *police-initiated custodial interview* is invalid. *Id.* (emphasis added). As noted above, Appellant initiated the encounter with Glenn, and Appellant's statement did not take place during the course of a custodial interrogation. A statement that does not arise from an interrogation thus does not violate the Sixth Amendment. *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. banc 1997).

3. Evidence not inadmissible even if wrongfully obtained.

Even if this Court were to determine that Appellant's statements to Officer Glenn were obtained in violation of his Fifth or Sixth Amendment rights, that does not render the statement inadmissible. Respondent has been unable to locate any Missouri cases addressing whether an improperly obtained statement can be used by an expert witness in reaching their opinion. The cases cited by Appellant are inapposite and actually suggest that Appellant's statement should be admissible.

Statements that are precluded from use in the State's case-in-chief can still be used for impeachment purposes. *People v. Ricco*, 437 N.E.2d 1097, 1100 (N.Y. 1982) quoting *Oregon v. Hass*, 420 U.S. 714, 722 (1975). The court in *Ricco* rejected an argument that the defendant's statement could be used by the State's psychiatric expert to rebut the defendant's insanity defense. *Ricco*, 437 N.E.2d at 1101. In doing so, the court found that the testimony went beyond impeachment because the State had the burden of proof on the insanity defense. *Id.* As a result, the testimony was a part of the State's case. *Id.*

By contrast, the Missouri statutes providing for competency determinations and for an NGRI defense place the burden of proof on the defendant. §§ 552.020.8 and 552.030.6, RSMo 2000. Dr. Rabun's testimony at the competency hearing and at trial that incorporated Appellant's statement to Officer Glenn was thus not a part of the State's case. It was instead more in the nature of impeachment evidence, which is an allowable use of an improperly obtained statement.

The remaining cases cited by Appellant are also distinguishable. In *United States v. Hinckley*, the federal agents who interviewed the defendant were considered "prime lay

witnesses” who would provide “critical” testimony on the insanity issue. *United States v. Hinckley*, 672 F.2d 115, 125 (D.C. Cir. 1982). Because of that, the court concluded that the agents’ questioning was designed to elicit incriminating responses, so that the resulting *Miranda* violation pervaded the whole process. *Id.* at 125-26. Although Glenn did testify at the first competency hearing, he was not a critical witness. Dr. Rabun or any other expert could have testified to the significance of Appellant’s statement without any testimony from Glenn. Also, as noted above, Glenn did not initiate his contact with Appellant in order to gain incriminating information about the shootings. Any constitutional violations that may have occurred did not pervade the entire process as they did in *Hinckley*.

Appellant also relies on *Walls v. State*, 580 So. 2d 131 (Fla. 1991). That case was decided, however, on the basis of Florida law. *Id.* at 133. The case is also distinguishable because it involved a psychiatric examination of the defendant that was conducted in whole or in part by means of an illegal subterfuge. *Id.* Subsequent Florida cases have labeled *Walls* “an extreme case” and have distinguished it on the basis that the police did not engage in the “gross deception” that was present in that case. *State v. Russell*, 814 So. 2d 483, 487 (Fla. Dist. Ct. App. 2002). The record in this case does not reflect gross deception on the part of the police, making *Walls* inapposite.

4. Any error in the admission of the statement was harmless.

Even if the trial court erred in admitting evidence of Appellant’s statement at the competency hearing or at trial, the trial court’s rulings are subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1990). In applying that analysis,

the appellate court reviews the remainder of the evidence to determine whether the admission of Appellant's statement was harmless beyond a reasonable doubt. *Id.* at 310. Improperly admitted evidence will be found harmless where it is cumulative to other evidence that is properly admitted. *United States v. Leichtling*, 684 F.2d 553, 557 (8th Cir. 1982) *see also State v. Pennington*, 642 S.W.2d 646, 648 (Mo. 1983); *Snethen v. Nix*, 885 F.2d 456, 459 n.5 (8th Cir. 1989).

*a. Use of statement at competency hearing.*

Appellant's statement to Officer Glenn was one of several statements that Dr. Rabun relied on at the competency hearing to reach his opinion that Appellant retained a memory for the shootings. Those other sources included two inmates whom Rabun interviewed. (1<sup>st</sup> Tr. 300, 308). The first inmate was a cellmate of Appellant who reported that Appellant told him about reaching into his briefcase as if he were retrieving some papers, then pulling the two revolvers out and shooting his wife. (1<sup>st</sup> Tr. 302). Appellant also told the inmate that he shot Mary because "he wasn't going to let her get away with it." (1<sup>st</sup> Tr. 302). Appellant told his cellmate that he was angry because the police had claimed he ran towards them, when he had actually been shot in the back of the head. (1<sup>st</sup> Tr. 302). Appellant said that he tried to shoot the judge, but the judge was hiding behind the bench. (1<sup>st</sup> Tr. 302). Appellant told the cellmate that he originally thought that he would die during the shootout. (1<sup>st</sup> Tr. 303).

Dr. Rabun also interviewed another inmate to whom Appellant had made statements about the shootings. (1<sup>st</sup> Tr. 308). Appellant told that inmate that he committed the shootings because Mary was having sex with one of the lawyers, and the

two of them were going to take all his money. (1<sup>st</sup> Tr. 310). The inmate also told Dr. Rabun that Appellant had bragged about how he was going to beat the case against him. (1<sup>st</sup> Tr. 310).

In addition to the inmates, Dr. Rabun talked to a social worker at the jail. (1<sup>st</sup> Tr. 315). The social worker told Dr. Rabun that Appellant had described the shootings to him in detail, including the sequence in which he shot the various individuals. (1<sup>st</sup> Tr. 317-18). Appellant was also able to describe how he was seated in court and how he reached into his briefcase to retrieve the guns and then began firing. (1<sup>st</sup> Tr. 317). Dr. Rabun testified that Appellant made those statements to the social worker before he had access to the police reports, so Appellant was not merely repeating information from those reports. (1<sup>st</sup> Tr. 318).

Not only did Dr. Rabun have multiple sources for his opinion regarding Appellant's memory of the shooting, but he had found Appellant competent to stand trial in May of 1999, prior to Appellant's interview with Officer Glenn. (1<sup>st</sup> Tr. 278). Dr. Rabun testified that the additional information he later received, including the statements made to Officer Glenn, did not change that opinion. (Tr. 398-99, 412-13).

Appellant nonetheless contends that the trial court relied on the statement to Officer Glenn in finding Appellant competent to proceed, because the court's Findings of Fact contained two references to Officer Glenn's testimony at the first competency hearing. (L.F. 239, 248). The court also made reference to the testimony of other witnesses at that hearing, including the social worker at the jail. (Tr. 238-39, 248). In any event, the court concluded that it did not have to determine whether Appellant's

amnesia is malingered or not because that amnesia does not bar him from being prosecuted. (L.F. 249-50). That conclusion shows that the court did not rely on the statement to Officer Glenn in reaching its competency determination. The admission of the statement at the competency hearing, if erroneous, was harmless error and Appellant did not suffer a manifest injustice or miscarriage of justice.

*b. Use of statement at trial.*

Dr. Rabun also testified at trial as a rebuttal witness to Appellant's NGRI defense. (Tr. 2377). Rabun told the jury that Appellant was malingering his memory loss – that he was either describing symptoms that did not exist or was exaggerating symptoms he might have. (Tr. 2397). In addition to Appellant's statement to Officer Glenn, Dr. Rabun based that conclusion on statements that Appellant made to the emergency room nurse, to a fellow inmate, to the social worker at the jail, and to witness descriptions of Appellant's behavior at the courthouse. (Tr. 2398-2403). Dr. Rabun did not describe the details of Appellant's statement to Officer Glenn, but said only that Appellant had, "made a statement which suggested he recalled the moment that he had shot his wife, some type of memory for that." (Tr. 2402). In light of the other information before the jury that suggested Appellant had a memory for the events of the shooting, any error in the admission of Dr. Rabun's unobjected to testimony was harmless, and Appellant did not suffer a manifest injustice or miscarriage of justice.

## VI.

### **Appellant's competence to stand trial.**

Appellant contends the trial court erred in finding him competent to proceed because he suffers post-traumatic amnesia as a result of being shot in the head and from the subsequent surgeries to treat those wounds. This claim was decided adversely to Appellant in his prior appeal to this Court and is barred under the law of the case doctrine.

#### **A. Underlying Facts.**

As noted in the previous point, the trial court conducted a hearing on Appellant's competency to stand trial on June 28-29, 2005. (L.F. 41). At the beginning of the hearing, the State offered into evidence the transcript of the competency hearing conducted on September 25, 2000, and the exhibits admitted at that hearing. (Comp. Tr. 6-8). This Court reviewed that evidence in the appeal from the first trial, and concluded that Appellant was competent to proceed. *Baumruk*, 85 S.W.3d at 648.

The State presented one witness at the second competency hearing. (Comp. Tr. 2). James Reynolds is a psychiatrist who conducted a court-ordered competency examination of Appellant on July 24, 2003. (Comp. Tr. 2, 14, 21). Reynolds questioned Appellant about his memories of the charged crime. (Comp. Tr. 59). Reynolds diagnosed Appellant with dementia not otherwise specified resulting from the brain injuries Appellant received when he was shot. (Comp. Tr. 97-98). Reynolds testified that the condition was manifested by movement and speech disorders, and also by Appellant's claimed memory loss. (Comp. Tr. 98). But Reynolds also questioned the extent of that

memory loss, saying that he did not find it plausible “that some of the things he claims not to recall would result from the injury, given that he can recall other items in the same period of time.” (Comp. Tr. 100-02). Reynolds concluded that the diagnosis of dementia did not render Appellant incompetent to stand trial, because Appellant possessed the capacity to understand the proceedings against him and to assist his attorneys in his defense. (Comp. Tr. 104-05, 110). Reynolds expressed the opinion that Appellant should be able to recall more than he had about the events and his mental state, and relate those to his attorneys in a confidential manner in order to develop a defense strategy. (Comp. Tr. 105-06).

Appellant presented four witnesses. (Comp. Tr. 2-3). Appellant’s former attorney, Larry Bagsby testified that he tried to develop a diminished capacity defense for the first trial, but that Appellant was unable to assist him, in part because he could not remember the events surrounding the murder. (Comp. Tr. 233, 237-40, 246-48). Bagsby testified on cross-examination that Appellant had some memory of events that happened prior to the two weeks before the shooting, and nothing in those memories provided a diminished capacity defense. (Comp. Tr. 251).

Sam Parwatiker is a psychiatrist who evaluated Appellant in 1992 and 1993. (Comp. Tr. 262-65). Parwatiker testified that Appellant was consistently unable to recall the events for which he was being tried. (Comp. Tr. 268-69). Parwatiker diagnosed Appellant with organic dementia, which is an inability to retain and recall information, especially new information. (Comp. Tr. 269). Parwatiker performed another evaluation in 2003, where he diagnosed Appellant with dementia not otherwise specified due to head

trauma, amnesic disorder. (Comp. Tr. 270-71). Parwatiker evaluated Appellant once again in 2005 and concluded that Appellant was not malingering his amnesia and memory loss, and that his ability to assist in his defense would be impaired by the memory loss. (Comp. Tr. 271, 274-76).

Daniel Cuneo is a clinical psychologist who performed competency evaluations of Appellant in 1993, 1999, 2003, and 2005. (Comp. Tr. 349-50, 375-76, 402). After each evaluation, Cuneo diagnosed Appellant with dementia due to head trauma. (Comp. Tr. 367-69, 387, 408, 422-23). He concluded after each evaluation that Appellant could understand the nature and purpose of the proceedings against him, but could not assist his attorneys because he had no memory of the events surrounding the charged crime. (Comp. Tr. 371-72, 393-94, 411-12, 425). Cuneo testified that Appellant's amnesia was the only bar to his competency to stand trial. (Comp. Tr. 479).

Bruce Harry is a psychiatrist who evaluated Appellant in 1994 and 2003. (Comp. Tr. 508-09, 511-12, 518). Harry diagnosed Appellant with dementia due to head trauma in 1999, and concluded that because of the dementia, Appellant lacked the capacity to assist in his own defense. (Comp. Tr. 513-14). In 2003, Harry diagnosed Appellant with amnesic disorder due to a penetrating gunshot wound to the head. (Comp. Tr. 520). Harry concluded that Appellant could not assist in his own defense because he cannot recall anything about his mental state at the time of the shootings and because of poor ability to visually process information. (Comp. Tr. 537-38, 541).

In finding Appellant competent to proceed, the court noted that it had observed Appellant interacting with his lawyers and behaving appropriately during the two-day

competency hearing. (L.F. 246). The court noted that the experts disagreed about the extent and time period of Appellant's memory loss, and that Appellant had acknowledged having a motive to lie about his memory loss. (L.F. 250). The Court also noted this Court's previous opinion finding that amnesia is not a bar to the prosecution of an otherwise competent defendant. (L.F. 250).

**B. Standard of Review.**

A defendant is competent to stand trial when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as a factual understanding of the proceedings against him. *State v. Anderson*, 79 S.W.3d 420, 432 (Mo. banc 2002). Appellant challenges only the finding that he did not have sufficient present ability to consult with his lawyer. He does not offer any argument suggesting that he did not possess a rational and factual understanding of the proceedings against him.

In Missouri, a defendant is presumed competent and has the burden of proving incompetence by a preponderance of the evidence. *Id.* at 432-33. The trial court's determination of competency is one of fact and will be upheld unless there is no substantial evidence to support it. *Id.* at 433. In assessing sufficiency of the evidence, this Court does not independently weigh the evidence, but accepts as true all evidence and reasonable inferences that tend to support the trial court's finding. *Id.*

**C. Analysis.**

As noted above, this Court ruled in Appellant's prior appeal that his amnesia did not render him incompetent to stand trial. *Baumruk*, 85 S.W.3d at 648. That ruling represents the "law of the case," and bars Appellant's claim in this appeal. The "law of the case" doctrine governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to later proceedings in that case. *State v. Johnson*, 22 S.W.3d 183, 189 (Mo. banc 2000). A previous holding is the law of the case, precluding re-litigation of issues on remand and subsequent appeal. *Id.* Appellate courts

have discretion to consider an issue where there is a mistake, a manifest injustice or an intervening change of law. *Id.* No such mistake, manifest injustice or intervening change of law has occurred. Appellant does cite to a Seventh Circuit case that has been handed down since this Court's prior ruling, but that case merely adopted an analytical model that had been employed by other courts prior to this Court's previous opinion. *United States v. Andrews*, 469 F.3d 1113, 1119 (7<sup>th</sup> Cir. 2006). *Andrews* and the cases it relies on are not binding on this Court, which has not adopted the factors utilized in those cases. *See People v. Palmer*, 31 P.3d 863, 867-70 (Colo. 2001) (noting split among courts on relevance of lack of memory to competency determination, and differing procedures for analyzing competency where lack of memory is considered relevant). This Court's previous opinion remains as the correct statement of the law in Missouri and it bars reconsideration of the issue in this appeal.

Even if this Court were to revisit the issue of whether Appellant's purported amnesia rendered him incompetent to stand trial, Appellant has failed to show that the alleged memory loss prevented him from assisting in his defense. The gravamen of Appellant's claim is that he was unable to help with the development of a diminished capacity or insanity defense because he could not describe his state of mind before or during the shooting.

Not only was Appellant able to present an NGRI defense at trial, but the defense was actually suggested by one of the experts who was retained to evaluate Appellant for purposes of providing mitigation evidence during the penalty phase. (6/16/06 Tr. 8-9, 12). Dr. Moisy Shopper, the psychiatrist who first suggested the possibility of an NGRI

defense, was able to diagnose Appellant with a persecutory-type delusional disorder based on Appellant's actions and statements before, during, and after the shootings. (Tr. 1933-2004). Psychologist Elizabeth Nettles reached the same diagnosis based on a review of the same information, plus psychological testing that she conducted. (Tr. 1780-1864). Dr. Shopper noted that while Appellant could not say specifically what he was thinking during the shootings, he did not express remorse and he had made statements that indicated he felt that he did the right thing. (Tr. 2079-80). Appellant has failed to show that his NGRI defense would have been substantially improved if he had a memory for his mental state at the time of the shootings. *See People v. Schwartz*, 482 N.E.2d 104, 112 (Ill. Ct. App. 1985) (amnesiac defendant received fair trial where he was able to present evidence supporting insanity defense). Some courts have, in fact, noted that memory loss can bolster the presentation of an insanity defense. *State v. Veal*, 326 So. 2d 329, 331 (La. 1976).

Furthermore, the record in this case raises substantial questions about whether Appellant was purposely holding back information from his lawyers and experts. Dr. Shopper testified that Appellant "is guarded and cautious about what he tells and to whom he tells it." (Tr. 2016). Dr. Shopper agreed that Appellant's claimed lack of memory of the shootings began after he began to be examined by psychologists and psychiatrists. (Tr. 2027). Dr. Shopper and Dr. Nettle's testimony, and the entire record in this case, is replete with examples of Appellant showing distrust and hostility towards his lawyers. Appellant's actions and attitudes raise serious questions about whether he was being forthcoming about the extent of any memory loss.

Even if Appellant's memory loss was genuine, he retained the ability to talk to his attorneys about the case with a reasonable degree of rational understanding. And any inability to remember all of the details of what happened was not reasonably likely to have changed the outcome of the trial, given the strength of the State's case. Defense counsel acknowledged that the only available defense was diminished capacity or insanity. Counsel was able to raise the latter defense, but it was severely undercut by the descriptions of Appellant's actions and demeanor before and during the shootings. That evidence painted the picture of a man who calmly and deliberately planned and carried out a deadly attack on those who he felt had wronged him. Even if Appellant had described what was going through his mind, the jury was not obligated to believe it, just as it would not be obligated to believe any of Appellant's evidence on the issue, even if uncontroverted. *State v. Bass*, 81 S.W.3d 595, 614-16 (Mo. App. W.D. 2002). And even though it would not be required to do so, the jury undoubtedly would have weighed Appellant's testimony against all the evidence pointing towards deliberation. It is not reasonably likely that the jury would have accepted Appellant's self-serving description of his mental state over the overwhelming evidence pointing to deliberation. Appellant has not, in fact, challenged the sufficiency of the evidence supporting the jury's finding that he killed his wife after deliberation.

The trial court did not err in finding Appellant competent to stand trial. Appellant's point should be denied.

## VII.

### **State's penalty phase closing argument.**

Appellant contends the trial court plainly erred in failing to *sua sponte* intervene in the State's penalty phase closing argument to prevent the prosecutor from implying knowledge of facts outside the record, and urging the jurors to return a death sentence to send a message to the police, the community, and the victim's family. The complained-of arguments were proper and Appellant did not suffer a manifest injustice.

#### **A. Standard of Review.**

Appellant's claims are not preserved for review because he did not object to the arguments at trial. *State v. Edwards*, 116 S.W.3d 511, 536 (Mo. banc 2003). The failure to object during closing argument is more likely a function of trial strategy than of error. *State v. Boyd*, 844 S.W.2d 524, 529 (Mo. App. E.D. 1992). In the absence of an objection, the trial court's options are narrowed to an uninvited interference with summation and a corresponding increase of error by such intervention. *Clemmons*, 753 S.W.2d at 907-08. A conviction will be reversed based on plain error in closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to a manifest injustice. *Edwards*, 116 S.W.3d at 536-37.

**B. Analysis.**

1. Prosecutor drew reasonable conclusions from the evidence.

Appellant claims that two statements by the prosecutor amounted to arguing facts outside the record. The first statement that Appellant complains of came in the initial penalty phase argument, “he knew what he was doing was wrong, and he had to plan it to the nth degree so that he could succeed in becoming one of the biggest mass murderers we’ve ever seen.” (Tr. 3043). Appellant takes the statement out of context. The prosecutor first went through a lengthy recitation of the evidence that supported a finding that Appellant planned to kill several people. (Tr. 3030-42). The evidence noted by the prosecutor included: that Appellant bought two guns and also ammunition that was designed “to kill and cause as much damage as it could possibly cause.” (Tr. 3030); Appellant’s statements to his co-workers before going to St. Louis that he was going to kill Mary, and the lawyers, and the judge (Tr. 3030); the extra ammunition Appellant carried in his pockets and his action of reloading during the shooting spree (Tr. 3031); his deliberate shooting of the lawyers after shooting Mary (Tr. 3032-34); his attempt to shoot Judge Hais (Tr. 3034); his shooting and wounding Fred Nicolay and Wade Dillon (Tr. 3034, 3039); the ballistics evidence showing the number and location of bullets found in the courthouse (Tr. 3037, 3040-41); his shooting at Paul Neske, Steve Salomon, Jim Hartwick, and William Mudd (Tr. 3035-39).

After summarizing that evidence, the prosecutor stated:

We talked about the evidence that shows overwhelmingly that he planned this in a manner that was so full of control, that was so cold, that he

knew what he was doing was wrong, and he had to plan it to the inth degree so that he could succeed in becoming one of the biggest murderers we've ever seen.

(Tr. 3043).

The only portion of the argument that Appellant specifically complains about is the reference to him nearly succeeding in being a mass murderer. That statement is, however, fairly drawn from the evidence. Prosecutors have wide latitude in arguing reasonable inferences from the evidence. *State v. Forrest*, 183 S.W.3d 218, 22 (Mo. banc 2006). While Appellant may have only succeeded in killing one person, his statements and actions demonstrated that he intended to do more than that.

He brought to the courthouse not one, but two guns, and numerous rounds of ammunition. In addition to Mary, he shot three other people at close range, he pursued Judge Hais in what can only reasonably be construed as an attempt to shoot him. Appellant shot at several other people and managed to wound two others. The prosecutor's argument came in the context of discussing the statutory aggravating circumstances, which submitted the individual instances where Appellant shot at eight people besides Mary Baumruk, wounding four of them. (Tr. 3030-41; L.F. 771-76).

Appellant tries to compare the argument to *State v. Storey*, where this Court found that the prosecutor argued facts outside the record when he said, "[t]his case is about the most brutal slaying in the history of this county." *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995). The two arguments are not comparable. The argument in *Storey* was unequivocal and largely subjective in nature. In this case, Appellant could potentially

have shot and killed nine people in a single incident. Mass killings are noteworthy and one does not have to be well-schooled in history to know that a shooting spree resulting in nine deaths would be one of the largest mass killings, not only in St. Louis County, but in all of Missouri. A prosecutor can properly argue matters that are within the juror's common knowledge. *Strong*, 142 S.W.3d at 725. This was such an argument and the trial court did not plainly err in allowing it.

The other argument that Appellant complains of as being outside the record came in the State's final penalty-phase argument. The theme of defense counsel's closing argument was that until Appellant reached the age of 50, there was nothing in his background to suggest that he would go on a shooting spree. (Tr. 3047-56). Counsel suggested that the change in Appellant when he reached 50 was the result of mental illness. (Tr. 3056). Counsel also argued that there was overwhelming evidence that Appellant had a delusional disorder or some type of mental illness, and that was a legitimate mitigating circumstance that they jury could consider. (Tr. 3064).

The prosecutor responded to that argument:

Why is it that whenever somebody commits a horrible, horrible, terrorizing, horrendous act like this is, that's why it's noteworthy. He tried to kill nine people. Why is it every time you have one of those acts, it must be something about mental disease, mental illness?

(Tr. 3071). Appellant complains that no evidence supports the assertion that whenever someone commits a horrible act, he claims to be mentally ill.

The prosecutor's statement is more properly viewed as a rhetorical flourish that serious crimes are more likely to draw a mental illness defense, rather than a statement of fact that all serious crimes draw a mental illness defense. Even so, the argument does have some support in the evidence. Appellant's expert, Dr. Moisy Shopper, noted that he alone had been hired on thirteen occasions by criminal defense lawyers, and that he had been hired on more than one occasion by the Missouri Public Defender's Office. (Tr. 2008-09). The jury could have inferred from that testimony that it is not uncommon for criminal defense lawyers to explore mental illness defenses.

In addition, the statement came in retaliation to defense counsel's argument. A prosecutor has considerable leeway to make retaliatory arguments at closing, even if the prosecutor's comment would otherwise be improper. *State v. Clayton*, 995 S.W.2d 468, 479 (Mo. banc 1999). Proper retaliation includes characterizing a defense theory as preposterous, which is essentially what the prosecutor was doing here. *Id.* at 480.

Finally, Appellant did not suffer a manifest injustice even if the argument was objectionable. The jury had already rejected Appellant's mental illness defense in the guilt phase. Defense counsel recognized that in his own argument:

Now, I'm nervous getting too much into this delusional disorder idea with you because obviously you folks considered a guilt-based defense of a delusional disorder. And I don't want to waste a lot of time trying to re-convince you of something you already rejected.

(Tr. 3063). Given the strength of the aggravating circumstances surrounding the crime, Appellant has not shown that the complained-of arguments had a decisive effect on the jury's penalty phase verdict.

2. Send a message arguments were proper.

Defense counsel began his penalty phase closing argument by telling the jury that sending Appellant to prison for the rest of his life would be a worse punishment for him than a death sentence. (Tr. 3044). The prosecutor responded to that argument in his final argument:

Ladies and gentlemen, when you go back and you consider the appropriate punishment don't consider what Mr. Kenyon says would be the toughest thing on Ken Baumruk because your verdict, he's right, this is a sensational case, your verdict is to punishment. It's not only Mary's family's only opportunity for justice, but it's going to send messages out into the community, and those messages are going to go to a lot of people. But specifically by your verdict as to punishment you're going to send a message out to Paul Neske, Steve Salamon (sic), Bill Mudd, Wade Dillon, Jim Hartwick, people who as I said before are heroes in my eyes.

They stepped forward and they stopped him, despite the risks that they both, or, I'm sorry, that they all had in front of them a loaded .38 in each hand and murderous intent.

\* \* \* \*

Make sure when you reach your decision about punishment that you send the right message out to those members of law enforcement who Ken Baumruk tried to kill that we appreciate what you do, that your sacrifices, you're willing to take risks, that we appreciate that and we understand.

You're going to – you're going to send a message to Harry Fozzard, 88 years-old.<sup>12</sup> Remember what Harry told you yesterday? Remember at age 88 he's still able to talk about how he remembered he almost lost his baby girl? Send Harry the right message. Send a message to Lisa and Shelley and Barbara.<sup>13</sup> We understand. That message has to be that everytime they wake up, they think of Mary, their mom, their sister, their baby girl, everyday they think of that.

(Tr. 3077-79).

It is proper for prosecutors to argue for the death penalty by requesting that the jury send a message of intolerance to the community. *State v. Lyons*, 951 S.W.2d 584, 595 (Mo. banc 1997). This Court has previously noted that arguments of the sort made here do not constitute plain error. *State v. Knese*, 985 S.W.2d 759, 775 (Mo. banc 1999).

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<sup>12</sup> Mary Baumruk's father, who testified for the State during the penalty phase proceeding. (Tr. 2844).

<sup>13</sup> Mary Baumruk's sister and two daughters, who also testified for the State during the penalty phase proceedings. (Tr. 2837, 2849, 2852).

The argument was also a proper retaliatory argument to defense counsel's argument that a life sentence would be a worse punishment than death. *Clayton*, 995 S.W.2d at 479.

Appellant did not suffer a manifest injustice even if the argument had been objectionable. Given the strength of the aggravating circumstances surrounding the crime, Appellant cannot show that the complained-of argument had a decisive effect on the jury's penalty phase verdict.

## VIII.

### **Failure to plead aggravating circumstances in the indictment.**

Appellant contends the trial court erred in sentencing him to death because the State failed to plead the aggravating circumstances in the indictment. Appellant raises a claim that has been rejected by this Court on numerous occasions and has not alleged that he did not receive adequate notice of the aggravating circumstances.

#### **A. Standard of Review.**

The test for the sufficiency of an indictment or information is whether it contains all the essential elements of the offense as set out in the statute creating the offense. *State v. Stringer*, 36 S.W.3d 821, 822 (Mo. App. S.D. 2001). The indictment or information must also clearly advise the defendant of the facts constituting the offense so that he may prepare an adequate defense and prevent retrial on the same charge in the case of an acquittal. *Id.* at 822-23.

#### **B. Analysis.**

Appellant's claim of error has been repeatedly been rejected by this Court. *See, e.g., Johnson*, 207 S.W.3d at 48; *Forrest*, 183 S.W.3d at 229; *State v. Zink*, 181 S.W.3d 66, 75 (Mo. banc 2005); *State v. Gill*, 167 S.W.3d 184, 194 (Mo. banc 2004); *Glass*, 136 S.W.3d at 513; *State v. Taylor*, 134 S.W.3d 21, 31 (Mo. banc 2004); *Edwards*, 116 S.W.3d at 543-44; *Gilbert*, 103 S.W.3d at 747; *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002); *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002). Appellant raises the issue for preservation purposes, but provides no new or persuasive reason for this Court to abandon its repeated and recent precedent. Appellant also fails to allege that he had

insufficient notice of the statutory aggravating circumstances in this case. *Johnson*, 207 S.W.3d at 48.

## CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 24,699 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 28th day of March, 2008, to:

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**APPENDIX**

SECTION 552.020, RSMo 2000..... A1

SECTION 552.030, RSMo 2000..... A6