

SC85556

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

JOHN D. COUTS,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 12
The Honorable Edith L. Messina, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

John Coutts was convicted of murder in the second degree, Section 565.021, RSMo 2000, and armed criminal action, Section 571.015, RSMo 2000, after a jury trial in the Jackson County Circuit Court. On July 11, 2002, the Honorable Edith L. Messina sentenced Mr. Coutts to consecutive sentences of life imprisonment on each count. Notice of appeal was timely filed on July 22, 2002.

On July 15, 2003, the Missouri Court of Appeals, Western District, reversed Mr. Coutts' armed criminal action conviction. On July 21, 2003, the State filed a motion for rehearing or, in the alternative, application for transfer. The Court of Appeals denied this motion on September 2, 2003. On September 16, 2003, the State filed an application for transfer with this Court. On October 28, 2003, this Court sustained the State's application for transfer.

STATEMENT OF THE ISSUES

I. If double jeopardy precludes a defendant from being convicted and sentenced to armed criminal action based on the same conduct that makes up the elements for the offense of unlawful use of a weapon, does double jeopardy also preclude a defendant from being convicted and sentenced to armed criminal action based on the offense of felony murder, when the felony murder derives its existence from the elements making up the offense of unlawful use of a weapon?

II. If in effectuating legislative intent, courts are to harmonize provisions of a legislative act together with all other provisions, when a legislature creates a prohibition referencing statutes that are no longer in existence, but either have been repealed or evolved into another statute, does harmony require that the court effectuate the legislative intent by including the current statute in the expressed prohibition, rather than reaching back to the no longer existing statutes?

STATEMENT OF FACTS

In the early morning hours of November 30, 1999, David Beck was shot and killed as he looked out into the darkness through the living room window of his home, located at 2448 Spruce, Kansas City, Jackson County, Missouri (Tr. 260-261, 282, 295, 324-326, 338-339).¹

In November 1999, David Beck lived with his wife, Cathy, along with his children, Kennyboy, Sissy, and Brandon (Tr. 260-262, 282, 283). Mr. Beck's² parents and his brother Patrick Beck lived next door (Tr. 260-261).

Around midnight on November 30, 1999, Joe Green, a friend of Kennyboy's, stopped by Mr. Beck's home (Tr. 261, 282). Mr. Green asked Kennyboy if he would like to go hang out at another house (Tr. 282-283). Kennyboy agreed to go and so did his sister Sissy and one of her friends (Tr. 282-283). Kennyboy, Sissy, and her friend followed Mr. Green in a separate car (Tr. 283). Once they arrived, Kennyboy found out that the house belonged to John Coutts (Tr. 284). Kennyboy did not know Mr. Coutts very well, but had met him a few times in the past (Tr. 284). Besides the people who accompanied Kennyboy,

¹ The record on appeal consists of a legal file ("L.F.") and a trial transcript ("Tr.").

² To avoid confusion due to the number of people with the last name Beck in this case, this brief will refer to David Beck and Cathy Beck as Mr. Beck and Ms. Beck, and refer to Patrick, Kennyboy, and Sissy Beck by their first names.

Mr. Coutts was the only other person in the house that he had met before (Tr. 284-285).

Kennyboy, along with the others, sat around and smoked marijuana and talked about boxing (Tr. 285-286). Kennyboy noticed that Mr. Green was talking to a “bigger guy,” who he found out later was John Camacho (Tr. 287). Mr. Green and Mr. Camacho were telling each other about their boxing pasts and bragging about their records (Tr. 307). They debated about who was the better boxer (Tr. 307). After about an hour and a half, Kennyboy, Sissy, and her friend decided to leave (Tr. 286-287). They left Mr. Green, who was still talking to Mr. Camacho, and went back home (Tr. 286-287).

Shortly after Kennyboy, Sissy, and her friend returned home, Mr. Green arrived (Tr. 287-288). After everyone else went to bed, Kennyboy and Mr. Green sat in the dining room and talked (Tr. 288). About fifteen minutes after Mr. Green arrived, Mr. Green looked out the window and said that John Coutts was there (Tr. 288-289). Kennyboy looked out and saw John Coutts and John Camacho in a blue or gray Chevrolet Caprice (“the Chevy”) (Tr. 288-289).

John Camacho called Mr. Green out for a fight (Tr. 379, 380, 395). Mr. Green ran out of the house pulling off his jacket and shirt as he went (Tr. 308-309, 380). Mr. Beck got up and went outside and told Mr. Green and Mr. Camacho to go out to the street, because he did not want a fight in his yard (Tr. 290).

When the fight began, Patrick Beck stepped out of his house to have a cigarette (Tr. 378). Noticing the fight next door, Patrick started to rush over, but

Kennyboy stopped him (Tr. 379). Kennyboy told Patrick that the fight was between Mr. Camacho and Mr. Green (Tr. 379). Patrick saw Mr. Camacho reach into his coat and try to pull something out (Tr. 290-291, 382-383). Patrick grabbed Mr. Camacho's wrist and felt a metal file that Mr. Camacho was holding (Tr. 290-291, 383). Patrick took the metal file from Mr. Camacho (Tr. 290-291, 383).

After the file was taken away, Mr. Camacho acted like he no longer wanted to fight Mr. Green (Tr. 309, 384). The fight did not last long (Tr. 291, 384-385). Mr. Green hit Mr. Camacho, knocking him down; and then Mr. Green fell himself (Tr. 384-385). During the fight, Mr. Coutts stood and watched, along with the Beck family (Tr. 291-292, 396). After the fight, Mr. Camacho drove away with Mr. Coutts in the passenger seat (Tr. 384-385). Mr. Green tried to stop Mr. Camacho from leaving (Tr. 265, 384-385). One of them said, "We'll be back," or "I'll be back" (Tr. 318-319). As Mr. Camacho drove away, his car door hit the side of Mr. Beck's parent's car that was parked in the street (Tr. 292, 265, 384-385).

Mr. Green left and everyone else went inside the Beck home (Tr. 266, 292, 293, 385-386). Mr. Beck, Sissy, and her friend went to their bedrooms (Tr. 293). Kennyboy went to sleep in the dining room (Tr. 293). About twenty minutes later, Kennyboy heard a vehicle outside the house (Tr. 293). He looked out the window into the darkness and saw the Chevy that Mr. Camacho and Mr. Coutts had been in

earlier (Tr. 293-294, 310-311). The Chevy stopped parallel with a vehicle that was up on blocks in front of the Beck home (Tr. 293-294, 310-311).

Looking over the hood of the car on blocks, Kennyboy saw that the Chevy was parked with the driver's side away from his house (Tr. 294). Kennyboy saw an object in between the driver's seat and passenger seat of the Chevy (Tr. 311). Kennyboy saw John Coutts sitting in the passenger seat (Tr. 294). Kennyboy went into his parent's room and awakened Mr. Beck (Tr. 294, 266).

Mr. Beck got out of bed and went into the living room (Tr. 266, 294-295). As Mr. Beck was looking out the living room window, Kennyboy heard a gunshot and then saw Mr. Beck fall backwards onto the floor (Tr. 295). While several more shots were being fired at the home, Patrick saw what was going on and grabbed his rifle (Tr. 295, 287-388). Even though Patrick believed that the gun shots were coming from the passenger side, he fired three shots from his rifle toward the driver's side of the Chevy (Tr. 388-391). The Chevy sped off (Tr. 391).

When the ambulance arrived, the paramedics were unable to save Mr. Beck's life (Tr. 266, 322-339). Mr. Beck died from a gunshot wound to his abdomen (Tr. 338-339).

On March 2, 2000, Kansas City Police Officer Thomas Mahoney went looking for Mr. Coutts (Tr. 569- 570). Officer Mahoney saw Mr. Coutts driving a Geo Metro (Tr. 570, 573). Officer Mahoney attempted to stop Mr. Coutts, but Mr. Coutts drove away from him (Tr. 571). When the Geo Metro finally stopped, Mr.

Couts jumped out and ran up the street (Tr. 572). Officer Mahoney chased after Mr. Coutts, tackled him and placed him under arrest (Tr. 572). When Mr. Coutts was searched, “a little green, leafy substance was found in a baggy” (Tr. 574). Mr. Coutts asked Officer Mahoney if he would cut him a break and let him go (Tr. 574).

On March 21, 2000, the State indicted Mr. Coutts with murder in the second degree, Section 565.021, RSMo 2000; and armed criminal action, Section 571.015, RSMo 2000 (L.F. 1-2). The State charged Mr. Coutts with felony murder, alleging that Mr. Beck died as a result of Mr. Coutts committing the offense of unlawful use of a weapon, Section 571.030, RSMo 2000 (L.F. 1).

On May 7, 2002, John Camacho pleaded guilty (Tr. 501, 518). In exchange for Mr. Camacho’s guilty plea and testimony against Mr. Coutts, the State reduced his charge from murder in the second degree to voluntary manslaughter, Section 565.023, RSMo 2000, and dismissed the charge of armed criminal action (Tr. 213-214, 501).

Mr. Coutts’s trial began on May 15, 2002 (Tr. 2). When the State called Mr. Camacho to testify, he stated, “I don’t want to have nothing to do with this matter. I want to plead the Fifth. I said I want to plead the Fifth and remain silent” (Tr. 471-472). The Court directed Mr. Camacho to answer the questions (Tr. 473-474). After every question, Mr. Camacho answered that he did not remember (Tr. 475-478). As a result, the court allowed into evidence Mr. Camacho’s videotaped police statement and a transcript of Mr. Camacho’s guilty plea hearing (Tr. 519-

520, 531, 533-535). Mr. Camacho's videotaped police statement was played for the jury and the transcript from his guilty plea hearing was read to the jury (Tr. 537-564).

In the videotaped police statement, Mr. Camacho told the police that he and John Coutts went back to the house where he had gotten into a fight (Tr. 494). Mr. Camacho said that he saw Mr. Coutts pick up his handgun before they left (Tr. 498). Mr. Camacho drove, and Mr. Coutts sat in the passenger seat (Tr. 497). Mr. Camacho told the police that when he stopped the car in front of the residence, Mr. Coutts started firing his gun (Tr. 498).

During Mr. Camacho's guilty plea hearing, Mr. Camacho agreed that he and John Coutts went to David Beck's house around 2:00 a.m. on November 30, 1999, and that Mr. Coutts fired shots at Mr. Beck's house, resulting in Mr. Beck's death (Tr. 556-557).

After the State rested, the defense did not put on any evidence (Tr. 575-580). Instructions on both counts were submitted to the jury, along with an instruction defining the offense of unlawful use of a weapon (L.F. 28-30; Tr. 581-591). After deliberating, the jury found Mr. Coutts guilty of armed criminal action and murder in the second degree based on the underlying felony of unlawful use of a weapon (Tr. 624-628).

On July 11, 2002, the court sentenced Mr. Coutts to consecutive sentences of life imprisonment on both counts (Tr. 643, 653-654). Notice of appeal was timely filed on July 22, 2002 (L.F. 48).

On February 21, 2003, Mr. Coutts filed a brief with the Missouri Court of Appeals, Western District. On July 15, 2003, the Court of Appeals vacated Mr. Coutts' conviction and sentence for armed criminal action. See *State v. Coutts*, Slip Op. No. 61714 (Mo.App.,W.D. July 15, 2003). On July 21, 2003, the State filed a motion for rehearing or, in the alternative, application for transfer, which was denied on September 2, 2003. On September 16, 2003, the State filed an application for transfer with this Court. On October 28, 2003, this Court sustained the State's application for transfer.

POINT RELIED ON

The trial court plainly erred when it instructed the jury, accepted the jury verdict, and sentenced John Coutts on both the offenses of armed criminal action *and* murder in the second degree predicated upon the offense of unlawful use of a weapon, because the court thereby violated Mr. Coutts's rights to due process of the law and to be free from double jeopardy, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, by Article I, Sections 10 and 19 of the Missouri Constitution, and by Section 571.015, RSMo 2000, in that the court had no power to enter the conviction or impose the sentence for armed criminal action, because: (1) double jeopardy precludes a conviction for armed criminal action based on felony murder when the offense of unlawful use of a weapon is the gravamen of the felony murder offense; and (2) in effectuating the legislative intent of the armed criminal action prohibition, the legislature intended to treat the same, not differently, the weapons offenses making up the unlawful use of a weapon statute.

Ivy v. State, 81 S.W.3d 199 (Mo. App., W.D. 2002);

State v. King, 748 S.W.2d 47 (Mo.App., E.D. 1988);

State v. Davis, 849 S.W.2d 34 (Mo. App., W.D. 1993);

Knob Noster Education v. Knob Noster School District, 101 S.W.3d 356 (Mo. App., W.D. 2003);

Mo. Rev. Stat. secs. 571.015 and 571.030 (2000);

Missouri Supreme Court Rule 30.20;

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

Mo. Const., Art. I, Section 10 and 19.

ARGUMENT

The trial court plainly erred when it instructed the jury, accepted the jury verdict, and sentenced John Coutts on both the offenses of armed criminal action *and* murder in the second degree predicated upon the offense of unlawful use of a weapon, because the court thereby violated Mr. Coutts's rights to due process of the law and to be free from double jeopardy, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, by Article I, Sections 10 and 19 of the Missouri Constitution, and by Section 571.015, RSMo 2000, in that the court had no power to enter the conviction or impose the sentence for armed criminal action, because: (1) double jeopardy precludes a conviction for armed criminal action based on felony murder when the offense of unlawful use of a weapon is the gravamen of the felony murder offense; and (2) in effectuating the legislative intent of the armed criminal action prohibition, the legislature intended to treat the same, not differently, the weapons offenses making up the unlawful use of a weapon statute.

Double jeopardy precludes the offense of armed criminal action from being based on the same conduct that makes up the offense of unlawful use of a weapon. *Ivy v. State*, 81 S.W.3d 199, 207 (Mo. App., W.D. 2002) (citations omitted); Section 571.015.4, RSMo 2000. The crime of felony murder derives its existence from an underlying or predicate offense. *Id.* at 207; Section 565.021.1(2), RSMo

2000. When the crime of felony murder is predicated upon the offense of unlawful use of a weapon, double jeopardy precludes a conviction for armed criminal action, because the armed criminal action conviction is necessarily being based on the same conduct as the offense of unlawful use of a weapon. *Id.* at 205-208.

In Mr. Coutts' case, the State indicted Mr. Coutts with murder in the second degree and armed criminal action (L.F. 1-2). The State charged Mr. Coutts with felony murder, alleging that David Beck died as a result of Mr. Coutts committing the offense of unlawful use of a weapon (L.F. 1, 4). The armed criminal action charge was based on the same conduct that supported the felony murder's underlying offense of unlawful use of a weapon (L.F. 1-2, 4-5).

After all of the evidence was presented to the jury, the court instructed the jury on both felony murder based on unlawful use of a weapon and armed criminal action (Tr. 581-591). The felony murder instruction read, in part:

Instruction No. 7

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

First, that defendant and another person committed Unlawful Use of a Weapon: Shooting into a Dwelling, as submitted in Instruction No. 8, and

Second, that the defendant or the other person caused the death of David Beck by shooting him, and

Third, that David Beck was killed as a result of the
perpetration of that Unlawful Use of a Weapon: Shooting
into a Dwelling,

then you are instructed that the offense of murder in the second
degree: felony has occurred.

(L.F. 28). Instruction No. 8 listed the elements for the offense of unlawful use of a
weapon (L.F. 29).

The armed criminal action instruction read:

Instruction No. 9

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

First, that defendant is guilty of the offense of murder in the
second degree, as submitted in Instruction No. 7, and

Second, that defendant and another person knowingly
committed that offense by or with or through the use or
assistance or aid of a deadly weapon,

then you are instructed that the offense of armed criminal action
has occurred, and if you further find and believe from the evidence
beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the
commission of that armed criminal action, the defendant
acted together with or aided John Camacho in committing

that offense,

then you will find the defendant guilty under Count II of armed criminal action. However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 30). The jury returned guilty verdicts on both offenses (L.F. 37-38). The court accepted the jury verdicts and sentenced Mr. Coutts to consecutive sentences of life imprisonment (L.F. 44-46; Tr. 653-654).

The claim that double jeopardy precluded Mr. Coutts' conviction and sentence for armed criminal action was not raised at the trial court level (Tr. 12-643). As such, Mr. Coutts requests that this Court review this issue for plain error under Missouri Supreme Court Rule 30.20, because the trial court's error affected substantial rights that resulted in a manifest injustice. *State v. Hagan*, 113 S.W.3d 260, 267 (Mo. App., W.D. 2003) (citations omitted).

An appellant's failure to raise a double jeopardy issue at the earliest opportunity, in some cases, may result in waiver. *State v. Elliot*, 987 S.W.2d 418, 420-421 (Mo.App., W.D. 1999). But plain error review regarding a double jeopardy claim is proper when the appellate court can determine from the face of the record that the court had no power to enter a conviction. *Id.* at 420, citing *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992).

In Mr. Coutts's case, this Court can determine from the face of the record that the trial court had no power to enter the conviction or impose the sentence for armed criminal action. *Ivy v. State*, 81 S.W.3d at 205-208.

The controlling case on this issue is *Ivy v. State*. In *Ivy*, Jason Ivy shot and killed his stepsister with a handgun. *Id.* at 200. The State charged Mr. Ivy with second degree murder and armed criminal action. *Id.* at 200-201. The second degree murder offense was charged as felony murder predicated upon the commission of the offense of unlawful use of a weapon. *Id.* at 201. Mr. Ivy pleaded guilty to both charges and was sentenced on each. *Id.* at 201.

Mr. Ivy filed a *pro se* motion to vacate, set aside, or correct judgment or sentence alleging that the sentences on both counts violated his double jeopardy rights. *Id.* This claim was not included in his amended motion that was filed later. *Id.* After an evidentiary hearing, the motion court denied Mr. Ivy's amended motion. *Id.* Mr. Ivy filed an appeal from this denial. *Id.*

On appeal, Mr. Ivy raised the issue that the motion court plainly erred in denying his motion for postconviction relief, because the face of the record clearly showed that the sentencing court violated his right to be free from double jeopardy, when it accepted his guilty pleas and sentenced him for both armed criminal action and felony murder predicated upon the felony of unlawful use of a weapon. *Id.* at 206.

The State argued in response that the armed criminal action charge was predicated upon felony murder, not unlawful use of a weapon. *Id.* The *Ivy* Court rejected this argument, stating:

In this case, however, there is no felony murder charge without the act of unlawful use of a weapon. The intent to commit the underlying felony is the gravamen of the felony murder offense.

Id. at 207. The *Ivy* Court explained, “[I]t is the intent to commit the underlying felony, not the intent to commit the killing, which is the gravamen of the offense [felony murder].” *Id.* quoting, *State v. Lassen*, 679 S.W.2d 363, 369 (Mo.App. 1984). The *Ivy* Court went on to find:

Under the felony murder doctrine, the underlying felony and the killing are part of one continuous transaction.
[citation omitted] Therefore the State’s attempt to dissect the two and apply armed criminal action only to the felony murder must fail.

Id. at 208. Finding that Mr. Ivy’s conviction and sentence for both armed criminal action and felony murder predicated upon unlawful use of a weapon violated Mr. Ivy’s right to be free from double jeopardy, the *Ivy* Court reversed and vacated the conviction and sentence for armed criminal action. *Id.* This Court declined to accept transfer on the *Ivy* case. *Id.* at 199.

In comparison, the Court in *State v. Coleman*, 949 S.W.2d 137 (Mo. App., W.D. 1997), found that convictions for both felony murder and armed criminal

action did not violate Alonzo Coleman's right to be free from double jeopardy. *Coleman*, 949 S.W. 2d at 149. Even though the underlying felony for the murder charge in *Coleman* was unlawful use of a weapon, the *Coleman* Court did not address this aspect of the murder charge, but only reviewed the felony murder and armed criminal action statutes Sections 565.021 and 571.015, RSMo, in relation to the double jeopardy claim. *Id.*

Additionally, in *State v. Blackman*, 968 S.W.2d 138 (Mo. banc 1998) and *State v. Flenoy*, 968 S.W.2d 141 (Mo. banc 1998), this Court determined that double jeopardy did not preclude the successive prosecutions and punishments for armed criminal action generally, because the legislature expressly stated that armed criminal action is to be "in addition to" other punishment. *Blackman*, 968 S.W.2d at 140; *Flenoy*, 968 S.W.2d at 145. But neither *Flenoy* nor *Blackman*, addressed whether an armed criminal action conviction can be based on the offense of felony murder that is predicated upon the offense of unlawful use of a weapon.

It was not until *Ivy* that an appellate court directly addressed the issue of whether or not it was double jeopardy to be convicted and sentenced to both armed criminal action and felony murder predicated upon the offense of unlawful use of a weapon. *Ivy v. State*, supra.

In applying *Ivy* to Mr. Coutts's case, the record is clear that the trial court committed plain error when it instructed the jury, accepted the jury's verdicts, and sentenced Mr. Coutts on both the offenses of armed criminal action and felony

murder predicated upon the offense of unlawful use of a weapon (L.F. 1-2, 4-5, 28-31, 44-46; Tr. 581-591, 653-654).

The record shows that the State indicted Mr. Coutts on one count of felony murder, predicated upon the offense of unlawful use of a weapon (L.F. 1-2, 4-5). The State also charged Mr. Coutts with armed criminal action, which was based on the allegations making up the offense of unlawful use of a weapon in the felony murder charge (L.F. 1-2, 4-5).

The record clearly shows that Instruction No. 7 informed the jury that in order to find Mr. Coutts guilty of murder in the second degree, the jury must first find that Mr. Coutts committed the offense of unlawful use of weapon (L.F. 28; Tr. 581-591). In the armed criminal action instruction, the jury was informed that they could only find Mr. Coutts guilty of armed criminal action, if they found him guilty of murder in the second degree as provided in Instruction No. 7 (L.F. 30). The jury found Mr. Coutts guilty on both counts (L.F. 37-38; Tr. 624-628). The trial court accepted the guilty verdicts and sentenced Mr. Coutts on both counts (L.F. 44-46; Tr. 643, 653-654). Therefore, based on *Ivy*, the record clearly shows that the trial court violated Mr. Coutts's right to be free from double jeopardy.

The *Ivy* Court's reasoning is sound and should be upheld. The murder in the second degree statute does specifically state that "the punishment for second degree murder shall be in addition to the punishment for the commission of a related felony." Section 565.021.2, RSMo 2000. But the inquiry into whether or not a conviction for armed criminal action is included in this mandate does not end

there. The *Ivy* Court went on to review the armed criminal action statute. The armed criminal action statute specifically exempts from its application, “sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.” Section 571.015.4, RSMo.

Some of these sections have been repealed and others have evolved into the present offense of unlawful use of a weapon under Section 571.030, RSMo 2000. In order to effectuate the legislative intent of Section 571.015, the *Ivy* Court followed the other Missouri Appellate court cases that interpreted Section 571.015 as expressly excluding from its application “offenses now contained in the present unlawful use of a weapon statute.” *Id.*; *State v. Davis*, 849 S.W.2d 34, 44 (Mo. App., W.D. 1993), citing *State v. King*, 748 S.W.2d 47 Mo. App., E.D. 1988); *State v. McKee*, 826 S.W.2d 26, 29 (Mo. App., W.D. 1992); and *State v. Gottsman*, 769 S.W.2d 27, 30 n.5 (Mo.App., W.D. 1990).

Since the armed criminal action statute expressly excludes from its application offenses now contained in the present unlawful use of a weapon statute, the *Ivy* Court properly determined that the legislature did not intend for armed criminal action to be applied to felony murder when the offense making up the felony murder is unlawful use of a weapon, because felony murder derives its existence from an underlying or predicate offense. *Id.* at 205-208. This is logical, because when felony murder is based on unlawful use of a weapon, an armed criminal action conviction necessarily is being based on the same conduct making up the underlying offense of unlawful use of a weapon. The legislature has

explicitly forbidden this result. *Id.*; *State v. King*, supra; *State v. Davis*, supra; *State v. McKee*, supra; Section 571.015.4, RSMo.

It is true that the unlawful use of a weapon offense of shooting into a dwelling cannot be specifically traced back to the old statutes cited in the armed criminal action statute. But the unlawful use of a weapon offense of shooting into a dwelling can, over time, be traced to the legislative intent expressed in the armed criminal action statute. The legislature in creating the general offense of unlawful use of a weapon under Section 571.030, specifically coupled the offense of shooting into a dwelling with some of the other offenses that were expressly mentioned in the armed criminal action statute.

Early cases have held that the legislature did not intend for armed criminal action to be an additional punishment for offenses described in the unlawful use of a weapon statute. *Ivy v. State*, supra; *State v. King*, supra; *State v. Davis*, supra; and *State v. McKee*, supra. These cases viewed the unlawful use of a weapon statute as a whole.

To treat the unlawful use of a weapon statute provisions differently depending on the statutory history, would ignore the present legislative purpose and go against the rules of statutory construction. The first rule of statutory construction is to determine and to give effect to the legislative intent. *Knob Noster Education v. Knob Noster School District*, 101 S.W.3d 356, 361 (Mo. App., W.D. 2003)(citation omitted). To give effect to the legislative intent, a court first consults the language of the statute, giving its terms their plain and ordinary

meaning. *Id.* (citation omitted). Where the language of the statute is clear, a court must give effect to the language as written. *Id.* (citation omitted).

A court, however, will resort to the rules of construction where the terms of the statute: (1) are ambiguous; or (2) are unambiguous, but, when given their ordinary meaning, produce an illogical or absurd result in light of the statute's purpose. *Id.* (citation omitted).

The armed criminal action statute is ambiguous, in that all of the statutory sections that the armed criminal action statute references, no longer exist. *Ivy v. State*, 81 S.W.3d at 206, citing *State v. Davis*, 849 S.W.2d at 44. These sections either have been repealed or evolved into other statutes, such as the statute of unlawful use of a weapon under Section 571.030. *Id.* When ambiguity exists in criminal statutes, the statute is to be construed more strictly against the State. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999) (citation omitted).

Additionally, a court is to harmonize provisions of a legislative act together with all other provisions, if possible. *Knob Noster Education v. Knob Noster School District*, 101 S.W.3d at 361, citing *Baldwin v. Dir. of Revenue*, 38 S.W.3d 401, 405 (Mo. banc 2001).

When the legislature first created the armed criminal action statute, it provided that it was not to be applied to certain statutory provisions. Section 571.015.4, RSMo. Later, the legislature repealed some of the provisions cited in the armed criminal action statute and transferred others to the present unlawful use of a weapon statute. *Ivy v. State*, supra; *State v. Davis*, supra;

In harmonizing these provisions, starting with the *King* Court, Courts have interpreted that the legislature did not intend for the punishment of armed criminal action to be based on the “offenses” described in the unlawful use of a weapon statute. *Id.*; *State v. Davis*, 849 S.W.2d at 44 (“the armed criminal action statute expressly excluded from its application offenses described in unlawful use of weapons, Section 571.030”); *State v. McKee*, 826 S.W.2d at 29; *State v. Gottsman*, 769 S.W.2d at 30 n.5; *Ivy v. State*, 81 S.W.3d at 205-208.

The *King* legacy interpretation effectuates the legislative intent expressed in the armed criminal action statute. The armed criminal action statute, as written, can only be interpreted by connecting the historical dots, which lead to the section on unlawful use of a weapon. Therefore, this interpretation provides certainty in the law.

The law as it stands clearly states that one cannot be charged with armed criminal action based on the offense of unlawful use of a weapon. *Ivy v. State*, supra; *State v. King*, supra; *State v. Davis*, supra; and *State v. McKee*, supra. This provides notice to the State about what it can charge, and notice to the public about what penalties they face when they commit a certain offense.

If this Court should choose to reverse this precedent, it would no longer be clear whether or not armed criminal action could be applied to certain unlawful use of a weapon offenses. In light of the unlawful use of a weapon statute’s purpose of combining like offenses and treating them the same, interpreting each section of the unlawful use of a weapon statute differently depending on its

legislative history would produce an illogical and absurd result, in that the unity of the statute as it now stands would be fragmented.

Whether or not armed criminal action could be applied would be based on the particular nuances of the case and would lead to uncertainty. For example, in Mr. Coutts's case, the charging document alleged that "Mr. Coutts killed David Beck "as result of the perpetration of the Class D felony of unlawful use of a weapon under Section 571.030, RSMo." (L.F. 1). Only when the court instructed the jury did it become clear that Mr. Coutts was being charged with the particular unlawful use of a weapon offense of shooting into a dwelling (L.F. 28).

The reference to the offense should be enough to apprise defendants of what penalties they are facing. This is the case under the current interpretation of the law. Mr. Coutts requests that this Court follow precedent, and vacate his conviction and sentence for armed criminal action.

CONCLUSION

Based on the foregoing argument, John Coutts respectfully requests that this Court reverse the judgment of the trial court, and vacate his conviction and sentence for armed criminal action.

Respectfully submitted,

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Certificate of Compliance and Service

I, Sarah Weber Patel, hereby certify as follows :

1. The attached brief complies with the limitations contained in this Court's Special Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 5,731 words, which does not exceed the 31,000 words allowed for an appellant's brief.
2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on November 5, 2003. According to that program, this disk is virus-free.
3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Breck K. Burgess, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on the 10th day of November, 2003.

Sarah Weber Patel

APPENDIX

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